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Christine Azzaro

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COMMENT

FRIENDS OF THE EARTH v. CROWN CENTRAL PETROLEUM: A STANDING ATTACK UNDERMINES ENVIRONMENTAL PROTECTION

CHRISTINE AZZARO*

INTRODUCTION

Several recent Fifth Circuit decisions have created new hurdles to standing requirements with regard to environmental law. Both a court of appeals and a federal district court have held that plaintiffs will not be able to meet the standing requirement of the Clean Water Act (CWA) unless they can present scientific proof of injury to the environment. Not only are such decisions incorrect on their face, but they also have been cast into doubt by recent case law in both the United States

* J.D. Candidate, June 2001, St. John’s University School of Law; B.A., State University of New York at Binghamton.


2 See Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp., 95 F.3d 358, 361–62 (5th Cir. 1996) (holding that an organization whose membership includes individuals who birdwatch and fish at a lake lacked standing by failing to show that their injury was “fairly traceable” to an oil refinery’s unlawful water pollution “solely on the truism that water flows downstream”); Informed Citizens United, Inc. v. USX Corp., 36 F. Supp. 2d 375, 378 (S.D. Tex. 1999) (holding that a non-profit corporation did not have standing). The court held that the allegations the corporation’s two experts made were merely “vague conclusions about the negative impact on wildlife.” The court further stated that the “complaints are not of the sort which the Clean Water Act, passed in response to concerns about burgeoning pollution in the nation’s navigable waterways, was designed to address.” Id.
Supreme Court and other federal circuits. Yet, this erroneous standing requirement remains valid law within the Fifth Circuit.

Standing is the constitutional requirement that any action brought in federal court must constitute an actual "case" or "controversy." Standing has come to play an important role in environmental law by governing the ability of a plaintiff to bring an action under the citizen suit provisions that Congress has included in most major environmental legislation.

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3 See Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc., 528 U.S. 167, 181 (2000) ("The relevant showing for purposes of Article III standing, however, is not injury to the environment but injury to the plaintiff"); Friends of the Earth v. Gaston Copper Recycling Corp., 204 F.3d 149, 156-61 (4th Cir. 2000) (finding that a property owner living in the path of a toxic chemical discharge suffered injury in fact and "can be counted 'among the injured' for standing purposes") (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 563 (1992)).


"Standing to sue" means that party has sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy. Standing is a concept utilized to determine if a party is sufficiently affected so as to insure that a justiciable controversy is presented to the court; it is the right to take the initial step that frames legal issues for ultimate adjudication by court or jury . . . .

Standing is a requirement that the plaintiffs have been injured or been threatened with injury by governmental action complained of, and focuses on the question of whether the litigant is the proper party to fight the lawsuit, not whether the issue itself is justiciable.

Id. (emphasis added) (citations omitted).

6 See U.S. CONST. art. III, § 2; see also Allen v. Wright, 468 U.S. 737, 750 (1983) ("The case-or-controversy doctrines state fundamental limits on federal judicial power in our system of government"); Gaston Copper, 204 F.3d at 153 ("Article III of the Constitution restricts the federal courts to the adjudication of 'cases' and 'controversies.'"); Marshall v. Meadows, 105 F.3d 904, 906 (4th Cir. 1997) ("One of the bulwark principles of constitutional law is the 'cases' or 'controversies' requirement for justiciability referred to in Article III.").

7 Citizen suits are provisions within statutes that grant a private individual the right to bring an action for violation of that statute. Examples are seen in the Clean Air Act, Clean Water Act, and Endangered Species Act, as well as several other major environmental statutes. See Philip Weinberg, Are Standing Requirements Becoming a Great Barrier Reef Against Environmental Actions?, 7 N.Y.U. ENVTL. L.J. 1, 3 (1999) ("The Clean Air Act, Clean Water Act, Endangered Species Act, and other federal environmental statutes contain explicit provisions authorizing 'any person' or 'any citizen' to sue to enjoin violations.") (citations omitted); John Echeverria & Jon T. Zeidler, Barely Standing: The Erosion of Citizen "Standing" to Sue and Enforce Environmental Law, Georgetown University Law Center's Environmental Policy Project (visited Sept 10, 2000) <http://www.envpoly.org/papers/barely.htm> [hereinafter Echeverria & Zeidler] ("Congress included citizen suit provisions in the major environmental laws, including the Clean Water Act and
be separated into two categories: (1) the standing of a plaintiff to bring suit in court; and (2) the minimum constitutional requirements for a party to have standing, imposed on the federal courts by Article III of the United States Constitution.

I. PLAINTIFFS' STANDING TO SUE

In environmental cases, both an organization and individual plaintiffs may have standing to bring suit. An organization has the option of bringing suit on its own behalf if it can prove that an injury has been done to it directly, or it may bring suit to defend the interests of its members. An organization, to qualify for representational standing to bring suit on behalf of one of its members, must meet three requirements. It must show that: "(1) the organization's members would have standing to sue individually; (2) the organization is seeking to protect interests that are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the organization's members to participate in the lawsuit."\(^8\)

An individual or an organization, acting on its own behalf, must also meet three requirements to have standing. "First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical."\(^9\) Second, "there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court."\(^10\) Third, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."\(^11\)

In addition, courts have developed prudential limits to standing. These are "judicially self-imposed limits which are the Clean Air Act, for example, so that citizens could act as 'private attorneys general' supplementing the government's limited enforcement resources.").\(^6\)

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10 Id. (citations and quotations omitted).
11 Id. at 561 (citations and quotations omitted).
subject to modification or abrogation by Congress. Most importantly, ... a litigant suing a federal agency under federal law must establish that the interest being asserted is within the ‘zone of interests’ of the statute allegedly being violated.”

