COMMENT

Standing to Challenge Climate Change Decisions

by Barry Kellman

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When the government decides to approve, or not to approve, some activity that has climate change impacts, who has standing to bring a legal challenge? Answers are tricky and, ultimately, unsatisfying. What is clear is that the sheer number of cases presenting this question is increasing, and there is every reason to believe that this trend will accelerate into the future. That substantial litigation resources are devoted to doctrinal debates about who does or does not have standing to bring a climate change challenge represents, in this writer's opinion, a diversion of scarce legal resources. Climate change is a serious matter, and, amidst an increasingly busy agenda, it is imperative to resolve climate change challenges on the merits.

The first part of this Comment explains the logic of standing doctrine and why this logic is so inapt with regard to climate change. The second part organizes the spate of recent rulings on standing to bring climate change challenges so that readers can appreciate the paradox that courts face in applying doctrine where it is logically inapposite.[1]

I. Understanding Standing

Not everyone may litigate every conceivable wrong. The courts would be inundated, and some complaints might be weakly advocated because, if anyone can be a plaintiff, many would lose interest in pursuing the dispute. It makes sense to limit the right to sue to those persons who have been caused injury by the wrongful act and will benefit from a legal ruling that redresses the complained-of wrong. Standing, as a doctrinal foundation of civil litigation inhering from tort principles of causation and redressability, is at root framed by the idea of particularized_injury: Only people who have suffered a particular injury caused by the defendant's conduct may complain of it. Thus, each civil litigant bears the burden of establishing (1) an injury-in-fact that is (a) concrete and particularized and (b) actual or imminent, and (2) a fairly traceable causal connection between the injury and the conduct complained of, which (3) likely will be redressed by a favorable decision.[2]

Initially, it is important to note that arguments about standing are different from arguments about whether the plaintiff has presented a justiciable claim. Some complaints simply do not allege a legal dispute; they should be dismissed for failing to present a case or controversy. Especially in connection with government acts, there are many policy disagreements that do not give any aggrieved party a cause of action. Regardless of who may bring the suit, the suit itself may lack merit or, for other reasons, be nonjusticiable. By contrast, a dispute over standing should arise only if there is a legal case to be made. To question standing is to ask whether the moving plaintiff is the right advocate: Has the plaintiff, among all those who may be aggrieved by a legal wrong, suffered a particular injury such that this plaintiff should be permitted to advance the claim?

A. The Charade of Environmental Standing

The logic of standing, grounded in tort concepts of liability and undeniably useful throughout so many domains of law, is twisted by the inherent logic of most environmental controversies and serves as little more than a call for ritual observance of doctrine. The twist is that most environmental disputes are about acts that have not yet happened, the consequences of which are not yet suffered and indeed may never be suffered. While some environmental disputes are about an actual nuisance for which relief is sought, many are about how the government is regulating common resources on behalf of every American.

The U.S. Congress has enacted various laws about how government is to perform environmental regulation—laws designed to benefit not only the living, but also the as-yet imaginary generations to come. With regard to environmental regulation, some interests that statutes seek to protect literally cannot advocate for themselves because they do not yet exist. There are other interests of significance

1. For a tabular analysis of many of the climate standing cases discussed here, see Bruce Myers et al., *Charting an Uncertain Legal Climate: Article III Standing in Lawsuits to Combat Climate Change*, 45 ELR 10509 (June 2015).

2. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 22 ELR 20913 (1992); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81, 30 ELR 20246 (2000).

that cannot advocate for themselves because they are not human, indeed may not even be animate.

Moreover, the logic of standing in environmental contexts often operates perversely to the interests sought to be advanced. For example, a wilderness is a place that few people visit; an extreme wilderness may be a place to which no one goes. If no one has ever gone to a wilderness area, who might have standing to challenge an agency decision to no longer protect it, even if Congress has enacted a law that obligates such protection? This was the problem in *Lujan v. Defenders of Wildlife*,[3] where the plaintiffs were denied standing to complain of practices jeopardizing endangered species in far-off lands because of the plaintiffs' inability to show they would actually go to where the species reside. The point here is that the more attenuated the impact that a decision has on any particular interest, the less may be anyone's standing to challenge it, even if the impact is portentous for the environment.

