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ABA SECTION OF ENVIRONMENT ENERGY AND RESOURCES

Constitutional Law Committee Newsletter

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MESSAGE FROM THE CO-CHAIRS

Trish McCubbin and Norman A. Dupont
Co-Chairs, Constitutional Law Committee

Dear Constitutional Law Committee members:

We look forward to seeing you at the ABA Section of Environment, Energy, and Resources 39th Annual Conference on Environmental Law, which will be held March 18–21, 2010. This year the meeting will be in a new venue, Salt Lake City.

The conference sessions are sure to be outstanding. Our committee helped put together a terrific panel titled *The Supreme Court: Will Ecosystem Restoration Inflame the Debate over Property "Takings"?* The panel will feature the Section Chair, John Cruden, and Roger Marzulla, former head of the Justice Department's Environment and Natural Resources Division, as well as counsel representing both private property owners and a public advocacy group. That panel, which will be held Friday morning, will address the *Stop the Beach Renourishment* takings case currently before the Supreme Court and other recent takings decisions by the lower courts.

On Friday evening at 6:00 p.m., join us at the committee roundtables for a lively discussion of current constitutional issues and the snow in Utah. We hope to see you there!

Before then, we hope that you will enjoy the "out-standing" articles in this month's newsletter on standing in the context of climate change (George Wyeth's article) and that doctrine as applied in recent lower court climate change cases (Maria Gillen's article). Then read Norm Dupont's article exploring the Second Circuit's application of the high court's standing doctrine to a climate change/public nuisance case, *Connecticut v. AEP.*

We also wish to highlight the writing contest for law students organized by the Environmental Law Institute and cosponsored by this Section. The award winner gets publication in the Environment Law Reporter and $2,000 in cash. This year's topic specifically requires that the author address one of a number of constitutional law issues in the environmental field. The deadline for submissions is April 12, 2010, so start sharpening your . . . , er, restocking those computer printers! All committee members are encouraged to bring this very attractive publication opportunity to their friends who are law students.

A PRIMER ON THE LAW OF "STANDING" IN THE ENVIRONMENTAL CONTEXT (WITH SPECIAL ATTENTION TO CLIMATE CHANGE CASES)

George Wyeth

The issue of standing has had a pervasive impact on the development of environmental law. Conversely, environmental cases have provided the context for many of the decisions that have shaped current standing doctrine. Environmental controversies often involve broadly shared interests, or strongly held but

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relatively intangible claims regarding the protection and preservation of the natural world. The federal courts, whose authority under Article III extends to "Cases . . . and Controversies," struggle to ensure that such claims may be appropriately raised without turning themselves into fora for policy debates. Drawing the line between abstract concern for the environment and individual harm suitable for judicial consideration has been the central issue in much of standing jurisprudence. Therefore, familiarity with the principles and applications of takings doctrine remains an essential part of the environmental lawyer's tool kit.

This article provides a brief refresher course on the main principles of standing, and reviews the most important recent developments in the field. Climate change cases in particular have raised new and challenging standing issues, and will receive special attention.

Core Principles of Standing Doctrine

The basic principles of standing doctrine have become fairly well settled in recent decades. In general, the Supreme Court has construed Article III to require that a plaintiff show a (1) legally cognizable injury in fact (2) that can be traced to the defendant's conduct and (3) is subject to being redressed by a judicial remedy. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990). Environmental cases can raise difficult issues with regard to all of these requirements. The Court has also identified "prudential" considerations that may lead a court to dismiss cases that meet the minimum constitutional requirements. In particular, a plaintiff's claim must fall within the "zone of interests" intended to be protected by the statute or constitutional provision it relies upon. *See Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, ___ (1987); *Warth v. Seldin*, 422 U.S. 490, 498 (1975). However, it is important to note that the "citizen suit" provisions of many federal environmental statutes were expressly written to override prudential limitations and provide standing to the maximum extent allowed by the Constitution. *See Bennett v. Spear*, 520 U.S. 154, 163–67 (1997).

Standing issues surfaced immediately during the environmental law revolution of the late 1960s and early 1970s. In the 1972 case of *Sierra Club v. Morton*, 405 U.S. 727 (1972), the Court recognized harms to widely shared, non-economic "aesthetic, conservational and recreational" interests as legally cognizable "injuries" that can serve as a sufficient basis for constitutional standing under Article III and reaffirmed that an organization may sue to protect such interests if one or more of its members meet the Article III requirements. *Id.* at 738–39. However, it also insisted that "the party seeking review must himself have suffered an injury," *id.* at 738, and that plaintiffs may not merely "vindicate their own value preferences through the judicial process." *Id.* at 740. Thus the landmark environmental standing decision resulted in the Sierra Club being thrown out of court. The distinction drawn in *Sierra Club v. Morton* has held up for nearly forty years, and courts continue to scrutinize affidavits with a fine-toothed comb for the necessary allegations of personal injury.

Over that time, the Supreme Court's standing jurisprudence has tended to emphasize setting limits, rather than expanding the reach, of jurisdiction in environmental cases. For example, in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Court rebuffed an environmental group's attempt to challenge agency actions based upon impacts on ecosystems overseas. Although the group had submitted affidavits from members asserting that they had visited potentially impacted locations in the past, and intended to do so in the future, the affidavits failed to state *when* they would do so, and thus did not demonstrate that their injury was "imminent." The Court emphasized that the alleged injury may not be "conjectural or hypothetical," that it must be traceable to the actions of the defendant and not of third parties before the Court, and that it must be "likely" that the relief being sought would redress the injury.

Other cases in which environmental plaintiffs have been found to lack standing include *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990), holding that allegations of injury not sufficiently linked to specific location affected by agency decision, and *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83 (1998), concluding that plaintiffs failed to show injury that would be redressed by the requested relief of penalties payable to the federal government and prospective injunction. One exception to the trend was *Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167 (2000), where the Court made clear that it is injury to a person, and not the environment, that matters, thus obviating any need to show environmental degradation to support constitutional injury. However, the Court reverted to form in 2009 and denied standing to an environmental group in *Summers v. Earth Island Institute*, 55 U.S. ___ (2009), emphasizing the need to demonstrate a specific, tangible injury suffered by an identified individual.

Environmental cases tend to highlight two strands of standing doctrine that allow parties to sue on behalf of others. As has been seen, an important element of standing in environmental cases is the ability of organizations to bring suit on behalf of their members. An association has standing when (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Wash. State Apple Advertisers Ass'n Comm'n*, 432 U.S. 333, 343 (1977).

A doctrine invoked less frequently, but that has played a prominent role in recent years, is that states may sue *in parens patriae* to protect their citizens and their natural resources. The cases discussed below will demonstrate the renewed vitality and importance of this form of standing.

Recent Developments

While the general principles described above have been well established for some time, questions of standing continue to play a central role in the most important environmental cases of the day and to

occupy the attention of the Supreme Court. The remainder of this article will review these recent developments.

The issue of global climate change has tested the boundaries of standing law (and other constitutional doctrines) in new ways. Courts have struggled to define their role in dealing with what is on one hand the single greatest environmental issue in modern times, but at the same time raises serious questions about whether the claims of particular plaintiffs against particular defendants amount to a "case or controversy" under Article III. (The courts were not unique in this regard; the executive and legislative branches sidestepped the issue for years.) These cases raised two distinct issues: whether plaintiffs met constitutional standing requirements, and whether the issues raised were "political questions" appropriate for legislative rather than judicial resolution. This article will not address the "political question" issue.Climate change cases have taken several forms, with the issues of standing varying depending on the nature of the claim presented:

- Claims against the government for failure to take action to address climate change;·
- Claims against private parties seeking injunctive relief to limit emissions;·
- Claims against private parties seeking damages.

Furthermore, in some of these cases the plaintiffs are states, and in others they are private parties or local governments. This distinction can make a difference in applicable standing doctrine.

