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The Future of the Citizen Suit After *Steel Co.* and *Laidlaw*

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Summary

Two recent court decisions have called into question the viability of environmental citizen suits. In *Steel Co.*, the Supreme Court denied plaintiff standing in a citizen suit where the defendant came into compliance after plaintiff sent its notice of intent to sue, but before it filed the complaint. Subsequently, the Fourth Circuit in *Laidlaw* invoked mootness doctrine to extend *Steel Co.* to where the citizen-suit defendant achieves compliance *after* the complaint is filed, but before entry of final judgment. To be sure, both suits resulted in compliance. But they also allow defendants to foreclose civil penalties by coming into compliance, eliminating much of the incentive citizen suits create for advance compliance. In addition, the possibility of case dismissal and denial of litigation costs when the defendant cures its transgression in time may make citizen suits unattractive to the many citizen enforcers who depend on such cost awards. Should Congress find it appropriate to address this situation (the citizen suit concept has its detractors as well as supporters), *Steel Co.* and *Laidlaw* arguably could be negated by various amendments to current citizen suit provisions.

Background/history

In enacting the Clean Air Act (CAA) of 1970, Congress created the first "citizen suit" provision in federal law. The CAA provision[1] allows persons to file suit on their own behalf to compel compliance with the Act, if neither federal nor state enforcers do so. As well, citizen-plaintiffs are invited to use the courts to compel EPA performance of its nondiscretionary duties under the Act.

[1] 42 U.S.C. § 7604.

In the years that followed, Congress added citizen-suit language to roughly twenty statutes, including most all federal environmental statutes of regulatory bent.[2] These provisions generally track the CAA prototype. For example, suit typically can only be brought for regulatory violations 60 days or more after plaintiff has given notice of the violation to the relevant federal agency, the state, and the alleged violator, and only if neither the United States nor the state is diligently prosecuting a civil or criminal action in a court to require compliance. One key addition to the CAA model -- in the CAA, Clean Water Act, and elsewhere -- was a new remedy: citizen-suit plaintiffs could ask courts to impose on violators not just injunctive orders, but civil money penalties as well.

Insertion of the citizen suit provision in the 1970 CAA was vigorously debated, and even later enactments adopted the device with expressions of congressional caution that it be properly limited. More pertinent here, some observers questioned whether citizen suits, by incorporating broad grants of standing to sue, might be on a collision course with increasingly restrictive Supreme Court notions as to what the Constitution demands for standing.

Standing doctrine seeks to limit who can invoke the jurisdiction of the federal Article III courts (district courts, courts of appeals, and the Supreme Court). By insisting that plaintiffs have a concrete stake in the outcome of the suit, the doctrine seeks to ensure that such courts will have the benefit of vigorous case preparation and argument by all parties. Standing prerequisites are textually rooted in Article III's statement that courts created under that constitutional provision may only hear "Cases" and "Controversies."

Today, the Article III-derived standing test has three components: injury in fact, causation, and redressability. First, plaintiff must allege (and ultimately prove) an "injury in fact" -- a concrete harm that has been or imminently will be suffered by him or her. Second, there must be causation -- that is, a connection between the plaintiff's injury and the complained-of conduct of the defendant. And third, there must be redressability -- a likelihood that the requested relief will redress the injury. Because these conditions are constitutionally based, Congress may not eliminate them by statute.