In the past decade a trend has developed, within both the Supreme Court and numerous federal and state courts, to use the standing issue as a limitation upon environmental actions brought through citizen suit provisions. These courts have held that a plaintiff bringing an environmental suit does not meet one of the several standing requirements, and consequently have dismissed the case without ever proceeding to trial. Recently, in Friends of the Earth, Inc. v. Crown Central Petroleum Corp., the United States Court of Appeals for the

12 Echeverria & Zeidler, supra note 7 (citing Allen, 468 U.S. at 750–51).
13 See id. In their article, Echeverria and Zeidler detail several cases that have taken this position. They include: Lujan v. National Wildlife Fed’n, 497 U.S. 871, 886–87 (1990) (holding that members of an organization lacked standing to challenge a federal agency’s land classification decision because their allegations of using lands “in the vicinity” of the classified lands were inadequate to demonstrate that they were “actually affected” by the decision); Defenders of Wildlife, 504 U.S. at 562–63 (denying standing to challenge federal agencies determination that parts of the Endangered Species Act did not apply to federal government actions in foreign nations because plaintiffs failed to establish “imminent” injury to satisfy the “injury in fact” requirement for standing); Steel Co. v. Citizens for a Better Env’t., 523 U.S. 83, 102–10 (1998) (denying standing to enforce a polluter’s compliance with reporting requirements on the lack of redressability because the plaintiff alleged only past violations that were remedied “and not a continuing violation or the likelihood of a future violation”); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 149 F.3d 303, 306–07 (4th Cir. 1998) (holding that environmental groups action against a pollutant became moot on appeal because the only potential relief was civil penalties which would not redress any alleged injury), which was later reversed and remanded by the Supreme Court in Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167 (2000); Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc., 123 F.3d 111, 119–20 (3d Cir. 1997) (holding that an environmental group lacked standing to sue a manufacturer for the Clean Water Act violations because the group failed to produce particular evidence of specific harm); and San Francisco Bay Keeper Inc. v. Cargill Salt Division, No. 96-02161 (N.D. Cal. Sept. 2, 1998) (an oral opinion denying standing to an environmental group to seek civil penalties from a water pollutant). See Allen, 468 U.S. at 750–51; see also Society of Plastics Indus., Inc. v. County of Suffolk, 573 N.E.2d 1034 (N.Y. 1991) (denying standing for failure to allege any threat of cognizable injury different than that of the public at large); Court Rulings Said to Cut Citizen Rights to Bring Health, Environment Lawsuits, 68 U.S.L.W. 2010 (July 6, 1999) (commenting on the Echeverria & Zeidler, and reporting on “how U.S. courts are allowing the erosion of citizen standing”).
14 See supra notes 9–11 and accompanying text.
15 See supra note 13 (citing environmental law cases dismissed based on the plaintiffs’ lack of standing to sue).
16 95 F.3d 358 (5th Cir. 1996).
Fifth Circuit followed this trend by ruling that when an action is brought under the citizen suit provision of the CWA,\(^\text{17}\) the requirement of standing will not be met unless a plaintiff offers proof of the alleged pollution and that the pollution has been caused by the defendant.\(^\text{18}\)

The court in *Crown Central* granted summary judgment for the defendant because the plaintiff lacked standing.\(^\text{19}\) The plaintiff organization, Friends of the Earth (FOE), brought an action in federal district court against Crown Central Petroleum Corporation on behalf of itself and its members under the citizen suit provision of the CWA.\(^\text{20}\) The plaintiff claimed that Crown Central had breached the Act by violating its National Pollutant Discharge Elimination System (NPDES) permit.\(^\text{21}\) The organization alleged that these violations led to contamination of a nearby waterway, which subsequently caused damage to the legally protected interests of several of its members.\(^\text{22}\)

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\(^{18}\) See *Crown Central*, 95 F.3d at 361–62.


\(^{21}\) See id. at *2. “Congress enacted the Federal Water Pollution Control Act Amendments of 1972, better know as the Clean Water Act, 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'” Friends of the Earth v. Gaston Copper Recycling Corp., 204 F.3d 149, 151 (4th Cir. 2000) (quoting 33 U.S.C. § 1251(a)). In order to carry out this goal, the Act makes unlawful the emission of pollutants into navigable waters. See id. These permits limit the amount of pollution that corporations may discharge into the water and require permit-holders to monitor their pollution discharges, to file the results of tests and other information with the Environmental Protection Agency, and to cooperate with state agencies by putting information into Discharge Monitoring Reports. See Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc., 123 F.3d 111, 114–115 (3d Cir. 1997) (citing 33 U.S.C. § 1342). Failure to comply with permit requirements constitutes a violation of the CWA and exposes the holder to federal and state enforcement action. See 33 U.S.C. §§ 1319, 1342(b)(7). If both state and federal agencies fail to take action, a private individual may bring a civil action against a permit violator through use of the citizen suit provision of the CWA. See 33 U.S.C. § 1365(a). Upon successful completion of the action, the plaintiff may obtain either injunctive relief, or civil penalties, which are paid directly to the United States Treasury. See id.

