

The Persistent Problem of Standing in Environmental Law

by Holly Doremus

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The first panel at this conference discussed standing to invoke federal court review, and related doctrines that limit access to the courts. That a standing panel should begin the day's discussion of the relationship between constitutional and environmental law is fitting in three respects. First, establishing standing is the initial step in pressing a claim in federal court. Second, standing was the issue in one of the first U.S. Supreme Court cases of the modern environmental era,¹ and it remains the most persistent constitutional quandary for environmental law. Third, citizen standing is critical to the success of environmental law.

The early architects of statutory environmental law understood that the executive branch might not always wholeheartedly pursue the environmental goals set by the U.S. Congress.² They therefore sought to ensure that interested citizens could fill that role when the government did not. Environmental citizen suits presented the courts with a new situation, one that immediately raised standing issues.

Standing is the most important gatekeeper doctrine for the federal courts, determining who can, and who cannot, invoke their jurisdiction. The Supreme Court has derived (some might say invented) the doctrine of standing from the U.S. Constitution's description of the judicial power of the United States as extending to specified "cases" and "controversies."³ That forecloses friendly suits or requests for advisory opinions.⁴ In order to ensure that the process will be truly adversarial,⁵ and that the legal issues "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,"⁶ the Court requires that a would-be plaintiff show that she has suffered (1) an "injury in fact;" (2) which is "fairly traceable" to the defen-

dant's challenged action; and (3) that it is likely that a favorable ruling would redress that injury.⁷

Environmental conflicts test the limits of each of those elements. The interests environmental law is intended to protect are diffuse, often shared by millions of people. They include interests in directly observing natural areas, but also the satisfaction of knowing that beautiful areas or astonishing creatures continue to exist, whether or not we will experience them in our lifetime. Indeed, environmental law is supposed to protect and nurture the environmental preferences of future generations as well as those of people now living.⁸ Furthermore, environmental harms are frequently caused by a combination of actions taken by a range of actors, complicating the task of showing that any defendant is responsible for the injury, or that a court victory will correct the problem. It is no surprise, therefore, that many of the most important standing cases have been environmental, and that standing remains an issue in a high proportion of environmental cases.

In the very first environmental standing case to reach the Supreme Court, *Sierra Club v. Morton*,⁹ the Court addressed the nature of the requisite injury. The Sierra Club sought to challenge the decision to authorize development of a ski resort in a national forest. The Court handed the Sierra Club, and the generations of environmental plaintiffs that would follow, both a crucial victory and an important defeat.

The good news for environmental litigants was that non-economic injury would suffice; the Court recognized their interest in the esthetics and ecology of the area as the type of harm that can support standing.¹⁰ Furthermore, the Court made it clear that the fact that an interest is widely shared is not a barrier to standing.¹¹ The bad news for the Sierra Club was that it would be required to show that it or its members were concretely injured. Its long-standing expertise and interest in protecting the Sierra Nevada range from development was dismissed as a "mere interest in the problem,"

1. *Sierra Club v. Morton*, 405 U.S. 727, 2 ELR 20469 (1972).

2. *E.g.*, JOSEPH L. SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* (1971).

3. U.S. CONST. art. III, §2.

4. *Flast v. Cohen*, 392 U.S. 83, 95 (1968); *Massachusetts v. EPA*, 549 U.S. 497, 516, 37 ELR 20075 (2007).

5. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581, 22 ELR 20913 (1992) (Kennedy, J., concurring).

6. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

7. *Lujan*, 504 U.S. at 560-61.

8. One of the purposes of the National Environmental Policy Act, for example, is to help the nation "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations." 42 U.S.C. §4331(b)(1).

9. 405 U.S. 727, 2 ELR 20192 (1972).

10. *Id.* at 734.

11. *Id.* ("the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process").

insufficient to invoke the jurisdiction of the federal courts.¹² Rather, in “a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome,”¹³ the Court ruled that environmental plaintiffs would have to show that they used the area in a way that would be affected by the challenged action.

