

# Standing to Sue in Citizen Suits Against Air and Water Polluters Under *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*

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Under the Supreme Court’s recent decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, a plaintiff in an action filed in federal court under the citizen suit provision<sup>1</sup> of the Clean Water Act (CWA) may establish standing to sue on the basis of recreational or aesthetic injury.<sup>2</sup> *Laidlaw* held that a plaintiff in a CWA citizen suit in federal court, seeking an injunction and civil penalties against a defendant who is discharging pollutants into a body of water, can establish the injury in fact element of federal standing to sue requirements by showing that the plaintiff uses an area “affected” by the defendant’s “challenged activity” and that the defendant’s actions have “lessened” the plaintiff’s recreational or aesthetic enjoyment of the “affected” area.<sup>3</sup> However, the Court in *Laidlaw* did not define “affected” area and “challenged activity” for purposes of this principle. Courts in future CWA citizen suits against polluters of a water body, therefore, will have to determine if the plaintiffs in such suits have established recreational or aesthetic injury in fact under *Laidlaw* in varying factual situations.

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1. 33 U.S.C. § 1365 (2000).  
2. 528 U.S. 167, 183 (2000).  
3. *Id.*

In future CWA citizen suits, federal courts also will have to interpret an additional holding in *Laidlaw*, which states that private individuals who live “nearby” a polluted river and who seek injunctive relief against an alleged polluter of the river establish imminent future recreational and aesthetic injury when they allege and establish two things.<sup>4</sup> The plaintiffs satisfy federal standing to sue requirements, under this additional holding in *Laidlaw*, when they allege and establish (1) that the defendant’s pollution of the river has caused them to refrain from using the “nearby” river for recreational purposes because of their reasonable concerns about the effects of the defendant’s pollutant discharges into the river, and (2) that they would use the river for recreation if the defendant was not discharging pollutants into it.<sup>5</sup> Because the *Laidlaw* decision does not define “nearby” for purposes of this principle, federal courts in future CWA citizen suits against polluters of a water body, that involve facts different than those in *Laidlaw*, face uncertainty as to what types of harm to recreational and aesthetic interests will satisfy federal standing to sue requirements in such suits.

Although *Laidlaw* established federal constitutional standing to sue principles for recreational and aesthetic injury in fact that should be applicable in actions brought in federal court under the citizen suit provision of the Clean Air Act (CAA), *Laidlaw*’s standing principles may have to be applied differently in cases involving air pollution rather than water pollution.<sup>6</sup> The distinctions arise because the area “affected” by a defendant’s emissions of air pollutants may be defined on the basis of factors that differ from the factors utilized to define the area “affected” by discharges of pollutants into a body of water.

This Article will analyze the federal standing to sue requirements that have to be satisfied by a plaintiff in a CWA or CAA citizen suit against a polluter of a water body or outdoor ambient air whose pollutant discharges or emissions allegedly cause injury to the plaintiff’s recreational or aesthetic enjoyment of a part of the environment, with particular emphasis on the *Laidlaw* decision.<sup>7</sup>

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4. *Id.* at 184, 186-87.

5. *See id.* at 181-85.

6. *See id.*

7. This Article will not analyze standing to sue based upon injury to a person’s economic and health interests that may be caused by a defendant’s discharges of pollutants into a body of water or into the outdoor ambient air.

## I. GENERAL FEDERAL STANDING TO SUE REQUIREMENTS

Federal standing to sue requirements for a plaintiff in a suit filed in a federal court seek to ensure that the plaintiff has “such a ‘personal stake in the outcome of the controversy,’ . . . as to ensure that ‘the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.’”<sup>8</sup> The standing requirement also “tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.”<sup>9</sup>

In any suit filed in a federal court, a plaintiff is required to satisfy both constitutionally based standing to sue requirements and “prudential” standing to sue requirements.<sup>10</sup> A plaintiff invoking federal jurisdiction has the burden of establishing all of these standing requirements as “an indispensable part of the plaintiff’s case,” not as “mere pleading requirements;”<sup>11</sup> and a plaintiff in federal court “must demonstrate standing separately for each form of relief sought.”<sup>12</sup> The federal constitutional standing to sue requirements, which derive from the “case” or “controversy” jurisdictional prerequisite of Article III of the United States Constitution,<sup>13</sup> are “immutable requirements”<sup>14</sup> that cannot be changed by either the federal judiciary or by the United States Congress.<sup>15</sup> On the other hand, federal prudential standing to sue requirements, which are “‘judicially self-imposed limits on the exercise of federal jurisdiction,’”<sup>16</sup> can be modified or abrogated by the Congress.<sup>17</sup>

To satisfy the “irreducible constitutional minimum”<sup>18</sup> federal standing to sue requirements, a plaintiff in a suit in a federal court “must, generally speaking, demonstrate that he has suffered ‘injury in fact,’ that

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8. *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972) (citations omitted).

9. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 472 (1982).

10. *See Bennett v. Spear*, 520 U.S. 154, 162 (1997).

11. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

12. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000).

13. *Id.* at 180.

14. *Bennett*, 520 U.S. at 162.

15. *Id.*

16. *Id.* (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

17. *Id.* at 162.

18. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

the injury is ‘fairly traceable’ to the actions of the defendant, and that the injury will likely be redressed by a favorable decision.”<sup>19</sup>

The injury in fact element requires a plaintiff to “have suffered . . . an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) ‘actual or imminent, not “conjectural” or “hypothetical.””<sup>20</sup> There is no quantitative standard for the injury in fact element: this element can be satisfied by an “identifiable trifle” and a plaintiff does not have to be “significantly” affected by the defendant’s challenged activity in order for this element to be satisfied.<sup>21</sup> Furthermore, the injury in fact suffered by a plaintiff “as a result of the putatively illegal conduct of the defendant” can be either actual injury or threatened [future] injury.<sup>22</sup> “One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough.”<sup>23</sup> An injury in fact that has occurred in the past may be sufficient to satisfy the injury in fact element when a plaintiff is seeking damages for this past injury,<sup>24</sup> but when a plaintiff is seeking injunctive relief, a plaintiff must establish that he or she presently is being injured by “continuing, present adverse effects”<sup>25</sup> or will be injured in the imminent future.<sup>26</sup>

The “fairly traceable” element requires a causal connection between the injury and the defendant’s challenged conduct, such that the injury is fairly traceable to the challenged activity of the defendant and not the result of an independent action of a third person not before the court.<sup>27</sup> This element only requires a plaintiff to show that there is a “substantial likelihood” that the defendant’s challenged activity caused the plaintiff’s injury,<sup>28</sup> and federal courts of appeal have held that the “fairly traceable” element does not require that a causal connection be established either to a scientific certainty<sup>29</sup> or to a certainty equivalent to that required by tort

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19. *Bennett*, 520 U.S. at 162.

20. *Defenders of Wildlife*, 504 U.S. at 560.

21. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973) (citation omitted).

22. *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99 (1979).

23. *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923).

24. *See Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (presuming that past injury is sufficient to satisfy the injury in fact element when the plaintiff is seeking damages).

25. *O’Shea v. Littleton*, 414 U.S. 488, 495-96 (1974).

26. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564-65 n.2 (1992).

27. *Id.* at 560.

28. *Duke Power Co. v. Carolina Env’tl. Study Group, Inc.*, 438 U.S. 59, 75 n.20 (1978).

29. *Pub. Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 72 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991) ; *Natural Res. Def. Council, Inc. v. Watkins*, 954 F.2d 974, 980 n.7 (4th Cir. 1992).

proximate causation standards.<sup>30</sup> The redressability element requires that the plaintiff show that it is “‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’”<sup>31</sup>

Federal “[p]rudential standing requirements include: ‘The general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked.’”<sup>32</sup> This “zone of interests” requirement mandates that a plaintiff “establish that the injury he complains of . . . falls within the ‘zone of interests’ sought to be protected by the statutory provision whose violation forms the legal basis for the complaint.”<sup>33</sup> An exception to the prudential requirement that a person only has standing to sue based upon personal injury to the plaintiff, permits an organization to have standing in federal court to assert interests of particular, identified members of the organization when these members of the organization would have standing to sue in their own right, the interests asserted by the organization in the lawsuit are germane to the organization’s purposes, and neither the claims asserted nor the relief requested in the litigation require the personal participation of these members in the litigation.<sup>34</sup>

## II. PROCEDURAL METHODS TO CHALLENGE A PLAINTIFF’S STANDING TO SUE IN A FEDERAL COURT

A defendant in federal court who seeks to have a case dismissed before trial on grounds of the plaintiff’s lack of standing should file a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, not a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Although a plaintiff’s allegations in the complaint “must be true and capable of proof of trial,”<sup>35</sup> if a defendant challenges the plaintiff’s standing to sue by filing a pre-trial motion to

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30. *Powell Duffryn Terminals*, 913 F.2d at 72; *Watkins*, 954 F.2d at 980 n.7; *Loggerhead Turtle v. County Council of Volusia County*, 148 F.3d 1231, 1251 n.23 (11th Cir. 1998), *cert. denied*, 526 U.S. 1081 (1999) (concluding that “no authority even remotely suggests that proximate causation applies to the doctrine of standing”).

31. *Defenders of Wildlife*, 504 U.S. at 561 (citation omitted).

32. *Devlin v. Scardelletti*, 536 U.S. 1, 7 (2002) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

33. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 883 (1990).

34. *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977).

35. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 (1973).

dismiss, a plaintiff's "general factual allegations of injury resulting from the defendant's conduct may suffice [to establish the plaintiff's standing to sue], for on a motion to dismiss [the Supreme Court] . . . 'presume[s] that general allegations embrace those specific facts that are necessary to support the claim.'"<sup>36</sup>

Consequently, if a defendant in a federal court believes that the plaintiff's allegations in his or her complaint in support of standing to sue are untrue, the defendant should move for summary judgment under Rule 56 on the standing issue and demonstrate to the federal court that the plaintiff's allegations with respect to standing "were sham and raised no genuine issue of fact."<sup>37</sup> "In response to a summary judgment motion, . . . the plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' Fed. Rule Civ. Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true."<sup>38</sup> If the defendant at trial controverts the facts set forth by the plaintiff in response to the defendant's motion for summary judgment, these facts "must be 'supported adequately by the evidence adduced at trial.'"<sup>39</sup>

### III. STANDING TO SUE BASED UPON AESTHETIC, RECREATIONAL OR CONSERVATIONAL INJURY

Although the Supreme Court has long recognized that an injury to a legally protected economic or property interest is a sufficient basis for standing to sue in federal court,<sup>40</sup> only in the last thirty or so years has the Court recognized that harm to a person's aesthetic, recreational or conservational interest can satisfy the "injury in fact" standing requirement.<sup>41</sup> However, in order for a person to satisfy the injury in fact standing requirement on the basis of harm to that person's recreational or aesthetic interests, the person must allege and establish that he or she physically uses the area affected by the defendant's challenged activity

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36. *Defenders of Wildlife*, 504 U.S. at 561 (quoting *Nat'l Wildlife Fed'n*, 497 U.S. at 889).

37. *Students Challenging Regulatory Agency Procedures*, 412 U.S. at 689.

38. *Defenders of Wildlife*, 504 U.S. at 561. Under Rule 56(c) of the Federal Rules of Civil Procedure, depositions, answers to interrogatories, and admissions on file may be considered by the court, along with the pleadings and affidavits, in determining whether there is a genuine issue as to any material fact with respect to the plaintiff's standing to sue and whether the moving party is entitled to a judgment as a matter of law. *Nat'l Wildlife Fed'n*, 497 U.S. at 884.

39. *Defenders of Wildlife*, 504 U.S. at 561 (quoting *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 115 n.31 (1979)).

40. See *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972).

41. *Id.* at 733-34; *Students Challenging Regulatory Agency Procedures*, 412 U.S. at 686-87.

and is a “person ‘for whom the aesthetic and recreational values of the area will be lessened’ by the challenged activity.”<sup>42</sup> By definition, this “physical use/presence” requirement for aesthetic or recreational injury is not satisfied by a person who derives aesthetic enjoyment only from viewing an affected natural area by means of a video, film, still photograph, or from reading about the area in a newspaper, book, magazine, or other print media.

The Supreme Court’s “use”-of-the-“affected area” test requires both (1) that a person seeking standing to sue on the basis of aesthetic or recreational injury must physically use or visit either the exact area where the defendant’s challenged activity occurs or an area that is “adjacent” to (“next door”<sup>43</sup> to) that area, and (2) that the defendant’s aesthetic or recreational enjoyment of the area is “lessened” by the defendant’s challenged activity.<sup>44</sup> When a plaintiff uses or visits such an “adjacent” or “next door” area, a plaintiff’s aesthetic or recreational enjoyment from physical presence in an area would be “lessened” because of the plaintiff’s sensory perceptions (usually through sight, sound, or smell) of adverse effects on nearby or adjacent land that are caused by the defendant’s challenged activity.<sup>45</sup> However, a plaintiff’s mere allegation that he or she uses an “area in the vicinity of” the area where the defendant’s challenged activity occurs is not specific enough to satisfy this physical use/presence requirement for aesthetic or recreational injury in fact.<sup>46</sup> Consequently, a plaintiff cannot avoid a court granting a defendant’s motion for summary judgment under Rule 56(e) of the Federal Rules of Civil Procedure, “by averments which state only that one of [plaintiff’s] . . . members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the [defendant’s challenged] . . . action.”<sup>47</sup>

Although adverse effects on outdoor activities such as camping, hiking, fishing, swimming, boating, picnicking, bird watching, and sightseeing implicitly have been recognized by the Supreme Court as

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42. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000) (quoting *Morton*, 405 U.S. at 735).

43. *Defenders of Wildlife*, 504 U.S. at 572 n.7 (dictum).

44. *Laidlaw*, 528 U.S. at 183; see *Morton*, 405 U.S. at 735.

45. A person engaging in recreational activities near (but not in) a polluted river has been held to suffer injury to his aesthetic and recreational interests when he was offended by the color and bad odors of the nearby polluted river that he personally perceived through his own senses of sight and smell. *Pub. Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals, Inc.* 913 F.2d 64, 71 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991).

46. See *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 886, 889 (1990).

47. *Id.* at 889.

injuries in fact to aesthetic and recreational interests for purposes of satisfying federal standing to sue requirements,<sup>48</sup> the Supreme Court has never established a general test for determining what types of adverse effects to an individual's outdoor activities will be considered to be injury in fact to an individual's aesthetic and recreational interests for purposes of federal standing to sue requirements.