Massachusetts v. EPA

The Supreme Court's first decision on standing in the climate context was in *Massachusetts v. EPA*, 549 U.S. 497 (2007), where states, local governments, and other organizations sought to require EPA to regulate greenhouse gas emissions from motor vehicles. A large part of the argument, and the opinion, was devoted to the threshold question of whether the case should be heard at all. For some members of the Court, the very scale and global nature of climate change impacts weighed against granting standing to sue. From this perspective, if vast numbers of people are adversely affected, it becomes difficult for any one person to demonstrate a discrete personal injury that creates a "case or controversy." And, in fact, the injuries cited by the named plaintiff had a somewhat contrived appearance: Massachusetts's interest in bringing the case was almost certainly motivated by many concerns in addition to the potential impact of a sea level rise on its coastline.

Nevertheless, the Court held that the state could challenge EPA's failure to regulate, even though emissions from motor vehicles represented only six percent of global greenhouse gases and any emission reductions that might result from regulatory action might be offset by growth in emissions from other sources in the United States or overseas. Taking a "big picture" approach, the majority found that sea levels had already begun to rise as a result of global warming, resulting in an injury to the states. Although the regulatory step at issue might be small and incremental, the Court ruled, that would be true of many regulatory actions. Moreover, even if emissions overseas could offset any reductions from such regulation, the overall pace of emissions increases would be slowed. The Court thus found that the state had met the requirements of injury, causation, and redressability.

In so doing, the Court placed great emphasis on the special status of states. Ignoring all the other petitioners, it held that a state is entitled to "special solicitude" in standing analysis where it acts as a quasi-sovereign to protect "all the earth and air within its domain" (i.e., sues *in parens patriae*). The Court did not spell out precisely how this added solicitude changed the standing analysis, nor did it discuss to what extent the result might have been different for other plaintiffs. As a result, this "special solicitude" for states could be a ground for distinguishing *Massachusetts* in cases brought by parties other than states.

Nevertheless, no court to date has explicitly relied upon such a distinction. In general (but not universally), the Court's sweeping approach to issues of injury, causation, and reparability has been followed in other climate change cases.

Climate Claims Against Private Defendants

In climate change cases against private parties, the issues of "causation" and "redressability" are even thornier than in *Massachusetts v. EPA*, because the actions of any single defendant, no matter how large it may be, are likely to represent a relatively tiny contribution to the global climate change problem, making it hard to show a link between the defendant's actions and the alleged injuries. Furthermore, in cases where injunctive relief is sought, the small contribution to global greenhouse gas concentrations by any single defendant raises the argument that relief will have no effect on the injury.

Nevertheless, the U.S. Court of Appeals for the Second Circuit brushed aside both of these objections in *Connecticut v. American Electric Power*, 582 F. 3d 309 (2d Cir. 2009). In that case, a number of states sued major power companies seeking to impose limits on their carbon dioxide emissions pursuant to the federal common law of nuisance. The court analyzed the states' standing both to protect their own property interests ("proprietary" standing) and to protect their citizenry and natural resources ("*parens patriae*" standing). With regard to proprietary standing, the court was satisfied that an adequate showing of causation was alleged so long as the defendants had emitted pollutants that contribute to the kind of injury alleged; it found no need to directly trace the injury to the defendants' actions. It also rejected arguments that any injury was not sufficiently imminent, finding that some injuries were already occurring (e.g., the melting of the snowpack in northern California) and that future injuries were not speculative. The court then rejected the argument that any relief against the defendants would have no effect because it would be offset by increased emissions elsewhere. Even if emissions elsewhere increased, the court reasoned, total emissions would still be lower and the magnitude of the injuries would be less.

The Second Circuit held that a state may sue *in parens patriae* if the interest is "sufficiently concrete to create an actual controversy." *Id.* at 334–35. It found that the state plaintiffs met this test because the alleged threats affected the health of virtually their entire population and it was doubtful that suit by private parties could achieve complete relief. The court noted that it was not necessary for the states to identify residents who might have injuries sufficient to confer standing, distinguishing *parens patriae* standing from associational standing.

Comer v. Murphy Oil USA, No. 07-60756 (5th Cir. Oct. 16, 2009) involved similar nuisance claims against energy and chemical companies whose operations generated greenhouse gas emissions, alleging that by contributing to global climate change, these defendants increased the impact of Hurricane Katrina and thereby damaged property in coastal areas. However, in this case the plaintiffs were private landowners rather than states suing in any quasi-sovereign status. Nevertheless, the U.S. Court of Appeals for the Fifth Circuit found that the plaintiffs had standing. Responding to arguments that any harms could not be "fairly traceable" to the defendants' actions, the court noted that the causation test for standing purposes is less demanding than that required for tort liability and concluded that the alleged chain of causation was virtually the same as that found sufficient for standing in *Massachusetts v. EPA*—and, in fact, more direct because the case did not involve the added step of failure to regulate.

The court decided that standing did *not* exist, however, on a second set of claims in *Comer*, relating to unjust enrichment, fraud, and conspiracy. Plaintiffs alleged that the defendants had conspired to raise gas prices and that they conspired to disseminate false information about global warming to decrease public awareness and discourage regulation. The court held that these claims, even if within the reach of Article III jurisdiction, should be dismissed on prudential standing grounds. These claims, the court held, involve "a generalized grievance that is more properly dealt with by the representative branches."

In *Native Village of Kivalina v. ExxonMobil Corp.*, Case No. C 08-1138 SBA (N.D. Cal. 2009), an

Alaskan village alleged that global warming is shrinking the sea ice that protects it from storms, forcing the village to be relocated at a potential cost of up to $400 million. It sought damages from a variety of defendants, including both large oil companies and electric power companies.

In this case, the court found that plaintiffs lacked standing because they could not prove the necessary "substantial likelihood" that their injuries were caused by the defendants' actions. (The court also ruled that the issue was a non-justiciable "political question.") The Village argued that although it could not directly trace specific injuries to specific actions, the defendants all contributed to a common injury. It relied on cases involving facilities that discharged pollutants to rivers also polluted by other sources. The court distinguished those cases on the ground that the Clean Water Act establishes standards for discharges, the exceedance of which creates a presumption of harm, whereas there are no regulatory limits for greenhouse gas emissions. The court also ruled that standing could not be granted where the defendants' emissions were commingled with those of many others in a process occurring over hundreds of years, and it relied on case law denying standing in water pollution cases where the sources were extremely distant—outside the "zone of discharge." Finally, the court discounted the "special solicitude" allowed to states under *Massachusetts v. EPA*, because the town was not claiming injury to any regulatory function and in any case was not a state.

It appears likely that the Supreme Court's intervention will be sought in some if not all of these cases, setting up a potential rematch on the standing issues litigated in *Massachusetts v. EPA*.

Aside from the climate change cases, the most significant standing decision of the past year was the Supreme Court's ruling in *Summers v. Earth Island Institute*, 555 U.S. ___—, 129 S. Ct. 1142 (2009). *Summers* does not greatly alter general standing doctrine. However, it reinforces the need to demonstrate specific harms to identifiable individuals and puts a clear burden on associations to show that a specific challenged action will cause some injury, not just that an injury to some member is likely because of a broad pattern of agency behavior if that injury cannot be entirely specified at the present time.

In *Summers*, environmental groups challenged Forest Service regulations that allowed certain timber sales to occur without public notice and comment. The plaintiff associations had challenged one such sale, but they settled their claims regarding that sale while maintaining a continued challenge to the regulations based on concerns that the exemptions would be applied to future sales of interest to their members who might use forests affected by those sales. The government argued that by settling the case the plaintiffs no longer had standing—that no ripe controversy still existed. The district court and the U.S. Court of Appeals for the Ninth Circuit both found that standing existed and invalidated the regulations.