Since *Sierra Club*, the Court has heard many more environmental standing cases, but it has failed to bring clarity to the doctrine. The Court is closely, but deeply, divided. Several of the Justices are reliably sympathetic to citizen suits, several others are reliably hostile to them, and Justice Anthony Kennedy perches uncomfortably somewhere in the middle. The result is a progression of 5-4 decisions that do not make a coherent whole, but that lawyers, law students, and lower court judges must struggle to understand.

This panel took on that daunting task with particular reference to the Court’s most recent word on the subject, and to the wave of climate change litigation now making its way through the district and circuit courts.

Deputy Solicitor General Edwin Kneeder and Prof. Bradford C. Mank of the University of Cincinnati College of Law provided their views on the Court’s most recent standing decision, *Summers v. Earth Island Institute*.¹⁴ Professor Mank expands on his presentation in this issue. In *Summers*, environmental groups, including the Sierra Club, sought to enjoin a post-fire salvage-timber sale in California, arguing that U.S. Forest Service regulations exempting small sales from notice, comment, and administrative appeal processes were unlawful. After winning a preliminary injunction from the district court, the plaintiffs settled their dispute with the Forest Service about that one sale. Over the government’s objection that the settlement removed any injury-in-fact, the district court proceeded to hold the challenged regulations invalid and enjoined their application nationwide.¹⁵ The U.S. Court of Appeals for the Ninth Circuit affirmed in relevant part,¹⁶ only to be reversed by a divided Supreme Court. Justice Antonin Scalia, writing for a five-Justice majority, rejected the argument that one or more of the environmental plaintiffs’ 700,000 members nationwide would surely be harmed by implementation of the challenged regulations across the country. Professor Mank concludes that once again the Court has failed to provide clarity. He cautions, however, that the lower courts should not overextend Justice Scalia’s demand for a showing of injury to an identified individual in a specific location to cases where the injury is inherently probabilistic, or to allow the government to evade all review of nationwide decisions.

David Bookbinder of the Sierra Club took up the topic of standing in climate change litigation. Global warming has spawned a wide variety of lawsuits. Environmental organizations have sued federal agencies for not doing enough to prevent greenhouse gas (GHG) emissions,¹⁷ and for failing to document the extent to which their actions contribute to climate change.¹⁸ States have joined with environmental interests to seek tort remedies against major polluters.¹⁹ When federal agencies have tried to regulate GHG emissions, industry has headed for the courthouse.²⁰ All of these cases raise standing issues in one form or another. The most difficult issue for environmental litigants may be redressability: while it is becoming ever easier to show that climate change causes concrete and imminent injury, it is ever more difficult to show that any judicial remedy could solve the problem. Bookbinder’s presentation, which has been transcribed for this issue, goes through the standing issues that have been raised in litigation so far, as well as the wrangling over how Congress might protect standing in what has so far proved its abortive attempt to adopt climate legislation.

Perhaps, the clearest lesson from this panel is that the law of environmental standing remains exquisitely murky. It will surely continue to bedevil litigants, law students, and judges for years to come.

12. *Id.* at 739.

13. *Id.* at 740.

14. 129 S. Ct. 1142, 39 ELR 20047 (2009).

15. *Earth Island Inst. v. Ruthenbeck*, No. CIV F-03-6386 JKS, 2005 WL 5280466 (E.D. Cal., Sept. 20, 2005).

16. *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 37 ELR 20133a (9th Cir. 2007).

17. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 37 ELR 20075 (2007).

18. *See, e.g.*, *Center for Biological Diversity v. U.S. Dept. of Interior*, 563 F.3d 466, 39 ELR 20091 (D.C. Cir. 2009).

19. *See, e.g.*, *Connecticut v. American Electric Power*, 582 F.3d 309, 39 ELR 20215 (2d Cir. 2009).

20. At least 17 challenges have been filed to the U.S. Environmental Protection Agency’s (EPA’s) finding that GHG emissions from automobiles cause or contribute to pollution that may reasonably be anticipated to endanger public health or welfare. They have been consolidated under the title *Coalition for Responsible Regulation v. EPA*, No. 09-1322 (D.D.C.).