In order to qualify as an aesthetic or recreational injury in fact for standing to sue purposes, a person's outdoor activity that is adversely affected probably would have to be a lawful activity. Adverse effects on an individual's outdoor activity should not be considered a recreational or aesthetic injury in fact if that activity is illegal under federal, state, or local law, because traditionally an injury in fact is recognized only when a person's legally protected or legally recognized interests are adversely affected.<sup>49</sup> Consequently, if a person's fishing or hunting that is adversely affected is illegal activity (such as poaching, fishing or hunting out of the lawful season, or exceeding legal catch limits), such adverse effects on illegal fishing or hunting presumably would not be recognized as recreational or aesthetic injury in fact that confers standing to sue. Similarly, adverse effects on other illegal outdoor activities, such as distilling moonshine whiskey, probably would not be recognized as recreational or aesthetic injury in fact for purposes of federal standing to sue requirements.

Although fishing (an activity that may kill or injure certain fish) implicitly has been recognized as an outdoor activity that is within an individual's aesthetic and recreational interests for standing to sue purposes,<sup>50</sup> the Supreme Court has not explicitly addressed the issue of whether adverse effects on a person's hunting of wildlife can constitute recreational or aesthetic injury. Furthermore, the Supreme Court has not explicitly addressed the issue of whether adverse effects on a person's outdoor activity can be considered to be an injury to that person's aesthetic and recreational interests for standing to sue purposes, when that outdoor activity causes harm to wildlife, ecosystems or other parts of the natural physical environment. A situation raising this issue would be presented if a defendant's challenged activity caused adverse effects to a plaintiff's recreational use of an off-road vehicle or a snowmobile.

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48. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 685 (1973); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181-83 (2000).

49. *Morton*, 405 U.S. at 733 (referring to "the various formulations of 'legal interest' and 'legal wrong' then prevailing as constitutional requirements of standing").

50. *Students Challenging Regulatory Agency Procedures*, 412 U.S. at 685; *Laidlaw*, 528 U.S. at 181-83.

Should such adverse effects be considered to be an injury in fact to the plaintiff's aesthetic or recreational interests for standing to sue purposes, when the plaintiff's adversely—affected outdoor activities cause harm to the environment? Even if adverse effects to such environmentally-harmful outdoor activities are considered recreational or aesthetic injury in fact, an individual alleging such injuries, nevertheless, might be denied standing to sue in federal court on the ground that such injury is not within the zone of interests allegedly protected by a federal environmental protection statute.<sup>51</sup>

The Supreme Court has identified neither the ways in which a person can derive aesthetic enjoyment from an area used or visited by that person, nor defined what types of adverse effects upon an individual can constitute an injury in fact to that person's aesthetic interests for federal standing to sue purposes. The Supreme Court did state in *Lujan v. Defenders of Wildlife* that “[o]f course, the desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for purpose of standing.”<sup>52</sup> Furthermore, the court recognized in *Laidlaw* that adverse effects on an individual's outdoor bird-watching activities can constitute aesthetic injury in fact for standing to sue purposes.<sup>53</sup> Earlier, in *Sierra Club v. Morton*, the Supreme Court stated that it did “not question” that “injury in fact” sufficient for standing to sue occurs when construction of a road in a national park destroys or otherwise adversely affects the scenery, natural and historic objects, and wildlife of the park, lessening aesthetic values for users of the area.<sup>54</sup>

*Morton* and *Laidlaw* therefore indicate that aesthetic injury in fact may occur when an individual's aesthetic enjoyment of wildlife, an ecosystem or a historic structure or object, that results from the person's use of her sensory perceptions (including hearing, smell, and touch, as well as sight), is adversely affected by a defendant's alteration or development of the natural physical environment (or of any historic structure or object). The Court, however, also should recognize that a person can gain aesthetic enjoyment from knowledge of the environmental characteristics of an area used or visited by that person, as

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51. See *supra* notes 32-33 and accompanying text (discussing the prudential zone of interests requirement).

52. 504 U.S. 555, 562-63 (1992).

53. 528 U.S. at 182-83.

54. 405 U.S. at 734.

well as from the person's sensory perceptions of the area while using or being physically present in that area.<sup>55</sup>

The Supreme Court has never required a plaintiff alleging an aesthetic injury in fact to establish the truthfulness of the claim by any type of objective or quantitative evidence and has given no indication whether, or how, a defendant successfully can defend a claim by a plaintiff that the defendant's challenged conduct will cause, or has caused, adverse effects to the plaintiff's aesthetic enjoyment of the area affected by the defendant's conduct. However, the determination of whether a plaintiff has suffered an aesthetic injury in fact in most cases probably will be based upon the plaintiff's subjective allegations and statements, because "aesthetic perceptions are necessarily personal and subjective"—unless a plaintiff's claim that the defendant's challenged activity lessens the plaintiff's aesthetic enjoyment of a particular "affected area" is found to be too preposterous to be believed to be true.<sup>56</sup>

Although the Supreme Court in *Morton* stated in dictum that the injury in fact element of federal standing to sue requirements can be satisfied when there is an injury to a conservational value or interest of the plaintiff,<sup>57</sup> the Supreme Court has never defined the term "conservational value," and has never stated whether a person alleging a conservational injury in fact must satisfy the physical user test that is required for a recreational or aesthetic injury in fact.<sup>58</sup>

#### IV. STANDING TO SUE IN POLLUTION CASES UNDER *FRIENDS OF THE EARTH, INC. v. LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.*

The Supreme Court in *Laidlaw* addressed in depth for the first time the issue of the requirements that an individual alleging aesthetic and recreational injury in fact must satisfy in order to meet federal standing to sue requirements in a suit seeking injunctive relief and assessment of

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55. See *Vt. Pub. Interest Research Group v. U.S. Fish & Wildlife Serv.*, 247 F. Supp. 2d 495, 510-11 (D. Vt. 2002) (holding that a plaintiff, who visited a particular affected area where he studied and engaged in recreational activities, had standing to sue in a suit seeking to protect a rare species that inhabited streams in the affected area, even if the plaintiff had not personally observed any members of these rare species, because of the value the plaintiff placed on knowing that these species existed in these streams). The court seemed to consider this value, that the plaintiff derived from knowing these species existed in the affected area used by the plaintiff for recreational activities, to be part of the plaintiff's aesthetic enjoyment of the affected area, by stating "There can be no doubt that such concrete interests include the kind of aesthetic and recreational uses . . . that the affiants claim to enjoy." *Id.* at 509.

56. *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1150 (9th Cir. 2000).

57. *Morton*, 405 U.S. at 738.

58. This Article therefore will not analyze "conservational" injury in fact as a basis for satisfying federal standing to sue requirements.

civil penalties against a facility discharging pollutants into a river or other surface body of water.<sup>59</sup> In *Laidlaw*, the Supreme Court held that residents who lived near the river and the defendant's facility had standing to sue the owner of the facility for civil penalties and injunctive relief because they alleged both (1) that they were refraining from using either the river or areas bordering the river because of the defendant's "continuous and pervasive illegal discharges of pollutants into [the river]" (due to their reasonable fears of defendant's discharges of pollutants) and (2) "that they would use the nearby . . . [r]iver for recreation if [the defendant] . . . were not discharging pollutants into it."<sup>60</sup>

The *Laidlaw* case involved a waste water treatment plant in Roebuck, South Carolina (that was part of a hazardous waste incinerator facility) that was owned by Laidlaw Environmental Services (TOC), Inc. (Laidlaw) and discharges from that facility of pollutants, particularly the "extremely toxic pollutant" mercury, into the North Tyger River in South Carolina.<sup>61</sup> The Laidlaw plant received an NPDES permit from the South Carolina Department of Health and Environmental Control (DHEC) that placed limits on Laidlaw's discharges of several pollutants (including mercury) into the North Tyger River.<sup>62</sup> The plant "repeatedly" discharged pollutants into the river that exceeded the limits set by Laidlaw's NPDES permit, with Laidlaw "consistently fail[ing] to meet the permit's stringent . . . daily average limit on mercury discharges."<sup>63</sup>

After Friends of the Earth, Inc. and a local environmental organization notified Laidlaw that they would file a citizen suit against Laidlaw under section 505(a) of the Clean Water Act after expiration of

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59. 528 U.S. 167, 181-88 (2000). In *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74 (1978), an earlier decision involving air and water pollution, the Supreme Court held that individuals seeking to halt the construction of two new nuclear power plants that were being built near their homes established satisfactory environmental, aesthetic, and health injury in fact for purposes of federal standing to sue requirements, but did so in cursory fashion without identifying and applying the relevant legal principles, as the Court did in *Laidlaw*. In *Duke Power Co.*, the Court first held that satisfactory injury in fact was established on the basis of the environmental and aesthetic consequences of thermal pollution that the power plants would discharge into lakes used by the plaintiffs for recreational purposes, with the Court merely citing *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 (1973), and *Morton*, 405 U.S. at 734, in support of this holding. *Duke Power Co.*, 438 U.S. at 73-74. *Duke Power Co.* also held that "the emission of non-natural radiation into the [plaintiffs'] . . . environment would also seem a direct and present injury, given our generalized concern about exposure to radiation and the apprehension flowing from the uncertainty about the health and genetic consequences of even small emissions like those concededly emitted by nuclear power plants." *Id.* at 74.

60. *Laidlaw*, 528 U.S. at 184.

61. *Id.* at 176.

62. *Id.*

63. *Id.*

the CWA's requisite sixty-day notice period,<sup>64</sup> Laidlaw arranged to have the DHEC file an enforcement suit against Laidlaw (using a complaint drafted and filed by Laidlaw, with Laidlaw also paying the filing fee<sup>65</sup>), in an attempt to have the proposed CWA citizen suit barred through the provisions of section 505(b)(1)(B) of the CWA.<sup>66</sup> On the last day before the sixty-day notice period expired, the DHEC and Laidlaw agreed to a settlement of the DHEC's enforcement suit, whereby Laidlaw agreed to pay \$100,000 in civil penalties and "to make 'every effort' to comply with its permit obligations."<sup>67</sup>

Despite this settlement agreement, Friends of the Earth, Sierra Club, and a local environmental organization (hereinafter referred to collectively as FOE) filed a CWA citizen suit against Laidlaw on June 12, 1992, three days after the settlement agreement was reached.<sup>68</sup> FOE, in its complaint, alleged that Laidlaw was not in compliance with its CWA NPDES permit and requested declaratory and injunctive relief and assessment of civil penalties against Laidlaw.<sup>69</sup>

After Laidlaw filed a motion for summary judgment on the ground that FOE lacked standing to sue, FOE submitted to the district court affidavits and deposition testimony of members of the plaintiff organizations.<sup>70</sup> These members, who gave sworn statements, asserted that their recreational, aesthetic, and economic interests were adversely affected by Laidlaw's discharges of pollutants into the North Tyger River.<sup>71</sup> The district court denied Laidlaw's motion for summary judgment after examining FOE's submissions and other affidavits of members of the plaintiff organizations that were previously submitted by the plaintiffs in support of an earlier motion for preliminary injunctive relief.<sup>72</sup> The district court also denied Laidlaw's motion to dismiss the citizen suit under section 505(b)(1)(B) of the CWA, because the district

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64. 33 U.S.C. § 1365(b)(1)(A) (2000) (stating that section 505(b)(1)(A) of the CWA requires that prior notice of the proposed filing of a CWA citizen suit be given by the prospective plaintiff to the alleged violator of the CWA (who is the prospective defendant in the suit), the United States Environmental Protection Agency [hereinafter EPA] and the state water pollution control agency of the state where the defendant's alleged violations are occurring).

65. *Laidlaw*, 528 U.S. at 176-77, 178 n.1.

66. *Id.* at 176-77.

67. *Id.* at 177 (citation omitted).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 181-84.

72. *Id.* at 177; *see infra* notes 88-95 and accompanying text (describing the sworn statements of six of these members upon which Justice Ginsburg subsequently relied to hold that the plaintiff organizations had standing, on behalf of these members, to sue for injunctive relief and civil penalties).

court held that the DHEC's enforcement action against Laidlaw had not been "diligently prosecuted."<sup>73</sup>

In January 1997, more than four years after FOE filed its citizen suit against Laidlaw, the district court issued its final judgment in the case, in which it assessed Laidlaw \$405,800 in civil penalties (to be paid to the United States Treasury).<sup>74</sup> However, the district court declined to issue the injunctive relief requested by FOE, on the ground "that an injunction was inappropriate because 'Laidlaw has been in substantial compliance with all parameters in its NPDES permit since at least August 1992,'" with the last recorded discharge of mercury in violation of Laidlaw's NPDES permit having occurred in January 1995.<sup>75</sup>

FOE appealed to the United States Court of Appeals for the Fourth Circuit on the ground that the amount of civil penalties assessed by the district court was inadequate, but did not appeal the district court's denial of the requested declaratory and injunctive relief.<sup>76</sup> Laidlaw cross-appealed, on grounds that included FOE's lack of standing to sue and that the citizen suit was barred because the DHEC's enforcement actions and settlement agreement with Laidlaw were "diligent prosecution" within the meaning of section 505(b)(1)(B) of the CWA.<sup>77</sup>

The Court of Appeals issued a judgment vacating the district court's order and remanding with instructions to dismiss the action on the ground that the case was moot.<sup>78</sup> The Fourth Circuit reasoned that the case was moot since "the only remedy currently available . . .—civil penalties payable to the government—would not redress any injury [suffered by FOE]."<sup>79</sup> The Court of Appeals assumed that FOE had standing to sue to bring the citizen suit, without deciding that issue.<sup>80</sup> After this decision by the Court of Appeals, Laidlaw closed its entire incinerator facility in Roebuck, South Carolina, and all discharges from the facility into the North Tyger River "permanently ceased."<sup>81</sup>

The Supreme Court thereafter granted certiorari in the case, "to resolve the inconsistency between the Fourth Circuit's decision in this case and the decisions of several other Courts of Appeals, which have

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73. *Laidlaw*, 528 U.S. at 177.

74. *Id.* at 178.

75. *Id.* (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 956 F. Supp. 588, 611 (D.S.C. 1997)).

76. *Laidlaw*, 528 U.S. at 179.

77. *Id.*

78. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 149 F.3d 303, 306-07 (4th Cir. 1998).

79. *Id.*

80. *See id.* at 306 n.3.

