
POLLUTION, POLLUTION EVERYWHERE, BUT NOT A
PLAINTIFF FOUND TO BE STANDING: THE FOURTH
CIRCUIT JUDICIALLY REPEALS THE CITIZEN SUIT
PROVISION OF THE CLEAN WATER ACT

[*FRIENDS OF THE EARTH, INC. v. GASTON COPPER
RECYCLING CORP.*, 179 F.3D 107 (4TH CIR. 1999)]

I. INTRODUCTION

Public interest lawsuits will be more complex and difficult for many plaintiffs in the foreseeable future. Standing (and ripeness) challenges will encumber all stages of the litigation. Administrative law might well come to resemble civil procedures in the 1820s, with all parties concerned more about the pleadings and motions than the real substantive issues.¹

While the authors were referring to a Supreme Court standing decision handed down almost a decade ago, Professors Coggins and Head could well have been predicting the future.² Their prophesy was proven accurate in *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*³ In *Gaston Copper*, the Fourth Circuit Court of Appeals elevated the standing threshold even higher than the decision the Professors were criticizing, in essence returning environmental litigation to its common law past. The *Gaston Copper* court, in a split decision, held that the plaintiffs failed to establish standing because existing evidence of actual or threatened injury was not proffered.⁴ In resolving the case, the *Gaston Copper* court identified the requirements an organization must establish to bring a suit on behalf of its members.⁵ The requirements include: (1) the individual members must be capable of establishing standing without the organization; and (2) the goal that the organization

1. George Cameron Coggins and John W. Head, *Beyond Defenders: Future Problems of Extraterritoriality and Superterritoriality for the Endangered Species Act*, 43 WASH. U.J. URB. & CONTEMP. L. 59, 69 (1993) (discussing the effect *Lujan v. Defenders of Wildlife Federation*, 504 U.S. 555 (1992) (Lujan II) will have on the Endangered Species Act).

2. *See id.*

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

4. *See Gaston Copper*, 179 F.3d at 116. The court stated that the injury in fact requirement could be established by either "toxicity tests" or "observable negative impact." *Id.* *See also* Burke S. Lewis, *Fourth Circuit Continues Conservative Trend Toward Citizen Suits*, 7 VA. ENVTL. COMPLIANCE UPDATE 7 (1999), available in WESTLAW at 7 No. 1 SMVAENCU 7 (discussing the Supreme Court's recent trend of taking a more restrictive approach towards standing in environmental suits).

5. *See Gaston Copper*, 179 F.3d at 113.

is trying to further must be important to the function of the group.⁶ Presence of individual parties, however, must not be required to resolve the legal action.⁷

The *Gaston Copper* court specifically focused its analysis on the first requirement.⁸ In doing so, the Fourth Circuit Court of Appeals wrongly applied Supreme Court precedent on the issue of standing. As a result, there will be a substantial increase in pre-trial environmental litigation that will effectively eliminate the citizen suit provision of the Clean Water Act.

II. CASE DESCRIPTION

In 1990, Gaston Copper Recycling Corporation ("GCRC") purchased the nonferrous metal smelting facility located just outside of Gaston in Lexington County, South Carolina.⁹ Prior to GCRC purchasing the facility, the Department of Health and Environmental Control ("DHEC") determined that runoff from the facility was contaminated.¹⁰ To combat this problem, the previous owner was required to treat the drainage before the water could be discharged.¹¹ To comply with the necessary National Pollution Discharge Elimination System ("NPDES") permit, GCRC was required to do the same.¹²

In 1992, Friends of the Earth, Inc. ("FOE") and Citizens Local Environmental Action Network, Inc. ("CLEAN") filed suit against GCRC under the citizen suit provision of the Clean Water Act, alleging that GCRC had violated its NPDES permit.¹³ The case was filed in the United States District Court for the District of South Carolina.¹⁴ The Plaintiffs alleged that GCRC had committed 1120 violations of monitoring and reporting requirements and 54 violations of the schedule of compliance stated in its permit.¹⁵

6. *See id.* *See also* Natural Resources Defense Council, Inc. v. Watkins, 954 F.2d 974, 978 (4th Cir. 1992) (noting that the National Resource Defense Council brought suit to bar the Department of Energy from reopening a reactor that would allegedly result in a violation of the Clean Water Act).

7. *See Gaston Copper*, 179 F.3d at 113.

8. *See id.* The defendants only alleged that Friends of the Earth, Inc. (FOE) and Citizens Local Environmental Action Network, Inc. (CLEAN) lacked representational standing. *See id.* To overcome this defense, FOE and CLEAN had to establish that their members had suffered an "injury in fact" and that the injury was "fairly traceable" to the defendant's conduct. *Id.*

9. *See* Brief of Appellee at 1, Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 179 F.3d 107 (4th Cir. 1999) (No. 98-1938).

10. *See id.*

11. *See id.*

12. *See id.* The Clean Water Act requires any person discharging a pollutant into navigable water to have a NPDES permit. *See* FRANK F. SKILLERN, ENVIRONMENTAL PROTECTION DESKBOOK 254 (2d ed. 1995). The permit contains such information as the type and amount of chemicals that can be legally discharged. *See id.* *See also* RAY VAUGHAN, ESSENTIALS OF ENVIRONMENTAL LAW 18 (1994).

13. *See* Brief for Appellant at 1, Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 179 F.3d 107 (4th Cir. 1999) (No. 98-1938).

14. *See id.*

15. *See id.* at 11.