The Supreme Court reversed, holding by a 5-4 vote that the associations were required to show at least one identified member who had suffered or would suffer harm as a result of the regulations. Although the associations submitted an affidavit from a member who stated that he had visited many national forests and planned to do so in the future, he did not state a specific intent to visit a particular site for which a timber sale had been or was about to be approved. Although he did state a desire to visit a particular forest affected by the regulations in question, he did not express a specific intent to do so; his injury was therefore not "actual or imminent" under *Defenders of Wildlife*. The fear of future action potentially (if not likely) impacting members, but without identifying a specific member who would be harmed by a specific action, was not sufficient in the eyes of the majority. The fact that thousands of sales are exempted from notice and comment, and that the associations claimed to have thousands of members who visit Sequoia National Forest, did not establish a sufficient injury in fact. Indeed, the majority opinion, written by Justice Scalia, derided "statistical probability" standing that would "make a mockery of our prior cases." 129 S. Ct. at 1151.

After *Summers*, establishing standing in cases involving general agency decisions that foreshadow, but do not make, specific local decisions remains tricky. General

"dredge and fill" permits issued under section 404 of the Clean Water Act are a good example. In *Ohio Valley Environmental Coalition v. Hurst*, 604 F. Supp. 2d 860 (S.D. W. Va. 2009), the court found that the plaintiffs had standing to challenge a nationwide permit under section 404, even though no specific fill authorizations under that permit had occurred, because there was a "substantial probability that local conditions will be adversely affected." *Id.* at 876. However, the U.S. District Court for the Southern District of Mississippi reached a contrary result in *Turkey Creek Community Initiatives v. Corps of Engineers*, No. 1:08cv124-LG-RHW (S.D. Miss. July 27, 2009). There the court found that the plaintiffs lacked standing in a challenge to a general permit because no applications to fill wetlands under the permit had been filed. It held that standing was lacking both as to substantive injury and as to the alleged procedural injury of failing to prepare an environmental impact statement.

State plaintiffs may be able to sidestep the problem in *Summers* of failing to identify a specific individual potentially harmed by a specific agency action. In *California Resources Agency v. USDA*, No. C 08-1185 MHP (N.D. Cal. Sept. 29, 2009), the court found that the state of California had standing on facts similar to those in *Summers*. The district court distinguished *Summers* on grounds that the state has an interest in all lands within its boundaries, and moreover is entitled to "special solicitude" in protecting its natural resources under *Massachusetts v. EPA*. Therefore, unlike an association, California did not have to show an imminent harm to a specific individual as in *Summers*.

Standing issues are litigated in dozens if not hundreds of environmental cases each year, and a comprehensive survey is beyond the scope of this article. However, the following cases illustrate the range of these issues, and the ways in which courts have dealt with them in recent years.

As *Summers* shows, the requirement that plaintiffs demonstrate some "injury in fact" is frequently at issue in environmental cases. One common issue is whether fear of a possible but uncertain future injury is sufficient to confer standing. For example, standing to sue for medical monitoring expenses, based on exposure to chemicals in drinking water, was upheld in *Rhodes v. Dupont*, No. 6:06-cv-00530 (S.D. W.Va. Sept. 28, 2009). It was not necessary for plaintiffs to demonstrate that their health had actually been harmed; an increased risk of harm was sufficient to confer standing. On the other hand, in *Pollack v. United States Department of Justice*, 577 F.3d 736 (7th Cir. 2009), the U.S. Court of Appeals for the Seventh Circuit was unimpressed with the plaintiff's concerns about lead shot contaminating Lake Michigan when his drinking water did not come from the area near the shooting range and he did not present persuasive evidence that contamination could reach his location.

Questions about "injury in fact" also tend to arise where claims relate to diminution of aesthetic enjoyment of natural surroundings. In *Pollack v. United States Department of Justice*, 577 F.3d 736 (7th Cir. 2009). a showing that the plaintiff visited local parks and was concerned about the potential impact of a shooting range on wildlife in the general area was insufficient to constitute a case or controversy, because he did not specifically visit the area in which the shooting range was located. Conversely, a sufficient "tangible, continuing connection" to a property proposed for development was found in *White Tanks Concerned Citizens v. Strock*, 563 F.3d 1033 (9th Cir. 2009). In that case, members of the plaintiff association lived near the area in question and used it for hiking and horseback riding. Similarly, in *Colorado Wild Horse and Burro Coalition v. Salazar*, 639 F. Supp. 2d 87 (D.D.C. 2009), evidence that plaintiffs observed the herds of wild horses that were the subject of the case was sufficient to prove injury for standing purposes.

"Informational injury" may constitute injury-in-fact, as seen in *Friends of Animals v. Salazar*, 626 F. Supp. 2d 102 (D.D.C. 2009). In that case, plaintiffs' standing to challenge certain exemptions under the Endangered Species Act was denied as to most claims because

they could not show a direct injury from the alleged effect of the exemption. However, the plaintiffs *did* have standing to challenge a provision in the rule allegedly resulting in denial of access to information that is required by statute to be made public.

As *Summers* emphasized, injury must be "imminent" and not speculative. An unusual claim was held too speculative to support standing in *United States v. Metro. St. Louis Sewer Dist.*, 569 F.3d 829 (8th Cir. 2009), where large users of sewer services sought to intervene in a Clean Water Act enforcement case against the sewer provider, on the theory that enforcement might result in increased rates. The U.S. Court of Appeals for the Eighth Circuit found that the possibility of increased rates was too remote to meet the "imminence" test.

In *Elko County, Nevada v. The Wilderness Society*, No. 08-571 (U.S. Mar. 23, 2009), the Supreme Court denied review of a Ninth Circuit decision (*United States v. Carpenter*, 526 F.3d 1237 (9th Cir. 2008)) that had granted standing to an environmental group to participate in proceedings regarding a claim by Elko County, Nevada, that it held an easement for a road on Forest Service lands, thus preventing the Service from allowing the road to become abandoned. Although the dispute was in the form of a quiet title action involving property in which the Wilderness Society had no ownership interest, the Ninth Circuit had ruled that the Society was entitled to limited intervenor status, with standing based on its members' interest in preserving the wilderness character of the area.

"Procedural" injuries, where a government agency fails to follow proper procedures for an action, give rise to a somewhat more generous standing test. In particular, it is generally not necessary to show that an actual injury has occurred or is imminent, but only that the plaintiff's procedural rights were denied. Moreover, a procedural injury may support standing even while a proceeding is ongoing; the plaintiff need not wait for a final decision. *Western Watersheds Project v. U.S. Forest Service*, CV-07-151-E-BLW (D. Idaho Sept. 26, 2009).

Standing issues regarding procedural injuries arise frequently under the National Environmental Policy Act's (NEPA's) action-forcing provisions. For instance, in *Lemon v. Geren*, 514 F.3d 1312 (D.C. Cir. 2008), community residents sought to enjoin the U.S. Army's sale of a defunct military base to a private developer, alleging that its failure to prepare a supplemental environmental impact statement (EIS) violated NEPA. The district court dismissed the suit, finding that preparing a supplemental EIS would not "force" the U.S. Army to alter its course of action; thus the residents had not demonstrated "injury-in-fact." However, the U.S. Court of Appeals for the D.C. Circuit reversed, holding that an "agency's failure to follow NEPA's procedures" constitutes "injury in fact." The D.C. Circuit reasoned that compliance with NEPA might persuade an agency to consider a more environmentally sensitive alternative, thus redressing plaintiffs' injury. The court cited a series of cases where similarly situated plaintiffs had standing "to seek compliance with the impact statement requirement of NEPA." *Id.* at 1314–15.