81. *Laidlaw*, 528 U.S. at 179.

held that a defendant's compliance with its permit after the commencement of litigation does not moot claims for civil penalties under the Act."<sup>82</sup>

The Supreme Court held that the Court of Appeals erred in holding that the case was moot,<sup>83</sup> but on its own initiative also addressed the issue of whether FOE met federal standing to sue requirements in the case.<sup>84</sup> Justice Ginsburg, in her opinion for the Court, held "that FOE had standing under Article III to bring this action."<sup>85</sup>

Justice Ginsburg held that the sworn affidavits and depositions of six members of the plaintiff organizations (Kenneth Lee Curtis, Angela Patterson, Judy Pruitt, Linda Moore, Gail Lee, and Norman Sharp) "adequately documented injury in fact" to "those affiants' recreational, aesthetic and economic interests."<sup>86</sup> Stating that "[t]he relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff," Justice Ginsburg rejected Laidlaw's argument that these members did not show that they "had sustained or faced the threat of any 'injury in fact' from Laidlaw's activities" because they failed to prove that Laidlaw's discharges of mercury, in violation of discharge limitations in its NPDES permit, resulted in any harm to the environment or any health risk.<sup>87</sup>

According to Justice Ginsburg, Curtis stated in his affidavits and depositions that he lived a half-mile from Laidlaw's facility, and that as a teenager he had fished, camped, swam, and picnicked in and near the river between three and fifteen miles downstream from the Laidlaw facility and would like to do so again.<sup>88</sup> Curtis, however, stated that he did not do so now because of his concern that the river's water (which he said looked and smelled polluted) was polluted by Laidlaw's discharges.<sup>89</sup> Patterson stated that she lived two miles from the Laidlaw facility, and that before Laidlaw operated the facility, she had picnicked, walked, bird-watched, and waded in and along the river because of its natural beauty.<sup>90</sup> Patterson stated, however, "that she no longer engaged in these activities in or near the river because she was concerned about harmful effects

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82. *Id.* at 179-80.

83. *Id.* at 180.

84. *Id.* The Court raised the standing to sue issue on its own initiative because lack of standing to sue would deprive the Court of Article III jurisdiction. *Id.*

85. *Id.* at 189.

86. *Id.* at 183-84.

87. *Id.* at 181; *see infra* 146-148 and accompanying text.

88. *Laidlaw*, 528 U.S. at 181-82.

89. *Id.*

90. *Id.* at 182.

from discharged pollutants,” and that she and her husband, despite a desire to do so, did not intend to purchase a home near the river, “in part because of Laidlaw’s discharges.”<sup>91</sup> Pruitt, who lived one-quarter mile from the Laidlaw facility, was described as desiring to fish, hike, and picnic along the river but as not doing so because of Laidlaw’s discharges.<sup>92</sup> Moore, who lived twenty miles from Roebuck (where Laidlaw’s facility was located), attested that she would use the river south of Roebuck, and lands bordering it, for hiking, picnicking, camping, swimming, boating, and diving were she not concerned about Laidlaw’s illegal discharges and pollutants in the water.<sup>93</sup> Lee attested that her home, located “near” the Laidlaw facility (with the exact distance not specified by Justice Ginsburg), had a lower value than similar homes located farther away from the facility and that she believed that some of this lower value was due to Laidlaw’s pollutant discharges.<sup>94</sup> Sharp stated that he canoed on the river about forty miles downstream from the Laidlaw facility and would like to canoe in the river closer to the Laidlaw facility, but did not do so because of his concern “that the water contained harmful pollutants.”<sup>95</sup>

As described by Justice Ginsburg, these affiants did not assert that they suffered a past injury in fact resulting from the defendant’s alleged unlawful pollutant discharges into the river that lessened their recreational and aesthetic enjoyment during their past use of the river and surrounding areas.<sup>96</sup> Nor did the affiants appear to assert that they would in the future suffer imminent injury in fact as a result of the defendant’s allegedly unlawful pollutant discharges into the river lessening their recreational and aesthetic enjoyment during their future use of the river and surrounding areas.<sup>97</sup>

Instead, these affiants’ sworn statements asserted that the affiants suffered or would suffer injury in fact both (1) because they refrained from recreational use of the river and surrounding areas because of fears and concerns about the effects of the defendant’s discharges of pollutants into the river and (2) because they would use the river and surrounding areas for recreational activities if the defendant’s discharges of pollutants into the river ceased.<sup>98</sup> This first asserted injury in fact (from the affiants’

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91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 182-83.

95. *Id.* at 183.

96. *See id.* at 181-83.

97. *See id.*

98. *See id.*

refraining from recreational use of the river and surrounding areas) might be interpreted as not only asserting an injury that occurred in the past (prior to the filing of the lawsuit), but as also asserting both (1) a present injury in fact that was continuing at the present time (after the lawsuit was filed through the Supreme Court's issuance of its judgment in the case) and (2) an imminent future injury that would continue into the immediate future (after the Supreme Court's judgment was issued) until the defendant's pollutant discharges (or allegedly unlawful pollutant discharges) ceased. The affiants' second asserted injury (future use of the river that is conditioned upon the defendant's pollutant discharges ending) might be interpreted as complementing the affiants' first asserted injury in fact, together asserting that in the imminent near future the affiants would refrain from recreational use of the river and surrounding areas because of fears and concerns about the effects of the defendant's pollutant discharges into the river, but that the affiants would begin recreational uses of the river and surrounding areas if the defendant's pollutant discharges (or allegedly unlawful pollutant discharges) ceased.<sup>99</sup>

Justice Ginsburg held that these members' "sworn statements . . . adequately documented injury in fact,"<sup>100</sup> on the basis of the principle "that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity."<sup>101</sup>

Justice Ginsburg based this principle upon the Supreme Court's 1972 decision in *Sierra Club v. Morton*, which she quoted in her statement of the principle.<sup>102</sup> In *Morton*, which established the "physical user" test for aesthetic and recreational injury in fact for standing to sue purposes,<sup>103</sup> the Supreme Court did not "question" that the type of harm that would result from proposed changes to Mineral King Valley as a result of construction of a huge resort complex "may amount to an 'injury in fact' sufficient to lay the basis for standing under § 10 of the APA."<sup>104</sup> After noting that the resort complex would result in "change in

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99. This latter conditional assertion of future use of the river appears to be conditioned upon the defendant ending all of its discharges of pollutants into the river, not just ending the allegedly unlawful discharges that were in violation of the discharge limitations in the defendant's CWA NPDES permit. *See id.* at 184 (noting "affiants' conditional statements that they would use the nearby North Tyger River for recreation if Laidlaw were not discharging pollutants into it").

100. *Id.* at 183.

101. *Id.* (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)).

102. *Id.*

103. *See supra* notes 42-47 and accompanying text (discussing the physical user test).

104. *Morton*, 405 U.S. at 734.

the uses, to which Mineral King will be put, and the attendant change in the aesthetics and ecology of the area,”<sup>105</sup> the Court in *Morton* then noted that the plaintiff’s complaint alleged that a road that would be constructed through Sequoia National Park for the resort complex “would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations.”<sup>106</sup> The Court in *Morton* also stated that “the alleged injury will be felt directly only by those who use Mineral King and Sequoia National Park, and for whom the aesthetic and recreational values of the area will be lessened by the highway and ski resort.”<sup>107</sup>

*Morton* probably used “adversely affected” area terminology because the plaintiff in that action brought suit under section 10 of the Administrative Procedure Act (APA), which provides that “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”<sup>108</sup> Although the APA only governs suits in federal courts against federal administrative agencies that are subject to the requirements of the APA, the CWA’s citizen suit provision, which was the basis for the plaintiffs’ suit in *Laidlaw*, authorizes certain suits to be brought under its provisions against a private business corporation or individual by “a person or persons having an interest which is or may be adversely affected.”<sup>109</sup> This language in the CWA citizen suit provision was previously interpreted by the Supreme Court as conferring standing to sue on a “broad category of potential plaintiffs” who “can claim some sort of injury,” whether economic or noneconomic.<sup>110</sup> Justice Ginsburg in *Laidlaw*, therefore, needed no explicit justification for extending *Morton*’s “adversely affected area” test, for determining aesthetic and recreational injury in fact, to a suit against a privately owned facility in a citizen suit under the CWA.

The Clean Air Act’s citizen suit provision, however, authorizes certain citizen suits by “any person,” without any requirement that a

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105. *Id.*

106. *Id.*

107. *Id.* at 735.

108. 5 U.S.C. § 702 (2000).

109. 33 U.S.C. §§ 1365(a), (g) (2000). The CWA defines “person” to mean “an individual, corporation, partnership, association, State, municipality, commission, or other political subdivision of a State, or any interstate body.” *Id.* § 1362(5).

110. *Middlesex County Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 16-17 (1981).

“person” have an interest that is or may be “adversely affected.”<sup>111</sup> The CAA citizen suit provision thus appears to permit a suit under its provisions by any person who meets federal constitutional standing to sue requirements. Justice Ginsburg’s stated principle in *Laidlaw* for recreational or aesthetic injury in fact refers to “environmental plaintiffs”<sup>112</sup> generally, not just to plaintiffs in CWA citizen suits, and is stated as a principle governing the injury in fact element of federal constitutional standing requirements (not standing requirements only for Clean Water Act citizen suits). A plaintiff in a CAA citizen suit, therefore, should be able to establish recreational and aesthetic injury in fact under *Laidlaw*’s principles.

Consequently, *Laidlaw*’s test for recreational and aesthetic injury in fact also should apply to citizen suits brought under the Clean Air Act<sup>113</sup> and other federal statutes that authorize certain suits either by an “adversely affected person” or by any “person.”<sup>114</sup>

Justice Ginsburg’s test in *Laidlaw* for recreational and aesthetic injury in fact only requires a plaintiff to allege and establish that the defendant’s challenged activity “lessens” or will “lessen” the plaintiff’s recreational or aesthetic enjoyment of the “affected area.”

Under *Laidlaw*, then, an individual can establish “injury in fact” by showing a connection to the area of concern sufficient to make credible the contention that the person’s future life will be less enjoyable—that he or she really has [suffered] or will suffer in his or her degree of aesthetic or recreational satisfaction—if the area in question remains or becomes environmentally degraded. Factors of residential contiguity [to the affected area] and frequency of use [of the affected area] may certainly be

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111. See 42 U.S.C. § 7604(a) (2000). The Clean Air Act defines “person” to include “an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.” *Id.* § 7602(e).

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

113. Several federal district courts have applied *Laidlaw* in CAA citizen suits in determining the injury-in-fact element of federal standing to sue requirements. *Bayview Hunters Point Cmty. Advocates v. Metro. Transp. Comm’n*, 177 F. Supp. 2d 1011, 1019 (N.D. Cal. 2001); *Cmtys. for Better Env’t v. Cenco Ref.*, 180 F. Supp. 2d 1062, 1075 (C.D. Cal. 2001).

114. *Laidlaw*’s test for recreational and aesthetic injury has been applied in a suit brought under 42 U.S.C. § 7607(b) (the Clean Air Act’s general judicial review provision), *New York Public Interest Research Group v. Whitman*, 321 F.2d 316 (2d Cir. 2003); and in a suit brought under 15 U.S.C. § 2618(a)(1) (2000) (the general judicial review provision of the Toxic Substances Control Act), *Central & South West Services, Inc. v. United States EPA*, 220 F.3d 683, 700-01 (5th Cir. 2000), *reh’g denied*, 237 F.3d 633 (5th Cir.), *cert. denied*, *Utility Solid Waste Activities Group v. EPA*, 532 U.S. 1065 (2001).

relevant to that determination, but are not to be evaluated in a one-size-fits-all, mechanistic manner.<sup>115</sup>

Although Justice Ginsburg's decision in *Laidlaw* holds that the injury in fact element can be satisfied by a plaintiff using an area "affected" by the defendant's challenged activity and whose recreational or aesthetic enjoyment of the area is "lessened" by the defendant's "challenged activity," her opinion neither defines "affected area" and defendant's "challenged activity" for purposes of federal standing to sue requirements, nor specifies factors that are relevant to determining whether a specific geographical area is part of an area "affected" by the defendant's challenged activity.<sup>116</sup>

Although Justice Ginsburg neither defined the term "challenged activity" nor identified the actions of defendant Laidlaw that she considered to be the defendant's "challenged activity," she appears to consider defendant Laidlaw's "challenged activity" to be only the portion of Laidlaw's pollutant discharges into the North Tyger River allegedly violating Laidlaw's CWA NPDES permit—not the entire amount of Laidlaw's pollutant discharges into the river. This conclusion is based upon the references, in the injury-in-fact portion of Justice Ginsburg's opinion, to "Laidlaw's unlawful conduct—discharging pollutants in excess of permit limits" and Laidlaw's "illegal discharges," as well as the fact that the amounts of pollutants discharged by Laidlaw into the river that did not exceed the effluent limitations in its CWA NPDES permit would not be illegal discharges that could be enjoined in a CWA citizen suit.<sup>117</sup>

Consequently, "challenged activity" for purposes of *Laidlaw*'s injury-in-fact test should be defined as only the parts of a defendant's activities that allegedly violate the United States Constitution or a federal statute or regulation, and should not include parts of the defendant's activities that are not alleged to be illegal or unlawful. Under this approach, in a CWA or CAA citizen suit alleging that a defendant has violated monitoring, reporting, or record-keeping requirements, the defendant's "challenged activity" probably should be found to be the defendant's failure to do the required monitoring of pollutants, reporting or record-keeping.

In determining whether the amount of pollutants discharged by a polluter into a river in violation of discharge limitations in its NPDES

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115. *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141,1149 (9th Cir. 2000).

116. *Laidlaw*, 528 U.S. at 183.

117. *Id.* at 184.

permit “affected” areas used by the plaintiffs’ members and lessened their recreational and aesthetic enjoyment of the affected areas they used, a court should consider the cumulative impacts of both the defendant’s illegal discharges and legal discharges and the discharges of the same types of pollutants into the river by other persons, because “even a slight increase in adverse conditions that form an existing environmental milieu may sometimes threaten harm that is significant. One more factory polluting air and water in an area zoned for industrial use may represent the straw that breaks the back of the environmental camel.”<sup>118</sup> Consequently, a court, in determining whether allegedly unlawful discharges of pollutants by a defendant “affect” a particular area and “lessen” the plaintiff’s recreational and aesthetic enjoyment of that area, should determine the extent of the impacts of those allegedly unlawful discharges when added to the adverse effects caused by both the lawful portions of the defendant’s pollutant discharges and the pollutant discharges by other persons. A court, when applying *Laidlaw*’s injury in fact test, should not seek to determine, hypothetically, what adverse impacts the unlawful portion of a defendant’s pollutant discharges would cause to the area in question, and to the plaintiff’s recreational and aesthetic enjoyment of that area, in a hypothetical situation where the defendant’s unlawful discharges were the only pollutant discharges affecting the area in question.

