Center for Biological Diversity v. EPA: Fifth Circuit Marooned in Uncharted Waters in CWA Standing Dismissal

I. OVERVIEW OF THE CASE

Three environmental associations (Petitioners) sought judicial review of the United States Environmental Protection Agency's (EPA) issuance of a National Pollution Discharge Elimination System permit (General Permit), which authorized and regulated the discharge of pollutants from oil and gas operations in federal waters in the central and western parts of the Gulf of Mexico.[1] The Petitioner associations advanced three arguments against the EPA's action: (1) that the EPA failed to prepare an adequate Environmental Impact Statement (EIS); (2) that the EPA did not adequately consider certain factors; and (3) that the EPA did not include certain monitoring requirements in the permit.[2] The Petitioners asked the court to remand the General Permit to the EPA for further proceedings.[3] Although the EPA initially stipulated to the Petitioners' standing, the American Petroleum Institute (API) intervened, urging that the Petitioners lacked standing.[4] The United States Court of Appeals for the Fifth Circuit *held* that the Petitioners lacked standing because their members could not show an injury in fact that was geographically and temporally connected to the discharges, self-inflicted injury could not support standing, and the alleged injury was not fairly traceable to the issuance of the General Permit. *Center for Biological Diversity v. EPA*, 937 F.3d 533 (5th Cir. 2019).

II. BACKGROUND

In 1969, two spectacular images of environmental degradation, an oil spill off the coast of California and the infamous burning of the Cuyahoga

1. Center for Biological Diversity v. EPA, 937 F.3d 533, 535-36 (5th Cir. 2019).
2. *Id.* at 536.
3. *Id.*
4. *Id.*

River, bolstered motivation among activists and legislators for a governmental check on the pollution of American waterways.[5] Congress enacted the Clean Water Act (CWA) with the goal of restoring and maintaining the integrity of the Nation's waters.[6] The CWA created a system of pollution regulation and outlawed all discharges that were not in compliance with the statute's provisions.[7] It established the National Pollutant Discharge Elimination System (NPDES) and vested the Administrator of the EPA with the authority to issue permits authorizing discharge of pollutants.[8]

The CWA creates two causes of action that may be brought by any interested party. The first is a citizen suit provision, empowering civil actions against polluters in violation of law, or against the Administrator for failure to perform non-discretionary duties.[9] The second is a petition for judicial review of an action of the Administrator that falls into any of seven enumerated categories of action, including issuing permits and setting effluent limitations.[10] Notably, the two actions have mutually exclusive jurisdictional routes: a citizen suit to enforce the duties of polluters or the Administrator (enforcement action) must be brought in the relevant federal district court, while a suit for review of one of the seven enumerated actions (administrative review action) must be brought in a federal court of appeal.[11] This grant of original (rather than appellate) jurisdiction is unusual for the courts of appeal; the role of appellate courts is typically to review the procedures and determinations of trial courts, as courts of appeal do not generally take in new evidence or permit witnesses to testify.[12]

Whenever a party invokes the jurisdiction of the federal courts, that party must establish its standing.[13] Standing doctrine is a court-made tool for enforcing the constitutional limitation of the judiciary's power to decide "Cases" and "Controversies," so as not to infringe on the powers

---

5. Tim Folger, *The Cuyahoga River Caught Fire 50 Years Ago. It Inspired a Movement.*, NAT'L GEOGRAPHIC (June 21, 2019), https://www.nationalgeographic.com/environment/2019/06/the-cuyahoga-river-caught-fire-it-inspired-a-movement/.

6. 33 U.S.C. § 1251 (2018).

7. *Id.* § 1311(a).

8. *Id.* § 1342(a). The statute also allows states to establish their own permit programs for discharges within their jurisdiction, subject to the approval of the Administrator. *Id.* § 1342(b).

9. *Id.* § 1365.

10. *Id.* § 1369(b).

11. Nat'l Ass'n of Mfrs. v. Dep't of Def., 138 S. Ct. 617, 626-27 (2018).

12. *See About the U.S. Courts of Appeals*, ADMIN. OFF., U.S. COURTS (Oct. 20, 2019), https://www.uscourts.gov/about-federal-courts/court-role-and-structure/about-us-courts-appeals.

13. Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992).

conferred on the other branches of government.[14] The elements of standing are "not mere pleading requirements but rather an indispensable part of the plaintiff's case" and, like other material facts, must be shown "with the manner and degree of evidence required at the successive stages of the litigation" by the party invoking federal jurisdiction.[15] The Supreme Court has established "that the irreducible constitutional minimum of standing contains three elements," which are (1) injury in fact, (2) traceability, and (3) redressability.[16] These requirements have been expounded in decisions of the Supreme Court and applied in many environmental cases.

An injury in fact is the invasion of a party's legally protected interest; the injury must be "concrete and particularized" and "actual or imminent" to be justiciable.[17] Even aesthetic interests are cognizable for this purpose, but a party must show that *its* particular interest is being injured.[18] Additionally, the injury must be "actual or imminent."[19] In *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers*, there was record evidence that an association's members used waters downstream from coal mines for recreation and that their enjoyment was harmed by the "visibly polluted" state of the water.[20] When an alleged injury has not yet occurred, courts require that the injury be imminent or "certainly impending."[21] In *Lujan v. Defenders of Wildlife*, the plaintiffs failed to allege injury in fact because they had "some day intent" to return to the habitat of the endangered species they were interested in, but did not have any current plans.[22] The Supreme Court has rejected the idea that a mere "realistic threat" of future harm to the plaintiff is enough to satisfy this requirement.[23]

Second, the injury alleged must be "fairly traceable" to the defendant's conduct to support standing.[24] This was memorably discussed in *Clapper v. Amnesty International USA*, where the Court dissected a

---

14. *Id.* at 559-60.
15. *Id.* at 561 (citing Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 883-89 (1990)).
16. *Id.* at 560.
17. *Id.* at 561.
18. *Id.* at 562-63.
19. *Id.* at 560.
20. Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs, 781 F.3d 1271, 1280 (11th Cir. 2015).
21. *Lujan*, 504 U.S. at 564 n.2.
22. *Id.* at 563-64. Justice Kennedy suggested that simply purchasing a plane ticket for a future date would have been enough to satisfy the injury in fact requirement. *Id.* at 579 (Kennedy, J., concurring in part and concurring in the judgment).
23. Summers v. Earth Island Inst., 555 U.S. 499-500 (2009).
24. *Lujan*, 504 U.S. at 560 (opinion of Scalia, J.).

five-link "chain of possibilities"—the sequence of events necessary for the challenged surveillance statute to actually result in interception of plaintiffs' communications.[25] The Court held that this chain was too speculative to support the "certainly impending" injury requirement, and that a number of bases for surveillance can be found in law, and therefore any future surveillance that did occur could not be "fairly traceable" to a particular provision.[26] The Court additionally rejected the notion that the costs plaintiffs incurred for measures to avoid surveillance could support standing, as "respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending."[27]

In the CWA context, the Fifth Circuit has partially adopted a test from the Third Circuit's language in *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc*.[28] The *Powell Duffryn* test for traceability requires that a plaintiff in an enforcement suit show that (1) a defendant discharged pollutants in amounts exceeding those permitted by a permit or the CWA (2) into a waterway the plaintiff had an interest in, and (3) that the pollutant causes or contributes to the type of injuries alleged.[29] In *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc.* (*Cedar Point*), the Fifth Circuit found traceability under this test where the defendant had discharged pollutants without a permit, a plaintiff had canoed and taken educational trips in the vicinity of the discharges, and the plaintiffs put on expert testimony of the harm that type of discharge causes.[30] However, the court cautioned that "an overly broad application of this [*Powell Duffryn*] test may be problematic," because "some 'waterways' covered by the CWA may be so large that plaintiffs should rightfully demonstrate a more specific geographic or other causative nexus," despite an interest in the waterway being sufficient under a literal application of *Powell Duffryn*.[31]

Just months later, the Fifth Circuit found such a waterway in *Friends of the Earth, Inc. v. Crown Central Petroleum Corp.* (*Crown Central*), holding that "individuals who birdwatch and fish at a lake some 18 miles