The most central objection here has to do with the primary logic of environmental law, that redress of environmental harm already suffered is entirely too little too late. No one would or should accept a legal system that addressed environmentally destructive activities only after the fact as a matter of responsibility in tort. All environmental statutes are designed primarily to prevent or deter harm, not redress it. It is often difficult to know, however, who might be harmed by ill-performed prevention responsibilities, as the harm the statute is designed to address has not happened and may never happen.

The illogic of standing doctrine in the context of environmental disputes has meant that environmental organizations must identify an individual who has a recreational, aesthetic, or other recognized interest in the area likely to be affected by the challenged governmental action. Groups such as the Sierra Club solicit members who happen to reside in or near federal lands that might be licensed for mining or oil drilling, forests and waterways that must be managed, habitats for environmental species, or other locales where proposed action might have adverse environmental impacts. The devoted environmentalist in the suburbs might be dismayed over scars inflicted to a treasured piece of America, but only someone who actually hikes in or near the proposed site of the challenged action may be conferred standing.[4] This is true even if the alleged wrongfulness of the action is harm to a natural resource as to which every American (including the unborn in the suburbs) has an indivisible interest.

Anyone who tracks federal district court rulings on environmental matters is all too familiar with pages of summarized affidavits swearing that the testator actually jogs through the affected forest or valley and will no doubt grievously suffer, in some unique way, if the court does not rectify the matter. By this point, many environmental organizations have gotten good at playing the game and can readily find the necessary plaintiffs, prepare affidavits for them to sign, and deliver them to a judge who accepts the ritualized observance of stipulated claims of injury before allowing the parties to discuss the merits.

B. Standing and Climate Change

It takes only a moment to appreciate that the phenomenon of climate change entirely defies any notion of particularized injury. In every sense, the problem is global—what a single governmental action might contribute or prevent with regard to climate change is impossible to assess in any discernible sense. Climate change is the ultimate problem of the commons: the entirety of humanity, some a lot more than others, burning fossil fuels and other organic materials and thereby releasing carbon dioxide (CO_2) and other greenhouse gases (GHGs) into the stratosphere where, along with emissions from everywhere else, they block some solar energy from escaping into space. It is absurd to think that any one polluter, no matter how huge and filthy, would add a difference-making quantity of GHGs such that the harms of climate change might be attributable to it.

It is exponentially more absurd to think that if the polluter is located in, say, Illinois, that the harms caused by its pollution through the process of climate change are going to affect people in Illinois any more particularly than people in Louisiana or Alaska or anywhere else. It is preposterous to base a legal rule on the idea that a ton of CO_2 molecules could be tracked from a specific facility's smokestack to the stratosphere and thereby to melting glaciers and destructive weather to the detriment of people who jog near that emitting facility. Or consider the leasing of a new domain for oil drilling or a new pipeline for taking the oil to market that could contribute incrementally to the overall climate change phenomenon. To link that tiny increment of harm to effects proximate to the site of the leased activities such that, to have standing to complain, a plaintiff must be someone who jogs through the leased area, defies all reason.

Perhaps more than any phenomenon that humanity has ever faced, climate change is about common injury differentially experienced depending on factors unrelated to the location of any individual causal agent. How GHGs are emitted, how they spread and interact in the stratosphere,

3. *Lujan*, 504 U.S. 555.
4. The concept of organizational standing enables a center, club, or other nongovernmental organization to gain standing to sue if one of its members is proximately caused particular injury by the alleged wrongful conduct. The organization must show that (1) at least one member has individual standing; (2) the lawsuit relates to the purposes of the organization; and (3) neither the litigation itself nor the relief provided require the participation of individual plaintiffs; generally, the organization is pursuing injunctive and/or declaratory relief, not damages. *See Friends of the Earth*, 528 U.S. 167.

how the heat they induce causes changes and adds extremes to weather—all of these processes defy the traceable logic of causation and redressability that is at the core of legal standing. Thus, in a case where the claim is that a government action or inaction permits or leaves unregulated some activity that (1) emits air pollution, which (2) contributes incrementally to climate change and (3) causes harm, the causal linkage is attenuated at multiple levels. It should not be surprising, therefore, that courts, facing an assertion that a complainant lacks standing to challenge a government action implicating climate change, render opinions that are often logically suspect.