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[2] A 1991 compilation of citizen suit provisions lists the following: Act to Prevent Pollution from Ships, 33 U.S.C. § 1910; Clean Air Act, 42 U.S.C. § 7604; Clean Water Act, 33 U.S.C. § 1365; Superfund Act, 42 U.S.C. § 9659; Deep Water Port Act, 33 U.S.C. § 1515; Deep Seabed Hard Mineral Resources Act, 30 U.S.C. § 1427; Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11046; Endangered Species Act, 16 U.S.C. § 1540(g); Energy Conservation Program for Consumer Products, 42 U.S.C. § 6305; Marine Protection, Research and Sanctuary Act, 33 U.S.C. § 1415(g); National Forests, Columbia River Gorge National Scenic Area, 16 U.S.C. § 544m(b); Natural Gas Pipeline Safety Act, 49 U.S.C. § 1686; Noise Control Act, 42 U.S.C. § 4911; Ocean Thermal Energy Conservation Act, 42 U.S.C. § 9124; Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(a); Powerplant and Industrial Fuel Use Act, 42 U.S.C. § 8435; Resource Conservation and Revovery Act, 42 U.S.C. § 6972; Safe Drinking Water Act, 42 U.S.C. § 300j-8; Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270; Toxic Substances Control Act, 15 U.S.C. § 2619. Michael D. Axline, ENVIRONMENTAL CITIZEN SUITS App. A (1991).

The only regulatory-type federal environmental law that lacks a citizen suit provision is the Federal Insecticide, Fungicide and Rodenticide Act.

In addition to the constitutionally based elements of standing, the Supreme Court holds that plaintiffs must satisfy certain *prudential* conditions, imposed by the courts to insure the efficient administration of justice. In particular, the Court has refrained from adjudicating "generalized grievances" -- i.e., injuries shared by a broad segment of the public -- and has required that the plaintiff's injury fall within the "zone of interests" to be protected by the statute in question. Because they are *not* constitutionally based, Congress may legislate away these standing prerequisites.[3]

We now turn to our focus here: two recent environmental court decisions that denied standing to citizen-suit plaintiffs seeking to compel regulatory compliance with federal environmental laws, or punish past noncompliance.

Two Recent Environmental Decisions

Steel Company: compliance achieved before complaint filed

In *Steel Company v. Citizens for a Better Environment*,[4] the Supreme Court sought to resolve a circuit split as to whether the citizen-suit provision of the Emergency Planning and Community Right-to-Know Act[5] (EPCRA) authorizes suit for wholly past violations. Following the environmental group's mailing of the requisite 60-day notice, the defendant company had corrected the noncompliance -- failure to file EPCRA-required chemical inventory and release forms -- *before the actual complaint was filed.*

The Court failed to reach the merits, however, because the environmental group was found to lack standing. Assuming that failure to file the forms was an "injury in fact" for standing purposes, the Court held that the relief requested in the complaint failed to meet the redressability prong of standing. First, the civil penalties sought by plaintiff were not payable to it, but rather went to the U.S. Treasury. Thus they could not redress any injury incurred by the plaintiff. Nor, said the Court, does plaintiff's possible satisfaction in seeing defendant get its just desserts and the rule of law vindicated constitute an Article III injury.

Second, plaintiff sought recovery of its "investigation and prosecution" costs. To the extent that these costs were the result of the litigation, however, they failed to support standing. "Obviously," said the Court, "a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit."[6] In contrast, investigation costs incurred prior to the litigation -- i.e., "unrelated" to the litigation -- "assuredly [did] support Article III standing."[7] Problem was, the EPCRA citizen suit provision authorized the recovery of only "costs of litigation."

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[3] And indeed has. *See, e.g.*, Bennett v. Spear, 520 U.S. 1154 (1997) (citizen suit provision in Endangered Species Act negated zone of interests test by allowing parties asserting purely economic interests to sue).

[4] 118 S. Ct. 1003 (1998).

[5] 42 U.S.C. § 11046(a)(1).

[6] 118 S. Ct. at 1019.

[7] 118 S. Ct. at 1019.

Finally, the environmental group sought injunctive relief -- e.g., enabling it to inspect the company's facility and records. Injunctive relief is only warranted, however, to deter the real possibility of future injury, and the environmental group had not alleged any such threat. The Court further rejected the argument of amicus United States that there is a presumption of future injury when the defendant voluntarily ceases an illegal activity as the result of litigation. An allegation of injury sufficient to support standing, said the Court, must be "particular and concrete."[8] Thus, it concluded, injunctive relief would not redress the group's injury.