FOE and CLEAN asserted they had standing to bring this suit on behalf of their members who had been harmed by GCRC's activities, however, the district court disagreed and dismissed the action.¹⁶ The court determined that FOE and CLEAN did not scientifically show that any pollutants discharged by GCRC adversely affected the waters used by any of their members.¹⁷ As a result, the district court held that the members of FOE and CLEAN did not establish either the "injury in fact" or the "fairly traceable" requirements of standing.¹⁸ Plaintiffs appealed, and the Court of Appeals for the Fourth Circuit affirmed the district court's decision.¹⁹

III. BACKGROUND

The Clean Water Act evolved primarily from the common law of nuisance.²⁰ In a nuisance action, a plaintiff must show that the invasion of his or her property rights were either "intentional and unreasonable; or unintentional and otherwise actionable under the rules governing liability for negligent or reckless conduct or for abnormally dangerous activity."²¹ This heavy burden resulted in many environmental injuries going unremedied.²² Moreover, damages were awarded only for physical harm to the property that resulted in a reduction of the property's economic worth.²³ Therefore, even the nuisance actions that succeeded did not protect the environment; they only awarded damages for past destruction.²⁴ In the case of water pollution, nuisance actions were often brought by one state against another, and usually failed.²⁵

16. See *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 179 F.3d 107, 110, 112 (4th Cir. 1999), *rev'd en banc*, 204 F.3d 149 (4th Cir. 2000). The most compelling testimony was given by Wilson Shealy who lived nearby a small lake, which was created by the damming of Bull Swamp Creek. See Brief of Appellee at 1-2, *Gaston Copper* (No. 98-1938). The overflow of Lake Watson (the discharge site of GCRC) eventually flowed into Bull Swamp Creek. See *id.*

17. See *Gaston Copper*, 179 F.3d at 112-13.

18. See *id.* at 112.

19. See *id.* at 112, 116.

20. See ROBERT V. PERCIVAL, ENVIRONMENTAL REGULATION 72 (2d ed. 1996); see also WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 100 (1977). "Nuisance actions have challenged virtually every major industrial and municipal activity which is today the subject of comprehensive environmental regulation . . ." *Id.* See also HENRY N. BUTLER & JONATHAN R. MACEY, USING FEDERALISM TO IMPROVE ENVIRONMENTAL POLICY 8 (1996); AARON GERSHONOWITZ, HOW THE ENVIRONMENTAL REGULATORY SYSTEM WORKS 3 (2d ed. 1993); VAUGHN, *supra* note 12, at 12.

21. RESTATEMENT (SECOND) OF TORTS § 822 (1979). See also PERCIVAL, *supra* note 20, at 82.

22. See PERCIVAL, *supra* note 20, at 81. Generally, nuisance law only applies when a defendant's conduct is repetitious. See RODGERS, *supra* note 20, at 115. Thus, nuisance law often excuses single violations. See *id.*

23. See PERCIVAL, *supra* note 20, at 81.

24. See *Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715, 727 (Mich. 1992). In *Adkins*, property owners sued for a decrease in their property value caused by a nearby contaminated site. See *id.* The court ruled that they could not recover damages unless the chemicals were shown to have actually migrated to their land. See *id.*

25. See *New York v. New Jersey*, 256 U.S. 296, 311-12 (1921) (determining that New York's nuisance action failed to meet the burden of "convincing evidence which the law requires . . ."); *Missouri v. Illinois*, 200 U.S. 496, 517, 526 (1906) (concluding that Missouri failed to show sewage discharged from Chicago contaminated the water supply in St. Louis). Cf. *Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 307, 332 (1981) (determining the Clean Water Act preempted the fed-

Given the inadequacy of the common law scheme, the Clean Water Act was passed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."²⁶ The Act placed an immense responsibility on the Environmental Protection Agency ("EPA"), which was charged with implementing and enforcing this statute. Congress perceived that the EPA needed help to achieve the Act's goals.²⁷ Therefore, to provide the EPA with assistance, Congress enacted a citizen suit provision, which gives the power to citizens, acting as "private attorneys general,"²⁸ to bring suit against violators.²⁹ Citizen suit provisions, which became popular statutory features during the environmental movements of the 1970s, reflect Congress's belief that environmental agencies would not diligently enforce these statutes without added motivation.³⁰

Congress has increasingly expressed its intent to allow citizens to bring environmental violators to justice.³¹ The Senate Committee Report for the Clean Air Act states: "Government initiative in seeking enforcement under the Clean Air Act has been restrained. Authorizing citizens to bring suits for violations of standards should motivate the responsible governmental agencies charged with the responsibility to bring enforcement and abatement proceedings."³² Congress also encouraged citizen suits by permitting recovery of litigation expenses, including attorney and expert witness fees.³³

However, Congress recognized that some limitations were required to control the number of potential plaintiffs.³⁴ For instance, the Clean Water Act requires a sixty-day notice be given to the alleged violator

eral common law of nuisance); *Illinois v. City of Milwaukee*, 406 U.S. 91, 93-94 (1972) (concluding that original jurisdiction is not mandatory when one of the parties is a municipality rather than a state itself; case remitted to district court's federal question jurisdiction based on federal common law of nuisance).

26. 33 U.S.C. § 1251 (1994).

27. See John Dolgetta, *Friends of the Earth v. Crown Central Petroleum: The Surrogate Enforcer Must Be Allowed to "Stand Up" for the Clean Water Act*, 15 PACE ENVTL. L. REV. 707, 711-12 (1998).

28. Cf. *Sierra Club v. Peterson*, 705 F.2d 1475, 1479 (9th Cir. 1983) (noting, in a Federal Insecticide, Fungicide and Rodenticide Act case, that citizen suit plaintiffs are thought of as "private attorneys general").

29. 33 U.S.C. § 1365(a)(1) (1994).

30. See *infra* text accompanying note 32.

31. See *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 700 (D.C. Cir. 1975) (discussing the congressional intent of citizen suit provisions). Nearly all regulatory environmental statutes have incorporated some type of citizen suit provision within them. See, e.g., 42 U.S.C. § 7604(a)(1) (1994) (Clean Air Act); 33 U.S.C. § 1365(a)(1) (1994) (Clean Water Act); 16 U.S.C. § 1540(g)(1)(A) (1994) (Endangered Species Act).