25. Clapper v. Amnesty Int'l USA, 568 U.S. 398, 410-11 (2013).
26. *Id.* at 410-15.
27. *Id.* at 415-18.
28. Pub. Interest Research Grp. of N.J., Inc. v. Powell Duffryn Terminals Inc., 913 F.2d 64 (3d Cir. 1990).
29. *Id.* at 72.
30. Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc. (Cedar Point), 73 F.3d 546, 557-58 (5th Cir. 1996).
31. *Id.* at 557, 558 n.4.

and three tributaries from the source of unlawful water pollution [do not] meet the fairly traceable component of the standing doctrine."[32] There, the court emphasized the narrowness of the ruling, declining to establish any strict limits on the distance of the alleged injury from the discharges, instead emphasizing the plaintiffs' failure to present adequate proof of traceability, which in the circumstances of this case could not be supported "solely [by] the truism that water flows downstream."[33]

The third requirement of standing is redressability: the plaintiff's injury must be likely to be redressed by a favorable decision from a court.[34] Redressability was the "most obvious problem" in *Lujan*, in part because the plaintiffs had sued only the Secretary of the Interior, rather than the government agencies funding the project, and it was unclear that the Secretary alone had the authority to make changes that would correct the alleged injury.[35] Another concern was that the agencies only supplied 10% of the funding for the disputed overseas project, so it was also uncertain that the project would actually be cancelled or altered if the funding were halted.[36]

When an association, rather than an individual, sues in federal court on behalf of its members, it must also demonstrate that it has associational standing.[37] This entails a three-part test: "(1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and, (3) neither the claim asserted nor the relief requested requires the participation of individual members."[38] In most CWA cases, the second and third elements are easily satisfied, and thus the analysis turns on the issue of individual standing.[39]

III. THE COURT'S DECISION

In the noted case, the Fifth Circuit analyzed the three petitioner organizations' claims of standing and, finding that none had standing, the court consequently did not reach the merits of the petitions.[40] The court

---

32. Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp. (Crown Central), 95 F.3d 358, 359 (5th Cir. 1996).

33. *Id.* at 361-62.

34. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

35. *Id.* at 568-70.

36. *Id.* at 571.

37. *Crown Central*, 95 F.3d at 360.

38. *Id.* (citing *Lujan*, 504 U.S. at 560-61).

39. *See id.* ("There is no dispute regarding the latter two elements. Rather, this appeal focuses on the first: whether FOE's members have standing to sue in their own right.")

40. Ctr. for Biological Diversity v. EPA, 937 F.3d 533, 536-37, 545 (5th Cir. 2019).

summarized the facts of the case in Part I, noting that the Petitioners' opening brief addressed standing only in a footnote, and that standing was at first stipulated by the EPA. Intervenor American Petroleum Institute (API) argued against standing, claiming the Petitioners' members "have failed to substantiate either a concrete or particularized injury to their localized interests," and that the Petitioners failed to produce any evidence as to traceability.[41] As the Petitioners are associations, the court began by stating the three-part test for associational standing, but the decision turned on the first requirement that a member of the association would independently have standing by establishing (1) an injury in fact, (2) fairly traceable to the challenged conduct, (3) which can likely be redressed by the court.[42]

Part II of the opinion addressed the injury in fact requirement.[43] The court inquired into whether the alleged future injuries were sufficiently imminent, rather than speculative, to satisfy Article III standing requirements.[44] The court applied the "chain of possibilities" approach of *Clapper* to construct a four-link chain:

> In this case, the injuries in fact asserted by Petitioners' members depend on at least four conditions:
> 1. Discharge: Operators in the Gulf discharge pollutants, as authorized by the permit.
> 2. Geographic Nexus: The discharges reach areas of the Gulf in which the Petitioners' members have interests.
> 3. Temporal Nexus: The discharges are present at a time relevant to Petitioners' members' interests.
> 4. Adverse Effect: The discharges negatively affect Petitioners' members' interests.[45]

The court readily accepted the first condition, as the General Permit authorizes such discharges, but found that the four members' declarations were inadequate based on the other conditions.[46]

The court first addressed the declarations of Peter Galvin, Todd Steiner, and Susan Prévost and found each failed to satisfy the Geographic

---

41. *Id.* at 536; Brief for Intervenor at 23-33, *id.* (No. 18-60102).