One effect of *Steel Co.* is to "constitutionalize" the Court's earlier ruling in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*[9] *Gwaltney* held on purely *statutory* grounds that the Clean Water Act did not allow citizen suits for wholly past violations.

Laidlaw: compliance achieved after complaint filed

In *Friends of the Earth v. Laidlaw Environmental Services, Inc.*,[10] environmental groups filed a citizen suit that, unlike *Steel Co.*, alleged regulatory infractions ongoing at the time of filing -- in this case, violations of a Clean Water Act permit. The district court imposed a $405,800 civil penalty, but, noting that Laidlaw had achieved substantial compliance during the suit, ruled that injunctive relief was unnecessary.

On appeal, the Fourth Circuit dismissed the entire case as moot. Mootness arises, the court began, when the Article III standing components do not "continue to exist at every stage of review, not merely at the time of the filing."[11] Here, as in *Steel Co.*, the "redressability" component was held not to "continue to exist." The court's argument was that because plaintiffs did not appeal the denial of injunctive relief, the only possible redress for their claimed injuries was the civil penalties. However, the *Steel Co.* decision instructed that because such penalties are paid to the U.S. Treasury, they cannot redress any injury suffered by a citizen plaintiff.[12] Nor did any satisfaction plaintiff might derive from seeing a wrongdoer punished constitute an Article III "injury in fact."

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[8]*Id.* at 1020.

[9]484 U.S. 49 (1987).

[10]149 F.3d 303 (4th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3364 (Nov. 9, 1998) (No. 98-82).

[11]149 F.3d at 306.

[12]A pre-*Steel Co.* decision of the Fourth Circuit had held to the contrary. In Sierra Club v. Simkins Industries, Inc., 847 F.2d 1109, 1113 (4th Cir. 1988), the court concluded that because "penalties can be an important deterren[t] against future violations," they could redress a private plaintiff's injury from regulatory violations even though the penalties are not paid to the plaintiff. Of course, *Steel Co.* required the Fourth Circuit to abandon this position in *Laidlaw*.

The pre-*Steel Co.* Fourth Circuit view appears to have been the dominant view at the time. Writing in 1993, one commentator noted that "[t]he majority rule is that in cases where a defendant achieves compliance only after a citizen suit complaint has been filed, civil penalties claims survive the mooting of injunctive relief." Timothy A. Wilkins, *Mootness Doctrine and the Post-Compliance Pursuit of Civil Penalties in Environmental Citizen Suits*, 17 Harv. Envtl. L. Rev. 389, 390 (1993).

Important here, the court also barred recovery of plaintiffs' attorney's fees and other litigation costs. Under the terms of the Clean Water Act's citizen suit provision, it noted, such recovery is available only to a "prevailing or substantially prevailing party."[13] The court acknowledged *Gwaltney*'s citation of Clean Water Act legislative history for the proposition that costs could be awarded when a case becomes moot because a defendant voluntarily comes into compliance.[14] It disregarded *Gwaltney*, however, on the ground that the Court there did not discuss the 1987 Clean Water Act amendment adding the "prevailing party" language. To disregard a Supreme Court opinion because of assumed (or actual) defects in its logic is questionable judicial practice.

Analysis

The impact of *Steel Co.* alone is unclear. Prospective citizen-suit plaintiffs could search for instances of noncompliance that are unlikely to be remedied within the 60-day period following notice of intent to sue. Compliance within 60 days may be difficult, for example, where it involves great expense and extensive changes in plant operations. Even if defendant cures the noncompliance before the complaint is filed, plaintiff's costs at this early stage may be manageable, so nonrecovery of such costs from defendant may be an acceptable risk. And, after all, compliance *was* achieved. Thus the possibility of pre-complaint compliance may not deter the sending of 60-day notice letters.