32. S. REP. NO. 91-1196, at 36-37 (1970). See also Phillip Weinberg, *Are Standing Requirements Becoming a Great Barrier Reef Against Environmental Actions?*, 7 N.Y.U. ENVTL. L.J. 1, 5-6 (1999).

33. See 33 U.S.C. § 1365(d) (1994); See also 2 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW AIR AND WATER 63 (1986).

34. See Robert June, *The Structure of Standing Requirements for Citizen Suits and the Scope of Congressional Power*, 24 ENVTL. L. 761, 764 (1994).

and the enforcement agency before a citizen suit may be commenced.³⁵ This time period provides the state or federal agency a chance to bring its own enforcement action.³⁶ Furthermore, no citizen suit action may be initiated against an alleged violator if a state or federal agency is already “diligently prosecuting” the violation.³⁷

A potential plaintiff meeting the statutory citizen suit requirements must also overcome the judicial hurdle of standing.³⁸ The standing doctrine, which evolved from the “case or controversy” requirement of Article III of the Constitution, generally requires that the party bringing suit has a “sufficient stake in the case’s outcome.”³⁹ The standing doctrine was incorporated into the definition of “citizen” when Congress enacted the citizen suit provision within the Clean Water Act.⁴⁰ Under section 505, a “citizen” is defined as “a person or persons having an interest which is or may be adversely affected.”⁴¹ Plaintiffs bringing a citizen suit must still comply with the *constitutional* requirements of standing.⁴²

Five modern cases have laid the constitutional foundation of the standing doctrine in the modern era of environmental law.⁴³ The initial case defining standing for environmental organizations was *Sierra Club v. Morton*.⁴⁴ The controversy centered around a proposed ski resort that Disney Corporation wanted to build on national forest land in Mineral King Valley.⁴⁵ The Sierra Club claimed standing based solely on the fact that it was an environmental organization trying to protect Mineral King Valley.⁴⁶ The Supreme Court denied standing to Sierra Club because it failed to allege any harm that would fall on its members.⁴⁷ The case was not, however, a total loss for the environmental

35. See 33 U.S.C. § 1365(b)(1)(A) (1994).

36. See June, *supra* note 34, at 764.

37. 33 U.S.C. § 1365(b)(1)(B) (1994).

38. See generally U.S. CONST. art. III, § 2. See also Arthur G. Carine III, *The Clean Water Act, Standing, and the Third Circuit's Failure to Clean Up the Quagmire: Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 4 VILL. ENVTL. L.J. 179, 182-83 (1993).

39. Carine, *supra* note 38, at 183 (citing *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972)).

40. 33 U.S.C. § 1365(g) (1994).

41. *Id.* A “person” within the definition includes “corporation[s]” and “association[s].” 33 U.S.C. § 1362(5) (1994). Thus, environmental groups are “persons” within the citizen suit provision of the Act. *Id.*

42. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (“*Lujan II*”) (“Over the years, our cases have established the irreducible constitutional minimum of standing . . .”).

43. See generally *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998); *Lujan II*, 504 U.S. at 560; *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973); *Sierra Club v. Morton*, 405 U.S. 727 (1972).

44. 405 U.S. 727 (1972).

45. See *id.* at 729; see also Karl Coplan, *Refracting the Spectrum of the Clean Water Act Standing in Light of Lujan v. Defenders of Wildlife*, 22 COLUM. J. ENVTL. L. 169, 179 (1997) (discussing the effect of the *Lujan II* decision on environmental citizen suit actions).

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

47. See *id.* at 740-41; see also Coplan, *supra* note 45, at 179-80 (discussing the significance of *Morton* for environmental plaintiffs); William S. Jordan III, *Citizen Litigation Under the Clean Water Act: The Second Circuit Renews its Leadership Role in Environmental Law*, 52 BROOK. L. REV. 829, 840 (1986) (analyzing the Second Circuit's most recent environmental decisions).

group in that the Court clarified that an environmental organization would have standing if any of its members would be able to establish standing on their own.⁴⁸ Significantly, *Sierra Club* also recognized that “[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.”⁴⁹

The second case, *United States v. Students Challenging Regulatory Agency Procedures* (“SCRAP”),⁵⁰ expanded the doctrine of standing.⁵¹ In *SCRAP*, several students claimed higher freight charges on recycled materials would result in damage to their surrounding metropolitan area because companies would be less likely to recycle and more apt to use raw materials.⁵² The students alleged that the destruction of these raw materials would result in damage to their recreational enjoyment of nature.⁵³ The Supreme Court agreed with SCRAP and granted standing.⁵⁴ In so holding, the Court stated:

Of course, pleadings must be something more than an ingenious academic exercise in the conceivable But we deal here simply with the pleadings in which the appellees alleged a specific and perceptible harm that distinguished them from other citizens who had not used the natural resources that were claimed to be affected.⁵⁵

Subsequent to the decision in *SCRAP*, the Supreme Court issued several opinions that eroded the power that environmental organizations once had to litigate their issues.⁵⁶ Justice Scalia, who has written all of the Court’s standing opinions, has spearheaded this erosion.⁵⁷ These opinions have been consistent with the approach that then Judge Scalia expressed in a 1983 law journal article.⁵⁸ He articulated his disa-

48. See *Morton*, 405 U.S. at 739.

49. *Id.* at 734.

50. 412 U.S. 669 (1973).