II. Surveying the Case Law

Cases involving standing to bring climate change challenges align into two distinct categories. First are cases where the plaintiff challenges the government's alleged failure to consider the climate change impacts of its decisions under the National Environmental Policy Act (NEPA)[5] and other statutes designed to protect the natural environment from unconsidered harm. Second are cases where the plaintiff alleges that the government should be doing more to regulate GHG emissions under the Clean Air Act (CAA)[6] and other pollution-control statutes.

A. Consideration of Climate Change Impacts

The federal government routinely issues licenses for oil drilling, mining, grazing, timber harvesting, and many other activities, any one of which could and probably will contribute to climate change, however slightly. Under NEPA and other statutes, the government must consider the environmental impacts of these licensed activities; failure to do so means that the decision must be reconsidered, delaying and increasing the cost of the activity even if it ultimately is approved.

As climate change has become a more prominent phenomenon, the question of whether it must be considered in connection with these licensing decisions has been recurrently litigated. One objection that has until recently served to deny standing is that the alleged failure to consider a decision's climate change impacts is not traceable to the plaintiff's harm. The leading case was *Center for Biological Diversity v. Department of Interior*,[7] where the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit denied standing to petitioners complaining of the U.S. Department of the Interior's decision to expand oil and gas leasing areas in the outer continental shelf without considering the leasing program's effects on climate change. The court denied standing because the plaintiffs could

> only aver that any significant adverse effects of climate change "may" occur at some point in the future. This does not amount to the actual, imminent, or "certainly impending" injury required to establish standing. Second, climate change is a harm that is shared by humanity at large, and the redress that Petitioners seek—to prevent an increase in global temperature—is not focused any more on these petitioners than it is on the remainder of the world's population.[8]

To similar effect was the U.S. District Court for New Mexico's ruling in *Amigos Bravos v. Bureau of Land Management*,[9] where the issue was approval of oil and gas lease sales allegedly made without the Bureau of Land Management's (BLM's) consideration of climate change impacts. The court denied the plaintiffs standing because of a lack of any evidence that temperature increases and water shortages induced by climate change are anticipated to occur for many years or decades, and thus "it is questionable whether they represent an actual and imminent threat to Declarants' interests."[10]

But the case law has pivoted recently in favor of standing for plaintiffs if they can establish that consideration of climate change would have impacted the decision that allegedly harms them, even if the harm is not itself related to climate change. Thus, in *WildEarth Guardians v. Jewell*,[11] the D.C. Circuit considered a challenge to BLM's decision to divide a tract of federal land available for coal mining into two tracts and to offer them for lease through separate competitive bidding processes. The plaintiffs, whose recreational and aesthetic interests would allegedly be harmed by the decision, claimed that BLM's environmental impact statement failed to adequately consider the increase in global climate change caused by future mining. The district court had denied standing on the ground that the plaintiffs "could not demonstrate a link between their members' recreational and aesthetic interests, 'which are uniformly local, and the diffuse and unpredictable effects of [greenhouse gas] emissions.'"[12]

The D.C. Circuit reversed, even though it agreed that the plaintiffs could not establish standing based on the effects of global climate change. The court found that the plaintiffs' other claims having to do with the aesthetic impact of the proposed mining were sufficient to justify standing; because standing to challenge the decision was otherwise justified, the plaintiffs could challenge any alleged deficiency in the decisionmaking process. According to the court, "their members' injuries are caused by the allegedly unlawful [decision] and would be redressed by vacatur of the [decision] on the basis of any of the procedural defects identified in the FEIS [final environmental impact statement]."[13]

The *Jewell* decision is an important half step in the logic of climate change standing. Its essence is a recognition that an agency's decision to lease environmentally

5. 42 U.S.C. §§4321-4370f, ELR Stat. NEPA §§2-209.
6. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.
7. 563 F.3d 466 (D.C. Cir. 2009).
8. *Id.* at 478.
9. 816 F. Supp. 2d 1118, 41 ELR 20261 (D.N.M. 2011).
10. *Id.* at 1130.
11. 738 F.3d 298, 44 ELR 20001 (D.C. Cir. 2013).
12. *Id.* at 307, quoting WildEarth Guardians v. Jewell, 880 F. Supp. 2d 77, 84 (D.D.C. 2012).
13. *Id.* at 308.

impactful activities is the culmination of having considered many implications of those activities. Congress has designed a rigorous system for preventing uninformed decisionmaking. If a material aspect of the decisionmaking process is inadequately or wrongly considered, then the decision that is the product of that inadequate consideration may be challenged by anyone proximately affected by that decision. Thus, with regard to plaintiffs' standing, even though plaintiffs could not trace a specific causal link between the failure to consider climate change and their particular injury, they could trace a specific causal link between the decision to approve the lease and their particular injury, and as that decision may be flawed, plaintiffs have standing.