42. *Ctr. for Biological Diversity*, 937 F.3d at 536. In the noted case, the court found the standing declarations insufficient to support individual members' standing and therefore did not consider the second and third prongs of the associational standing test and did not analyze the declarations that only supported those prongs. *Id.* at 536 n.1.

43. *Id.* at 537-42.

44. Lujan v. Defs. of Wildlife, 504 U.S. 555, 564 (1992).

45. *Id.* at 537-38 (citing Clapper v. Amnesty Int'l USA, 568 U.S. 398, 410 (2013)).

46. *Id.* at 538.

Nexus requirement, which requires the Petitioners to "show that they use the area affected by the challenged activity and not [merely] an area roughly in the vicinity."[47] Members each alleged future plans to visit the gulf coast, mentioning specific coastal locales and general plans to engage in recreational activities on the Gulf of Mexico.[48] The court found that the geographic remoteness of these declarations failed to establish that "members of the [Petitioner] associations 'plan to make use of *the specific sites*' where environmental effects would allegedly be felt."[49] The court compared two decisions from other circuits dealing with discharges to large bodies of water.[50] In *Texas Independent Producers & Royalty Owners Ass'n v. EPA*, the Seventh Circuit held that the Rio Grande was too long for discharges into one part of the river to necessarily establish injury in another.[51] In *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers*, the Eleventh Circuit found standing to challenge a general permit where members were able to see visible pollution arising from upstream mining discharges.[52] The court concluded that the members' failure to point to more specific locations in which the injury would occur, coupled with the vast size of the area covered by the General Permit, prevented their statements from supporting the argument for standing.[53]

The court next turned to the "more complicated" questions presented by the declarations of Jonathan Henderson.[54] In addition to using the Gulf for recreational activities, Henderson surveys the Gulf by boat and plane to monitor offshore industrial activity and track oil spills.[55] Beginning with the geographic-nexus requirement, the court noted that Henderson was "much closer to the Article III minimum" and assumed without deciding that he satisfied that requirement.[56] Nevertheless, the court found Henderson's declaration inadequate, as it failed to meet the temporal-nexus and adverse effect requirements.[57] As to the temporal-nexus

47. *Id.* at 538-39.
48. *Id.* at 539.
49. *Id.* at 538 (quoting Summers v. Earth Island Inst., 555 U.S. 488, 499 (2009)) (citing *Lujan*, 504 U.S. at 567 n.3).
50. *Id.* at 538-39.
51. Tex. Indep. Producers & Royalty Owners Ass'n v. EPA, 410 F.3d 964, 973 (7th Cir. 2005).
52. Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs, 781 F.3d 1271, 1279-80 (11th Cir. 2015).
53. *Id.* at 539.
54. *Id.* at 538, 540.
55. *Id.* at 540.
56. *Id.*
57. *Id.*

requirement, the court found that Henderson failed to furnish sufficient evidence that his trips will coincide with the discharges, a finding that would depend on factors such as the frequency of Henderson's trips, the frequency of discharges, and the duration of noticeable effects of the discharges.[58]

The court also found that Henderson could not show any adverse effect, as "someone who goes looking for pollution cannot claim an aesthetic injury in fact from seeing it."[59] The court catalogued a number of cases in which standing was not found where the party did not actually have an aesthetic interest, or voluntarily set that interest aside "to pursue an incompatible interest."[60] Thus, the court instead characterized Henderson as "pursuing his interest in locating pollution, and seeing pollution means he has succeeded in locating it."[61]

The court reconciled its holding with its reasoning in *Cedar Point*.[62] Petitioners argued that *Cedar Point* stood for the proposition that use of the water bodies receiving discharges was enough for standing.[63] The court rejected this, as the plaintiffs in *Cedar Point* regularly canoed in the part of Galveston Bay near the discharge, and the decision in *Cedar Point* cautioned against allowing an interest in a waterway to suffice for standing in any situation, regardless of size.[64] The court also found that the Petitioners had waived any standing arguments based on informational injury by failing to raise them in their opening brief.[65]