Procedural injuries may be established under other federal environmental statutes, such as the Endangered Species Act. *Salmon Spawning & Recovery Alliance v. United States*, 523 F.3d 1338 (D.C. Cir. 2008). Failure to promulgate a rule was held to be a procedural claim entitled to more generous standing requirements in *Sierra Club v. Johnson*, No. C 08-01409 WHA (N.D. Cal. Feb. 25, 2009). Plaintiffs were given greater latitude with respect to causation and redressability, since it would be impossible to predict in detail what the effect of the rule might be.

Even where procedural claims are asserted, the plaintiff must still show that it has a potentially affected "concrete interest," even though imminent injury is not required. Lack of such an interest was fatal to standing in *Friends of Hamilton Grange v. Salazar*, LEXIS U.S. Dist 21855 (S.D.N.Y. Mar. 12, 2009), as to some but not all claims, as well as in *Central Delta*

Water Agency v. U.S. Fish and Wildlife Service, 1:09-CV-00861 OWW DLB (E.D. Cal. Sept. 8, 2009).

Summers has been interpreted by some courts as creating a less generous test for procedural injuries than had been allowed in the past. In *Ashley Creek Properties v. Timchak*, Case No. CV-08-0412-E-BLW (D. Idaho May 19, 2009), the court read *Summers* as requiring a showing of imminent harm even in cases of procedural injury, and held that a plaintiff lacked standing because its injuries were too remote and speculative. On the other hand, in *Citizens for Better Forestry v. USDA*, 632 F. Supp. 2d 968 (N.D. Cal. 2009), involving a challenge for failure to require an EIS in a new rule on development of forest plans, standing was upheld even though plaintiffs did not show a likely injury tied to specific action in a specific location. The district court distinguished *Summers* on the ground that the claim was purely procedural, and the rule in question would never be directly linked to a site-specific project.

If injury is shown, the plaintiff must also show some causal link to the defendant's actions. This link need not meet the standards of causation required in tort law, but the injury must be "fairly traceable" to the defendant. As seen above, causation is regularly an issue in cases relating to climate change. In that arena, courts are becoming more willing to infer causation (for standing purposes) even if the defendant's contribution is tiny relative to the overall problem.

Complex causal chains can create problems for standing in other circumstances as well. In *Coalition for a Sustainable Delta v. Koch*, 1:08-CV-00397 OWW GSA (E.D. Cal. July 16, 2009), an environmental group sought to limit enforcement of rules protecting striped bass that allegedly prey on endangered species. Its standing was based on the affidavit of a member that he visited the delta and observed endangered species. The court found that the member's allegations were not sufficient to grant the plaintiff group summary judgment on standing, because of expert testimony questioning whether striped bass have an adverse effect on endangered species populations.

In *Appalachian Voices v. Bodman*, No. 08-0380, 2008 WL 4839676 (D.D.C. Nov. 10, 2008), the court held that the plaintiff lacked standing to challenge tax credits because it had not established that the challenged tax credits were a "substantial factor" in the underlying decision to pursue clean coal technology. Similarly, in *Miccosukee Tribe of Indians of Florida v. United States*, 574 F. Supp. 2d 1360 (S.D. Fla. 2008), the court dismissed the complaint for a lack of standing, holding that the tribe had failed to demonstrate that a challenged conveyance of land in a public park for a highway project would affect individuals within the tribe or its land holdings.

Even where there is an injury and causation, standing requires that the matter be one on which adjudication could lead to some form of redress. A case in which lack of redressability was found to be fatal to standing was *North Carolina v. EPA*, No. 08-1225 (D.C. Cir. Nov. 24, 2009). North Carolina had challenged an EPA rule that exempted part of the State of Georgia from certain air pollution regulations. Georgia contended that even if the exemption had not been given, its sources would be able to obtain credits that would allow them to comply with those regulations. Therefore, the court concluded that no relief could be afforded that would redress North Carolina's claimed injury.

In *West v. Johnson*, Case No. C08-5741RJB (W.D. Wash. Aug. 7, 2009), the court made a fine distinction as to redressability. The court found that the plaintiff, who was suing the State of Washington for inadequately administering its National Pollutant Discharge Elimination System (NPDES) permit system and EPA for not taking back the program, had established standing against the state based on his use of water bodies affected by the permit system. However, EPA's involvement was too remote to establish standing, both in terms of causation and redressability. Even if plaintiff got the relief he sought, requiring federalization of the permit program, it was

not clear to the court that this remedy would change the circumstances giving rise to his injury.

In *FACTS v. City of St. Louis*, 638 F. Supp. 2d 1117 (E.D. Mo. 2009), the court ruled after trial that plaintiffs lacked standing because all regulatory violations had ceased before the case was filed, and plaintiffs had failed to show that further violations were imminent. Therefore, the claim failed the redressability requirement for standing. Similarly, lack of redressability was fatal where plaintiffs concerned about the impact of potential development on turtles failed to show that any further construction was ongoing or imminent. *Fox v. Palmas del Mar Properties*, 620 F. Supp. 2d 250 (D.P.R. 2009). The U.S. Court of Appeals for the Sixth Circuit reached a similar result in *Friends of Tims Ford v. TVA*, No. 08-5706 (6th Cir. Nov. 6, 2009), where the plaintiffs sought to enjoin future construction, but all planned construction had been completed.

A plaintiff may have standing at the time a case is brought, but lose it if circumstances later render the claim moot. Some common ways in which mootness arises in an environmental context include the following:

- Where a citizen suit is brought based on alleged regulatory violations, post-complaint compliance may moot the case. For example, in *Environmental Conservation Organization (ECO) v. City of Dallas*, 529 F.3d 519 (5th Cir. 2008), the U.S. Court of Appeals for the Fifth Circuit upheld the lower court's dismissal of a citizen suit on mootness grounds. Normally, in the citizen suit context, the defendant "bears the formidable burden of showing that its alleged violations of the CWA *cannot reasonably be expected to recur*." *Id*. at 527. Plaintiffs, on the other hand, must demonstrate that "there is a realistic prospect that the violations alleged in its complaint will continue notwithstanding the consent decree." *Id.* at 528–30. In *ECO*, the plaintiff alleged that the City of Dallas was discharging wastewater from a sewer system without a permit, in violation of the Clean Water Act (CWA). While the city subsequently negotiated a consent decree with EPA, the plaintiff continued the action, maintaining that the text of the CWA does not divest a court of jurisdiction based on subsequent compliance, thereby implicitly rejecting mootness. The Fifth Circuit upheld the lower court's dismissal, reasoning that because mootness is an element of Article III standing, the federal courts lack jurisdiction to "resolve" a CWA citizen suit once an intervening event eliminates the controversy associated with the original claim. Here, the city obtained a permit and EPA and other third parties essentially ensured that the violations would not recur. The circuit court also observed that allowing the suit to continue would "effectively cede primary enforcement authority under the CWA to citizens acting in the role of private attorneys general," and would discourage CWA defendants from seeking consent decrees. *Id*. at 528–29.

- Similarly, in *National Parks Conservation Ass'n v. U.S. Army Corps of Engineers* (USCOE), 574 F. Supp. 2d 1314 (S.D. Fla. 2008), the court found that the plaintiff lacked standing to challenge a CWA section 404 permit issued by USCOE for filling wetlands because the permit at issue expired before the court could grant relief.

Prudential limits on standing were addressed in *City of Los Angeles v. County of Kern*, 581 F.3d 841 (9th Cir. 2009), where recyclers of biosolids from wastewater treatment facilities challenged a county ordinance, within the same state, prohibiting the application of biosolids to land in the county. They alleged that this violated the "dormant" Commerce Clause. The Ninth Circuit ruled, however, that since the Commerce Clause was meant to prevent barriers to interstate commerce, parties involved in within-state commerce were not within its intended zone of protected interests.