In an unpublished decision, the U.S. Court of Appeals for the Ninth Circuit expressed the same logic in *Montana Environmental Information Center v. U.S. Bureau of Land Management*.[14] Vacating and remanding a decision by the U.S. District Court for Montana, the Ninth Circuit concluded that environmental groups could challenge BLM's decision to sell oil and gas leases in Montana on the basis of the agency's failure to consider climate change effects:

> Although Appellants' claims of procedural *error* relate to the government's alleged failure to consider climate-change effects, Appellants' injuries which *resulted from* that error need not. For standing, it matters only whether the challenged governmental action would cause the plaintiff a concrete and redressable injury. Once such injury is established, the plaintiff may seek to invalidate the action that caused it by identifying all grounds on which the agency may have failed to comply with its statutory mandate. . . . Therefore, Appellants may have standing to challenge the government's sale of oil and gas leases on the basis of any concrete injury that is caused by such sale and which would likely be remedied by the sale's invalidation.[15]

In both *Jewell* and *Montana*, the plaintiffs established standing on bases other than climate change and, once having standing, could "piggy-back" the climate change issue onto their other concerns. To similar effect is *High Country Conservation Advocates v. U.S. Forest Service*,[16] where environmental groups were found to have standing to challenge the U.S. Forest Service's authorization of various companies' on-the-ground mining exploration activities due to the Service's alleged failure to take a hard look at the impact of GHGs. The U.S. District Court for Colorado rejected the companies' argument that the plaintiffs lacked standing to challenge the decision because plaintiffs could not draw a line between the alleged inadequate analysis of the impacts of GHGs and the particular harm to their recreational interests. The court offered that a plaintiff who has otherwise demonstrated standing need not demonstrate a nexus between the right asserted and the injury alleged.

A subtle expansion of this view is manifest in the very recent decision in *WildEarth Guardians v. U.S. Forest Service*.[17] The U.S. District Court of Wyoming upheld environmental groups' standing to challenge the Forest Service's issuance of two large coal leases, allegedly without taking a hard look at the direct and indirect climate impacts caused by emissions from coal mining and combustion. Relevant to the group's organizational standing were the affidavits of members who were geographically not proximate to the leases in dispute. These affiants' claims of injury were based exclusively on coal mining's contribution to climate change—that is, without any claim of any direct or particularized injuries. The court recognized that the leases would produce about 2 billion tons of coal, which, when burned, would result in more than 3 billion tons of CO_2 emissions, and that the consequent climate change could affect property interests of environmental group members in California, Florida, New Jersey, and Texas.

There is a somewhat revolutionary implication here that, with regard to climate change, plaintiffs' standing may be assessed without regard to any particular geographic delimitation that restricts standing to only people who are caused injury because of their proximity to the offending source. If I, living on the shores of Lake Michigan, can demonstrate that a decision to lease Wyoming coal mines, along with infinite other emitting activities from everywhere else, will adversely impact the climate that in the aggregate will harm my recreational interests, then why should I have less standing than someone in Wyoming to sue, especially if the Wyoming claimant does not challenge the decision on any grounds related to his proximity? The causal relationship established by either of us is identical, and the only reason to distinguish our standing would be because of a historical inclination to think of environmental harms as local nuisances and not because of any rational appreciation of the substance of the challenge to the approved activity.