51. See *SCRAP*, 412 U.S. at 690; see also PERCIVAL, *supra* note 20, at 725.

52. See *SCRAP*, 412 U.S. at 676. The Interstate Commerce Commission (ICC) had established a higher railroad freight charges for recycled materials. See *id.* The ICC then approved the freight increase for all materials transported on the railroads. See *id.* Several students challenged the higher freight increases, claiming it would result in environmental harm. See *id.* See also SUSAN J. BUCK, UNDERSTANDING ENVIRONMENTAL ADMINISTRATION AND LAW 60 (1991) (discussing the evolution of standing in environmental litigation); Coplan, *supra* note 45, at 182.

53. See *SCRAP*, 412 U.S. at 676.

54. See *id.* at 685.

55. *Id.* at 688-89.

56. See generally *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (*Lujan II*); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990) (*Lujan I*). See also Lewis, *supra* note 4, at 2; PERCIVAL, *supra* note 20, at 725; Weinberg, *supra* note 32, at 4.

57. See *Steel*, 523 U.S. at 83; *Bennet v. Spear*, 520 U.S. 154, 157 (1997); *Lujan II*, 504 U.S. at 555; *Lujan I*, 497 U.S. at 875.

58. See generally Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881 (1983). See also Steve France, *What is it to You?* A.B.A. J., Oct. 1999, at 36 (criticizing Justice Scalia’s opinion in *Steel*); Richard J. Lazarus, *Restoring What’s Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703,

greement with decisions such as *SCRAP*, stating “I suggest that courts need to accord greater weight than they have in recent times to the traditional requirement that the plaintiff’s alleged injury be a particularized one, which sets him apart from the citizenry at large.”⁵⁹ Furthermore, Justice Scalia blamed “the judiciary’s long love affair with environmental litigation” for what he considered to be the degradation of the constitutional requirement of standing.⁶⁰

The Court first began following Justice Scalia’s view in *Lujan v. National Wildlife Federation* (“Lujan I”).⁶¹ In *Lujan I*, the National Wildlife Federation (“NWF”) claimed that the government had breached the Federal Land Policy and Management Act (“FLPMA”).⁶² NWF alleged that the violation would result in some federal land, which was previously withdrawn from mining, being destroyed by mining activity once the land’s mining availability status was changed.⁶³ The environmental organization asserted standing on behalf of two members who claimed they would be injured because they used land “in the vicinity” of the land that was going to be opened for mining.⁶⁴ Justice Scalia, writing for the Court, denied standing to NWF.⁶⁵ The Court concluded that using land only “in the vicinity” would not give rise to actual harm to the potential plaintiffs.⁶⁶

The next decision to restrict the standing doctrine was *Lujan v. Defenders of Wildlife* (“Lujan II”).⁶⁷ Defenders of Wildlife (“DOW”) brought suit attacking a change in the Department of Interior’s regulations, which removed the Endangered Species Act consultation requirement from projects that were being conducted outside the United States by U.S. citizens.⁶⁸

812 (2000) (giving Justice Scalia the lowest environmental protection score among Supreme Court Justices from the 1969 through the 1998 term).

59. Scalia, *supra* note 58, at 881-82. Justice Scalia contrasted the distinction between plaintiffs who have been injured individually and plaintiffs who have suffered a generalized injury among society. *See id.* at 894. Justice Scalia believed that only individualized injuries met the standing requirements. *See id.* Furthermore, Justice Scalia has construed individualized injury narrowly. *See supra* text accompanying notes 56-60.

60. Scalia, *supra* note 58, at 884.

61. 497 U.S. 871, 900 (1990). *See also* Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 164-65 (1992) (discussing the implication of *Lujan II* on citizen suit actions).

62. *See Lujan I*, 497 U.S. at 875.

63. *See Lujan I*, 497 U.S. at 879.

64. *See id.* at 880.

65. *See id.* at 889.

66. *Id.* The Supreme Court, in denying standing, rejected the application of *SCRAP*. *See id.* Justice Scalia stated that *SCRAP* did not control because that case dealt with a motion to dismiss and this case involved a motion for summary judgment. *See id.* *See also* Weinberg, *supra* note 32, at 4.

67. 504 U.S. 555 (1992).

68. *See Lujan II*, 504 U.S. at 555, 557-58; *see also* Matthew M. Werner, *Mootness and Citizen Suit Civil Penalty Claims Under The Clean Water Act: A Post-Lujan Reassessment*, 25 ENVTL. L. 801, 811 (1995) (discussing the effect of the *Lujan II* decision on the environmental citizen suit provisions).

DOW claimed standing on behalf of two of its members.⁶⁹ One member had previously been to Sri Lanka to view the endangered leopard and Asian elephant.⁷⁰ Another member had traveled to Egypt to see the endangered Nile crocodile.⁷¹ The members argued that the U.S. funding would cause injury to these animals and, therefore, hinder enjoyment of the wildlife.⁷²

Not surprisingly, Justice Scalia wrote the Court's opinion, which denied standing to DOW.⁷³ The Court applied a three-part constitutional test: (1) "the plaintiff must have suffered an injury in fact;" (2) "there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant;" and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."⁷⁴

The Court determined that DOW's initial theory had failed to establish two prongs of the standing test.⁷⁵ First, the Court concluded that the harm alleged by the members was too remote and speculative, though it did suggest that, if the members had definite plans to return to view the endangered animals, then they may have been injured.⁷⁶ Also, the Court declared that there could be no redressability because the United States only funded a small portion of the total cost of the project.⁷⁷ In other words, even if the United States did not invest any money, the project would still continue and the same alleged harm would occur.⁷⁸

The most recent Supreme Court decision interpreting the law of standing, as applied to environmental organizations, is *Steel Co. v. Citizens for a Better Environment*.⁷⁹ In 1995, a group of environmentalists notified Steel that it had been violating the Emergency Planning and Community Right-To-Know Act ("EPCRA") since 1988.⁸⁰ In response, Steel complied with the Act by filing all necessary information.⁸¹ The plaintiffs, however, then filed suit against Steel for the past violations.⁸² The group alleged that without the information they would continue to

69. See *Lujan II*, 504 U.S. at 563.

70. See *id.*

71. See *id.*

72. See *id.*

73. See *id.* at 557.

74. *Id.* at 560-61 (internal quotations omitted).