\(^{22}\) See *Crown Central*, 1995 U.S. Dist. LEXIS 16338, at *2. The permit issued to Crown Central sanctioned the release of a highly limited amount of contaminated storm water run-off into the nearby waterway of Black Fork Creek and mandated that monitoring and recording of this pollution discharge be done by Crown Central.
Members of the organization argued that they had legally protected interests in the waterways contaminated by Crown Central. Nathan Greene, Larry Pilgrim, and Judith Pilgrim claimed that they were reluctant to fish in Lake Palestine due to contamination that they believed had run downstream from Crown Central into the lake. In addition, the three argued that they would no longer be able to participate in birdwatching in the vicinity of the lake as the "pollution in Lake Palestine could cause extinction of certain species of birds due to the magnification of its toxic effects as it rose through the food chain, the birds being the top predator in the food chain."

The plaintiffs appealed the dismissal of their case to the Court of Appeals for the Fifth Circuit, arguing that the district court erred in determining that the group lacked standing. The

See id. FOE claimed that Crown Central had and was continuing to violate the permit requirements by exceeding the limitations set for certain pollutants and by failing to comply with certain monitoring and reporting requirements. See id. At the time the action was brought, Crown Central had violated their permit a total of 344 times. See Crown Central, 95 F.3d at 359. These violations resulted in the release of contaminants into waterways downstream from the company's oil refining facility, via the flow of chemicals from Black Fork Creek "into Prairie Creek, which joins the Neches River, which in turn flows into Lake Palestine." Id.

See Crown Central, 1995 U.S. Dist. LEXIS 16338, at *20–22. According to Supreme Court precedent, these complaints constitute a violation of legally protected interests for purposes of standing. "The traditional view of standing required some pecuniary or physical damage, either sustained or impending." Weinberg, supra note 7, at 2. Further, the Supreme Court has held on several occasions that harm to either economic or recreational interests may constitute a violation of a legally protected interest. See id. (citing Sierra Club v. Morton, 405 U.S. 727, 738 (1972); United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 685 (1973)).

FOE claimed that it could bring suit through the doctrine of representational standing, due to the fact that members of the organization had suffered violations of their legally protected interests. See Crown Central, 95 F.3d at 359–60; supra notes 9–11 (discussing the constitutional requirements for representational standing).

See Crown Central, 1995 U.S. Dist. LEXIS 16338, at *22–25. The district court reasoned that the organization did not establish representational standing because FOE had failed to show injury in fact and it had failed to demonstrate that the claimed injuries were traceable to the permit violations of Crown Central. Id. at *17–25. The court believed that the organization had failed to present sufficient evidence that the types of pollution discharged by Crown Central affected the waterways used by the members who testified or that the injuries were "fairly traceable" to the discharges made by the defendant. The court also noted that no scientific testing had been done on water, bird, or plant samples from the area. Id.

FOE argued that it had proper standing to bring suit because it had proven that its members had been negatively affected by pollution and that these injuries could be causally connected to the permit violations of Crown Central. See Crown Central, 95 F.3d at 359–60. The plaintiff pointed out that "the types of pollutants that Defendant has discharged in excess of its permit limitations into Black Fork Creek
court of appeals affirmed the district court judgment, holding that FOE did not have standing because of its failure to prove an injury in fact to its members.26

Writing for the court, Judge Higginbotham found that FOE had failed to prove it had representational standing.27 For an organization to obtain representational standing, it is required that individual members "would otherwise have standing to sue in their own right."28 The court found that the organization members who testified had failed to achieve standing on their own because of their inability to prove that "the injury is 'fairly traceable' to the defendant's actions . . . ."29 The court believed that the inability to prove an injury traceable to Crown Central was linked to a lack of scientific proof that the waterways had been adversely affected by pollution from Crown Central.30

have been specifically recognized as harmful to aquatic life by Congress and the EPA." Crown Central, 1995 U.S. Dist. LEXIS 16338, at *24. Indeed, the District Court had gone so far as to state that:

Plaintiff has provided summary judgment evidence indicating that Defendant's violations are attributable to oil and grease discharges [that] are toxic to aquatic life. Oil interferes with and destroys the reproductive process of many species. Because oil and grease harm aquatic life, it affects the birds that feed on these species.

Id. The court admitted that "Defendant's discharges could be detrimental to waterfowl . . . ." Id. The plaintiff further pointed to "the absence of any evidence in the record that the pollutants in [Crown Central's] discharges evaporate, are diluted to neutrality, or sink to the bottom before reaching Lake Palestine." Crown Central, 95 F.3d at 361.

26 See Crown Central, 95 F.3d at 360-62.
27 See id.
28 Id. at 360 (citing Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977); see also supra notes 9-11 and accompanying text (discussing the constitutional requirements for individual standing).
29 Crown Central, 95 F.3d at 360 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Sierra Club v. Cedar Point Oil Co., 73 F.3d 546, 556 (5th Cir. 1996)); see also supra notes 9-10 and accompanying text for discussion on the constitutional requirements for individual standing.

The court used the fairly traceable test adopted in the case of Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64 (3d Cir. 1990). The court stated that the fairly traceable standard requires that a plaintiff show a "substantial likelihood" that the harm was caused by the conduct of the defendant. Id. at 72. "Substantial likelihood" requires a showing that:

[D]efendant has (1) discharged some pollutant in concentrations greater than allowed by its permit (2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that (3) the pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.