Although Justice Ginsburg’s opinion in *Laidlaw* does not define “affected area” for purposes of “injury in fact,” her opinion should not be interpreted as establishing a per se standard defining “affected area” exactly the same way in all CWA citizen suits, requiring in every CWA citizen suit that the specific place used by the plaintiff be within a specified distance to the place where the defendant discharged pollutants. In *Laidlaw*, member Norman Sharp’s recreational use of the river for canoeing forty miles downstream from the Laidlaw facility was the activity farthest away from the Laidlaw facility among the six members whose affected interests were described by Justice Ginsburg.<sup>119</sup> However, Justice Ginsburg made no statements indicating that another member’s recreational use of a river more than forty miles downstream from the defendant’s facility could not have been considered to be a use of the “affected area.” Justice Ginsburg made no statements indicating that in other CWA citizen suits, involving different facts, the “affected area”

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118. *Hanly v. Kleindienst*, 471 F.2d 823, 831 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973) (involving the National Environmental Policy Act § 102(2)(C), 42 U.S.C. § 4332(2)(C)).

119. *Laidlaw*, 528 U.S. at 183.

would always extend forty miles downstream from the defendant's facility that discharges pollutants into a river or stream.

From a scientific standpoint, a per se "mileage" test should not be adopted for the interpretation of "affected area," because in most situations the determination of whether a specific place is an area "affected" by a defendant's discharges or emissions of a particular type of pollutant into a body of water or outdoor ambient air (and an area where the plaintiff's aesthetic or recreational enjoyment of the area is lessened by the defendant's pollutant discharges or emissions) will depend upon the concentration of the type of pollutant (expressed in terms of the weight of that pollutant in a particular volume of water or air) that is measured at the specific place, and the harm or threatened harm resulting from that concentration of pollutants in that specific place.

However, federal courts should not adopt a test for recreational and aesthetic injury in fact that requires a citizen plaintiff in a CWA or CAA citizen suit to measure scientifically the concentration of pollutants in a specific place in a body of water or outdoor ambient air used by the plaintiff and to have that scientific data assessed by an expert scientist to determine whether the measured pollutant concentration harms or threatens harm to the environment or public health.<sup>120</sup> Such a test

would further thwart congressional intent by recreating the old system of water quality standards whose failure led to the enactment of the Clean Water Act in the first place. . . . An important reason for Congress' shift to end-of-pipe standards was to eliminate the need to address complex questions of environmental abasement and scientific traceability in enforcement proceedings. To have standing now turn on direct evidence of such things as the chemical composition and salinity of receiving waters would throw federal legislative efforts to control water pollution into a time warp by judicially reinstating the previous statutory regime in the form of escalated standing requirements. Courts would become enmeshed in abstruse scientific discussions as standing questions assumed a complicated life of their own.<sup>121</sup>

A requirement that the "affected area" be established by scientific measurements in most cases also would be such an expensive and

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120. See *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 162 (4th Cir. 2000) (en banc) (holding that Article III of the United States Constitution does not require "laboratory analysis of the chemical content, salinity or ecosystem" of the area used by the plaintiff for recreational activities in order to satisfy federal standing to sue requirements, and that Congress does not require such scientific evidence in order for a plaintiff to achieve standing to sue in a CWA citizen suit).

121. *Id.* at 163.

burdensome requirement that many meritorious citizen suits would be deterred from being brought under the CWA and CAA.

Of course, a plaintiff in a CWA or CAA citizen suit should be permitted to introduce scientific measurements of the concentrations of pollutants in the outdoor ambient air or a body of water at a specific location, and expert scientific witnesses testifying as to the likely source of those pollutants and the harm or effects to the environment caused by such pollutant concentrations, to establish that a specific area, used by the plaintiff for recreational or aesthetic enjoyment, is “affected” by the pollutants discharged or emitted by a particular defendant. But a plaintiff in a CWA or CAA citizen suit should not be required to introduce such scientific evidence in order to establish recreational or aesthetic injury in fact under *Laidlaw*.

To avoid unnecessarily placing expensive scientific monitoring requirements upon plaintiffs in CWA and CAA citizen suits, the determination of whether a specific place is an area “affected” by the defendant’s discharges or emissions of pollutants should be permitted to be based upon two factors: (1) the distance between the specific place used by the plaintiff and the place where the defendant discharged or emitted pollutants (with this distance of separation being used as an approximate measure of the concentration of the discharged or emitted pollutants at the place used by the plaintiff) and (2) the type of statutory or regulatory violation allegedly committed by the defendant whose pollutant discharges or emissions are being challenged (with the type of violation being used as an approximate measure of the adverse effects that a defendant’s discharge may have upon “nearby” areas).<sup>122</sup>

Justice Ginsburg’s analysis of the injury in fact element in her majority opinion in *Laidlaw* may be interpreted as implicitly permitting this approach. Her opinion refers not only to the defendant’s “illegal discharges”<sup>123</sup> allegedly not in compliance with effluent limitations in the defendant’s NPDES permit,<sup>124</sup> but also refers to the affiant members who established injury in fact as residing “nearby” the North Tyger River.<sup>125</sup> The opinion explicitly identifies for each of these affiant members (except for member Gail Lee) either the distance between a member’s residence and Laidlaw’s facility, or the distance between the place used

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122. See *infra* notes 145-161 and accompanying text (discussing latter factor).

123. *Laidlaw*, 528 U.S. at 184.

124. *Id.* at 181.

125. *Id.* at 184.

(or desired to be used) by a member for recreational activity and Laidlaw's facility (or both).<sup>126</sup>

Although Justice Ginsburg's opinion in *Laidlaw* does not explicitly explain why the type of alleged violation of the CWA or CAA should be a relevant factor in determining whether a specific place is part of the area "affected" by the defendant's challenged activity, the injury in fact part of her opinion may be interpreted as implicitly holding that, as a matter of law, injury in fact should be found to occur to recreational users of areas "nearby" a facility allegedly discharging pollutants in violation of discharge limitations in an NPDES permit. This interpretation rests on the grounds that as a matter of law the defendant's unlawful discharges in excess of its permit's effluent limitations "affect" nearby areas by lessening the recreational and aesthetic enjoyment of users of that affected area. Furthermore, this interpretation is based upon Justice Ginsburg's statement that the "standing hurdle" should not be raised "higher than the necessary showing for success on the merits in an action alleging noncompliance with [effluent limitations of] an NPDES permit."<sup>127</sup> This statement should be interpreted as indicating that Justice Ginsburg's *Laidlaw* decision seeks to simplify the burden of proof that a plaintiff must meet in a CWA citizen suit in order to establish standing to sue. The statement supports a rule providing that a defendant's unlawful excess discharges of pollutants, allegedly in violation of discharge limitations in a CWA NPDES permit, will be considered, as a matter of law, both to "affect" areas in the river and on the shores of the river that are "nearby" the defendant's facility and also to lessen the recreational and aesthetic enjoyment of the river and its shore by users of those nearby areas.

Justice Ginsburg's opinion, however, does not provide any indication of whether violations of the CWA or CAA, other than violations of discharge or emission limitations in a CWA or CAA permit, can be the basis for a holding that another type of violation (such as violation of a water quality standard that is caused by a defendant's

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126. Member Curtis stated both the distance between his residence and Laidlaw's facility and the distance between Laidlaw's facility and the places he desired to use for recreational purposes. *Id.* at 181-82. Member Patterson referred to the distance between her home and Laidlaw's facility and also stated that she would like to purchase a home "near" the river but would not in part because of Laidlaw's discharges. *Id.* at 182. Members Pruitt and Moore attested to the distance between their homes and Laidlaw's facility. *Id.* Member Lee stated that her home is "near" Laidlaw's facility, while member Sharp identified the distance between Laidlaw's facility and places on the river he used or desired to use for recreational canoeing. *Id.* at 182-83; see *supra* notes 88-95 and accompanying text (describing these members' specific allegations).

127. *Laidlaw*, 528 U.S. at 181.

pollutant discharges, or a violation of a monitoring, reporting, or record-keeping requirement in an NPDES permit) can be considered to “affect” areas “near” where a defendant otherwise lawfully discharges pollutants.<sup>128</sup>

Justice Ginsburg’s opinion in *Laidlaw* does not explicitly state that the determination of whether a specific location is part of the area “affected” by the defendant’s challenged discharge of pollutants should be based, at least in part, on how close that area is to the place where the defendant is discharging pollutants into a river. The opinion also makes no references to the concentration of mercury (or other pollutants discharged by *Laidlaw*) in any part of the river at or near places used by the affiant members for recreational or aesthetic enjoyment.

However, if the determination of whether a specific place that is used by a plaintiff for recreational or aesthetic purposes, is part of an “affected area,” is not required to be established by scientific measurements of pollutant concentrations in that specific place, the determination of whether that place is “affected” by a defendant’s discharges or emissions of pollutants into a body of water or outdoor ambient air should be based, in part, upon a determination by the court of whether that specific place is sufficiently close to the place where the pollutants were discharged or emitted. In order to hold that a place is an affected area, a court should find that the concentration of the pollutants discharged or emitted by the defendant probably is high enough in or near that place to cause the plaintiff to have a reasonable concern or fear that the defendant’s pollutant discharges present a risk to human health or to the environment, and consequently lessen the plaintiff’s recreational use or aesthetic enjoyment of that area.<sup>129</sup> This “reasonable concern” test

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128. See discussion *infra* notes 156-161 and accompanying text.

129. See *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000) (en banc). The court essentially followed this recommended approach to hold that a plaintiff, who resided and engaged in recreational activities four miles downstream from the location where the defendant discharged pollutants into a waterway in violation of discharge limitations in its NPDES permit, established standing to sue under *Laidlaw*, despite not having introduced scientific measurements of the concentrations of the pollutants in downstream waters used by the plaintiff for recreational activities. *Id.* at 163. The court held that the plaintiff established recreational injury (from decreased recreational activities in nearby downstream waters because of reasonable fear of the effects of the defendant’s illegal pollutant discharges) and economic injury that were fairly traceable to the defendant’s illegal pollutant discharges, on the basis of evidence that the same types of pollutants discharged upstream by the defendant had been found in the downstream waterway used by the plaintiff, evidence that pollutants discharged by the defendant could flow at least 16.5 miles downstream from the place of discharge (12.5 miles beyond the place used by the plaintiff for recreational activities), evidence that the types of pollutants discharged by the defendant can cause adverse health and environmental effects, and evidence that many of the discharge limitations in the defendant’s NPDES permit were imposed

is based upon Justice Ginsburg's holding in *Laidlaw* that the affiant members established injury in fact by establishing that their reasonable concern and fear about the effects of the defendant's pollutant discharges caused them to refrain from recreational use of the North Tyger River and to suffer "other economic and aesthetic harms."<sup>130</sup>

In some cases, a specific place used by a plaintiff for recreational or aesthetic enjoyment may be so close to the place where the defendant discharges or emits pollutants that the presence and effects of those pollutants in a body of water or outdoor ambient air can be detected by the plaintiff's sense of sight or smell.<sup>131</sup> In such a case, a court can rely upon the personal observations of the plaintiff to hold that the area "affected" by the defendant's discharges of pollutants includes the place where the plaintiff made these personal observations.<sup>132</sup>

Usually, however, a number of factors should be considered by a court to determine if a specific place used by a plaintiff for recreational or aesthetic enjoyment is sufficiently close enough to the place where the defendant discharges pollutants into a body of water or emits pollutants into outdoor ambient air. The factors allow the court to conclude reasonably that pollutant concentrations probably are high enough at or near that place to cause the plaintiff to have a reasonable concern about the health or environmental risks of these pollutants.

In the case of pollutants discharged into a river or stream from a facility located on the banks, the concentration of the discharged pollutants in any particular part of the river or stream downstream from the place of discharge will depend, in part, upon the volume and concentration of the pollutants in the discharges from the defendant's facility, the flow rate of the river or stream at the place where pollutants are discharged, and the amounts and types of pollutants that are discharged into the river or stream by other persons from other facilities. In addition, when pollutants are discharged into a river or stream, even on a continuous basis, the concentration of those pollutants will decrease the farther downstream the discharged pollutants travel as additional amounts of water from runoff and tributaries flow into the river or stream. Pollution concentrations may also decrease continuously the

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in order to achieve a particular water quality. *Id.* at 157-59. The court concluded that "[c]itizens may thus rely on circumstantial evidence such as proximity to polluting sources, predictions of discharge influence, and past pollution to prove both injury in fact and traceability." *Id.* at 163.

130. *Laidlaw*, 528 U.S. at 183-84; see discussion *infra* notes 165-167, 187-218 and accompanying text.

131. In *Laidlaw*, Justice Ginsburg noted that affiant member Kenneth Lee Curtis had attested in affidavits that the North Tyger River "looked and smelled polluted." 528 U.S. at 181.

132. See *id.*

farther downstream the discharged pollutants are carried by the river or stream as some of the discharged pollutants evaporate, settle to the bottom or are removed from the water by fish, wildlife, or plants ingesting water. The addition of more water to a river or stream dilutes the concentration of pollutants previously discharged and the removal of some of the discharged pollutants further dilutes the concentration of the discharged pollutants.

Of course, no significant amounts of pollutants discharged into a river or stream should be found in waters that are upstream from the place where the pollutants were discharged. The upstream areas in or near the river or stream usually will not be an area "affected" by a downstream discharge of pollutants, unless the upstream area is adjacent to or near the place of discharge (so that persons using these upstream areas have lessened aesthetic or recreational enjoyment of these upstream areas as a result of their viewing or smelling the defendant's pollutant discharges).

When pollutants are discharged, even on a continuous basis, into a lake, bay or coastal ocean waters (rather than into a flowing river or stream), the concentration of those discharged pollutants in any particular part of the receiving body of water depends upon several factors, such as the volume and concentration of the discharges in the wastewater from the defendant's facility, the volume of the water in the receiving body of water, the flow rate of water into and out of the receiving body of water, and the amounts of that type of pollutant being discharged into the receiving body of water by other persons. As a general rule, however, the concentration of the discharged pollutants should decrease the farther the pollutants travel from the point of discharge because the pollutants will be dispersed into larger volumes of water after discharge and some of the discharged pollutants may evaporate, settle to the bottom or be removed from the water by fish, wildlife, or plants. Consequently, the farther a place in or near a lake, bay or coastal waters is from the place where the pollutants were discharged, the less likely that a court will hold that place to be part of the area "affected" by the defendant's discharges. However, currents in a lake, bay or ocean coastal waters may affect the way in which discharged pollutants are dispersed in the receiving body of water, so some areas of such receiving bodies of water may have higher concentrations of discharged pollutants resulting from currents transporting pollutants.