B. Requirements for Controlling GHG Emissions

In the cases considered here, the challenge to governmental action is distinctly different than in the set of cases previously discussed where plaintiffs challenged agency decisions having climate change impacts as procedurally flawed. Here, the claims are that the government did not satisfy legal requirements for mitigating climate change by regulating emissions of GHGs, not under NEPA, but under the CAA or another pollution control statute. Initially, it might be suggested that the logic of someone having standing to bring a challenge on this basis might be stronger than in the earlier-discussed NEPA context. In these cases, there is no serious question that curtailing (or not curtailing) GHG emissions is causally connected to the magnitude of climate change, and therefore a deci-

14. No. 13-35688, 45 ELR 20160 (9th Cir. Aug. 31, 2015), http://cdn.ca9.uscourts.gov/datastore/memoranda/2015/08/31/13-35688.pdf.
15. *Id.* slip op. at 3-4 (citations omitted).
16. No. 13-cv-01723-RBJ, 44 ELR 20144 (D. Colo. June 27, 2014).
17. No. 12-CV-85-ABJ (D. Wyo. Aug. 14, 2015).

sion by the government not to observe its obligations must cause injury to anyone harmed by climate change.

The leading case is *Massachusetts v. EPA*,[18] the first U.S. Supreme Court decision to overtly confront climate change. At issue was whether the U.S. Environmental Protection Agency (EPA) was obligated pursuant to CAA §202 to identify CO_2 and other GHGs as pollutants. If so, then EPA would be obligated by the CAA to regulate GHG emissions. The Justices fiercely debated whether Massachusetts, representing a consortium of states and environmental interest groups, had standing to sue. As to the objection that EPA regulation would have only a partial impact on climate change, Justice John Paul Stevens clarified that the government does not "generally solve massive problems in one fell regulatory swoop," and "that the first step might be tentative does not by itself support the notion that federal courts lack jurisdiction to determine whether that step conforms to law."[19]

The *Massachusetts* Court went on to rule that (1) the evidence of GHG emissions' causal connection to climate change was overwhelming; (2) the evidence of climate change's emerging consequences to coastal erosion, flooding, and other weather-related harms was overwhelming; and therefore (3) Massachusetts had standing to advance its own state interests in preventing harms to its resources. The Court left unclear whether this logic applied only to states or to anyone who could establish a comparable causal chain. Certainly, the Court's reasoning that Massachusetts met the standing test for injury, causation, and redressability could be reasonably advanced by private plaintiffs who allege similar injuries from rising sea levels to demonstrate that their allegations about harm from climate change also meet Article III standing principles.

Subsequent case law, however, has been confusing. In a leading post-*Massachusetts* decision, the D.C. Circuit, in *Communities for a Better Environment (CBE) v. EPA*,[20] denied standing to plaintiffs challenging an EPA decision not to set secondary ambient air quality standards (for the protection of the public welfare) for carbon monoxide (CO). In 1971, EPA adopted primary standards for CO but not secondary standards, and in 2011, EPA explicitly reaffirmed its decision not to set secondary standards because, in its view, the connection between CO and climate change was tenuous and the Agency could not determine whether any secondary standard would reduce climate change.[21] Alleging that CO emissions will worsen global warming and in turn displace birds that one of its members observes for recreational purposes, the petitioner challenged both EPA's decision not to change the primary CO standard and its decision not to set a secondary standard for CO.

The court ruled that the claimants did not present "a sufficient showing that carbon monoxide emissions in the United States—at the level allowed by EPA—will worsen global warming as compared to what would happen if EPA set the secondary standards in accordance with the law as petitioners see it." Moreover, the court noted EPA's explanation that CO's effects on climate change involve "significant uncertainties,"[22] stating that:

> petitioners' theory of causation is simply a bridge too far given the current record. Petitioners have not presented a sufficient showing that carbon monoxide at the level permitted by EPA would worsen global warming as compared to what would happen if EPA set the secondary standard in accordance with the law as petitioners see it. Therefore, petitioners do not have standing to advance this claim in this case.[23]

This holding is odd. It might be argued that EPA's determination was, on the merits, not arbitrary and capricious. It is quite another thing to assert that the plaintiffs lack standing to bring their claim. As posited in the introduction to this Comment, the doctrine of legal standing suggests a limitation on who may bring an action, but if the action itself is without legal merit, then it is appropriate for the court to dismiss the claim without regard to who brings it. Notably, the D.C. Circuit in *CBE* recognized that the plaintiffs had standing to challenge EPA's decision to not alter primary standards for CO. The court's conclusion that the plaintiffs lacked standing to challenge the absence of a secondary standard, even though they had standing to challenge the adequacy of EPA's primary standard, was justified on the basis that challenging secondary standards is "simply a bridge too far." What might distinguish that challenge from a "bridge not too far," for purposes of predicting which plaintiffs might have standing to seek judicial review of an EPA action (or inaction) with regard to climate change, is a matter of pure conjecture.