Crown Central, 95 F.3d at 360-61 (quoting Powell Duffryn, 913 F.2d at 72).

30 See Crown Central, 95 F.3d at 360-61. The court felt that "FOE offered no
Additionally, the court cited the distance between the alleged source of the pollution and the affected waterways, claiming that the span was too large to infer causation.\textsuperscript{31} FOE’s application for a rehearing by the court of appeals was denied.\textsuperscript{32}

This Comment argues that by ruling the plaintiffs had failed to establish standing, the court of appeals struck a serious blow to the CWA and indeed, to the environmental law at large. The court restricted standing in a way that has not been mandated by the Supreme Court.\textsuperscript{33} It established judge-made law that conflicts with the congressional intent behind the CWA, and is injurious to the concept of separation of powers. Furthermore, the standing requirement set by the court disables the CWA, and leaves the environment in danger of destruction.

\textsuperscript{31} See id. The court noted that “FOE’s members use a body of water located three tributaries and 18 miles ‘downstream’ from [Crown Central’s] refinery.” Id. at 361. The court reasoned that there had been neither tests nor studies of any kind, and that none of the members had testified that they were able to observe any sort of negative impact upon the bodies of water. Id. The court also noted that scientific evidence might be necessary to satisfy its standard. Id. at 362. “For example, plaintiffs may produce water samples showing the presence of a pollutant of the type discharged by the defendant upstream or rely on expert testimony suggesting that pollution upstream contributes to a perceivable effect in the water that the plaintiffs use.” Id. The court stated that the concerns and fears of pollution voiced by the members were not enough to establish an injury in fact. See id. at 361–62.


\textsuperscript{33} See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180–95 (2000) (holding that Fourth Circuit erred in concluding that plaintiff lacked standing because the case was moot when defendant had come into compliance with its permit).
II. CONGRESSIONAL INTENT

When examining the intent of Congress in enacting legislation, it is a well-established principle that one begins by analyzing the plain meaning of the statute. Upon reading the CWA, it becomes apparent that the overriding intent of the legislation is to protect the environment by reducing pollution of American waterways. In order to achieve this objective, Congress enacted the citizen suit provision of the CWA, which serves to eliminate the need for traditional standing requirements when bringing an environmental action under the Act. Congress meant to enable, and indeed to encourage,
private citizens to bring suit against polluters to supplement the
recognized limitations of the government in enforcing the Act.\textsuperscript{38} Subsequent Supreme Court decisions have recognized the
constitutional mandate that standing constitutes the "irreducible
constitutional minimum" and must be maintained, even in
environmental suits.\textsuperscript{39}

It is obvious that the ruling of the court of appeals in \textit{Crown
Central} was made in total disregard to the congressional intent
behind the CWA.\textsuperscript{40} The court took a statute that was meant to
prevent pollution and stood it on its head by requiring plaintiffs
to prove that pollution has already occurred before a suit may be
brought.\textsuperscript{41}

\begin{footnotes}
\footnotetext[38]{See Echeverria & Zeidler, supra note 7. "Congress included citizen suit
provisions in the major environmental laws, including the Clean Water Act... so
that citizens could act as 'private attorneys general' supplementing the
government's limited enforcement resources." \textit{Id}; see also Weinberg, supra note 7,
at 11-12 (citing \textit{Train}, 510 F.2d at 700).}

sets forth the statutory standing requirement for the citizen suit provision of the
Clean Water Act. Specifically, it defines 'citizen' as 'a person or persons having an
interest which is or may be adversely affected.'" \textit{Gaston Copper}, 204 F.3d at 152
(quoting 33 U.S.C. § 1365(g)). "Congress has indicated that this provision confers
standing to enforce the Clean Water Act to the full extent allowed by the
Constitution." \textit{Id.} (citations omitted).}

\footnotetext[40]{Compare Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp., 95 F.3d
358, 362 (5th Cir. 1996) (requiring scientific proof of pollution which was caused by
the defendant, in order to bring a citizen suit under the CWA), with \textit{supra} note 36
(concluding that the intent of Congress was to create a statute that eliminated the
need of scientific proof to guarantee enforcement).}

\footnotetext[41]{See \textit{supra} notes 38-39 and accompanying text. It is ludicrous that the court
would take a statute requiring injury to the plaintiff and read it as requiring a
showing of scientific proof of injury to the environment. The Constitution does not
require that the plaintiff "wait until his lake becomes barren and sterile or assumes
an unpleasant color and smell before he can invoke the protections of the Clean
Water Act." \textit{Gaston Copper}, 204 F.3d at 160. This new requirement "would
eliminate the claims of those who are directly threatened but not yet engulfed by an
unlawful discharge. Article III does not bar such concrete disputes from court." \textit{Id.}
(citing \textit{Lujan} v. \textit{Defenders of Wildlife}, 504 U.S. at 560-61). Furthermore, "the 'fairly
traceable' standard is 'not equivalent to a requirement of tort causation.'" \textit{Id.} at
161. (quoting Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn

Furthermore, it seems that the standard of proof imposed upon plaintiffs will discourage suits from being brought, contravening the congressional intent behind the citizen suit provision.\textsuperscript{42} Through this ruling, the court of appeals has struck a serious blow to the integrity of the environment by taking away one of the most effective means to enforce the Act.\textsuperscript{43}