When pollutants are emitted into the outdoor ambient air, even on a continuous basis, the concentration of those emitted pollutants in the outdoor ambient air should decrease the farther the pollutants travel from

the facility that emitted the pollutants, as the pollutants disperse through greater volumes of outdoor ambient air and as some of those pollutants fall or precipitate back to earth. However, the concentration of a particular type of pollutant in a particular area's outdoor ambient air, after that type of pollutant has been emitted elsewhere from a particular facility, also will depend upon the height above ground at which pollutants are emitted from the facility into the outdoor ambient air (from a smokestack, vent or pipe), topographical characteristics of the area (such as mountains that may block the dispersion and transport of the pollutants), emissions of the same type of pollutant into the same air shed from other facilities, and prevailing winds.

However, when pollutants emitted from a particular facility are continuously dispersed downwind by prevailing winds, areas that are upwind from the facility that emitted those pollutants should not have significant concentrations of those pollutants in the ambient air. Consequently, such upwind areas should not be considered to be "affected" by emissions from a facility located downwind, unless the upwind area is adjacent to or near the place where the emissions occur (so that persons using those upwind areas have lessened aesthetic or recreational enjoyment of the upwind area as a result of their viewing or smelling the defendant's emission of pollutants).

As a general rule, as the distance increases between a particular geographical location and the place from where a defendant's challenged activity discharges pollutants into a surface body of water (or emits pollutants into the outdoor ambient air), the concentration of those discharged or emitted pollutants in the receiving body of water or ambient air should decrease continuously, becoming much lower than the pollutant concentration in the original discharge or emission. The concentration of the type of pollutant discharged or emitted may become so low in the outdoor air or water, at a specific distant location far from the place where the discharge or emission occurred, that either the presence of that pollutant may not be detected scientifically in any measurable amount, or the low amounts of the pollutant at a distant place may be found not to cause or threaten any harm to the environment or public health. In such a case, the distant location should not be considered to be an area "affected" by the defendant's discharges or emissions of pollutants at a distant facility.

In *Laidlaw*, the most distant area affected by Laidlaw's pollutant discharges was forty miles away from Laidlaw's facility (where member Norman Sharp canoed forty miles downstream from the Laidlaw

facility.)<sup>133</sup> However, in other cases with different factual situations, a part of a river more than forty miles downstream from a defendant's facility that discharges pollutants into a river may be considered to be "affected" if that type of pollutant is found in measurable amounts in water that far downstream and those amounts lessen the aesthetic or recreational enjoyment of users of that area. Conversely, there may be other factual situations where a part of a river closer than forty miles downstream from a defendant's polluting facility is found not to be an area "affected" by the defendant's pollutant discharges. This may occur because the concentration of those pollutants in that part of the river either is so low as not to be detectable in any measurable amount or is so low as not to be harmful to human health or the environment.

In cases where a plaintiff seeks standing to sue on the basis of recreational or aesthetic uses of a river that occur very far downstream from the place where the defendant's pollutant discharges occur, a court will have to decide not only if the plaintiff's downstream use occurs within the area "affected" by the defendant's pollutant discharges, but also whether the plaintiff satisfied the "fairly traceable" element of federal standing to sue requirements. This "fairly traceable" element requires a plaintiff to establish that there is a causal connection between the plaintiff's alleged injury in fact and the defendant's challenged pollutant discharges.<sup>134</sup> This element establishes that the plaintiff's injury is "fairly traceable" to the challenged activity of the defendant and is not the result of the independent action of some third person not before the court.<sup>135</sup>

Justice Ginsburg's opinion in *Laidlaw* does not discuss whether the plaintiffs' affiant members satisfied the "fairly traceable" standing requirement. Nonetheless, a number of federal courts of appeals have held that the "fairly traceable" element is satisfied in a CWA citizen suit, against a defendant who is shown to have discharged a particular type of pollutant in violation of discharge limitations in its NPDES permit, when the plaintiff shows both (1) that the pollutants are discharged into a waterway in which the plaintiff has a recreational or aesthetic interest that is or may be adversely affected by that type of pollutant and (2) that that type of pollutant causes or contributes to the kinds of injuries alleged by the plaintiff.<sup>136</sup> Under this standard, a plaintiff can sue any person who is

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133. *Id.* at 183.

134. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

135. *Id.*

136. *See, e.g.,* Pub. Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 72 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991); *Sierra Club v. Cedar Point Oil*

discharging that particular type of pollutant into a water body, even when there are several persons doing so, and can establish standing to sue by showing that the person sued has caused “some part” of the injury suffered by the plaintiff.<sup>137</sup>

Under this approach, the “fairly traceable” element is satisfied by evidence establishing that the body of water in which, or near where, the plaintiff engages in recreational activity, has been adversely affected in a manner that can be caused by the types of pollutants discharged by the defendant, without a need to show that each type of pollutant discharged by the defendant by itself has caused specific recreational or aesthetic injury to the plaintiff. For example, the “fairly traceable” element was held as satisfied when (1) the collective effects of a defendant’s discharges of several different types of pollutants, in unlawful quantities in violation of several different effluent limitation parameters in its NPDES permit, interfered with the plaintiffs’ fishing, swimming, and other recreational activities in and near the place where the defendant discharged pollutants (because of the unpleasant appearance and odors of the pollution) and (2) an expert witness for the plaintiffs testified that the effluents discharged by the defendant “may poison fish, render areas unsafe for people to swim, and generally limit the river as a fertile ground for recreation,” without the need for “proof of this nature . . . with respect to each individual parameter.”<sup>138</sup>

Additionally, the fairly traceable element was satisfied when a plaintiff’s affiants, who engaged in recreational activities on the shores of a “heavily industrialized” stream within several miles of where the defendant discharged oil and grease into the stream in violation of discharge limitations in its NPDES permit, stated that the nearby waters of the stream had an oily or greasy sheen, thus permitting the court to conclude that the aesthetic injury suffered by the affiants “may be fairly traced to [the defendant’s] effluent.”<sup>139</sup> On the other hand, “if a plaintiff has alleged . . . that the waterway is unable to support aquatic life . . . , but failed to show that defendant’s effluent contains pollutants that harm aquatic life, then plaintiffs would lack standing.”<sup>140</sup>

These courts of appeal adopted this approach on the grounds that the “fairly traceable” element does not require a plaintiff to “show to a

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Co., 73 F.3d 546, 557 (5th Cir. 1996); *Natural Res. Def. Council, Inc. v. Watkins*, 954 F.2d 974, 980 (4th Cir. 1992).

137. *Powell Duffryn Terminals*, 913 F.2d at 72 n.8.

138. *Natural Res. Def. Council, Inc. v. Texaco Ref. & Mktg., Inc.*, 2 F.3d 493, 505 (3d Cir. 1993).

139. *Powell Duffryn Terminals*, 913 F.2d at 71-73 n.8.

140. *Id.* at 72-73 n.8 (dictum).

scientific certainty that defendant's effluent, and defendant's effluent alone, caused the precise harm suffered by the plaintiffs,"<sup>141</sup> because "[i]f 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 . . . the asserted cause of action [a defendant's alleged violation of discharge limitations in its CWA NPDES permit] does not itself require such proof."<sup>142</sup>

This approach, however, may not be appropriate when the body of water into which the defendant discharges pollutants is so very large "that plaintiffs should rightfully demonstrate a more specific geographic or other causative nexus in order to satisfy the 'fairly traceable' element of standing."<sup>143</sup> Also, the approach would not be appropriate when the defendant discharges pollutants into a body of water that is not the water body used by the plaintiff for recreational activities and that does not have a direct hydrologic connection to that body of water.<sup>144</sup>

The type of CWA or CAA violation allegedly committed by a defendant not only is a relevant factor in deciding if a plaintiff in a CWA or CAA citizen suit satisfies the "fairly traceable" element, but also is a relevant factor in determining if a specific place is part of the area "affected" by the defendant's challenged pollutant discharges or emissions. As discussed earlier, Justice Ginsburg's majority opinion in *Laidlaw* should be interpreted as requiring that the determination of whether an area is "affected" by the defendant's challenged activity should be based not only upon consideration of the distance between the place where the defendant's facility discharges pollutants and the place used by the plaintiff for recreational or aesthetic enjoyment, but also should be based upon the type of violation of the CWA or CAA allegedly committed by the defendant.<sup>145</sup>

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141. *Id.* at 72; *Natural Res. Def. Council, Inc.*, 954 F.2d at 980.

142. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000) (en banc).

143. *Sierra Club v. Cedar Point Oil Co., Inc.*, 73 F.3d 546, 558 n.24 (5th Cir. 1996) (dictum).

144. *Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.*, 95 F.3d 358, 362 (5th Cir. 1996) (holding that a fairly traceable element was not satisfied in a case where plaintiff's members used a body of water located three tributaries and eighteen miles away from the place where the defendant discharged pollutants, when there was no evidence demonstrating that pollutants discharged by the defendant made their way to the water body used by the plaintiff's members). The court held that the plaintiff's members' injuries could not be assumed to be fairly traceable to the defendant's discharges "solely on the basis of the observation that water runs downstream." *Id.* at 362.

145. *See supra* notes 122-128 and accompanying text.

Justice Ginsburg's opinion implicitly holds, however, that an area can be "affected" for purposes of the injury in fact principle without the environment of the area being harmed or degraded. In the standing to sue part of the *Laidlaw* opinion, Justice Ginsburg held that "[t]he relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff."<sup>146</sup> Consequently, Justice Ginsburg rejected Laidlaw's (and Justice Scalia's) argument, that FOE had no standing to sue for either injunctive relief or civil penalties when the suit was filed because the district court found that Laidlaw's discharges of mercury in violation of its CWA NPDES permit caused "'no demonstrated . . . harm to the environment'" and "did not result in any health risk."<sup>147</sup> Justice Ginsburg, in her majority opinion, responded to this argument by stating that insistence upon injury to the environment rather than injury to the plaintiff "is to raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance with an NPDES permit."<sup>148</sup>

Justice Scalia, however, favored this argument made by Laidlaw, asserting in dissent (joined by Justice Thomas) that "[t]ypically, an environmental plaintiff claiming injury due to discharges in violation of the Clean Water Act argues that the discharges harm the environment, and that the harm to the environment injures him."<sup>149</sup> Applying his "harm to the environment" standard to the facts in *Laidlaw*, Justice Scalia asserted that the plaintiffs in the *Laidlaw* case could not establish injury in fact for standing to sue purposes by the "typical" method, since the district court found that Laidlaw's discharges of pollutants did not harm either the environment or the North Tyger River and did not result in any health risk and that the overall quality of the water in the river exceeds the levels necessary to support recreation in and on the water.<sup>150</sup> Justice Scalia conceded that "[w]hile it is perhaps possible that a plaintiff could be harmed even though the environment was not, such a plaintiff would have the burden of articulating and demonstrating the nature of that injury."<sup>151</sup> He argued, however, that in the *Laidlaw* case, the plaintiffs, in order to prove injury in fact to their members, should have introduced "evidence supporting the affidavits' bald assertions regarding decreasing

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146. *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

147. *Id.* (quoting *Friends of the Earth, Inc., v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 956 F. Supp. 588, 602 (D.S.C. 1997)).

148. *Laidlaw*, 528 U.S. at 181.

149. *Id.* at 199 (Scalia, J., dissenting).

150. *Id.* (citing *Laidlaw*, 956 F. Supp. at 600, 602-03).

151. *Id.* at 199 (Scalia, J., dissenting).

recreational usage and declining home values, as well as evidence for the improbable proposition that Laidlaw's violations, even though harmless to the environment, are somehow responsible for these effects."<sup>152</sup>

Justice Ginsburg's "affected area" test for aesthetic and recreational injury in fact differs from Justice Scalia's statement of what he believes to be the correct legal principle for recreational and aesthetic injury in fact, by not explicitly requiring that the lessening of the plaintiff's recreational and aesthetic values in the affected area be caused by harm or changes to the environment of the affected area. Justice Ginsburg's test, while requiring that the plaintiff's physically use an area that is "affected" by the defendant's challenged activity, only requires that the plaintiff establish that the defendant's challenged activity lessens the aesthetic and recreational enjoyment that the plaintiff derives from that use.<sup>153</sup>

Justice Scalia's test, on the other hand, requires that the plaintiff show that the defendant's discharges harm the environment of the area physically used by the plaintiff and that this environmental harm causes injury to the plaintiff's aesthetic or recreational enjoyment of the affected area.<sup>154</sup> Although Justice Ginsburg's test requires that the defendant's challenged activity "adversely affect" an area used by the plaintiff, her test does not require that those adverse effects on the affected area result in adverse effects on the plaintiff's recreational or aesthetic enjoyment of the affected area. Furthermore, Justice Ginsburg's majority opinion in *Laidlaw* implicitly holds that an area used by the plaintiff can be "adversely affected," within the meaning of her test for "injury in fact," even though there is no showing by the plaintiff of any harm to the environment, injury or risk to human health, or "harm" to the "affected area."

Of course, both Justice Ginsburg's test and Justice Scalia's test in *Laidlaw* will be satisfied in a CWA citizen suit if a plaintiff can show that a defendant's discharges into a surface body of water not only violate effluent limitations in the facility's CWA NPDES permit, but also cause harm to the receiving body of water or other parts of the environment used by the plaintiffs, or adversely affect or threaten the health of the plaintiffs, because such "harm" certainly would "affect" the area.

Justice Ginsburg's majority opinion in *Laidlaw* held that the plaintiffs had standing to sue to seek both injunctive relief and civil penalties in an action against a defendant whose facility was alleged to be

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152. *Id.* at 200 (citation omitted).

153. *Id.* at 183-85.

154. *Id.* at 199 (Scalia, J. dissenting).

in noncompliance with effluent limitations in a CWA NPDES permit.<sup>155</sup> This decision should be interpreted as implicitly holding that any discharges of pollutants into a surface body of water that allegedly are in violation of effluent discharge limitations in a CWA NPDES permit “affect” “nearby” areas in the receiving body of water and its adjoining shoreline, for purposes of determining injury in fact for standing to sue purposes, even though those pollutant discharges do not cause a violation of water quality standards or otherwise harm or threaten to harm the environment or human health.