75. See *id.* at 568.

76. See *id.* at 564.

77. See *id.* at 571.

78. See *id.*

79. 523 U.S. 83 (1998).

80. See *Steel*, 523 U.S. at 87. "EPCRA establishes a framework of state, regional and local agencies designed to inform the public about the presence of hazardous and toxic chemicals, and to provide for emergency response in the event of health-threatening releases." *Id.* at 86.

81. See *id.* at 88.

82. See *id.*

be injured medically and environmentally.⁸³

The Court denied standing to the plaintiffs, holding that redressability would be impossible.⁸⁴ In writing the majority opinion, Justice Scalia concluded that a declaratory judgment would be “worthless” because all the proper documents had now been filed.⁸⁵ Furthermore, the Court decided that because any fines would go to the government, these penalties would not compensate any injury to the plaintiffs.⁸⁶

Viewed over time, the Supreme Court decisions have become increasingly more protective of business world defendants. While these decisions have significantly raised the standing hurdle, no Supreme Court opinion has extended this threshold to the level that the Fourth Circuit Court of Appeals reached in *Gaston Copper*.⁸⁷

IV. ANALYSIS

The issue before the Fourth Circuit Court of Appeals in *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.* was whether the district court’s decision to dismiss the suit brought by FOE and CLEAN against GCRC for lack of standing should be reversed.⁸⁸

A. Parties’ Arguments

The environmental organizations filed suit under the citizen suit provision of section 505 of the Clean Water Act.⁸⁹ FOE and CLEAN alleged standing on behalf of their members who had been adversely affected by GCRC’s permit violations.⁹⁰

FOE and CLEAN first illustrated that their members had suffered an “injury-in-fact.”⁹¹ FOE and CLEAN submitted a study done by GCRC in 1993 that detected hazardous substances within Lake Watson, the discharge site of GCRC.⁹² A 1994 study revealed the same results, but in increased amounts.⁹³ In support of their “fairly traceable” argument, the plaintiffs presented testimony that chemicals released from GCRC were capable of flowing downstream at least sixteen miles.⁹⁴ FOE and CLEAN claimed that several of their members suffered injury because of the presence of these chemicals in the water.⁹⁵

83. *See id.* at 105.

84. *See id.*

85. *See id.* at 106.

86. *See id.*

87. 179 F.3d 107 (4th Cir. 1999), *rev’d en banc*, 204 F.3d 149 (4th Cir. 2000).

88. *See Gaston Copper*, 179 F.3d at 112.

89. *See id.* at 109.

90. *See id.* at 110.

91. *Id.* at 112.

92. *See* Brief for Appellant at 16, *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 179 F.3d 107 (4th Cir. 1999) (No. 98-1938).

93. *See id.*

94. *Id.*

95. *See Gaston Copper*, 179 F.3d at 110.

1. Wilson Shealy

Wilson Shealy, a member of CLEAN, claimed he suffered a loss of recreational enjoyment.⁹⁶ Shealy lived on a lake just four miles south of GCRC's discharge site.⁹⁷ The lake was formed by the damming of Bull Swamp Creek.⁹⁸ His family regularly used the lake for recreational activities including boating, fishing, and swimming.⁹⁹

Shealy testified that his family's enjoyment of the lake had been limited by GCRC's violations.¹⁰⁰ He claimed that because of fear of contamination, he ate less fish from the lake.¹⁰¹ Also, because of Shealy's concern about the chemicals, he restricted the time his grandchildren could play in the lake.¹⁰² Furthermore, Shealy alleged monetary harm because his property value had decreased as a result of pollution in the lake.¹⁰³

2. Guy Jones

Guy Jones, a member of FOE and CLEAN, alleged that his company, River Runner, would suffer economic harm if GCRC was polluting the Edisto River.¹⁰⁴ Jones periodically guided canoe trips downstream from GCRC's discharge site.¹⁰⁵ He claimed that his business would decline if his customers could not safely continue to swim and fish on their trips.¹⁰⁶

3. William McCullough

Another member of FOE, William McCullough, also alleged harm.¹⁰⁷ McCullough testified that he scuba dives and canoes on the Edisto River south of GCRC and plans to continue these activities.¹⁰⁸ He claimed that his recreational enjoyment would be curtailed if the river continued to be polluted by GCRC.¹⁰⁹

96. *See id.* at 111.

97. *See id.* at 110.

98. *See* Brief for Appellant at 17, *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 179 F.3d 107 (4th Cir. 1999) (No. 98-1938).

99. *See id.*

100. *See Gaston Copper*, 179 F.3d at 111.

101. *See id.*

102. *See id.*

103. *See id.*

104. *See id.*

105. *See* Brief for Appellant at 19, *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 179 F.3d 107 (4th Cir. 1999) (No. 98-1938).

106. *See Gaston Copper*, 179 F.3d at 111. Jones and others would often take a break from canoeing by jumping from their canoes into the river to enjoy a quick swim. *See* Brief for Appellant at 19, *Gaston Copper* (No. 98-1938). They picnicked on the shoreline and ate fish caught from the river. *See id.* It was argued that, because of river pollution, customers of River Runner would be unable to indulge in these activities and would commission another guide business. *See id.* at 19-20. Thus, Jones would be harmed economically because of river pollution. *See id.*

107. *See Gaston Copper*, 179 F.3d at 111.

108. *See* Brief for Appellant at 20, *Gaston Copper* (No. 98-1938).