Similarly, plaintiffs not engaged in interstate commerce did not have standing to challenge an alleged dormant Ccommerce Cclause violation based on its impact upon others. *Liberty Disposal, Inc. v. City of Kankakee*, No. 09 C 1985 (N.D. Ill. Aug. 26, 2009). The fact that they might receive an indirect benefit did not place them within the zone of interests intended to be protected by the Commerce Clause. A similar theory was used to conclude that the plaintiffs lacked standing under Massachusetts law in *Hertz v. Secretary*, 901 N.E. 2d 1240 (Mass. App. 2009). Specifically, the Massachusetts court concluded that state trust lands regulations were intended to protect water-dependent interests, so plaintiffs concerned about the effect of development on abutting property lacked standing.

Conclusion

After forty years of litigation within a body of relatively stable doctrine, it is remarkable how frequently standing remains a central and highly disputed issue in environmental cases. The tension between the broad but intense interests of environmentalists, and the need for courts to maintain a role distinct from that of the legislative or executive branches, surfaces again and again, with decisions often turning on what seem to be arcane and artificial matters. In reality, harm to coastal lands was probably a small part of what motivated Massachusetts to force EPA's hand on the climate issue; the same claim might well have been brought by a landlocked state. Yet that distinct and palpable injury was critical in the eyes of the Supreme Court. With more climate cases likely headed to the Court in future years, the law of standing remains one of the hottest topics in environmental law today.

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STANDING, THE SUPREME COURT, AND ENVIRONMENTAL HARM IN THE LOWER COURTS

Maria Gillen

Two of the Supreme Court's recent environmental standing cases, *Massachusetts v. EPA*, 549 U.S. 497 (2007), and *Summers v. Earth Island Institute*, 129 S. Ct. 1142 (2009), figured prominently in 2009 in lower court decisions that addressed the plaintiffs' standing to use statutory and common law to address environmental harm.

In *Massachusetts*, the Court was liberal in its analysis of standing for several states, cities, and environmental organizations that challenged EPA's denial of a petition to regulate greenhouse gases. It stressed the significance of the fact that one of the plaintiffs, Massachusetts, was "a sovereign State and not, as it was in *Lujan*, a private individual." 549 U.S. at 518. The Court emphasized that states are not "normal litigants" but instead are "quasi-sovereign[s]" who have "an interest independent of and behind the titles of [their] citizens in all the earth and air within [their] domain[s]." *Id*. at 518–19 (quoting *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907)). It concluded that because a state "surrenders certain sovereign prerogatives" when it enters the Union, it is due a "special solicitude in [a court's] standing analysis." *Id*. at 519–20. That "special solicitude" helped the Court find that plaintiffs had alleged an injury-in-fact despite the fact that those injuries were "widely shared" and temporally remote. *Id*. at 521-23. In addition, the Court found that causation and redressability were satisfied despite the myriad and more significant "causes" of global warming. *Id*. at 524–26.

In contrast, last term in the *Summers* case, a majority of the Court showed no solicitude, special or otherwise, for plaintiffs who challenged the Forest Service's decision to exempt small fire-rehabilitation and timber-salvage projects from notice-and-comment rulemaking under the National Environmental Policy Act and the Forest Service Decisionmaking and Appeals Reform Act. 129 S. Ct. at 1147. In *Summers*, the Court once again narrowed the pigeonhole through which only the most specific of allegations of injury-in-fact can pass to confer standing on plaintiffs.

"Special Solicitude" in Short Supply in Lower Court Decisions

After *Massachusetts*, state environmental plaintiffs appeared to take the idea of "special solicitude" and run with it. The lower courts, however, did not take the bait. Although all three "global warming" cases that confronted the lower courts—*Connecticut v. American Electric Power*, 582 F.3d 309 (2d Cir. 2009), *Comer v. Murphy Oil*, 585 F.3d 855 (5th Cir. 2009), and *Native Village of Kivalina v. ExxonMobil Corp.*, ___ F. Supp. 2d ___, 2009 WL 3326113 (N.D. Cal. 2009)—discussed this "special solicitude," none applied it. There were also two Clean Air Act cases that acknowledged the Supreme Court's observation that special solicitude should be accorded states, but one found it inapplicable where the state was suing the federal government and the other determined that it did not help the plaintiff state demonstrate redressability.

The first "global warming" case, *Connecticut v. AEP*, was brought by several states, the City of New York, and three land trusts against six electric power corporations and sought injunctive relief to limit those defendants' emissions of greenhouse gases that contribute to global warming. The plaintiffs relied on a federal common law public nuisance theory. The district court dismissed the case, ruling that it presented a political question. The U.S. Court of Appeals for the Second Circuit reversed on the political question issue and went on to decide that plaintiffs had standing to bring their claims, an argument that the district court had not reached. The Second Circuit discussed the effect of *Massachusetts* on the standing inquiry, but sidestepped the need to apply the "special solicitude" created there. Indeed, the Court of Appeals criticized the Supreme Court's standing analysis in *Massachusetts* as being in conflict with the Court's earlier pronouncement on state standing in *Snapp v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982).

In *Snapp*, the Court emphasized that state standing is not monolithic but must be analyzed according to the

claims presented in the lawsuit. Moreover, the *Snapp* Court held that a state demonstrated *parens patriae* standing if it demonstrated: (1) an interest apart from private parties; (2) a quasi-sovereign interest was at stake; and (3) an injury to a "sufficiently substantial segment of its population." *Connecticut*, 582 F.3d at 335 (quoting *Snapp*, 458 U.S. at 607). In *Massachusetts*, however, the Court appeared to have conflated Massachusetts's proprietary interests as a landowner with its quasi-sovereign interests in the well-being of its citizens. 582 F.3d at 337. This conflation left the Second Circuit wondering whether "a state asserting *parens patriae* standing [must] satisfy both the *Snapp* and *Lujan* tests?" *Id*. at 338. In other words, the Second Circuit realized that the Supreme Court's mention of "special solicitude" in *Massachusetts* was unnecessary in light of *Snapp*'s already relaxed standing analysis, unless the Court was requiring states to also show proprietary standing under *Lujan*. The Second Circuit did not answer the question, however, because "even assuming that a state asserting *parens patriae* standing must meet the *Lujan* requirements, here, those requirements have been met." *Id*.

Comer was brought by individual landowners against various oil and energy companies under state law nuisance, trespass, negligence, and other causes of action for the injuries that Hurricane Katrina caused their properties. The plaintiffs alleged that defendants' operations emit greenhouse gases that exacerbated the force of Hurricane Katrina. The lower court dismissed the case on political question and standing grounds. The U.S. Court of Appeals for the Fifth Circuit reversed on both issues and allowed the case to go forward. The Fifth Circuit's standing analysis focused on the causation prong. *Comer*, 585 F.3d at 863–64. For that analysis, the court relied heavily on the *Massachusetts* finding that the Supreme Court "accepted as plausible the link between man-made greenhouse gas emissions and global warming . . . as well as the nexus of warmer climate and rising ocean temperatures with the strength of hurricanes" and "that injuries may be fairly traceable to actions that contribute to, rather than solely or materially cause greenhouse gas emissions and global warming." *Id*. at 865–66. In a footnote, the court mentioned the "special solicitude" that was given to the state plaintiffs in *Massachusetts*, but found that because "the chain of causation at issue here is one step shorter than the one recognized in *Massachusetts*" (i.e., extending to the failure of EPA to regulate greenhouse gases), the plaintiffs "need no special solicitude." *Id*. at 865.

Notably absent from the *Comer* court's analysis was an acknowledgement that the plaintiffs in *Comer* were not states, but private landowners, and thus could not avail themselves of the "special solicitude" shown in *Massachusetts*. This failure led to a logical hole in the *Comer* court's analysis because the relaxed causation standard the Supreme Court used in *Massachusetts* came about because of the special solicitude bestowed on states; without that solicitude, it is unclear whether the Court would have found the attenuated chain of causation presented in *Massachusetts* sufficient.