Similarly, emissions of pollutants from a facility into the ambient air should be considered to sufficiently “affect” that ambient air to constitute injury in fact to persons who reside, work or engage in recreational activities “near,” and downwind from, that facility (and who therefore may breath ambient air that contains pollutants emitted from the defendant’s facility), when those emissions allegedly are in violation of emission limitations in the facility’s CAA Title V permit. Consequently, under Justice Ginsburg’s injury in fact test in *Laidlaw*, a plaintiff should have standing to sue in a citizen suit under section 304<sup>156</sup> of the CAA filed against a facility that allegedly is emitting pollutants into the ambient air in violation of emission limitations in that facility’s CAA permit issued under Title V<sup>157</sup> of the CAA, if the plaintiff is a person who uses areas “near” (or downwind from) the polluting facility for recreational or aesthetic enjoyment and if such enjoyment allegedly is lessened by the defendant’s emissions of pollutants into the ambient air. A plaintiff should have standing in such a case even if the defendant’s emissions do not cause CAA National Ambient Air Quality Standards to be violated in that area or region, and even though the defendant’s pollutant emissions do not cause or threaten to cause any other harm to the environment or to public health.

In addition, a particular area’s outdoor ambient air should be considered to be “affected” by a defendant’s emissions of pollutants into that air if the defendant’s emissions cause a violation of a National Ambient Air Quality Standard in that particular area, even if the defendant’s emissions do not violate emission limitations in a CAA Title V permit. Similarly, a part of a river should be considered to be “affected” by discharges of pollutants into that river from a defendant’s facility located upstream, if those discharges cause a violation of a CWA water quality standard in that part of the river (regardless of whether the

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155. *Id.* at 189.

156. 42 U.S.C. § 7604 (2000).

157. *Id.* §§ 7661-7661f.

defendant's pollutant discharges violate a discharge limitation in a CWA NPDES permit).

However, *Laidlaw* does not make clear whether an area can be "affected" by a defendant in a CWA or CAA citizen suit who allegedly is violating monitoring, record-keeping, or reporting requirements in a CWA NPDES permit or CAA Title V permit, but who is not alleged to be violating CWA or CAA discharge or emission limitations or to be causing a violation of a CWA water quality standard or CAA ambient air quality standard. In such cases, an area may not be considered to be "affected" by the defendant's "challenged activity" if the defendant's "challenged activity" is considered to be the defendant's failure to comply with monitoring, reporting, or record-keeping requirements, as opposed to the defendant's pollutant discharges or emissions (which may be in compliance with the discharge or emission limitations in the defendant's CWA NPDES permit or CAA Title V permit).<sup>158</sup> However, if a plaintiff in such a case is not considered to suffer recreational or aesthetic injury under *Laidlaw*'s test for recreational and aesthetic injury in fact, the plaintiff may be able to establish the injury in fact element of federal standing to sue requirements on the basis of "informational injury"—the failure of the plaintiff to obtain information which must be publicly disclosed pursuant to statute,<sup>159</sup> which arguably would include information required to be reported to governmental authorities and kept in records, and to be made available to members of the public, by the CWA<sup>160</sup> and CAA.<sup>161</sup>

In the part of his statement asserting that "[t]ypically, an environmental plaintiff . . . argues that the [defendant's] discharges harm the environment," Justice Scalia appears to require that the environment be harmed solely by defendant's discharges of pollutants.<sup>162</sup> This interpretation is supported by Justice Scalia's subsequent statement in his

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158. See *Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109, 1112-13 (4th Cir. 1988). The *Simkins Industries* decision, issued many years prior to the Supreme Court's *Laidlaw* decision, held that a defendant's violation of provisions in its NPDES permit, requiring it to monitor and report its discharges of pollutants into a river, caused injury in fact to the interests of the plaintiffs' members in protecting the environmental integrity of the river and curtailing ongoing unlawful discharges by the defendant into that river. *Id.* *Simkins Industries* may not be consistent with *Laidlaw*, because it does not state how the defendant's monitoring and reporting violations "affected" the area of the river or surrounding areas used by the plaintiffs' members that were near the place where the defendant discharged pollutants into the river.

159. Fed. Election Comm'n v. Adkins, 524 U.S. 11, 21 (1998).

160. 33 U.S.C. § 1318 (2000).

161. 42 U.S.C. § 7414 (2000).

162. *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 199 (Scalia, J., dissenting) (2000).

*Laidlaw* dissent, that if the river was in a polluted condition, “this condition, if present, was surely not caused by Laidlaw’s discharges, which according to the District Court ‘did not result in any health risk or environmental harm.’”<sup>163</sup> If Justice Scalia requires a showing that a defendant’s pollutant discharges by themselves cause harm to the environment, he would hold that a plaintiff does not establish injury in fact where the environment is harmed by the cumulative impact of the pollutant discharges of a number of different facilities, but where the defendant’s discharges by themselves would not be sufficient to cause the harm to the environment.

Quite often, the quality of surface bodies of water or ambient air is degraded by the cumulative effects of the discharges or emissions of pollutants into the air or water by numerous facilities whose discharges or emissions individually would not cause water or ambient air quality standards to be exceeded or the environment or public health to be harmed or threatened.

Under Justice Ginsburg’s test, any person who recreationally or aesthetically uses an area near a facility that allegedly is emitting pollutants into air or water in violation of either a CWA NPDES permit or a CAA Title V permit can have standing to sue in a CWA or CAA citizen suit. The plaintiff could sue regardless of whether the defendant’s pollutant discharges or emissions by themselves are the cause of a violation of a water or air quality standard in the receiving body of water or ambient air, or of other harm or threatened harm to the environment or public health. Justice Scalia’s approach to injury in fact, on the other hand, if interpreted as only granting standing to sue to a plaintiff in a CWA or CAA citizen suit against a polluter whose pollutant discharges or emissions by themselves cause water or air quality standards to be violated or the environment or public health to be harmed or threatened, would grant standing to citizens in CWA and CAA citizen suits only in the most egregious cases of water and air pollution.

Justice Ginsburg’s test for injury in fact, because it only requires a defendant’s pollutant discharges or emissions to “affect” an area used by the plaintiff and to “lessen” the plaintiff’s recreational or aesthetic enjoyment of that area, grants federal court jurisdiction over CWA and CAA citizen suits against polluters whose individual contributions to water and air pollution problems may not be substantial, but whose discharges or emissions contribute to adverse environmental effects caused by the cumulative effects of the discharges or emissions of several

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163. *Id.* at 200.

or even numerous polluting facilities. Her injury in fact test does not require a defendant's pollutant discharges or emissions to harm or threaten to harm either the environment or public health, and does not require that the defendant's discharges or emissions by themselves injure or harm the plaintiff's recreational or aesthetic enjoyment of the "affected area."<sup>164</sup>

After stating that the sworn affidavits and depositions of members of the plaintiff organizations "adequately documented" injury in fact to those members' recreational, aesthetic and economic interests,<sup>165</sup> Justice Ginsburg appears to hold in *Laidlaw* that the plaintiffs' members had standing to seek injunctive relief because they established that they would suffer future imminent injury in fact both through (1) their statements that they were refraining from using the river and its surrounding areas for recreation because of their concerns about the effects of the defendant's pollutant discharges<sup>166</sup> and (2) their conditional statements that they would use the "nearby" river for recreation in the future if the defendant's pollutant discharges ceased.<sup>167</sup>

This interpretation of *Laidlaw* would establish a new, additional standard for recreational and aesthetic injury in fact that permits the injury in fact element to be satisfied in a suit seeking injunctive relief by a person who has neither actually engaged in physical use of the affected area in the past nor alleged that he or she will physically use the affected area in the imminent near future, based upon two aspects of the *Laidlaw* case. The first aspect of the case supporting this interpretation is that the members' affidavits and depositions, which Justice Ginsburg held "adequately documented" injury in fact, attested to injuries both (1) from the members refraining from recreational uses of the river and

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164. In a decision issued prior to the Supreme Court's *Laidlaw* decision, the Fourth Circuit held that

[t]o establish standing to redress an environmental injury, plaintiffs need not show that a particular defendant is the only cause of their injury, and that, therefore, absent the defendant's activities, the plaintiffs would enjoy undisturbed use of a resource. . . . Instead, to meet the "fairly traceable" requirement . . . , plaintiffs must merely show that a defendant discharges a pollutant that "causes or contributes to the kinds of injuries alleged by the plaintiffs."

Natural Res. Def. Council, Inc. v. Watkins, 954 F.2d 974, 980 (4th Cir. 1992) (citation omitted). Quoting from *Watkins*, the Fourth Circuit similarly has stated that "[r]ather than pinpointing the origins of particular molecules, a plaintiff 'must merely show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged' in the specific geographic area of concern." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 151, 161 (4th Cir. 2000) (en banc) (alteration in original).

165. *Laidlaw*, 528 U.S. at 183-84.

166. *Id.* at 184-85.

167. *Id.* at 184.

surrounding areas (because of their reasonable fears of the effects of the defendant's pollutant discharges), and (2) from the members' conditional commitment to future recreational uses of the river if the defendant's discharges of pollutants into the river ceased.<sup>168</sup> The second aspect of the case is that Justice Ginsburg's majority opinion in *Laidlaw* does not explicitly state that the injury in fact element for standing for injunctive relief was satisfied solely by either the members refraining from recreational use of the river (because of their fears about the effects of the defendant's pollutant discharges) or the members' conditional commitments to future recreational uses of the river if the defendant's pollutant discharges into the river ceased.

Justice Ginsburg in *Laidlaw* appears to have held that sufficient injury in fact for injunctive relief was shown by the members' "conditional statements—that they would use the nearby North Tyger River for recreation if Laidlaw were not discharging pollutants into it."<sup>169</sup> Although Justice Ginsburg did not explicitly state that these intended future uses established the injury in fact element for standing to sue for injunctive relief, as opposed to standing to sue for civil penalties (another form of relief sought by the plaintiffs in the suit), this interpretation follows implicitly from Justice Ginsburg's statement: "Nor can the affiants' conditional statements—that they would use the nearby North Tyger River for recreation if Laidlaw were not discharging pollutants into it—be equated with the speculative "'some day" intentions' to visit endangered species halfway around the world that [the Supreme Court] . . . held insufficient to show injury in fact in [*Lujan v. Defenders of Wildlife*]"<sup>170</sup>—which apparently caused the Court in *Defenders of Wildlife* to deny the plaintiff organizations standing to sue for injunctive relief.<sup>171</sup>

In *Defenders of Wildlife*, the plaintiffs, who were seeking injunctive relief that would extend the protection of section 7<sup>172</sup> of the United States Endangered Species Act to species in foreign countries, were denied standing.<sup>173</sup> The plaintiffs alleged that they intended "some day" to make return visits to foreign countries they had previously visited to observe particular endangered species.<sup>174</sup> The Court held that these allegations did not establish the imminent future injury required to obtain standing to

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168. *Id.* at 182-83.

169. *Id.* at 184.

170. *Id.* (citation omitted).

171. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

172. 16 U.S.C. § 1536 (2000).

173. *Defenders of Wildlife*, 504 U.S. at 564.

174. *Id.*

sue in a suit seeking injunctive relief.<sup>175</sup> The Court in *Defenders of Wildlife* stated:

[T]he affiants' profession of an "inten[t]" to return to the places they had visited before [Egypt and Sri Lanka]—where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species—is simply not enough. Such "some day" intentions—without any description of concrete plans, or indeed even any specifications of *when* the some day will be—do not support a finding of the "actual or imminent" injury that our cases require. . . . "[I]mminence" . . . has been stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control. In such circumstances we have insisted that the injury proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all.<sup>176</sup>

In his dissenting opinion in *Defenders of Wildlife*, Justice Kennedy suggested that the majority was requiring that the members purchase airplane tickets to Egypt and Sri Lanka in order to obtain standing to sue to seek injunctive relief.<sup>177</sup>

In *Laidlaw*, however, members of the plaintiff organization who either lived near the Laidlaw facility (within one-quarter mile to twenty miles away) or who in the past had engaged in recreational activities on the river forty miles downstream from Laidlaw's facility, apparently had standing to sue to seek injunctive relief based upon their allegations that "they would use the nearby North Tyger River for recreation if Laidlaw were not discharging pollutants into it."<sup>178</sup>

In this holding, Justice Ginsburg made no reference to these members having any plans to use the river for recreational purposes at any specific date in the imminent near future, as *Defenders of Wildlife* seemingly requires in order for a plaintiff to establish standing to sue in a suit seeking injunctive relief. Justice Ginsburg apparently did not require the *Laidlaw* plaintiffs to show that their members had concrete and specific plans to use the river on specific dates in the future because the members in *Laidlaw* were "nearby" the North Tyger River, as opposed to

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175. *Id.*

176. *Id.* at 564-65 n.2 (citations omitted).

177. *See id.* at 592 (Blackmun, J., dissenting).

178. *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 184 (2000). These members' standing to sue for injunctive relief also may have been based upon their refraining from using the river and its surrounding areas for recreational activities, both at the time the suit was filed and in the imminent near future, because of their reasonable concerns about the effects of the defendant's discharges. *See* discussion *infra* notes 187-218 and accompanying text.

the plaintiffs in *Defenders of Wildlife* who alleged only that they would travel “halfway around the world” ““some day.””<sup>179</sup> She also may not have required specific and concrete plans for future use of the river on a specific date because the members’ alleged future uses of the river were conditional upon defendant Laidlaw stopping its discharges into the river, an act that had not happened at the time the complaint was filed and these members were deposed.<sup>180</sup>

*Laidlaw*, therefore, might be interpreted as holding that a person who resides “nearby” both the area affected by the defendant’s challenged activity and the site of the defendant’s challenged discharge or emission of pollutants, has standing to sue to seek injunctive relief against the defendant’s challenged activity, by showing that (1) in the imminent future he or she will use the affected area for a specified recreational use (such as fishing, swimming or boating) if the defendant’s challenged activity ceases and (2) he or she will refrain from using the affected area for recreational activities until the defendant’s illegal pollutant discharges cease—even if the plaintiff has never used the affected area in the past for that or any other recreational purpose.

The *Laidlaw* decision however, does not define “nearby.” The members described by Justice Ginsburg in her opinion in *Laidlaw* either resided one-quarter mile to twenty miles from the Laidlaw facility or in the past had canoed in the North Tyger River forty miles downstream of the Laidlaw facility.<sup>181</sup> Under *Laidlaw*, therefore, persons who either reside or engage in recreational activities within forty miles of the defendant’s challenged activity, arguably have standing to sue to seek injunctive relief against the defendant’s challenged activity simply by alleging that in the future he or she will engage in specified recreational activities in the “affected” area, if the defendant’s challenged activity ceases, with no necessity to specify a particular date for such future recreational activities and with no need to have engaged in that or any other recreational activity in the “affected” area at any time in the past.<sup>182</sup>

Apparently, Justice Ginsburg believes that absent proof of facts to the contrary, a court can presume the truthfulness of allegations of a

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179. *Id.* at 184 (quoting *Defenders of Wildlife*, 504 U.S. at 564).

180. *Id.* at 179.