In Part III of the opinion, the court held that the Petitioners could also not meet the traceability requirement.[66] The court required of the Petitioners a "causal chain with at least two links": the first between the failure to issue an adequate EIS and the issuance of the General Permit, and the second between the issuance of the General Permit and the

58. *Id.*
59. *Id.*
60. *See* Am. Soc'y for Prevention of Cruelty to Animals v. Feld Entm't, Inc., 659 F.3d 13, 21 (D.C. Cir. 2011); New England Anti-Vivisection Soc'y v. U.S. Fish & Wildlife Serv., 208 F. Supp. 3d 142, 175 (D.D.C. 2016).
61. *Id.* at 541.
62. Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546 (5th Cir. 1996).
63. Ctr. for Biological Diversity v. EPA, 937 F.3d 533, 541 (5th Cir. 2019). Indeed, as noted in *Cedar Point*, this is supported by a literal reading of the *Powell Duffryn* test. *Cedar Point*, 73 F.3d at 558 n.24.
64. *Cedar Point*, 73 F.3d at 558 n.4.
65. *Ctr. for Biological Diversity*, 937 F.3d at 542.
66. *Id.* at 542-45.

discharges complained of.[67] The court quickly determined that the first link was established.[68]

The second link, between the issuance of the General Permit and the discharges causing injury, garnered closer scrutiny from the court.[69] Analogizing the government surveillance at issue in *Clapper*, the court noted that the allegedly injurious discharges must be "pursuant to the General Permit, and not pursuant to some other authority or in violation of law."[70] The court synthesized *Cedar Point* and *Crown Central* and determined that the existence of this causal link depends on "many factors, including the size of the waterway, the proximity of the source and the injury, forces like water currents, and whether discharges will evaporate or become diluted."[71] Because of the size of the Gulf of Mexico and the conclusory nature of the declarations, the court held that the Petitioners lacked standing and did not reach the merits of their claims.[72]

IV. ANALYSIS

The court's decision in this case implicates thorny issues in standing doctrine and Clean Water Act litigation. As a threshold matter, the logic the court applies in Part III to determine that the Petitioners cannot demonstrate traceability contradicts the logic in Part II. In determining that Galvin, Steiner, and Prévost failed to meet the geographic-nexus requirement, the court emphasized the sheer vastness of the Gulf of Mexico.[73] The court raised this point at oral argument, along with the assertion that the effects of any discharges disperse within a thousand meters of the source of the discharge.[74] Although the court correctly interprets these facts as striking a fatal blow to these members' claims of injury in fact, the court's own assumptions contradict its analysis when it comes to traceability.

---

67. *Id.* at 542-43.
68. *Id.* at 543.
69. *Id.* at 543-45.
70. *Id.* at 544 (citing Clapper v. Amnesty Int'l USA, 568 U.S. 398, 410-11 (2013)).
71. *Id.* at 544-45 (first citing Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp., 95 F.3d 358, 361-62 (5th Cir. 1996); and then citing Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546, 557 (5th Cir. 1996)).
72. *Id.* at 545 (citing Tex. Indep. Producers & Royalty Owners Ass'n v. EPA, 410 F.3d 964, 973 (7th Cir. 2005)).
73. *Id.* at 539 ("The Gulf is huge. It covers about 600,000 square miles, and it contains more than 640 quadrillion gallons of water.")
74. Oral Argument at 14:20-16:10, Ctr. for Biological Diversity v. EPA, 937 F.3d 533 (5th Cir. 2019) (No. 18-60102), http://www.ca5.uscourts.gov/OralArgRecordings/18/18-60102_4-3-2019.MP3.

The court begins its traceability analysis by supposing that the Petitioners had shown an injury in fact.[75] After articulating the two-link causal chain, the court finds that the first link, between the allegedly inadequate EIS and the issuance of the General Permit, is duly satisfied.[76] The court relies on *Clapper*, comparing the possibility that a discharge could be traced back to its source to *Clapper*'s skepticism that interception of communications could be traced to one specific law out of many that authorize surveillance.[77]