The third global warming case, *Kivalina*, was dismissed at the district court level as presenting a political question. 2009 WL 3326113, at *7–10. An Eskimo village sued oil, energy, and utility companies under a federal common law nuisance theory, arguing that the companies were contributing to global warming, which in turn caused the Arctic sea ice to melt, threatening the existence of their village. The standing dispute before the court centered on the causation requirement—that is, whether plaintiffs had to trace their injuries to a particular defendant, or could simply rely on the proof that defendants *contributed to* plaintiff's injury. The court held that where no statutory scheme limiting defendants' emissions existed, "no presumption arises that there is a substantial likelihood that any defendant's conduct harmed plaintiffs. Without that presumption . . . it is entirely irrelevant whether any defendant 'contributed' to the harm because a discharge, standing alone, is insufficient to establish injury." *Id*. at *11. In sum, the court found plaintiffs' chain of causation too attenuated and their defined "zone of discharge" so widespread so as to "effectively eliminate[ ] the issue of geographical proximity in any case involving harms caused by global warming." *Id*. at *14. Finally, although plaintiffs claimed that they were entitled to a relaxed standing inquiry because of the special solicitude afforded to sovereigns, the court summarily dismissed that

argument by distinguishing the relief plaintiffs sought—damages against private entities versus procedural rights related to an agency's rulemaking—and by finding that "[t]his rationale does not apply to Plaintiffs, which did not surrender its sovereignty as the price for acceding to the Union." *Id*. at *15.

Two Clean Air Act cases also demonstrated the effect of *Massachusetts*. In *Michigan v. EPA*, 581 F.3d 524 (7th Cir. 2009), Michigan filed a petition to review the EPA's redesignation of certain tribal lands as Class I areas under the Clean Air Act's Prevention of Significant Deterioration program, a designation that imposed stricter limits on emitting sources within Michigan. The court dismissed Michigan's attempt to avail itself of the "special solicitude" given to Massachusetts in *Massachusetts v. EPA* because, unlike Massachusetts, Michigan was suing the United States for enforcement of federal statutes. In such cases, according to the court, citizens are properly protected by their federal "parent," not their state "parent"; therefore, Michigan could not act *in parens patriae*. *Id*. at 529 (citing *Massachusetts v. Mellon*, 262 U.S. 447, 485–86 (1923) ("It cannot be conceded that a State, as *parens patriae*, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof . . . In that field it is the United States, and not the State, which represents them as *parens patriae*[.]")). Without a similar quasi-sovereign interest, Michigan could not benefit from any special solicitude. *Id*.

Finally, in a second Clean Air Act case, *North Carolina v. EPA*, 587 F.3d 422 (D.C. Cir. 2009), the D.C. Circuit did bestow "special solicitude" on the state petitioner, but that solicitude did not get North Carolina the relief it sought. North Carolina filed a petition for review of EPA's final rule removing part of Georgia from the one-hour NOx SIP Call (a requirement by the EPA for states to amend their State Implementation Plans to account for interstate air pollution) promulgated under the Clean Air Act (CAA), claiming that Georgia's excessive emissions of NOx injured North Carolina by making it more difficult for North Carolina to meet the eight-hour CAA ozone standard. As a result, EPA's exempting Georgia from the limits of the one-hour NOx SIP Call was an action contrary to EPA's policy and disparate treatment of Georgia without lawful justification. *Id*. at 423–24. The D.C. Circuit found that "North Carolina's situation is similar in many respects to that of Massachusetts in *Massachusetts v. EPA* [because like] Massachusetts, North Carolina is a state challenging EPA's rule pursuant to 42 U.S.C. 7607(b)(1) in order to reduce air pollution, which entitles North Carolina to 'special solicitude in our standing analysis.'" *Id*. at 426.

The application of this special solicitude led the D.C. Circuit to find that North Carolina had satisfied both the injury-in-fact and causation prongs of the standing analysis. However, in an ironic twist, the court also found that the relief North Carolina sought—reinstating the NOx SIP Call limits in Georgia—would not redress the state's injury because Georgia would not reduce emissions to comply with the NOx SIP Call limits, but would comply by purchasing pollution allowances. Accordingly, North Carolina lacked standing to challenge EPA's decision. Therefore, even though North Carolina showed that Georgia's emissions of nitrogen oxides exceeded CAA limits and that those emissions were causing harm in North Carolina, it "can no longer show that vacating the [rule exempting Georgia from the NOx SIP Call] and re-including northern Georgia in the NOx SIP Call is likely to redress North Carolina's difficulty in meeting the 1997 eight-hour ozone standard. As counsel for North Carolina stated at oral argument, if reinstating Georgia in the NOx SIP Call would not lower Georgia's emissions, then NC has a standing problem." 582 F.3d at 429.

The *Summers* Effect

Last term, the Supreme Court decided *Summers v. Earth Island Institute*, in which environmental organizations sought to enjoin the application of certain Forest Service regulations to a sale of 238 acres of salvage timber from a forest fire in the Sequoia National Forest ("the Burnt Ridge Project"). The regulations exempted timber sales of less than 250 acres from the notice, comment, and appeal process contained in the Forest Service's Decisionmaking and Appeals Reform Act. 129 S. Ct. 1142, 1147. After the district court granted a preliminary injunction against

the Burnt Ridge timber sale, the parties settled their dispute with respect to the timber sale at that site. *Id*. at 1148. The government argued for dismissal on the grounds that without the Burnt Ridge project, there was no concrete dispute between the parties such that the plaintiffs had standing to challenge the Forest Service regulations in the abstract. The district court did not dismiss the case but instead invalidated five of the Forest Service regulations and issued a nationwide injunction against their application. The U.S. Court of Appeals for the Ninth Circuit reversed the district court's rulings on the regulations not at issue in the Burnt Ridge sale, but affirmed its rulings on the two regulations at issue in the Burnt Ridge sale and upheld the injunction against their application.

The Supreme Court reversed the standing decision, finding that the plaintiff organizations had submitted no evidence that any of its members were threatened with imminent injury from application of the regulations. The organizations had submitted an affidavit from a member during the lower court proceedings, but that member attested to imminent injury resulting from application of the regulations only to the Burnt Ridge project, not to other impending timber sales. Writing for the Court, Justice Scalia found this affidavit clearly insufficient to confer organizational standing:

> We know of no precedent for the proposition that when a plaintiff has sued to challenge the lawfulness of certain action or threatened action but has settled that suit, he retains standing to challenge the basis for that action (here, the regulation in the abstract) apart from any concrete application that threatens imminent harm to his interests. Such a holding would fly in the face of Article III's injury-in-fact requirement.

Id. at 1149–50. References to other projects subject to the challenged regulations in the affidavit were also insufficient to confer standing because the affiant had not asserted a firm intention to visit the locations of those projects but said only that he wanted to go there. Nor was the organizations' allegation of procedural injury—the denial of an ability to file comments on some Forest Service actions—sufficient to confer standing because "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Id*. at 1151.

Several lower courts took *Summers* to heart and denied plaintiffs' allegation of procedural injury without strict proof of a connection between the procedural injury and a concrete injury-in-fact. Thus, for example, homeowners' associations lost their bid for an injunction to halt the implementation of a Tennessee Valley Authority land management plan because, just as in *Summers*, the affidavits submitted by the associations' members "failed to connect the procedural harm alleged in its complaint—the creation of a new land use classification in the [Final Environmental Impact Statement] without an environmental assessment—to specific harm threatening [the associations'] members." *Friends of Tims Ford v. Tennessee Valley Authority*, 585 F.3d 955, 969 (6th Cir. 2009). While the affidavits alleged direct harms that had already resulted from the completed construction of boat docks in the landowners' lakefront neighborhood, they did not allege any imminent threat to their interests from the new land use classification. Without such a link between procedural injury and injury to a concrete interest, the plaintiffs in *Friends of Tims Ford*, like the plaintiffs in *Summers*, had a "procedural right *in vacuo*" insufficient to confer standing.