181. Member Judy Pruitt lived one-quarter mile from the Laidlaw facility, member Lee Curtis lived one-half mile from the facility, member Angela Patterson lived two miles from the facility, and member Linda Moore lived twenty miles from the facility, while member Norman Sharp had canoed forty miles downstream from the facility. *Id.* at 181-83.

182. In *Laidlaw*, members Kenneth Lee Curtis, Angela Patterson, and Norman Sharp had engaged in past recreational uses in or along the affected river, but members Judy Pruitt and Linda Moore did not allege or establish any prior recreational uses of the river. *Id.*

person that he or she in the future will engage in recreational uses of a “nearby” affected area if the defendant’s challenged pollution or degradation of that area ceases, if that person resides “near” the affected area and within forty miles of the defendant’s challenged activity and that person states that he or she presently does not engage in recreational activities in the “affected” area because of reasonable concerns about the effects of the defendant’s pollutant discharges.

However, if such a person has never in the past engaged in any recreational activity in the “affected” area—or any other area, or if such person’s sedentary lifestyle or poor physical condition indicate that the person is unlikely in the future to engage in any outdoor recreational activities in the affected area—or any other place, a court might decline to accept as true that person’s allegations and sworn statements attesting that the person in the future will engage in specified recreational activities in the affected area if the defendant’s unlawful pollution in that area ceases.

*Laidlaw*, however, provides no guidelines indicating when prospective future users of an affected area will be considered to be users of a “nearby area” within *Laidlaw*’s holding, and therefore not subject to *Defenders of Wildlife*’s requirement that prospective future users of an affected area must show specific and concrete plans to use the affected area in the imminent future.

*Defenders of Wildlife*’s requirement may not be limited just to situations where a person simply alleges plans to visit an area in a foreign country that is more than halfway around the world. The Court’s concern in *Laidlaw* and *Defenders of Wildlife* was “to reduce the possibility of deciding a case in which no injury would have occurred at all” (because the plaintiff’s alleged future use was too “speculative” and “indefinite” as to when it would occur).<sup>183</sup> A court, therefore, may decide that there are other factual situations, including some involving alleged future plans to visit areas within the United States, that should be subject to the “concrete and specific plans” requirements of *Defenders of Wildlife*.

A court, in deciding whether a plaintiff alleging an imminent future use of an affected area should be subject to *Defenders of Wildlife*’s requirements of showing specific and concrete plans, should consider not only the distance that will be involved in the plaintiff traveling to that area, but also should consider other factors that are relevant to determining whether a plaintiff probably will visit the affected area in the imminent future as he or she has alleged. Although a past visit is neither

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183. *Defenders of Wildlife*, 504 U.S. at 565 n.2.

sufficient by itself<sup>184</sup> nor required<sup>185</sup> to establish standing to sue in a suit seeking injunctive relief, a plaintiff's past recreational uses of, or visits to, the affected area should support the plaintiff's allegations if those visits have been on a regular or periodic basis in the past that makes a repeat visit in the near future a likely event.

Daily geographical proximity . . . may make actual past recreational use less important in substantiating an "injury in fact," because a person who lives quite nearby is likely to notice and care about the physical beauty of an area he passes often. . . . On the other hand, a person who uses an area for recreational purposes does not have to show that he or she lives particularly nearby to establish an injury-in-fact due to possible or feared environmental degradation. Repeated recreational use itself, accompanied by a credible allegation of desired future use, can be sufficient, even if relatively infrequent, to demonstrate that environmental degradation of the area is injurious to that person. . . . An individual who visits Yosemite National Park once a year to hike or rock climb and regards that visit as the highlight of his year is not precluded from litigating to protect the environmental quality of Yosemite Valley simply because he cannot visit more often.<sup>186</sup>

However, if a plaintiff has never engaged in recreational activities in the affected area because of reasonable concerns about the effects of the defendant's pollutant discharges on the plaintiff's health, the plaintiff's failure in the past to have engaged in recreational activities in the affected area should not be considered a negative factor in determining if the plaintiff has established imminent future injury in fact.

In deciding whether a plaintiff has established an imminent future use of the affected area, a court also should consider the cost that a plaintiff will incur to visit the affected area in the imminent future, and the availability of resources to the plaintiff to pay those costs. A court also should consider any legal obstacles (e.g., visa requirements or governmental travel bans) that might impede the plaintiff's efforts to visit the affected area, and any logistical problems that the plaintiff might face in seeking to visit the affected area in the imminent future (such as difficult means of traveling to the area, particularly if extended hiking or

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184. *Id.* at 564.

185. This is an implicit holding of *Laidlaw* because Justice Ginsburg made no reference to the affiant members attesting that they would *again* use areas in and near the river for recreational purposes if *Laidlaw's* pollutant discharges into it stopped and only three of the affiant members (Kenneth Lee Curtis, Angela Patterson, and Norman Sharp) attested to having previously engaged in recreational activities in or near the river. 528 U.S. at 181-83.

186. *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1149-50 (9th Cir. 2000).

climbing might be required in order for the plaintiff to reach the area). A court also should consider the plaintiff's lifestyle and personal characteristics in determining if the plaintiff is likely to visit the affected area in the imminent near future. For example, if the plaintiff is a "couch potato" in poor physical condition who has never (or not for many years) engaged in outdoor hiking and camping activities, a court might decline to accept as true that person's allegations that he or she will soon climb to the top of Mount Everest (particularly if the cost of doing so by means of a private expedition would be well beyond the financial resources available to that person).

Justice Ginsburg in *Laidlaw* also held that the plaintiff organizations showed injury in fact by establishing that the defendant's "continuous and pervasive illegal discharges of pollutants into a river"<sup>187</sup> caused the affiant members to have "reasonable concerns about the effects of those discharges"<sup>188</sup> and reasonable fears that "led the affiants to respond to that concededly ongoing conduct by refraining from use of the North Tyger River and surrounding areas" and caused these "nearby residents to curtail their recreational use of [the river and] . . . subject[ed] them to other economic and aesthetic harms."<sup>189</sup> Justice Ginsburg held that because *Laidlaw*'s unlawful discharges of pollutants in violation of its NPDES permit was occurring at the time the complaint was filed, "the only 'subjective' issue [presented in the case was] . . . '[t]he reasonableness of [the] fear' that led the affiants to respond to that . . . conduct by refraining from use of the North Tyger River and surrounding areas."<sup>190</sup>

Justice Ginsburg never explicitly explained why the court found it necessary to find this injury in fact from the affiant members' refraining from use of the river and its surrounding areas, when the Court apparently already had found that the affiants had established injury in fact for purposes of standing to seek injunctive relief, on the basis of their statements that in the future they would use the river for recreation if *Laidlaw* were not discharging pollutants into the river. However, she may have done so because she found that imminent future injury in fact for standing for injunctive relief was established by both the members refraining from recreational use of the river (because of their reasonable fears of the effects of the defendant's pollutant discharges) and by the members' conditional commitment to use the river for recreational

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187. *Laidlaw*, 528 U.S. at 184.

188. *Id.* at 183-84.

189. *Id.* at 184.

190. *Id.*

purposes in the future if the defendant's pollutant discharges into the river ceased.

Although the affiants' conduct in refraining from using the river and surrounding areas because of the defendant's pollutant discharges can be characterized as a past injury (which the Court previously held to be insufficient injury in fact in a suit seeking injunctive relief),<sup>191</sup> the members' conduct in refraining from recreational use of the river and its surrounding area also can be characterized as a continuing present injury and as an imminent future injury, which are sufficient to establish standing to sue to seek injunctive relief.<sup>192</sup>

Justice Ginsburg may have identified this injury resulting from the affiants' conduct in refraining from using the river and surrounding areas until the trial court issued its judgment, at least in part to establish the plaintiffs' past injury in fact that was necessary in order for them to have standing to seek the assessment of civil penalties. The affiants' alleged future injury, while sufficient to establish the plaintiffs' standing to sue to seek injunctive relief, probably was insufficient to establish the plaintiffs' standing to sue to seek civil penalties, because past injury in fact is necessary to establish standing to sue to seek damages (and civil penalties arguably are analogous to damages). Justice Ginsburg therefore, at least in part, may have noted the affiants' refraining from recreational use of the river to identify a past injury to the affiants, because it was necessary to do so in order for the affiants to have standing to sue to seek civil penalties for the defendant's illegal pollutant discharges that occurred in the past (and continued until after the plaintiffs filed the complaint in the action).

Another possible interpretation of this part of the *Laidlaw* opinion is that Justice Ginsburg considered the members' conduct, in refraining from recreational use of the "affected" area because of their concern about the effects of the defendant's discharges, to be a future imminent injury that helped to establish (in conjunction with the members' conditional statement about future recreational use if the defendant's pollutant discharges ceased) the plaintiffs' standing to seek injunctive relief. Under this interpretation, the plaintiffs' injury, resulting from their refraining from recreational use of the river and its surrounding areas because of their reasonable concern about the effects of the defendant's pollutant discharges, would be considered a future imminent injury that

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191. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983).

192. See *Lujan v. Defender of Wildlife*, 504 U.S. 555, 560 n.8 (1992).

helped to show that the members sufficiently established standing to seek injunctive relief.

This interpretation is supported by Justice Ginsburg's statement in *Laidlaw*, immediately after her statement that injury in fact was established by the members refraining from using the river and its surrounding areas because of their concerns about Laidlaw's pollutant discharges, that "Laidlaw argues next that even if FOE had standing to seek injunctive relief, it lacked standing to seek civil penalties. Here the asserted defect is not injury but redressability."<sup>193</sup> This latter statement might be interpreted as indicating that the Court's holding, that injury in fact resulted from the affiants refraining from recreational use of the river, should be interpreted as relevant to the affiants' standing to sue to seek injunctive relief, not their standing to seek civil penalties. This interpretation also is supported by Justice Ginsburg's discussion of the Court's holding in *City of Los Angeles v. Lyons*,<sup>194</sup> which she referred to as holding that the "plaintiff lacked standing to seek an injunction."<sup>195</sup> In this part of her opinion Justice Ginsburg concluded that the plaintiffs' members established injury in fact by showing that their reasonable fear about the effects of the defendant's pollutant discharges caused them to refrain from recreational use of the river and surrounding areas.<sup>196</sup>

Under this alternative reading, the *Laidlaw* opinion is interpreted as holding that the plaintiffs' members established the injury in fact element, for purposes of establishing standing to seek injunctive relief, both (1) because of their refraining in the imminent near future from using the river for recreational purposes because of their reasonable concern about the defendant's pollutant discharges and (2) because of their statements that in the future they would use the river for recreational purposes if the defendant ceased discharging pollutants into it. Of course, *Laidlaw* under this interpretation might be considered as also holding that the members' conduct in refraining from using the river in the past established a past injury in fact that sufficiently established the members' standing to seek civil penalties for the defendant's past violations of its NPDES permit.

Justice Ginsburg's opinion in *Laidlaw* did not identify the type of harm or risk of harm the affiant members reasonably feared from the defendant's discharges of pollutants into the river. The affiant members (Kenneth Lee Curtis, Angela Patterson, and Linda Moore) who allegedly

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

194. *Lyons*, 461 U.S. at 107 n.7.

195. *Laidlaw*, 528 U.S. at 184.

196. *Id.* at 184-85.

would swim or wade in the river if it was not polluted, may have feared adverse effects on their health if they swam in the river when it contained harmful pollutants discharged by the defendant, although Justice Ginsburg did not explicitly make any such finding in *Laidlaw*. The members (Kenneth Lee Curtis and Judy Pruitt) who allegedly would fish in the river (and who presumably might eat fish caught from the river), also might have feared adverse effects on their health if they ate fish from the river containing harmful pollutants—although Justice Ginsburg did not make any such explicit finding in the *Laidlaw* case.<sup>197</sup>

However, Justice Ginsburg did not explicitly hold that any of the affiant members in *Laidlaw* suffered injury in fact because of harm or adverse effects, or risk of harm or adverse effects, to their health. In fact, none of the affiant members in *Laidlaw* alleged that they suffered injury in fact because of harm or risk of harm to their health caused by the defendant's discharges of pollutants into the river. No allegations of injury to the affiants' health may have been made in the plaintiff's complaint in *Laidlaw* because of concerns that proximate causation requirements would make it difficult to establish the truthfulness of such allegations if the defendant challenged such allegations of injury to health in a motion for summary judgment.

But even if some of the affiant members declined to swim, wade or fish in the river because of fear of harm to their health, or did not engage in other recreational activities, such as boating or canoeing, in or near the river, because of concerns about harm to their health, the injury that such a member would suffer should still be considered to be an injury to a recreational or aesthetic interest (not just an injury to health). This conclusion should be reached because a reasonable concern about a person's health would be the reason why the person declined to engage in the particular recreational activity (that also might provide the person aesthetic pleasure, as may be the case with bird-watching and many other outdoor activities that might be characterized as a "recreational activity").

Of course, there may be cases where a person declines to engage in an outdoor recreational activity in or near a polluted river not because of any concerns that doing so will result in harm to that person's health, but because of concerns that the smell or color of the river's polluted water will cause a particular outdoor recreational activity in or near the river either not to be an enjoyable recreational experience or not to be an experience that will provide aesthetic enjoyment. In such cases, such

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197. *Id.* at 181-83.

person would also suffer a recreational or aesthetic injury in fact that would be sufficient to satisfy federal standing to sue requirements.

Consequently, under Justice Ginsburg's decision in *Laidlaw*, a person should be considered to have suffered a recreational or aesthetic injury in fact when the person declines to engage in a specified recreational activity in or near a river because of the defendant's discharges of pollutants into the river, either because of reasonable concerns or fears that the activity will not be an enjoyable recreational activity (or will not be an aesthetically enjoyable activity) or because of reasonable concerns or fears that the activity will harm or risk harm to the person's health.

Justice Ginsburg based this "reasonableness of fear" standard on *Lyons*, which she described as holding that a plaintiff lacked standing to sue to seek an injunction against the enforcement of a police choke-hold policy because he did not establish that he reasonably feared being the victim of such unlawful conduct in the future, since there was no evidence of recurrence of this unlawful conduct against the plaintiff or a realistic threat to the plaintiff from this policy.<sup>198</sup> Justice Ginsburg stated that Lyons' "'subjective apprehensions' that such a recurrence would even *take place* were not enough to support standing."<sup>199</sup> She then held in *Laidlaw* that under *Lyons* the only subjective issue in the case was the reasonableness of the affiants' fears and that the Court in *Laidlaw* found nothing "'improbable' about the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms."<sup>200</sup> She concluded by stating that "[t]he proposition is entirely reasonable, the District Court found it was true in this case, and that is enough for injury in fact."<sup>201</sup>

Justice Ginsburg did not state that the affiant members, in order to establish a reasonable concern or fear about the effects of Laidlaw's pollutant discharges, had to establish either that they had specific knowledge of the types and amount of pollutants being discharged by the Laidlaw facility, or that they had a reasonable belief that Laidlaw's pollutant discharges were in violation of discharge limitations in Laidlaw's CWA NPDES permit. Affiant member Kenneth Lee Curtis only attested that "he was concerned that the water [in the river] was

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198. *Lyons*, 461 U.S. at 107-08.