A. The Irreducible Constitutional Minimum For Standing

Since the Article III requirement of a "case" or "controversy"\textsuperscript{44} is extremely vague on its face, the Supreme Court has filled in the blanks regarding standing.\textsuperscript{45} The court of

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\textsuperscript{42} See Gaston Copper, 204 F.3d at 160–64. By setting such a high standard of proof through requiring scientific evidence of pollution, the court will effectively dissuade many from bringing suits under the CWA. Since satisfying such a standard of proof requires numerous tests, and an inevitable "threshold 'battle of the experts' over matters of degree . . . [t]he exhaustive exposition and proof of such matters will create expensive, lengthy sideshows to the straightforward issue under the Clean Water Act . . . ." Friends of the Earth, Inc. v. Gaston Cooper Recycling Corp., 179 F.3d 107, 118 (4th Cir. 1999) (Wilkinson, C.J., dissenting), rev'd, 204 F.3d 149 (4th Cir. 2000). This higher standard is a battle that a private citizen, with limited time and resources, will be unwilling to take. Rather, after weighing the factors, a prospective plaintiff will be forced to give up their suit and tolerate living with the pollution.

\textsuperscript{43} See Echeverria & Zeidler, supra note 7.

Citizen enforcement suits have proven to be a valuable mechanism for implementing federal environmental laws. Individual citizens and groups have brought hundreds, if not thousands, of successful lawsuits that have forced polluters to comply with the law. In addition, the threat of potential citizen enforcement suits has served as a powerful deterrent.

\textsuperscript{44} U.S. CONST. art. III, § 2.

\textsuperscript{45} See Allen v. Wright, 468 U.S. 737, 751–52 (1984) ("Like most legal notions, the standing concepts have gained considerable definition from developing case law. In many cases the standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases.").
appeals in *Crown Central* narrowed standing more than the Supreme Court, fulfilling the warning of several judges that the current uncertainty concerning standing would lead to varied and misguided interpretations by lower courts.46

Supreme Court decisions involving standing in environmental citizens suits have not required scientific proof for either injury-in-fact or causation to satisfy the standing requirement of Article III.47 The closest the Court has come to requiring scientific proof to satisfy standing requirements is *Lujan v. Defenders of Wildlife*,48 in which the Court held that the plaintiff had not met the requirement of injury-in-fact.49 *Defenders of Wildlife*, which incidentally is the primary Supreme Court environmental authority that the *Crown Central* majority relied upon, is easily distinguishable. A comparison of the alleged harms in the two cases is illustrative.

In *Defenders of Wildlife*, the plaintiffs asserted that they would not be able to observe endangered species abroad because of an increased rate of extinction caused by activities funded by the United States government.50 Upon further questioning, however, the plaintiffs admitted their plans to make a return visit to the foreign country were speculative at best.51 The Court found that an allegation of an imminent injury “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.”52

Contrasting the injury in

46 See *Allen*, 468 U.S. at 792 n.10 (Stevens, J., dissenting) (commenting on the failure of the majority opinion to provide adequate guidance to the lower courts on proper use of standing); see also *Weinberg*, supra note 7, at 18 (noting examples where no one could challenge environmental regulations that increase pollution because of the improper use of standing by the lower courts) (citing Society of Plastics Indus., Inc. v. County of Suffolk, 573 N.E.2d 1034, 1046 (N.Y. 1991) (Hancock, J., dissenting)).


49 See id. at 578.

50 See id. at 562–63.

51 See id. at 564–65 n.2.

52 Id. at 565 n.2.
Defenders of Wildlife with the alleged injury in Crown Central, it is clear that the defendant had been continually violating its permit by releasing pollutants into the water. Furthermore, the plaintiffs had no control over suffering the injury. If an injury had not already occurred in this situation, it is sure to occur in the very near future, unlike in Defenders of Wildlife, where the injury may only occur "some day" in the future if the plaintiffs decided to make a return visit.

Several statements made by the Supreme Court in previous standing cases seem to indicate that the Court would disagree with the Crown Central ruling requiring scientific proof of injury and causation to establish standing. Notably, in Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., the Supreme Court ruled, as in Crown Central, on a citizen suit brought under the CWA. In the opinion for the Court, Justice Marshall pointed out that the citizen suit provision of the Act "does not require that a defendant 'be in violation' of the Act at the commencement of suit; rather, the statute requires that a defendant be 'alleged to be in violation' " of section 505. This led the Supreme Court to "acknowledg[e] that Congress intended a good-faith allegation to suffice for jurisdictional

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54 See Defenders of Wildlife, 504 U.S. at 564 n.2. The plaintiffs in Defenders of Wildlife were not bringing suit against the governmental agency that would directly cause the destruction of the species in question, but rather against the Secretary of the Interior for promulgating regulations that allegedly failed to follow the Endangered Species Act. Id. at 557–59. Indeed, the agencies alleged to be performing the harmful activities were not even part of the suit. See id. at 568. This seems to have been a major contribution to the reluctance of the Supreme Court to grant standing in the case. See id. In his opinion, Justice Scalia stated that "[t]he existence of one or more of the essential elements of standing 'depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict . . .'." Id. at 562 (quoting ASARCO Inc. v. Kadish, 490 U.S. 605, 615 (1989)). Furthermore, "it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." Id.