Similarly, the U.S. Court of Appeals for the Seventh Circuit cited *Summers* in *State of Michigan v. EPA*, 581 F.3d 524 (7th Cir. 2009), in its conclusion that Michigan had failed to connect its alleged procedural injury to a concrete harm suffered by the state. Michigan alleged that EPA had used the wrong process in redesignating Indian lands in Michigan to Class I status under the Clean Air Act, a designation that required Michigan to ensure that the most stringent air quality standards were maintained in that area. The Seventh Circuit found that Michigan had alleged no harm alleged flowed directly from this redesignation. The stricter air emissions restrictions did not affect Michigan directly but rather affected emitting sources within Michigan that wanted to construct new facilities

or modify existing ones. *Id*. at 529. Moreover, although Michigan's allegation, that the redesignation created "numerous complications and unworkable conflicts" in Michigan's air pollution programs, "raise[d] some important issue about the [Clean Air Act's Prevention of Significant Deterioration] program's regulatory structure, those harms were not concrete until they had been 'hashed out in the context of the application process for a particular permit.'" *Id*. at 530. Thus, Michigan's allegation of harm was speculative and premature.

In contrast, the U.S. Court of Appeals for the Ninth Circuit navigated its way through *Summers*' narrow passage to find a connection between a procedural injury and a concrete injury-in-fact in *Center for Biological Diversity v. Kempthorne*, 588 F.3d 701, 2009 WL 4282025 (9th Cir. Dec. 2, 2009). Plaintiff challenged Fish and Wildlife Service's regulations authorizing the nonlethal "take" (that is, the harassment, hunting, capture, or kill of any marine mammal) of polar bears and Pacific walrus by oil and gas activities in and along the Beaufort Sea on the northern coast of Alaska as procedurally deficient under NEPA and the Marine Mammal Protection Act. The Ninth Circuit distinguished *Summers* by pointing out that the members of the Center for Biological Diversity alleged in their affidavits that:

> they have viewed polar bears and walrus in the Beaufort Sea region, enjoy doing so, and have plans to return. If the plaintiffs' allegations are true, the Service's incidental take regulations threaten imminent, concrete harm to these interests by destroying polar bears and walrus in the Beaufort Sea. . . . Unlike the alleged injury in *Summers*, this injury is geographically specific, is caused by the regulations at issue, and is imminent. The plaintiffs do not challenge the "regulation in the abstract."

2009 WL 4282025, at *3.

Thus, it appears that the Supreme Court's extension of solicitude in the demonstration of standing to states in *Massachusetts v. EPA* has not been taken up as a cause célèbre by the lower courts. Instead, the lower courts appear to prefer the strictly defined *Summers* standard for a showing of injury-in-fact, causation, and redressability.

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CONNECTICUT V. AEP: THE SECOND CIRCUIT CONFIRMS STANDING OF STATES, THE CITY OF NEW YORK, AND PRIVATE LAND TRUSTS

Norman A. Dupont

In *Connecticut v. American Electric Power*, 582 F.3d 309 (2d Cir. 2009), petition for rehearing pending (Nov. 5, 2009) (*AEP*), the U.S. Court of Appeals for the Second Circuit ruled upon a troika of constitutional issues involving federal common law nuisance claims for injuries allegedly resulting from global warming. The consolidated suits were brought by eight states, the City of New York, and three private land trusts, each of whom alleged injury resulting from the greenhouse gases emitted from fossil fuel power plants operated by six multistate public utility defendants. The primary constitutional issue in *AEP* was whether the public nuisance claim required a court to determine what was essentially a political question, violating principles of separation of powers. Beyond that, the Second Circuit also examined whether the plaintiff had sufficient standing under Article III and whether any such federal common law nuisance claim was "displaced" by virtue of existing federal statutes including the Clean Air Act.

The Second Circuit's analysis of standing on the part of the City of New York and the three private land trusts extended beyond the requirement of an "injury in fact" that is "imminent" and instead allowed the land trusts to satisfy the standing test based largely upon a claim of a future injury. The Second Circuit's standing analysis for these four parties appears to go well beyond the Supreme Court's traditional test in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). On the other hand, the Second Circuit's opinion finding standing for the eight state plaintiffs, based upon claimed current injury to at least one state's property, appears to be safely within the doctrinal boundaries of the Supreme Court's more recent decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007). Thus, the Second Circuit's opinion leaves completely unresolved the fundamental question: Has the Supreme Court's more recent analysis of standing in the context of greenhouse gas emissions superseded the Court's prior standing analysis in *Lujan*?

With respect to the standing of the eight sovereign states, the Second Circuit's approach appears to mirror both the doctrinal confusion and ultimate holding reached by the Supreme Court in *Massachusetts v. EPA*. The Second Circuit spent pages discussing the "special" standing rights accorded to states in their capacity as *parens patriae* on behalf of residents within their boundaries impacted by large-scale pollution such as global warming. 2009 WL 29969729 at *18–*21. Then, however, the Second Circuit held that it need not decide whether the eight states had constitutional standing under the doctrine of *parens patriae*. Rather, because at least one state (California) had alleged sufficient standing under the more traditional *Lujan* test, the Second Circuit held that all of the states therefore had Article III standing to pursue the lawsuit. *Id*. at *21 and *22–*25 (noting that California asserted loss of Sierra Nevada snowpack as a direct result of global warming that impacted state property already).

One might wonder how the operations of the Tennessee Valley Authority's coal-fired plants in the South can be said to have measurably contributed to a melting of the snowpack in the Sierra Nevada. However, the Second Circuit answered the question of "traceability" of a plaintiff's claimed injury to the defendant's asserted conduct through two conclusions: (1) that at the pleading stage a plaintiff need not establish the element of "proximate cause" (although it might have to at the time of trial); or (2) that plaintiffs in a common law pollution case need not sue every polluter in order to bring a claim against some significant polluters. *Id*. at *28–*29.

Thus, regarding the standing of the state plaintiffs, the Second Circuit's standing analysis does not break with existing Supreme Court standing law. In *Massachusetts v. EPA*, the greenhouse gases emitted as the result of an agency's failure to properly analyze whether greenhouse gases could be regulated as an "air pollutant" under the Clean Air Act was held to be justiciable by at least the state of Massachusetts, which alleged that its shoreline had already been decreased by virtue of global warming.

However, the second part of the Second Circuit's standing analysis with respect to the three private land trusts (and the city of New York) ventures forward into legal territory akin to the venture into space that Gene Roddenberry termed "to boldly go where no man has gone before." A review of the complaint filed by the three public trusts—the Open Space Institute, the Open Space Conservancy, and the Audubon Society of New Hampshire—indicates that those three groups all alleged that they owned various parcels of real property for the benefit of their members and that they feared future injury to those properties caused by global warming. They alleged as "special injuries" that "unrestrained global warming" would cause sea levels to rise and thereby harm property held in trust for the ecological benefit of their members. *Complaint of Open Space Institute, et al.*, 2004 WL 5614409 (S.D.N.Y.). The Second Circuit characterized these as claims of "future injury." In response to objections that such claims of "future injury" were simply too remote to merit Article III standing, the Second Circuit held that, although not definite in time, the allegations of the complaints made it appear that such injury was relatively "certain" to occur. The Second Circuit noted that the land trusts complained of future injuries that were "likely" to occur based upon the "laws of physics and chemistry," not a hypothetic prediction based upon economic principles or other less certain disciplines. 582 F.3d at 344.