109. *See Gaston Copper*, 179 F.3d at 111.

B. Majority Opinion

The Fourth Circuit Court of Appeals concluded that FOE and CLEAN failed to meet the injury-in-fact requirement of standing.¹¹⁰ The court decided “that the evidence failed to establish that the waters in which Shealy, Jones, and McCullough recreated or used were actually, or in imminent threat of being, adversely affected by pollution.”¹¹¹ The court asserted that Shealy’s concerns about pollution, which resulted in restrictions on the amount of time his grandchildren could swim in the river, were based on “mere speculation” of “pollution.”¹¹² Thus, the fact that Shealy had forgone recreational enjoyment added no weight to the plaintiffs’ argument that their members had been injured.¹¹³ This decision was based on the fact that neither FOE nor CLEAN submitted any toxicity reports on Shealy’s lake or any of the waters the other members enjoyed.¹¹⁴ Also significant was the fact that none of the witnesses testified about any visible harm to the waters they used.¹¹⁵

The Fourth Circuit Court of Appeals further determined that the plaintiffs failed to show that the defendant’s conduct was fairly traceable to any injuries alleged.¹¹⁶ It relied heavily on the fact that neither FOE nor CLEAN produced any scientific evidence that Shealy’s lake contained any chemicals discharged from GCRC.¹¹⁷ The court felt that the distance from the discharge site to the site of alleged harm was “too great to infer causation.”¹¹⁸ Finally, the Fourth Circuit decided that FOE and CLEAN “were required to establish the fairly traceable element of standing by producing water samples or expert testimony.”¹¹⁹

C. Dissenting Opinion

Chief Judge Wilkinson wrote a vigorous dissent.¹²⁰ Wilkinson stated that CLEAN and FOE only needed to show that there was a “substantial likelihood” that GCRC’s conduct caused the alleged harm, which is “not the equivalent to a requirement of tort causation.”¹²¹ The dissent indicated that to establish a “substantial likelihood,” Shealy had to illustrate only that GCRC’s discharge was in violation of its NPDES

110. *See id.* at 114.

111. *Id.* at 113.

112. *Id.* at 114.

113. *See id.*

114. *See id.*

115. *See id.*

116. *See id.* at 115.

117. *See id.*

118. *Id.*

119. *Id.*

120. *See id.* at 116 (Wilkinson, J., dissenting).

121. *Id.* at 121 (internal quotations omitted).

permit and possessed the capability to result in Shealy's alleged injury.¹²²

Wilkinson next noted that Shealy's testimony established that before GCRC's NPDES permit violations, the DHEC discovered pollutants discharged from the plant in his lake.¹²³ Therefore, it was shown that Shealy's lake was within reach of chemicals discharged by GCRC.¹²⁴ Thus, there was a "substantial likelihood" that Shealy's alleged harm was capable of being caused by GCRC's Clean Water Act violations.¹²⁵

Finally, the dissent concluded that CLEAN had established standing to bring suit on Shealy's behalf.¹²⁶ The dissent agreed, however, that CLEAN and FOE lacked standing for Jones' and McCullough's alleged harm because the area of the river they used was further downstream than the DHEC determined the pollutants would flow.¹²⁷

D. Commentary

1. Precedent

The dissent in *Gaston Copper* correctly concluded Shealy had established a legally recognizable injury. Had the Fourth Circuit Court of Appeals followed Supreme Court precedent, instead of embracing Justice Scalia's agenda, CLEAN would have been able to establish standing.

The members of FOE and CLEAN suffered more of a direct injury from GCRC's discharges than the members of SCRAP incurred from a higher shipping rate.¹²⁸ For instance, all the members of FOE and CLEAN alleged harm as a result of discharge into the very river they used.¹²⁹ The section of the Edisto River that the plaintiffs alleged was contaminated was more identifiable than the entire "Washington metropolitan area," which the members of SCRAP alleged would be harmed.¹³⁰ The members of SCRAP occasionally *hiked* in the metropolitan areas, while one member of CLEAN *lived* on the polluted river and another member of FOE and CLEAN *operated his business* on the river.¹³¹ Furthermore, the harm from an illegal chemical discharge is more traceable to water pollution than environmental destruction is to a

122. See *id.* at 120-21; see also *Public Interest Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 72 (3d Cir. 1990).

123. See *Gaston Copper*, 179 F.3d at 119 (Wilkinson, J., dissenting).

124. See *id.*

125. *Id.* at 119-20.

126. See *id.* at 122-23.

127. See *id.* at 117.

128. See *Id.* at 110. *But cf.* *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 676 (1973).

129. See *Gaston Copper*, 179 F.3d at 110.

130. *Id.* *But cf.* *SCRAP*, 412 U.S. at 685.

131. See *Gaston Copper*, 179 F.3d at 110. *But cf.* *SCRAP*, 412 U.S. at 685.

higher railroad surcharge.¹³²

While *SCRAP* has never been expressly overruled, the Supreme Court has expressed disfavor with the opinion; the *SCRAP* scenario was considered to be just too tenuous.¹³³ However, in *Gaston Copper* there was a clear nexus.¹³⁴ The plaintiffs in *Gaston Copper* brought forth more evidence of direct causation and serious injury than the members of *SCRAP*.¹³⁵ The injury alleged by CLEAN should have been adjudged to have established standing irrespective of whether the court applied *SCRAP*; however, CLEAN's injury clearly falls within even the more restrictive decisions of *Lujan I* and *Lujan II*.¹³⁶