The court invokes *Crown Central* to limit the power of the "truism that water flows downstream."[78] The court suggests such common-sense inferences are limited to "case[s] involving small bod[ies] of water, close proximity, well-understood water currents, and persistent discharges."[79] Here, the court misses a key distinction that differentiates the noted case from both *Cedar Point* and *Crown Central*: in each, the plaintiffs were *suing an individual polluter*.[80] Here, the Petitioners are seeking review of EPA's *authorization of pollution*, and a broad one at that.[81] Once the court assumes that Plaintiffs have an injury in fact, traceability becomes simple: if Henderson (or anyone else) were to take a purely aesthetic or recreational trip to the vast area covered by the General Permit, and happened to see an oil slick, the traceability of that injury to the General Permit's authorization of discharges would be quite clear, and for fundamentally the same reason the court found the Petitioners failed to establish injury in fact: the size of the waterway and dispersal of the

75. *Ctr. for Biological Diversity*, 937 F.3d at 542 ("Even if Petitioners could show injury, they could not meet another of Article III's standing requirements: traceability.").

76. *Id.* at 543. The court is generous in its treatment of this issue: it finds that "Petitioners have made this showing," then notes that the showing is undisputed in this case, and goes on to "assum[e] a connection between the EIS and EPA's issuance of the General Permit." *Id.*

77. *Id.* at 544 (citing Clapper v. Amnesty Int'l USA, 568 U.S. 398, 413 (2013)). While this is an apt analogy, the "chain of possibilities" approach in *Clapper* might better be used as an analytical tool than a prescriptive test, especially considering that Justice Alito acknowledges the unique circumstances in *Clapper* that called for "especially rigorous" standing analysis. *Clapper*, 568 U.S. at 408-09. The "chain of possibilities" approach drawn from *Clapper* may be what draws the court's traceability analysis astray, as it atomizes the claims in a case, possibly to the point of obscuring common sense or causing redundant analysis.

78. *Ctr. for Biological Diversity*, 937 F.3d at 545.

79. *Id.* (citing Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546, 557 (5th Cir. 1996)).

80. *See Cedar Point*, 73 F.3d at 550; Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp., 95 F.3d 358, 359 (5th Cir. 1996).

81. *See Ctr. for Biological Diversity*, 937 F.3d at 535-36.

currents make it improbable that the source is from some faraway discharge not covered by the General Permit.[82]

To be sure, this scenario assumes some affirmative findings of fact that the court diligently avoided: if the discharges are buffeted in offensive form for considerable distance and duration, then injury-in-fact is more likely; if the currents quickly dispatch any pungent pollutants before they travel a significant distance, then traceability to a source is near assured to the unfortunate observer; absent any findings, the court leaves us in uncharted waters.

The underlying feature that distinguishes the noted case from many of the cited precedents is that it is a petition for review of an administrative action.[83] The Clean Water Act created two avenues for citizens to seek relief in the courts: a suit for enforcement in a district court and a petition for judicial review of certain administrative actions in a court of appeal.[84] The petition for judicial review vests original jurisdiction in the court of appeal and has rigid timing requirements: "If an EPA action is on the list of enumerated actions, petitioners must sue within 120 days or forever lose their right to do so."[85] Commentators have noted significant differences between this process and the analogous provision of the Clean Air Act; the Clean Air Act provides more explicit and detailed instructions for rulemaking and appellate review.[86] The vagueness of the CWA has flummoxed litigants and jurists alike, and the noted case is not the first in which a thorny jurisdictional matter escaped notice at first.[87] In the noted case, the Fifth Circuit found that the Petitioners had forfeited their informational injury argument for standing and indicated in a footnote that it was only because of the court's indulgence that the Petitioner's other standing arguments were considered at all.[88] This highlights the necessity

---

82. *Cf. id.* at 539 ("Moreover, we do not know how widely water currents might transport any pollutants.").

83. *See id.* at 535-36.

84. 33 U.S.C. §§ 1365, 1369 (2018).

85. Allison LaPlante & Lia Comerford, *On Judicial Review Under the Clean Water Act in the Wake of* Decker v. Northwest Environmental Defense Center*: What We Now Know and What We Have Yet to Find Out,* 43 ENVTL. L. 767, 775 (2013) (citing 33 U.S.C. § 1369(b)(1)(G) (2006)).

86. *See id.* at 778-79.