In Crown Central, however, it is not some amorphous third party that is alleged to be causing the harm, but rather the defendant to the suit itself. Thus, we are not dealing with independent actors and unfettered choices over which the court has no control, but with a party whose violations of law have been well documented and are directly before the court in question.

56 See id. at 54.
57 Id. at 64.
purposes . . . ."58 The Fifth Circuit decision is at odds with the viewpoint of the Supreme Court in Gwaltney, which is supported by the subsequent Supreme Court decision in Friends of the Earth v. Laidlaw Environmental Services,59 discussed later in this Comment.

Thus, it seems that the plaintiff organization in Crown Central met the burden set by the Supreme Court through the allegations of injury that its members were in fear of pollution from Crown Central, as well as by showing actual injuries that they will suffer.60

III. A CONSTITUTIONAL VIOLATION?

What is most disconcerting about the decision in Crown Central is the court of appeals' obvious flouting of congressional intent, combined with the fact that the Supreme Court has never ruled in favor of the "scientific proof" restriction.

The Supreme Court has consistently held that the main purpose behind the Article III standing requirement of an actual "case" or "controversy" is to ensure the proper separation of powers within the federal branches of government.61 Specifically, the requirements are meant to place limits upon the federal courts in order to prevent them from intruding into the province of the other federal branches of government.62

By limiting the standing requirement in a way that the

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58 Id. at 65.
61 See Allen v. Wright, 468 U.S. 737, 750 (1984) ("[T]he 'case or controversy' requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." (citing Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471-76 (1982)); see also Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 93-94 (1998) (declining to endorse a practice of several Courts of Appeals to "'assume[e]' jurisdiction for the purpose of deciding the merits . . . because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers."); Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60 (1992) (noting that the doctrine of standing is a part of separation of powers "'identify[ing] those disputes which are appropriately resolved through the judicial process'") (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).
62 See Allen, 468 U.S. at 750 ("The several doctrines that have grown up to elaborate [the 'case or controversy'] requirement [of Article III] are 'founded in concern about the proper—and properly limited—role of the courts in a democratic society.'") (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)).
Supreme Court has neither intended nor approved of, and which other circuits do not accept, the Court of Appeals for the Fifth Circuit violated the separation of powers by restraining the ability of the congressional legislation to achieve its goals. The court of appeals has single-handedly taken the initiative to confine the citizen suit provision of the CWA through its creation of a new limitation on standing that is in complete contravention of the intent and purpose of Congress, and which lacks both the Supreme Court initiative and approval. Only the Supreme Court can wield such power over the legislative branch of the federal government. Thus, the court of appeals has violated the purpose of standing and separation of powers, which limits the judicial branch from exerting improper control over executive or legislative function.

See Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 163–64 (4th Cir. 2000) (warning that "[c]ourts must avoid infringing on [the separation of powers] principle either by reaching beyond jurisdictional limitations to decide abstract questions or by refusing to decide concrete cases that Congress wants adjudicated."). There are several examples of federal circuit courts which have held that the standing requirement was satisfied where the plaintiff testified that his interests were affected in some way, be it recreational or aesthetic, by either his fear or apprehension of pollution. See id. at 156–57 (finding that a reasonable fear of fishing and swimming in a lake polluted by defendant's permit violations falls within the "type of injuries that Congress intended to prevent by enacting the Clean Water Act"); United States v. Metropolitan St. Louis Sewer Dist., 883 F.2d 54, 56 (8th Cir. 1989) (holding that allegations of adversely affected interests in visiting, crossing, observing and using of polluted waters for recreational purposes "are sufficient to give [the plaintiffs] constitutional standing"); Friends of the Earth v. Consolidated Rail Corp., 768 F.2d 57, 61 (2d Cir. 1985) (noting that "injury to aesthetic and environmental well being, as well as economic harm, could provide the requisite injury to confer standing") (citing Sierra Club v. Morton, 405 U.S. 727, 734 (1972)). See Allen, 468 U.S. at 751. "Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as ... the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches ... ." Id.

See Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–60 (1992). Decisions on what constitutes a proper exercise of federal jurisdiction within the standing requirement depend "largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts." Id. A federal circuit court does not have the power to emasculate congressional legislation as the court has done in Crown Central. Therefore, the court of appeals has obviously either misunderstood or ignored its proper place within the separation of powers doctrine, and thus misused the standing requirement.

See Gaston Copper, 204 F.3d at 163–64. Courts are not at liberty to write their own rules of evidence for environmental standing by crediting only direct evidence of impairment. Such elevated evidentiary hurdles are in no way mandated by Article III.
A. Putting The Cart Before The Horse: The Consequence of Trying the Case Before Allowing the Trial

Another area of concern regarding the holding in *Crown Central* is that the court's preliminary standing prerequisite, which requires proving the scientific fact of pollution, necessitates an inquiry into the merits of a case before an actual trial has even begun. Yet, "[a]s the U.S. Supreme Court has repeatedly held, it is improper to 'requir[e] the [plaintiffs] to prove their case on the merits in order to defeat a motion to dismiss.' "67 In this case, "the Court's standing inquiry is no more than a poor disguise for the Court's view of the merits of the underlying claims."68 Thus it seems that while the court is claiming it is unable to hear the case through its lack of power under the rules of standing, it is actually trying the case on its merits. Worse yet, the court is using the case to establish a new rule of standing, one in direct conflict with congressional intent and with disastrous results upon environmental legislation.