In *Lujan II*, DOW alleged injury based on the harm to two of its members.¹³⁷ The members claimed they would be injured by the destruction of animals that they might someday visit.¹³⁸ Shealy was not a traveling tourist who lived over a thousand miles away from the possible harm.¹³⁹ His property was on the very site of the alleged injury.¹⁴⁰ Shealy was not claiming the possibility of injury if he one day vacationed in another country.¹⁴¹ Instead, Shealy alleged that he was harmed everyday he decided to go outside and enjoy his lake.¹⁴² The harm he claimed was not the destruction of animals, but the health risks that he and his grandchildren were exposed to when playing in the lake.¹⁴³ Furthermore, Scalia hinted in *Lujan II* that if the members had definite plans instead of an "intent" to one day view the endangered species, then they may have suffered an injury.¹⁴⁴ Surely, the Fourth Circuit Court of Appeals could not justify denying standing to a man claiming injury to the very lake he lived on, while the Supreme Court would grant standing to a tourist who might be injured during her vacation in Egypt. The Fourth Circuit Court of Appeals appears to have read the *Lujan II* decision as barring all environmental actions.¹⁴⁵

2. Implication

The *Gaston Copper* decision will inevitably force a number of

132. See *Gaston Copper*, 179 F.3d at 110. *But cf.* *SCRAP*, 412 U.S. at 688.

133. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 889 (1990). "The *SCRAP* opinion, whose expansive expression of what would suffice for § 702 review under its particular facts has never since been emulated by this Court . . ." *Id.*

134. See *Gaston Copper*, 179 F.3d at 111.

135. See *id.* *But cf.* *SCRAP*, 412 U.S. at 676.

136. See *Gaston Copper*, 179 F.3d at 111. *But cf.* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992) (*Lujan II*); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 886-87 (1990) (*Lujan I*).

137. See *Lujan II*, 504 U.S. at 563.

138. See *id.*

139. See *Gaston Copper*, 179 F.3d at 110.

140. See *id.*

141. See *id.* at 111.

142. See *id.*

143. See *id.* at 110.

144. *Lujan v. Defenders of Wildlife (Lujan II)*, 504 U.S. 555, 564 (1992).

145. See *Gaston Copper*, 179 F.3d at 116.

“mini-trials” on the issue of standing. To establish standing, the specific scientific technical elements of a case will have to be proven twice in order for a plaintiff to win a citizen suit. Currently, the plaintiff must present scientific evidence and show that the defendant’s chemicals actually caused the alleged injury before the defendant can be found liable on the merits.

However, under *Gaston Copper* these elements now have to be proven to even have a trial. The expert testimony will have to show that the pollutants discharged by a defendant actually reached the alleged polluted waters. The scientific studies will have to prove that these pollutants caused harm to the environment and to the people using the environment. In effect, the plaintiff now has to prove his case by a preponderance of the evidence twice: first, to defeat a motion for summary judgment and second, to actually win on the merits of the case.

Requiring plaintiffs to prove causation and injury twice will substantially increase litigation costs. Powerful industries will no doubt use tactics, which include challenges to standing, to delay the trial date and, thus, run up the cost of litigation. This added hardship will result in insurmountable burdens for many individuals and volunteer organizations. Accordingly, many violations of the Clean Water Act will go unchallenged and unpunished.

This result clearly contradicts the intent of Congress. The citizen suit provision of the Clean Water Act was enacted to ensure that the Clean Water Act would be effectively administered.¹⁴⁶ Congress intended the citizen suit provision to become a supplemental method of enforcement, in addition to administrative prosecution.¹⁴⁷ Increasing the cost of litigation by holding “mini-trials” and raising the level of proof required to get into court will, no doubt, deter citizen suit actions. Furthermore, those actions that are brought will be delayed, thus, pollution will continue for extended periods of time.¹⁴⁸

The Clean Water Act was designed to protect not only people, but also the waters of this country.¹⁴⁹ As a practical matter, the *Gaston Copper* decision that standing requirements must be established by scientific evidence or observable negative impacts will restrict many plaintiffs to only common law nuisance claims. Citizens without the finances

146. See Dolgetta, *supra* note 27, at 712.

147. See RODGERS, *supra* note 20, at 76. “[T]he routine fashioning of citizen suit provisions recognizes that compliance with environmental laws is the business of an alert community as well as of trained specialists.” *Id.*

148. Interview with Professor Myrl L. Duncan, Washburn University School of Law, Topeka, Kansas (Nov. 15, 1999). Chief Judge Wilkinson had a similar thought when he stated “The exhaustive exposition and proof of such matters will create expensive lengthy sideshows to the straightforward issue under the Clean Water Act—namely, whether a defendant is violating its discharge permit.” *Gaston Copper*, 179 F.3d at 118 (Wilkinson, J., dissenting).

149. See 33 U.S.C. § 1251 (1994).

to offer scientific evidence twice will only be able to have their day in court when there are observable negative impacts. Forcing plaintiffs to wait and bring suit only after there is visible harm to the lakes and rivers will result in serious harm to the environment. The Fourth Circuit Court of Appeals would require plaintiffs such as Shealy to stand by and let the violations of GCRC to occur. Then, after they could visibly point to serious harm to themselves and their lake, they could bring a citizen suit action. This result is certainly at odds with the intent of the Clean Water Act, which is to *prevent pollution*, unlike common law nuisance actions that only *react* to harm.¹⁵⁰ By requiring plaintiffs to wait until injury has occurred the *Gaston Copper* ruling returns environmental litigation to the common law approach that Congress previously rejected. The Fourth Circuit Court of Appeals essentially reduces the citizen suit provision of the Clean Water Act to little more than a codified nuisance action.

V. CONCLUSION

In *Gaston Copper*, the Fourth Circuit Court of Appeals makes a clear statement to potential plaintiffs who wish to bring a citizen suit action under the Clean Water Act. Without expert testimony and chemical tests, lawsuits brought under the Clean Water Act's citizen suit provision will be dismissed for lack of standing.

