Legal Backgrounder

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Can Constitutional Standing Arguments Restrain Citizen-Suit Enforcement of Federal Environmental Laws?

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Changes in leadership at the US Environmental Protection Agency (EPA) and the US Department of Justice (DOJ), and a proclaimed shift in how those federal agencies approach the enforcement of environmental laws, have propelled non-governmental organizations to action.[1] It remains to be seen whether and to what extent these changes will alter the level of government enforcement activity over time.

The perception that they could, however, is likely to inspire a significant increase in environmental-group litigation against private businesses under citizen-suit provisions of federal environmental statutes. How federal judges, especially at the trial court level, apply the legal test for whether organizational-group plaintiffs have standing to sue will determine the success of this regulation-by-litigation strategy.

As discussed below, recent appellate court decisions, in particular the US Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), suggest that rules governing standing in federal court cases generally should continue to present significant hurdles to the use of citizen-suit litigation for enforcement purposes.

Statutory Provisions Allowing Environmental Citizen Suits

Virtually every major federal environmental statute allows for some degree of private-party enforcement. A principal exception is the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq.* Private party actions challenging the sufficiency of environmental review conducted for federal agency actions under NEPA are only allowed under the federal Administrative Procedures Act, which provides that any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

Section 505(a)(1) of the Clean Water Act (CWA) authorizes "any citizen" to commence a civil action "on his own behalf" against any person who is alleged to be in violation of an effluent standard or limitation promulgated under the statute. Section 304 of the Clean Air Act (CAA) authorizes "any person" to commence a civil action "on his own behalf" against any person who is alleged to be in violation of an emission standard or limitation promulgated under that statute. Similar provisions can be found in the federal Safe Drinking Water Act; the Endangered Species Act (ESA); the Toxic Substances Control Act; the Resources Conservation and Recovery Act; and the Emergency Planning and Community Right to Know Act.

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[1] *See*, *e.g.*, Tammy Webber and John Flesher, *Environmentalists Prepare to Battle Trump, GOP, in Court*, Associated Press, Jan. 29, 2017, https://apnews.com/f56ceb04f4c542239a637a1b99e17652/environmentalists-preparing-battle-trump-gop-court.

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Congress has imposed relatively few limitations on the rights of individuals and groups to pursue enforcement actions under these statutory provisions. As a general matter, private litigants are only required to provide both the government and prospective defendants with notice of alleged environmental violations before filing private actions. Notice requirements are intended to give the government, among other things, time to evaluate potential violations and commerce their own enforcement actions. If the government has "commenced and is diligently prosecuting" an enforcement action with respect to an alleged violation, citizen suits concerning the same matter may be barred. In the absence of diligent government enforcement, private litigants are free to proceed as a statutory matter and may recover attorneys' fees for legal representation in that context.

As a general matter, Congress has not restricted who may initiate environmental citizen suits; however, the US Supreme Court has long held that under the Article III "case or controversy" requirement of the US Constitution, litigants must demonstrate that they have suffered "injury in fact" in order to establish standing to bring an action in federal court. This requirement applies just as much to litigants seeking to prosecute environmental citizen suits as it does to parties involved in any other federal court case.

The Evolution of Citizen-Suit Standing Requirements

The Court's decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), delineated essential criteria that must be met to establish standing to bring environmental citizen suits in federal court. *Lujan* addressed the authority of the Department of the Interior to adopt regulations implementing the ESA. According to the majority opinion in *Lujan* (authored by Justice Antonin Scalia),

> [O]ur cases have established that the irreducible constitutional minimum of standing contains three elements. 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.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

A key part of the *Lujan* decision was the way in which it addressed the claim that a "procedural injury" could be sufficient to establish standing to bring an environmental citizen suit under federal law. The Court focused in that regard on the ESA's commonly used language allowing that "any person may commence a civil suit on his own behalf" to enforce the requirements of the statute.

The US Court of Appeals for the Eighth Circuit in *Lujan* below held that this "provision create[d] a procedural righ[t] ... in all 'persons,'—so that anyone could file a suit" challenging the government's "failure to follow [ESA procedures], notwithstanding [the absence of] any discrete injury flowing from that failure." The US Supreme Court rejected this position on the ground that plaintiffs' ESA challenge was no more unique to the plaintiffs than to members of the public at large and therefore did not state a justiciable case or controversy under Article III.

The Court clarified its ruling in *Lujan* with the 2000 decision *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167 (2000). In *Laidlaw*, several environmental groups brought an action under the citizen suit provision of the CWA, seeking injunctive relief and civil penalties for alleged violations of a state-issued permit authorizing the discharge of treated industrial wastewater. Relying on its decision in

Lujan, the Court found that factual averments in affidavits submitted by the plaintiffs adequately documented the existence of an injury in fact. The Court pointed out that it previously had "held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity."

More recently, the Court addressed standing specifically within the context of a request for injunctive relief from agency actions allegedly violating NEPA. In *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010), the Court considered a decision by the US Department of Agriculture's Animal and Plant Health Inspection Service (APHIS), to deregulate a variety of genetically engineered alfalfa known as "Roundup Ready Alfalfa" (RRA). The district court held that APHIS violated NEPA by issuing its deregulation decision without first completing a full environmental review under NEPA, and it enjoined future planting of RRA pending the completion of that review.