199. *Laidlaw*, 528 U.S. at 184 (quoting *Lyons*, 461 U.S. at 108 n.8).

200. *Id.*

201. *Id.* at 184-85.

polluted by Laidlaw's discharges," and that he did not fish "at a specific spot [in the river] . . . because of his concerns about Laidlaw's discharges."<sup>202</sup> Affiant member Angela Patterson stated that she would like to engage in various recreational activities "in or near the river because she was concerned about harmful effects from discharged pollutants; and that she and her husband would like to purchase a home near the river but did not intend to do so, in part because of Laidlaw's discharges."<sup>203</sup> Affiant member Judy Pruitt similarly averred that she would like to engage in various recreational activities along the river "but has refrained from those activities because of the discharges."<sup>204</sup> Affiant member Linda Moore similarly attested that she would engage in a number of different types of recreational activities "were it not for her concerns about illegal discharges."<sup>205</sup> However, none of the affiant members described by Justice Ginsburg referred either to mercury or any other specific type of pollutant allegedly discharged by Laidlaw, or stated that they believed that Laidlaw's discharges were in violation of discharge limitations in its CWA NPDES permit. Although affiant member Moore referred to "illegal discharges," her statements do not indicate either that she was referring to the defendant's discharges as being illegal or why she believed that the discharges were illegal.<sup>206</sup> The other five affiant members, who were held to have established injury in fact, made no references to "illegal" discharges by the defendant.

Consequently, a person, in order to establish recreational or aesthetic injury in fact under *Laidlaw*, apparently only needs to allege and establish that they have general knowledge that the defendant in a CWA citizen suit is discharging some type(s) of pollutant(s) into a river or other body of water and that they do not engage in recreational activities in or near that body of water because of concern about the effects of those pollutant discharges on their health or aesthetic or recreational enjoyment if she did engage in such activities.

In dissent, Justice Scalia in *Laidlaw* asserted that "[o]ngoing 'concerns' about the environment are not enough [to show injury in fact], for '[i]t is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions."<sup>207</sup> The "reality of the threat" language quoted by Justice Scalia in this statement

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202. *Id.* at 182.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 199 (Scalia, J., dissenting) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983)).

comes from a footnote in *Lyons* that is the same source of Justice Ginsburg's "reasonableness of [the] fear" standard upon which she relied to hold that the affiant members established recreational and aesthetic injury in fact by showing that they refrained from recreational use of the river and surrounding areas because of their reasonable fears and concerns about the effects of the defendant's discharges of pollutants into the river.<sup>208</sup>

Justice Scalia's dissent does not oppose the application of a test for recreational and aesthetic injury in fact that is based on *Lyons*, but rather interprets *Lyons* as requiring injury in fact that is based on concerns that reflect the true reality of environmental harm and pollution in an area, when injury in fact is based on a person's refraining from recreational use of an area because of the person's concerns about the effects of a defendant's pollutant discharges or emissions. Justice Ginsburg, on the other hand, interprets *Lyons* as making the reasonableness of a person's concerns, not the true reality of environmental harm and pollution, the determinative issue in such situations in determining whether the injury in fact element is satisfied when a person refrains from recreational use of an area because of concerns or fears about the effects of the defendant's pollution discharges or emissions. Of course, under Justice Ginsburg's approach, reasonable people can disagree about whether an individual's concerns about the effects of a defendant's pollutant discharges or emissions are "reasonable fears" or unreasonable "subjective apprehensions." Justice Scalia's dissent, in part, may be based on his belief that the affiant members' concerns were unreasonable "subjective apprehensions," not "reasonable fears."

This interpretation of his dissent is supported by his statements that the affiants "rely entirely upon unsupported and unexplained affidavit allegations of 'concern'"<sup>209</sup> and "have established nothing but 'subjective apprehensions.'"<sup>210</sup> He first noted that although affiant member Moore

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208. *Id.* at 184 (quoting *Lyons*, 461 U.S. at 107 n.8). The footnote in *Lyons* upon which both Justice Ginsburg and Justice Scalia relied states:

*Lyons* alleged that he feared he would be choked in any future encounter with the police. The reasonableness of *Lyons*' fear is dependent upon the likelihood of a recurrence of the allegedly unlawful conduct. It is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions. The emotional consequences of a prior act simply are not a sufficient basis for an injunction absent a real and immediate threat of future injury by the defendant.

461 U.S. at 107 n.8.

209. *Laidlaw*, 528 U.S. at 200 (Scalia, J., dissenting).

210. *Id.* at 201.

stated that she would use the river for recreation if she was not concerned about the pollution, she also had only been to the river twice (once before the suit was filed and once afterwards).<sup>211</sup> Similarly, Justice Scalia noted that affiant member Curtis had admitted that he had not been to the river since he was a “kid” and also had stated that the reason he had not been to the river since then was not because of pollution.<sup>212</sup> Justice Scalia also asserted that although Curtis had claimed that the river looked and smelled polluted, “this condition, if present, was surely not caused by Laidlaw’s discharges, which according to the District Court ‘did not result in any health risk or environmental harm.’”<sup>213</sup> Justice Scalia also asserted that the other affiants only “established nothing but ‘subjective apprehensions’” in stating “either that they *would* use the river if it were not polluted or harmful (as the court subsequently found it is not) . . . or said that the river looks polluted (which is also incompatible with the court’s findings).”<sup>214</sup>

Justice Scalia also argued that although the district court found that the plaintiffs had standing to sue in 1993, this initial conclusion that the plaintiff had standing should be re-examined because of the district court’s later finding in 1997 that Laidlaw’s discharges did not harm the environment.<sup>215</sup> He contended that the Court in *Laidlaw* was “content” to base standing on “‘conclusory allegations of an affidavit,’”<sup>216</sup> which the Court had refused to do in *National Wildlife Federation*.<sup>217</sup> Justice Scalia concluded this argument as follows:

By accepting plaintiffs’ vague, contradictory, and unsubstantiated allegations of “concern” about the environment as adequate to prove injury in fact, and accepting them even in the face of a finding that the environment was not demonstrably harmed, the Court makes the injury-in-fact requirement a sham. If there are permit violations, and a member of a plaintiff environmental organization lives near the offending plant, it would be difficult not to satisfy today’s lenient standard.<sup>218</sup>

Although Justice Scalia based these arguments on the true reality of the environmental harm and pollution in the area near the defendant’s pollutant discharges, rather than on the reasonableness of the affiant members’ concerns, Justice Scalia properly focused on a person’s past

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211. *Id.*

212. *Id.*

213. *Id.* (citation omitted).

214. *Id.* at 200-01.

215. *Id.* at 201.

216. *Id.* (quoting *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888 (1990)).

217. *Nat’l Wildlife Fed’n*, 497 U.S. at 888.

218. *Laidlaw*, 528 U.S. at 201 (Scalia, J., dissenting).

use of an affected area. This focus determines whether that person is truthfully alleging either that she will use that particular area in the future for a particular outdoor recreational activity if the defendant ceases unlawful discharges of pollutants or that she has not been using the affected area for a particular outdoor recreational activity because of the person's concern about the defendant's discharges of pollutants. A court does not have to believe that such allegations are truthful when the person making such allegations in the past has not frequently, or ever, engaged in such recreational activities in the affected area (or anywhere else). A court in a particular case may find that a person, who alleges that she has not engaged in specific recreational activities in or near a particular body of water because of concerns about the adverse effects that would result from the defendant's pollutant discharges if she did so, in fact did not engage in such recreational activities in or near the body of water because she does not enjoy such outdoor recreational activities and does not engage in such activities even if given the time and opportunity to do so.

Justice Ginsburg's opinion in *Laidlaw* did not discuss whether the plaintiff's claim for injunctive relief satisfied the redressability element of federal standing to sue requirements. This element has been held to be satisfied in a CWA citizen suit seeking injunctive relief against a defendant alleged to be violating effluent limitations in its NPDES permit, on the grounds that an injunction will reduce, at least in part, the plaintiff's recreational and aesthetic injuries caused by the defendant's illegal discharges, by reducing the pollution in the receiving body of water.<sup>219</sup> A plaintiff in such a case "need not show that the waterway will be returned to pristine condition in order to satisfy" the redressability element.<sup>220</sup>

In the final portion of the part of her majority opinion addressing the plaintiff's standing to sue, Justice Ginsburg in *Laidlaw* held that the plaintiffs' claim for civil penalties, against a defendant who allegedly was committing an NPDES permit violation at the time the citizen suit was filed, satisfied the redressability element of constitutional standing to sue requirements, because potential sanctions of civil penalties both "encourage defendants to discontinue current violations and deter them from committing future ones," thus "afford[ing] redress to citizen plaintiffs who are injured or threatened with injury as a consequence of

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219. See *Pub. Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 73 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991).

220. *Id.*

ongoing lawful conduct.”<sup>221</sup> Justice Ginsburg distinguished *Steel Co. v. Citizens for a Better Environment*, where the Supreme Court held that citizen plaintiffs did not satisfy the redressability element of standing to sue requirements in a citizen suit seeking civil penalties against a defendant whose violations had ceased by the time the citizen’s suit was filed, on the ground that civil penalties for violations that have ceased by the time the plaintiff’s suit is filed do not redress any of a private plaintiff’s injury in fact.<sup>222</sup>

## V. CONCLUSION

Regardless of whether *Laidlaw* is interpreted as a decision that has “effected no significant change in standing doctrine”<sup>223</sup> or as a decision that has made a “significant change in environmental standing doctrine,”<sup>224</sup> or a “sea change in constitutional standing principles,”<sup>225</sup> that “has unnecessarily opened the standing floodgates, rendering . . . standing inquiry ‘a sham,’”<sup>226</sup> *Laidlaw* clearly is the first decision by the United States Supreme Court to address in depth the issue of how a plaintiff can establish recreational and aesthetic injury in fact in a case against a defendant who is either discharging pollutants into a body of water or emitting pollutants into the outdoor ambient air.

*Laidlaw* recognizes that a person can establish recreational or aesthetic injury in fact by showing both (1) that he or she uses an area “affected” by a defendant’s allegedly unlawful pollution of a water body or outdoor ambient air and (2) that the defendant’s challenged pollution of the water body or outdoor air “lessens” the plaintiff’s recreational or aesthetic enjoyment of the “affected” area.<sup>227</sup> Courts in future cases involving air or water pollution will have to determine, on a case-by-case basis, whether a specific place used by a plaintiff for recreational or aesthetic enjoyment is part of the area “affected” by a defendant’s challenged pollutant discharges or emissions. Although the distance

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221. *Laidlaw*, 528 U.S. at 186.

222. See *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 106-07 (1998). Justice Ginsburg, in the final part of her opinion in *Laidlaw*, also held that the suit had not become moot as a matter of law simply because the defendant achieved substantial compliance with its permit after the plaintiff’s suit was filed or because the defendant closed its facility after the plaintiff’s suit was filed. *Laidlaw*, 528 U.S. at 189-94. In this part of her decision, Justice Ginsburg distinguished standing from mootness. *Id.* at 189-92.

223. *Am. Littoral Soc’y v. United States EPA*, 199 F. Supp. 2d 217, 231 n.8 (D.N.J. 2002).

224. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 165 (4th Cir. 2000) (Luttig, J., concurring).

225. *Id.* at 164 (Niemeyer, J., concurring).

226. *Id.* at 165 (Hamilton, J., concurring).

227. *Laidlaw*, 528 U.S. at 183.

between the specific place used by the plaintiff and the place where the defendant discharges or emits pollutants is a significant factor in the determination of whether the specific place is part of the “affected area,” courts in making these determinations also will have to take into account the type of CWA or CAA violation allegedly committed by the defendant and other circumstantial evidence that assists a court in determining if the concentrations, in or near the specific area used by the plaintiff, of the type of pollutant discharged or emitted by the defendant, are sufficiently high enough to “affect” the area.<sup>228</sup>

Courts applying *Laidlaw* in future cases also will have to decide if a plaintiff has established that the defendant’s pollutant discharges or emissions have “lessened,” or threaten to lessen, the plaintiff’s recreational or aesthetic enjoyment of the “affected” area.<sup>229</sup> When applying *Laidlaw* to make such determinations, courts will face particular difficulty in citizen suits seeking injunctive relief where a plaintiff alleges imminent future recreational or aesthetic injury on the basis of the plaintiff refraining from recreational use of an “affected” area because of concerns about the defendant’s pollutant discharges or emissions and on the basis of statements that the plaintiff would engage in recreational activities in the affected area in the near future if the defendant’s illegal pollutant discharges or emissions ceased.

Of course, a court does not face any such difficulties when a plaintiff organization in a CWA or CAA citizen suit either alleges and establishes (1) past injury in fact (for standing to seek civil penalties) on the basis of its members’ allegations and sworn statements asserting that their actual past recreational use and enjoyment of an area affected by the defendant’s challenged activity was lessened in the past by the defendant’s challenged activity; or (2) future imminent injury (for standing to seek injunctive relief) on the basis of its members’ allegations and statements that in the imminent near future they actually will use part of the “affected” area for recreational activity or aesthetic enjoyment and that their future recreational or aesthetic enjoyment of the “affected” area will be lessened by the defendant’s allegedly unlawful discharges or emissions of pollutants. Recreational and aesthetic injury in fact clearly are established by such allegations and proof of both (1) actual past or imminent future recreational use of an “affected” area by the plaintiff and (2) actual lessening of the plaintiff’s recreational or aesthetic enjoyment of the affected area when the plaintiff actually uses the “affected” area.

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228. See *id.* at 184.

229. See *id.* at 184-85.

*Laidlaw*, however, now permits a plaintiff also to establish recreational and aesthetic injury in fact even if the person has not actually recreationally used the affected area in the past and does not assert that she will engage in recreational use of the affected area in the imminent near future, when that person establishes that she refrains from recreational use of the affected area because of reasonable concerns and fears about the effects of the defendant's allegedly unlawful pollutant discharges or emissions and that she would begin recreational use of the affected area if the defendant's allegedly unlawful pollutant discharges or emissions ceased.