The *Gaston Copper* decision is the product of Justice Scalia's agenda to raise the standing hurdle for environmental organizations. This decision will essentially result in two trials for every environmental action. Such a requirement makes the environment the ultimate loser. The standing bar has become so high that the citizen suit provision will effectively be eliminated from the Clean Water Act. Thus, the power of "citizens" to protect the environment is being handed to the commercial world, which, for the most part, will continue to dodge the regulations that seek to protect our environment.

VI. ADDENDUM

After the Fourth Circuit Court of Appeal's opinion, FOE and CLEAN requested a hearing *en banc*. The court, after hearing the appeal *en banc*, reversed its earlier ruling, concluding that the facts alleged by Shealy in *Gaston Copper* established standing even under the restrictive decision of *Lujan II*.¹⁵¹ The Fourth Circuit Court of Appeals held

150. See 33 U.S.C. §§ 1251, 1342 (1994). For discussion of reactive nature of nuisance law see *supra* text accompanying notes 20-25.

151. See *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000) (*Gaston Copper II*) (stating: "He [Shealy] is thus precisely the type of plaintiff that the Supreme Court envisioned in *Lujan v. Defenders of Wildlife*—namely, one who is acting to protect a 'threatened concrete interest of his' own").

that plaintiffs are not required to prove their case by “scientific certainty” before being allowed to proceed on the merits.¹⁵² “If scientific certainty were the standard, then plaintiffs would be required to supply costly, strict proof of causation to meet a threshold jurisdictional requirement—even where, as here, the asserted cause of action does not itself require such proof.”¹⁵³ The plaintiffs only needed to show a direct nexus between the injury and the harm.¹⁵⁴

The majority believed that the reversal was consistent with *Lujan II*; however, Judge Hamilton, who authored the majority opinion in the original *Gaston Copper* decision, disagreed.¹⁵⁵ Concurring in the *en banc* decision, Judge Hamilton stated that the reversal was the result of the Supreme Court’s decision in *Friends of the Earth, Inc., v. Laidlaw Environmental Services, Inc.*¹⁵⁶ In *Laidlaw*, the Supreme Court determined that potential plaintiffs had established standing with facts very similar to those in *Gaston Copper*, leading Judge Hamilton to conclude that the Supreme Court had lowered the standing bar.¹⁵⁷ Judge Hamilton declared that *Laidlaw* “has unnecessarily opened the standing floodgates, rendering our standing inquiry ‘a sham.’”¹⁵⁸ Not surprisingly, Judge Hamilton was quoting Justice Scalia’s dissent in *Laidlaw*.¹⁵⁹

In the wake of *Laidlaw*, several environmental standing questions remain unanswered. What is the status of *Lujan II*? Are *Laidlaw* and *Gaston Copper* consistent with the holding in *Lujan II*? If it does sound a retreat, does *Laidlaw* begin a trend to weaken the strength of *Lujan*

152. *Gaston Copper II*, 204 F.3d at 161. The Fourth Circuit’s decision follows several other circuits. See *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 557-58 (5th Cir. 1996); *Public Interest Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 72-73 (3d Cir. 1990); *Natural Resources Defense Council, Inc. v. Texaco Ref. and Mktg., Inc.*, 2 F.3d 493, 505 (3d Cir. 1993).

153. *Gaston Copper II*, 204 F.3d at 161.

154. *See id.*

155. *See id.* at 165 (Hamilton, J., concurring). “This represents a sea change in the law of standing for citizen suits and will return us to the day of about 15 years ago when we saw this as the law.” Susan Bruning, *Supreme Court Upholds Citizen Rights To Sue, Standing Issue in Laidlaw Case*, 31 *Env’t Rep.* (BNA), at 105-06 (Jan. 21, 2000).

156. 120 S. Ct. 693 (2000), *construed in Gaston Copper II*, 204 F.3d at 165 (Hamilton, J., concurring). Judge Hamilton only concurred because he believed that Shealy had established standing under *Laidlaw*. *See id.* However, Judge Hamilton did not agree with the decision in *Laidlaw*. *See id.*

157. *See Laidlaw*, 120 S. Ct. at 704-05. In *Laidlaw*, FOE had alleged standing on behalf of several of its members who claimed to be harmed by Laidlaw’s discharge violations. *See id.* The first member claimed he only lived a half-mile downstream from Laidlaw’s discharge cite. *See id.* The member alleged he occasionally drove over the river “and that it looked and smelled polluted; and that he would like to fish, camp, swim, and picnic in and near the river between 3 and 15 miles downstream from the facility”, except that he was afraid of contamination. *Id.* A member of CLEAN alleged she lived less than a mile from Laidlaw. *See id.* The woman stated that she was prohibited from recreational activities such as hiking and fishing because of Laidlaw’s pollution. *See id.* Several other members of CLEAN alleged to have discontinued similar activities because of fear of contamination. *See id.*

158. *Gaston Copper II*, 204 F.3d at 165 (Hamilton, J., concurring).

159. *See Laidlaw*, 120 S. Ct. at 715 (Scalia, J., dissenting). Justice Scalia also stated: “The new standing law that the Court makes—like all expansions of standing beyond the traditional constitutional limits—has grave implications for democratic governance.” *Id.* at 715 (Scalia, J., dissenting).

II, not unlike *Lujan I* did to *SCRAP?*¹⁶⁰ While only time will provide answers, *Laidlaw* did make one fundamental point: unlike the Fourth Circuit Court of Appeals in the initial *Gaston Copper* decision, the Supreme Court recognizes the viability of citizen suit provisions.

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160. *See id.* (Scalia, J., dissenting). “The Courts ruling [in *Laidlaw*] marks a significant retreat from the broader implications in the Court’s recent standing precedent. . . .” Lazarus, *supra* note 58, at 750.

† I would like to thank Professor Myrl L. Duncan for teaching me the fine art of legal writing.