The Ninth Circuit subsequently affirmed the district court's entry of permanent injunctive relief. While reversing the Ninth Circuit's decision on other grounds, the Supreme Court sustained its holding on the issue of standing. According to the Court,

> Article III standing requires an injury that is (i) concrete, particularized, and actual or imminent, (ii) fairly traceable to the challenged action, and (iii) redressable by a favorable ruling. Petitioners are injured by their inability to sell or license RRA to prospective customers until APHIS completes the EIS. Because that injury is caused by the very remedial order that petitioners challenge on appeal, it would be redressed by a favorable ruling from this Court.

The Court rejected petitioners' argument that respondents had failed to show that any of the named respondents were likely to suffer a constitutionally cognizable injury absent injunctive relief. The Court noted the district court's finding that respondents, including conventional alfalfa farmers, had "'established a "reasonable probability" that their organic and conventional alfalfa crops will be infected with the engineered gene' [in RRA] if RRA is completely deregulated." This "reasonable probability of harm" test is consistent with the Court's emphasis in prior cases on the necessity of a concrete and imminent injury in fact for standing purposes (whether or not the injury alleged is procedural).

Impact of the Supreme Court's *Spokeo, Inc. v. Robins Decision*

The Supreme Court addressed the parameters of federal court standing most recently in *Spokeo. Spokeo* was not an environmental case, but instead addressed remedies available to consumers under the Fair Credit Reporting Act of 1970 (FCRA). This statute provides for a private right of action against "[a]ny person who willfully fails to comply with any requirement [of the Act] with respect to any" individual, 15 U.S.C. § 1681n(a). The district court dismissed a federal class-action suit against Spokeo, an alleged "consumer reporting agency," on grounds that the plaintiff had not properly pleaded "concrete and particular" injury in fact under the criteria specified in the *Lujan* case. The Ninth Circuit reversed, based on plaintiff's allegation that "Spokeo violated *his* statutory rights" and the fact that plaintiff's "personal interests in the handling of his credit information are *individualized.*"

The Court rejected the Ninth Circuit's analysis. It held that while the court of appeals' decision addressed the requirement that injury in fact must be *particular* (*i.e.*, affect a plaintiff in a personal and individual way), it also must be *concrete*. According to the Court, a "'concrete' injury must be '*de facto*'; that is, it must actually exist." The Court recognized that concrete injuries need not always be "tangible" to establish standing. As the Court acknowledged in *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013),

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even a *risk* of injury can be sufficient for standing purposes, so long as the risk is "certainly impending," not speculative, and is fairly traceable to the statutory violation for which a plaintiff seeks relief. Nevertheless, the injury-in-fact requirement cannot be met simply because legislation "grants a person a statutory right and purports to authorize that person to sue to vindicate that right."

The lines drawn by the Court for "particularity" and "concreteness" in determining whether injury in fact exists for standing purposes under *Spokeo* are especially important in the context of federal environmental citizen suits. As noted above, provisions in environmental laws authorizing citizen suits generally allow "any person" or "any citizen" to file an action pursuant to those provisions; thus, the *Lujan* requirement of "particularity" arguably can be met without regard to whether individual plaintiffs are personally affected by conduct alleged to be in violation of the statute. This is different from the situation addressed in *Spokeo*, where violations alleged under the consumer reporting provisions of FCRA focused on the misreporting of consumer information about specific individuals.

By highlighting "concreteness" as a requirement distinct from "particularity," the Supreme Court confirmed in *Spokeo* the fundamental tenets of standing under Article III that it first articulated in *Lujan*. Most courts that have considered the issue suggest that *Spokeo* has done little to change the fundamental jurisprudence governing standing under Article III. For example, in *Forest Watch v. U.S. Bureau of Land Mgmt.,* 2016 WL 5172009 (C.D. Cal. Sept. 6, 2016), a California district court stated "federal courts generally agree that *Spokeo* clarified the meaning of 'concreteness' without breaking any new ground (citations omitted)."

Spokeo does suggest, however, that plaintiffs in citizen-suit cases may have a higher burden to plead facts establishing the existence of an injury that is both sufficiently concrete *and* particular in the way in which it implicates plaintiff' interests, regardless of whether those interests are substantive or procedural.[2]

Conclusion

Changing priorities at the highest levels within EPA, DOJ, and other federal agencies will inevitably alter the manner in which those agencies elect to enforce the nation's environmental laws. Environmental advocacy groups already view those changing priorities as cause for concern that justifies intensified private-enforcement efforts through citizen suits. Potential targets for citizen-suit enforcement of federal environmental laws need to be sensitive to this trend and prepared to test the adequacy of citizen-suit complaints at the earliest possible time.

After the US Supreme Court's seminal procedural rulings in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009), any such complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face," to survive a motion to dismiss for failure state a sufficient claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. In light of the Court's ruling in *Spokeo*, it is clear that citizen-suit plaintiffs must allege in their complaints facts sufficient to show that they will suffer an injury in fact that is both particular *and* concrete. Absent credible, independent allegations on each point, environmental citizen-suit claims cannot be sustained.

[2] *See, e.g., Alfa Int'l Seafood v. Ross*, No. 17–cv–00031 (APM), 2017 WL 1377914 (D.D.C. Apr. 17, 2017) (environmental organizations lacked standing on grounds that their claimed were "simply too abstract to satisfy the 'concrete' injury requirement discussed in *Spokeo*"); *Nucor-Steel Arkansas v. Pruitt*, No. 14–cv–0199 (KBJ), 2017 WL 1239558 (D.D.C. Mar. 31, 2017) (plaintiff sufficiently alleged standing to seek to compel EPA to respond to a petition under the Clean Air Act, on grounds that a plaintiff's inability to operate a manufacturing facility as it chooses inflicts a concrete injury on that plaintiff).

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