The decision of the court to rule on the merits during the initial phase of the case may also have the effect of increasing the burden placed upon the court system when dealing with environmental actions. Dissenting, the Chief Judge stated that:

[The] holding sets courts up for the litigation of scientific facts...
as a matter of standing—facts unnecessary to the ultimate question presented in these cases. Under the majority’s regime, standing requirements will assume a complicated life of their own. As defendants concentrate on undermining plaintiffs’ claims of injury or traceability, courts should now prepare for threshold ‘battles of the experts’ over matters of degree... The exhaustive exposition and proof of such matters will create expensive, lengthy sidebars to the straightforward issue under the Clean Water Act—namely, whether a defendant is violating its discharge permit.69

IV. RECENT DEVELOPMENTS: THE LAIDLAW AND GASTON COPPER OPINIONS

*Crown Central* is not the only recent federal court of appeals case dealing harshly with private individuals bringing an action under the citizen suit provision of the CWA. In *Friends of the Earth, Inc. v. Laidlaw Environmental Services*,70 the Court of Appeals for the Fourth Circuit ruled against a private citizens group who brought suit under the citizen suit provision of the CWA against an owner and operator of a hazardous waste incinerator.71

In their action, the citizens claimed that Laidlaw had allowed discharges from its wastewater treatment plant to be released into the North Tyger River in violation of its NPDES permit.72 Despite the extent of the violations, the court of appeals ruled against the plaintiffs, concluding that the “action [was] moot because the only remedy currently available to Plaintiffs—civil penalties payable to the government—would not redress any injury Plaintiffs [had] suffered.”73

Possibly recognizing the consequences of their recent decisions against environmental suits,74 the Supreme Court granted certiorari,75 and upon review, overturned the ruling of

71 *See Laidlaw*, 149 F.3d at 306–07 (4th Cir. 1998).
73 *Laidlaw*, 149 F.3d at 307.
74 *See supra* notes 42–43 and accompanying text.
the court of appeals. While the Court decided the case based upon the issue of mootness, the opinion made several statements that may have major ramifications on the way in which courts make standing decisions in future environmental cases.

In Laidlaw, the Supreme Court stated that in an environmental suit “[t]he relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff.” In her majority opinion, Justice Ginsburg wrote that “[t]o insist upon the former rather than the latter as part of the standing inquiry standing . . . [as the dissent does] . . . is to raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging non-compliance with an NPDES permit.” This suggests that

77 See id. at 177 (reversing the judgment of the court of appeals because “[t]he appellate court erred in concluding that a citizen suitor's claim for civil penalties must be dismissed as moot when the defendant, albeit after commencement of the litigation, has come into compliance”).
78 See id. at 179–85. Despite the fact that the Court had based its decision on mootness, the Court believed that because the court of appeals was persuaded that the case had become moot it simply assumed without deciding that FOE had standing. Id. at 181. The Court, however, further stated that since “the Court of Appeals erred in declaring the case moot, we have an obligation to assure ourselves that FOE had Article III standing at the outset of the litigation” before deciding on mootness. Id.
79 Id.
80 It is interesting to note that it was Justice Scalia who wrote the dissenting opinion in Laidlaw. See Laidlaw, 528 U.S. 167, 198–215. Justice Scalia is generally recognized as the person who, through the use of his majority opinions, began the attack upon standing in environmental law. See Echeverria & Zeidler, supra note 7. The authors' noted:

The erosion of citizen standing is the result of an unusually focused and determined effort at jurisprudential reform, spearheaded by U.S. Supreme Court Justice Antonin Scalia. Prior to his appointment to the Court, then court of appeals Judge Scalia articulated a comprehensive argument for thoroughly overhauling the law of standing to limit environmental advocates' access to the courts. Since his appointment to the Court in 1986, Justice Scalia has demonstrated an extraordinary commitment to this issue by authoring the majority opinion in all of the Court's major environmental standing cases. Through these decisions, Justice Scalia has substantially revised the Court's standing doctrine to match his own views and has closed the doors of the courthouse to many environmental advocates.

Id. In the authors' view, it is a positive sign of change that Justice Scalia has now come to represent the voice of dissent upon the issue of standing within environmental law.
81 Laidlaw, 528 U.S. at 181.
the Supreme Court believes that the recent lower court decisions have gone too far in the restrictions they had placed on standing in citizen suit cases. Indeed, the Supreme Court has used Laidlaw to disclaim the type of test that was used in Crown Central, which mandated proof of damage before a suit may be brought.\textsuperscript{82}

As a direct result of Laidlaw, there has been a perceptible change in the case law on this issue. In Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.,\textsuperscript{83} the plaintiff brought a suit in federal district court on behalf of several of its members through the citizen suit provision of the CWA.\textsuperscript{84} The plaintiff alleged that the defendant had breached the Act by violating its NPDES permit,\textsuperscript{85} which resulted in the polluting of a nearby waterway.\textsuperscript{86} The plaintiff stated that this pollution had caused damage to the legally protected interests of several of its members.\textsuperscript{87} The district court dismissed the suit, claiming that the plaintiff organization lacked standing.\textsuperscript{88} The Court of

\textsuperscript{82} See supra notes 79 & 81 and accompanying text.