In accord with *CBE* is the Ninth Circuit's decision in *Washington Environmental Council v. Bellon*.[24] The plaintiffs sought an injunction to require the state of Washington to promulgate reasonably available control technology (RACT) standards for five oil refineries' GHG emissions. The court ruled that, to have standing, the plaintiffs would have to show that (1) RACT standards would demand cleaner technology than what the oil companies currently use; (2) the oil companies would comply with new RACT standards; (3) the oil companies' compliance would reduce GHG emissions; and (4) lower emissions would mitigate global climate change in a way that would alleviate the alleged injuries. The state introduced evidence that "RACT [standards] would likely not result in meaningful green-

18. 549 U.S. 497, 37 ELR 20075 (2007).
19. *Id.* at 524. *See also* California Wilderness Coalition v. Department of Energy, 631 F. 3d 1072, 41 ELR 20078 (9th Cir. 2011).
20. 748 F.3d 333, 44 ELR 20084 (D.C. Cir. 2014).
21. *Id.* at 335 (citing Review of National Ambient Air Quality Standards for Carbon Monoxide, 76 Fed. Reg. 54294, 54308 (Aug. 31, 2011)).
22. 76 Fed. Reg. 54294. EPA's Clean Air Scientific Advisory Committee agreed with this position. Letter from Dr. Joseph Brain, Chair, Clean Air Scientific Advisory Committee Carbon Monoxide Review Panel, and Dr. Jonathan Samet, Chair, Clean Air Scientific Advisory Committee, to EPA Administrator Lisa P. Jackson 9 (Jan. 20, 2010).
23. *CBE*, 748 F.3d at 338.
24. 732 F.3d 1131, 43 ELR 20231 (9th Cir. 2013).

house gas reductions because RACT is a low bar and many sources are likely already meeting or exceeding RACT."[25]

In denying standing for the claimants, the Ninth Circuit stated that "there are numerous independent sources of GHG emissions, both within and outside the United States, which together contribute to the greenhouse effect."[26] Moreover, the plaintiffs' "causal chain is too tenuous to support standing," because "a multitude of independent third parties are responsible for the changes contributing to [their] injuries" and because the GHG emissions at issue make up only 5.9% of emissions in Washington.[27] The plaintiffs lacked standing because of a dearth of evidence showing that emissions from the five oil refineries constitute a "meaningful contribution" to global GHG levels.[28]

This "lack of meaningful contribution" test is precisely the argument that Justice Stevens explicitly rejected in *Massachusetts.* The Ninth Circuit's conclusion that imposing RACT requirements on five oil refiners would not materially alter the phenomenon of climate change is obvious but irrelevant. The challenged inaction is but a tiny fraction of what must be done to alter the direction of climate change, but regulation as a whole operates effectively only through the most incremental of steps. It would have been quite another matter if the court had ruled that declining to impose RACT standards for oil drilling activities is a matter within the state of Washington's discretion and therefore the plaintiffs' claim should fail on the merits. Many claims that challenge a government action or inaction are without merit and are dismissed on those grounds. But the use of the standing doctrine only confuses the distinction between the different queries of who should be the rightful plaintiff and whether the substance of the claim deserves judicial scrutiny.

A somewhat different perspective was recently offered by the U.S. District Court for the Western District of Washington in *Center for Biological Diversity (CBD) v. EPA*.[29] The plaintiffs challenged EPA's decisions not to identify as impaired under the Clean Water Act (CWA)[30] any coastal waters experiencing ocean acidification. The plaintiffs alleged injury to their aesthetic and recreational interests in the coastal waters. EPA argued that the primary driver of ocean acidification is oceanic uptake of atmospheric carbon, but there is no evidence regarding the effect of local carbon emissions on local ocean acidification. Moreover, according to EPA, the plaintiffs could not point to a mechanism under the CWA that addresses global carbon emissions in an appreciable way and thus the plaintiffs could not show causation and redressability.