87. *See id.* at 780-88 ("[T]he issues surrounding the court's jurisdiction also started to creep into the case at this point for the first time in its then four-year history [in defendant's petitions for rehearing and rehearing en banc.]" (detailing the procedural history and holding of Decker v. Nw. Envtl. Def. Cent., 133 S. Ct. 1326 (2013))).

88. *Ctr. for Biological Diversity*, 937 F.3d at 542 n.4 ("Petitioners have arguably forfeited all [standing arguments] by limiting their jurisdictional argument to a single footnote of their opening brief. But we overlook Petitioners' decision to include only a cursory discussion of

of anticipatory pleading in administrative review cases such as this, where a court of appeal has original jurisdiction and petitioners have only a brief window to seek relief, as opposed to enforcement cases like *Cedar Point*, where "the plaintiffs introduced 'expert testimony that [the defendant's] produced water was typical, and that typical produced water has harmful effects on water quality and marine life.' They could thus show that defendant 'contributed to the pollution.'"[89]

V. CONCLUSION

A party seeking relief in the federal courts, whether under the Clean Water Act or any other basis for jurisdiction, bears at least the burden of establishing "the irreducible constitutional minimum of standing."[90] Initially, this burden is relatively light, but as the case progresses, the proof demanded of a party asserting standing rises "in the same way as any other matter on which the [party] bears the burden of proof."[91] Reality does not quite conform to this ideal in administrative review cases, particularly under the arcane standards of the Clean Water Act. A court of appeal might normally expect to be presented with a well-developed record on appeal, in which all parties have had a full opportunity to brief, call fact witnesses, and seek out expert testimony, and this is indeed the case of appeals from CWA enforcement actions.[92] However, in an administrative review action, the court of appeal is presented with the scientific record, the briefing, and scant declarations from the parties and is expected to reach a disposition on that alone.

Although administrative review petitioners and enforcement plaintiffs have vastly different opportunities to develop a record, an appellate court is held to the same standard: the facts must establish that "irreducible constitutional minimum" of standing before the court can

---

standing because we assume they had a good-faith (though mistaken) belief that standing would be both undisputed and easily resolved." (citations omitted)).

89. *Id.* at 544 (alteration in original) (citation omitted) (quoting Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546, 558 (5th Cir. 1996)). Notably, the court earlier in the opinion found that a past decision in which standing was found in an administrative review case was not contrary, because standing was undisputed and the court therefore "alluded to evidence in the record but did not detail how that evidence established an injury in fact." *See id.* at 539 n.3 (addressing Gulf Restoration Network v. Salazar, 683 F.3d 158 (5th Cir. 2012)). However, in that opinion, the court did discuss two plaintiffs whose professions (conservation photographer and kayaker) supported cognizable interests for the purpose of standing. *Salazar*, 683 F.3d at 167.

90. *Cf.* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992).

91. *Id.* at 561.

92. *See Cedar Point*, 73 F.3d at 550; Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp., 95 F.3d 358, 359 (5th Cir. 1996).

reach the merits. Thus, in an administrative review case, it is necessary for the court of appeal to make factual determinations traditionally left to a district judge (who can take live testimony and follow up on loose ends), rely on precedents where plaintiffs were afforded a fulsome, relatively forgiving opportunity to prove standing, and apply them to cases where anything less than diligent foresight could lead to forfeiture of standing arguments and a hard 120-day deadline forecloses reviewability altogether if petitioners fail to act swiftly. Standing is a crucial tool of judicial restraint, but both in finding jurisdiction and finding its absence, courts must be cognizant of Justice Scalia's admonition that "[s]tanding is not 'an ingenious academic exercise in the conceivable.'"[93] The bifurcated structure of the Clean Water Act affords courts and litigants only a hastened and diminished opportunity to perfect a record, and courts of appeal will likely continue to struggle with standing determinations on such bare evidence.

Thomas Frederick*

93. *Lujan*, 504 U.S. at 565 (citing United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 688 (1973)).

* © 2020 Thomas Frederick. J.D. candidate 2021, Tulane University School of Law; B.S.E., Chemical Engineering, 2017, Tulane University. Thomas is interested in practicing environmental and civil rights law. The author would like to thank his family and the staff and editorial board of the *Tulane Environmental Law Journal*.