\textsuperscript{83} 9 F. Supp. 2d 589 (D.S.C. 1998), aff'd, 179 F.3d 107 (4th Cir. 1999), rev'd en banc, 204 F.3d 149 (4th Cir. 2000).

\textsuperscript{84} See Gaston Copper, 9 F. Supp. 2d at 590–94.

\textsuperscript{85} See Gaston Copper, 179 F.3d 107, 109 (4th Cir. 1999). The permit issued to Gaston Copper sanctioned the release of a highly limited amount of pollution into the nearby waterway of Lake Watson; set a schedule for compliance with the required limitations; and mandated that monitoring and recording be done by Gaston Copper of its pollution discharges. See id.

\textsuperscript{86} See id. at 108–11. Plaintiff claimed that Gaston had and was continuing to violate these permit requirements "by exceeding the effluent limitations for certain pollutants, by failing to comply with certain monitoring and reporting requirements, and by failing to comply with the schedule of compliance with respect to the effluent limitations." Id. at 110. These violations resulted in the release of contaminants into waterways downstream of the company's facility. Id. at 109 n.1 (citation omitted).

\textsuperscript{87} See id. at 110–11. Several members of the organization argued that they had legally protected interests in the waterways that Gaston Copper's permit violations had contaminated. Wilson Shealy argued that he and his family were reluctant to fish or swim in a lake located on his property, because of contamination that he believed had run downstream from Gaston Copper into the lake. See id. at 111. In addition, Shealy felt that his property value had been adversely affected by the circumstances. See id. Guy Jones argued that he could no longer safely and confidently run his canoe company, which specialized in guided excursions down the Edisto River, for fear of contamination. See id. Lastly, William McCullough, Jr. stated that, his concern over contamination made him reluctant to continue scuba diving in the Edisto River. See id.

\textsuperscript{88} See id. at 112. The district court felt that the organizations had failed to show standing because they had proven neither injury in fact or traceability. The court felt that the organizations had:

[F]ailed to present evidence that the types of effluents discharged by
Appeals for the Fourth Circuit affirmed, maintaining that even if the members proved they had suffered an injury-in-fact, they failed to prove that this injury had been caused by the defendant. 89

Soon after the Supreme Court decided Laidlaw, the Fourth Circuit, sitting en banc, reversed its judgement in Gaston, 90 specifically relying on Laidlaw. 91 The court held that affidavits by the plaintiff alleging injuries, along with evidence of what the possible damages caused by pollutants of this type might be, was sufficient proof of injury to allow the case to proceed to trial. 92 The court 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.” 93 It is interesting to note that this is similar to the showing made by the plaintiff in Crown Central. 94 Scientific proof of harm to the environment itself was held to be an unnecessary showing for purposes of standing in environmental suits of this type. 95 This radical change in case law exemplifies the fact that any case which sets up a standard of scientific proof of injury has become obsolete in light of Supreme Court dicta in Laidlaw. Despite these decisions, the Fifth Circuit continues to require scientific proof for standing, evidenced by both the Crown Central opinion and a recent federal district court case. 96

Gaston Copper affected the waterways used by the members who testified. Further, the district court determined that the testimony of [the members] that they were concerned that Gaston Copper violated its ... [pl]ermit, did not, standing alone, establish that the waterways that they used were adversely affected.

Id.

89 See id. at 116.
90 See Friends of the Earth v. Gaston Copper Recycling Corp., 204 F.3d 149, 164 (4th Cir. 2000).
91 See Gaston Copper, 204 F.3d at 160–61. The concurring judges went so far as to grudgingly admit that, had it not been for the statements of the Supreme Court in Laidlaw, they would have been voting to affirm the dismissal due to lack of standing made by the district court. See id. at 164–65.
92 See id. at 156–58.
93 Id. at 161 (quoting Natural Resources Defense Council, Inc. v. Watkins, 954 F.2d 974, 980 (4th Cir. 1992)).
94 See supra notes 23–24 and accompanying text.
95 See Gaston Cooper, 204 F.3d at 161 (stating that “traceability ‘does not mean that plaintiffs must show to a scientific certainty that defendant’s effluent ... caused the precise harm suffered by the plaintiffs.’”) (quoting Watkins, 954 F.2d at 980 n.7).
CONCLUSION

Article III of the Constitution does not demand the "scientific proof" requirement, which the Court of Appeals for the Fifth Circuit in Crown Central has set in as a requirement for Article III standing. The Supreme Court has never thrust such a strict burden of proof upon a plaintiff bringing an action under an environmental citizen suit provision. Indeed, the holding of the Fifth Circuit directly conflicts with the intent of Congress in creating the CWA and its citizen suit provision. The decision can have nothing but disastrous effects upon the environment by requiring proof of pollution before an action can be brought. But most importantly, by indirectly reducing the extent of the citizen suit provision of the CWA, the court of appeals has trod into the domain of the legislature. The court's decision in Crown Central ironically violates the very separation of powers doctrine upon which the standing requirement is based. The proper decision would have allowed the plaintiffs to proceed to a trial on the merits of their case. With the advent of the Laidlaw decision, the Fifth Circuit will be obliged to follow the Supreme Court in future cases regarding this issue.

(S.D. Tex. 1999) (holding that plaintiff did not have standing as an association because it did not show a redressable injury in fact).