If the *Laidlaw* holding is widely adopted, however, a reduction in the number of citizen suits seems very likely.[15] The strategy suggested by *Steel Co.* will be foreclosed, since coming into compliance after the filing of the citizen suit, but before final judgment, will be sufficient to defeat the claim and bar any award of costs. And at this later stage in the proceedings, possibly after years of effort and expense, denial of costs takes a bigger bite.

Arguably, *Steel Co.* and particularly *Laidlaw* may have a second impact. The civil penalties imposed under citizen suits supplement the threat of government enforcement as an incentive for regulated entities to conform to the law *in advance of enforcement efforts*. If citizen enforcers are unable to secure civil penalties, and only bring about voluntary compliance, there is no economic benefit to a company's coming into compliance until a citizen suit is filed -- at least not based on citizen suits. Only the possibility of government pursuit of civil penalties (and perhaps tort liability) makes compliance a rational pre-enforcement strategy.

Of course, the citizen suit concept has its detractors as well as supporters. "For [its supporters], citizen suits were instrumental in ensuring facility compliance. For [its detractors], however, citizen suits bordered on extortion and allowed environmentalists

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[13]33 U.S.C. § 1365(d).

[14]*Gwaltney*, 484 U.S. at 67 n.6.

[15]*See generally* James D. Brusslan, *"Steeling" Environmental Suits from Citizens: The* Steel Co. *Decision and How Congress Can Restore Citizens' Rights*, 29 Env't Rptr. (BNA) No. 22, at 1126 (Oct. 2, 1998); Richard Lazarus, *Rise and Demise of the Citizen Suit*, 15 Envtl. Forum no. 5, at 8 (Sept.-Oct. 1998).

to maintain suits for technical violations so trivial that they had not warranted governmental enforcement."[16] Thus, it is by no means clear that Congress, even should it conclude that the above-described impacts will occur, will choose to respond. If Congress determines that such results are undesirable, however, it has at least three options for negating *Steel Co.* and *Laidlaw*.

1. Bounties or damages. Congress might authorize recovery by a successful citizen plaintiff of a monetary sum -- e.g., a percentage of the civil penalties imposed, or damages for personal or property injury. The first, bounty-like solution resembles the "qui tam" provision in the False Claims Act, under which citizens may bring suit for violations of the False Claims Act and receive 15 to 30 percent of the civil penalty awarded (or settlement amount).[17] Commentators have written approvingly of the bounty option.[18] However, there may be a constitutional complication where there remains no injury in fact whose abatement may be aided by the bounty payment -- as when plaintiff's only claimed injury is an agency's failure to disclose information and that failure has already been rectified.

2. Mitigation payments. Congress might authorize the earmarking of civil penalties for mitigating the environmental problem that prompted the citizen suit. Less clearly sufficient from a constitutional standpoint is placing the recovered civil penalty in a state or local fund that supports remediation of environmental problems over a broad area, including the problem that gave rise to the citizen suit in question. As above with bounties, these solutions assume a lingering injury.

3. Expenses unrelated to litigation. Steel Co., recall, noted that recovery of expenses unrelated to the litigation -- there, the pre-litigation cost of digging up the information defendant should have filed -- would support standing. Hence, Congress might consider an expansion of the plaintiff costs recoverable through citizen suits to embrace this category.

If *Steel Co.* and *Laidlaw* (widely adopted) ultimately do reduce the number of citizen suits and their value as incentives for advance compliance, one should not assume that rampant flouting of environmental and other regulations will result. Nothing in these decisions impairs the enforcement ability of federal agencies, or state agencies under delegated federal programs. The key issue is whether government enforcement, less frequently assisted by citizen watchdogs as the possible result of these decisions, can achieve a level of compliance by the regulated community that Congress and the public still regard as acceptable.

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[16]Lazarus, *supra* note 15.

[17]31 U.S.C. § 3730(d).

[18]*See* references, *supra* note 15.