The court disagreed, finding standing in the plaintiffs' contention that regional human-caused drivers exacerbate ocean acidification along the Washington and Oregon coasts, and local pollution controls can reduce the input from these drivers. The plaintiffs' evidence showed that "Washington's marine waters are particularly vulnerable to ocean acidification because of regional factors that exacerbate the acidifying effects of global carbon dioxide emissions"; the plaintiffs' evidence also identified multiple local mitigation measures that could address "local and regional 'hot spots' of ocean acidification."[31] "Reducing inputs of nutrients and organic carbon from local sources will decrease acidity in Washington's marine waters that are impacted by these local sources and thereby decrease the effects of ocean acidification on local marine species."[32] According to the court, causation and redressibility are two sides of the same coin: the plaintiffs' members' injuries are traceable to EPA's conduct and redressable by a favorable ruling to the extent that coastal waters improperly not identified as acidified-impaired are influenced by sources that can be mitigated by local actions.

The difference between these cases is explainable by the statutory interest at stake. The CWA imposes specific obligations to protect imperiled water spaces, but the CAA's obligations are not about protecting the air per se as much as they are about ensuring that pollution does not harm human health or welfare. The CWA's obligations are more proactive: If a water space is imperiled, regulatory obligations may be imposed on activities that are not a material cause of that imperilment. Yet, this explanation only returns the question to its starting point: If a government decision that allows GHG emissions arguably violates a legal requirement, and if we are all affected by climate change in unpredictably different ways through an enormously complex process, then there is no logical basis for distinguishing who should have standing to challenge that decision.

III. Conclusion

In Sweden, there is a state-financed nongovernmental advocate for the environment who is authorized to bring claims against the government for allegedly harmful actions against the environment. Such an authorized advocate need not establish standing at all: As the representative of the environment itself, he or she necessarily has standing if there is harm to the environment. But such centralization of standing to sue on environmental matters would seem highly inappropriate for the United States where such matters have long been left to the marketplace of civil litigation.

A better solution to the question of who has standing to challenge government actions concerning climate change might be to simply do away with any type of proximity requirement altogether. The fear is that the standing doctrine is needed to insulate courts from a rash of nuisance suits brought against the government merely to harass it or in hopes of some type of fee award. But this fear seems akin to citing baseless allegations of voter fraud to justify

25. *Id.* at 1146.
26. *Id.* at 1143.
27. *Id.* at 1144.
28. *Id.* at 1146.
29. 90 F. Supp. 3d 1177 (W.D. Wash. Mar. 2, 2015).
30. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.
31. *CBD*, 90 F. Supp. 3d at 1192-93.
32. *Id.* at 1193.

imposing restrictions on peoples' right to vote—there does not seem to be evidence of the problem that the restriction is purportedly protecting against.

The larger point is that the judiciary has many tools to protect courts against the possibility of every American running into the local federal district courthouse to challenge regulatory action. The most important tool is Federal Rule of Civil Procedure 12(b)(6) dismissal of the complaint on the basis of the plaintiff's failure to state a claim upon which relief can be granted. As repeatedly urged in this Comment, if a claim lacks merit, it should not occupy a court's time. There is no need for a court to invoke (and confuse) the standing doctrine when faced with a meritless claim against environmental regulation. Especially with regard to a matter as complex as climate change, there is a strong argument to be made in favor of judicial deference to the discretion of government agencies, especially where challenges to these agencies' actions lack substance or are manifestly based on weak appreciation of statutory obligations. In any event, the current system offers no real protection against frivolous environmental litigation since the ritual of finding a properly located complainant is so widely practiced and well-performed.

Most centrally, even if a policy argument can be made in favor of erecting hurdles to limit climate change litigants from getting to the courthouse door, the hurdle of legal standing is plainly inapposite. Climate change is much more than a series of torts that cause particular injury to proximate persons. Climate change is the undesired manifestation of yesterday's decisions that failed to consider the implications of what we humans are doing to the environment; the best hope for dealing with climate change is that tomorrow's decisions will reflect full consideration of the reality of climate change. The courts, through the process of civil litigation challenging governmental action or inaction, are an essential component of ensuring law's beneficial use for coping with a human-caused warmer planet. It is time for doctrine to get with the program.