The Second Circuit's standing analysis is hard to square with the Supreme Court's decision in *Lujan*. There, the Court found that the intent to go sometime in the future to a foreign land whose endangered species were threatened by governmental action was not sufficiently "imminent" to past the Article III requirement of a current case or controversy. Justice Scalia in footnote 2 for the Court majority specifically noted that if the dissenters meant by the term "soon" "nothing more than 'in this lifetime,'" then the dissent took "quite a departure" from Court precedent. 504 U.S. at 564, n.2.

How "soon" would global warming in fact inundate or otherwise impair the properties of the private trusts? This question was never directly answered in the Second Circuit's opinion. As the Second Circuit noted, the Supreme Court in *Lujan* stated that the standing requirement of an "imminent" injury was flexible in terms of a temporal date but that, on the other hand, where plaintiff "alleges only an injury at some indefinite future time," such injuries may not comport with the constitutional standing criteria. *Id.* The Court of Appeals noted that in *Lujan* the Supreme Court was also concerned with the possibility that a future injury could be affected by actions of plaintiff, and thus, might be a speculative injury. 582 F.3d at 343.

While the Second Circuit addressed the *Lujan* requirement of an "imminent" injury, it ultimately avoided the hard questions: How soon (in this lifetime or next) would the flooding of the private plaintiffs' lands in fact occur? The Court noted that the private trusts "do not provide a time frame for the injuries they expect to sustain from global warming," 582 F.3d at 342, a lack of specificity that is troubling in light of the Supreme Court's holding in *Lujan*. How relatively certain was it that the increased water levels produced by global warming would in fact inundate plaintiffs' lands, as opposed to some other part of the globe? As the Supreme Court in *Lujan* noted, a plaintiff "claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly 'in the vicinity' of it." 504 U.S. at 565–66. While the private party plaintiffs claim that the scope of global warming will affect all property held throughout the world, this argument seems to render the more traditional Article III standing criteria irrelevant. Under plaintiffs' theory, a plaintiff in any global warming case will have standing because it can claim that all parties of the globe will be affected, and therefore, the specific property it visits will be directly impacted by the challenged activity—greenhouse gas emissions.

The Second Circuit's opinion failed to grapple with the real intellectual issue: Is the Supreme Court's widely cited *Lujan* criteria for "imminence" of an injury to a private party somehow modified or overruled by the Supreme Court's later opinion in *Massachusetts v. EPA*? If the answer is yes, then the Second Circuit was well within the new standing criteria established by later Supreme Court precedent to allow the suit by the private trusts to proceed. If, however, the answer to this fundamental question is no, then the Second Circuit's analysis of the standing of the three private trusts arguably violates the *Lujan* standard.
Finally, although the Court of Appeals emphasized that it made its decision on standing at a preliminary stage of the pleadings with no discovery (582 F.3d at 333),

this more lenient review of a preliminary pleading of standing is difficult to square with the Supreme Court's recent decisions in *Bell Atlantic Corp v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). As the Supreme Court put it in *Twombly*: "[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" 550 U.S. at 570. If the *Twombly* pleading standard applies to the pleading alleging an environmental organization's claim to Article III standing, then one wonders about the "facts" that can be averred to demonstrate the "certainty" that some of the private trusts' lands will actually suffer flooding due to global warming. While these two Supreme Court decisions were rendered years after the initial complaint was filed in *AEP*, they were both decided before the Second Circuit issued its long-awaited opinion in *AEP*. Because the Second Circuit clearly considered at least one Supreme Court case decided after the initial submission of *AEP* to the panel (*Massachusetts v. EPA*), one wonders why the Court of Appeals did not at least mention *Twombly* or *Iqbal* in analyzing the sufficiency of the allegations of the private trusts' complaint under Federal Rule of Civil Procedure 8. Finally, the Supreme Court's recent decision in *Summers v. Earth Island Institute*, 129 S. Ct. 1142 (2009), demonstrates that the high court rigorously examines the claims of a private party's injury due to a generalized federal policy (in that case, the categorical exclusion from NEPA review of various federal salvage timber sales) very closely at the pleading stage.

Perhaps the Second Circuit feared that if it hinged its standing holding upon a controversial interpretation of the interplay of *Massachusetts v. EPA* and the Supreme Court's earlier decision in *Lujan*, it would simply invite a petition for *certiorari* founded upon the notion that the Court of Appeals simply "got it wrong." Nonetheless, the panel opinion's effort to suggest that its holding with respect to standing (at least of the private party trusts) is consistent with *Lujan* fails the red-face test.

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The Section invites nominations for the following awards:

Environment, Energy, and Resources Government Attorney of the Year Award

The Environment, Energy, and Resources Government Attorney of the Year Award will recognize exceptional achievement by federal, state, tribal, or local government attorneys who have worked or are working in the field of environment, energy, or natural resources law and are esteemed by their peers and viewed as having consistently achieved distinction in an exemplary way. The Award will be for sustained career achievement, not simply individual projects or recent accomplishments. Nominees are likely to be currently serving, or recently retired, career attorneys for federal, state, tribal, or local governmental entities.

Law Student Environment, Energy, and Resources Program of the Year Award

The Law Student Environment, Energy, and Resources Program of the Year Award will be given in recognition of the best student-organized educational program or public service project of the year addressing on issues in the field of environmental, energy, or natural resources law. The program or project must have occurred during the 2009 calendar year [consideration may be given to allowing projects that occurred in the 2008-2009 or 2009-2010 academic years]. Nominees are likely to be law student societies, groups, or committees focused on environmental, energy, and natural resources issues.

State or Local Bar Environment, Energy, and Resources Program of the Year Award

The State or Local Bar Environment, Energy, and Resources Program of the Year Award will be given in recognition of the best CLE program or public service project of the year focused on issues in the field of environmental, energy, or natural resources law. The program or project must have occurred during the 2009 calendar year. Nominees are likely to be state or local bar sections or committees focused on environmental, energy, and natural resources issues.

Nomination deadlines: April 23, 2010.
These Awards will be presented at the ABA Annual Meeting in San Francisco in August 2010.

2010 ABA Award for Excellence in Environmental, Energy, and Resources Stewardship

The *2010 ABA Award for Excellence in Environmental, Energy, and Resources Stewardship* was established in 2002 to recognize and honor the accomplishments of a person, organization, or group that has distinguished itself in environmental, energy, and resources stewardship. Nominees must be people, entities, or organizations that have made significant accomplishments or demonstrated recognized leadership in the areas of sustainable development, energy, environmental, or resources stewardship. This may include a major development in law or policy that serves to enhance conservation, responsible development, prudent resource use, and pollution abatement or mitigation, or it may be a recognition for a sustained period of leadership in the development of law and policy in this area. The Award may also be given for significant achievements in legal practice or in business, including corporate charitable contributions of funds, land, or resources; in written articles; in teaching; in advocacy before courts, agencies, legislators, or other institutions; or for any other significant achievement that evidences excellence in environmental, energy, and resources stewardship.

Nomination deadline: June 11, 2010.
The Award will be presented at the 18th Section Fall Meeting in New Orleans in September 2010.

2010 ABA Award for Distinguished Achievement in Environmental Law and Policy

The ABA Standing Committee on Environmental Law ("SCEL") and the Section of Environment, Energy, and Resources invite nominations for the *2010 ABA Award for Distinguished Achievement in Environmental Law and Policy*. This award recognizes individuals or organizations who have distinguished themselves in environmental law and policy, contributing significant leadership in improving the substance, process or understanding of environmental protection and sustainable development.

Nomination deadline: March 26, 2010.
The Award will be presented at the ABA Annual Meeting in San Francisco in August 2010.

For further details about these awards, please visit the Section Web site at
http://www.abanet.org/environ/sectaward/

AMERICAN BAR ASSOCIATION
Section of Environment, Energy, and Resources