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Ninth Circuit Follows *Laidlaw* By Keeping the Door Open to Environmental Citizen Suits

In *Ecological Rights Foundation v. Pacific Lumber Co.*,¹ the 9th Circuit followed Supreme Court precedent, set forth in *Friends of the Earth v. Laidlaw Environmental Services*,² by broadly construing what types of injuries satisfy the injury in fact requirement necessary for standing to bring suit. The court found that an environmental group's allegations of damage to its members' aesthetic and recreational interests were sufficiently cognizable injuries to support claims brought under a citizens' suit provision of the Clean Water Act.³

In 1997, the Ecological Rights Foundation (ELF) and the Mateel Environmental Justice Foundation (Mateel) sued Pacific Lumber for violations of the Clean Water Act (CWA).⁴ They alleged that runoff from Pacific Lumber's Yager Camp and Carlotta Mill in Humboldt County, California, was draining into Yager Creek in violation of the General Permit under the National Pollution Discharge Elimination System (NPDES), damaging the ecological and aesthetic integrity of the area, and impinging on members' recreational enjoyment of the area.⁵ ELF and Mateel members testified that their enjoyment of activities such as swimming, fishing, snorkeling and wildlife observation were diminished by concerns about pollutants in the river.⁶ Despite these allegations, the district court granted summary judgment for Pacific Lumber, holding that the environmental groups lacked

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1. 230 F.3d 1141 [9th Cir. 2000].
3. 33 U.S.C. § 1365 (1994). The Clean Water Act allows "any citizen" – defined as "a person or persons having an interest which is or may be adversely affected" – to sue "any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the [EPA] Administrator or a State with respect to such a standard or limitation" or to sue the Administrator for failure to perform duties in compliance with the Act."
4. 230 F.3d at 1144-45.
5. Id.
6. Id.
standing to sue because they failed to demonstrate sufficient injuries to their members to meet the requirements of Article III of the Constitution.\(^7\)

The Supreme Court has interpreted Article III as requiring the plaintiff to meet three elements for standing: 1) the plaintiff must have suffered an "injury in fact," 2) there must be a causal connection between the injury and the conduct in question, and 3) "it must be 'likely'... that the injury will be 'redressed by a favorable decision.'"\(^8\) The district court's decision turned on the environmental groups' supposed failure to fulfill the "injury in fact" requirement. In *Lujan v. Defenders of Wildlife*,\(^9\) the Court defined "injury in fact" to be "an invasion of a legally protected interest which is (a) concrete and particularized... and (b) 'actual or imminent, not 'conjectural' or 'hypothetical.'"\(^9\) The district court held that the plaintiffs' "spatial and temporal contacts with Yager Creek are too sporadic or attenuated to satisfy the injury in fact prong of the standing analysis. Importantly, none of the plaintiffs' affiants state that they live in the vicinity of Yager Creek or regularly use Yager Creek for recreational or aesthetic purposes."

The district court's opinion followed Supreme Court's precedent at that time. For example, in *Defenders of Wildlife* two of the organization's members claimed that changes to the consultation requirements of the Endangered Species Act would harm endangered species in Sri Lanka and Egypt, producing injury to them personally because they would not be able to observe the wildlife in the future.\(^11\) The majority opinion by Justice Scalia held that the members' "'some day' intentions" to return to the areas they had visited failed to demonstrate the requisite "actual or imminent" injury to establish standing.\(^12\) In *Lujan v. National Wildlife Federation*,\(^13\) the Court made a similar finding. National Wildlife Federation (NWF) members' affidavits described the prospective impact on recreational activities they had enjoyed "in the vicinity of" public lands facing increased oil and gas mining.\(^14\) The Court held that these averments lacked

\(^7\) Id. at 1148.
\(^9\) Id.
\(^11\) *Defenders of Wildlife*, 504 U.S. at 563-64.
\(^12\) Id. at 564.
\(^14\) Id. at 886.
the required specificity to demonstrate a valid adverse impact from the government action—a condition required for standing under the Administrative Procedures Act under which the claim was brought.\textsuperscript{15}

After the district court's opinion in \textit{Ecological Rights Foundation} was issued, however, the Supreme Court issued its opinion in \textit{Laidlaw}, which specifically addressed the demonstration of injury in fact required for individual members of an organization to be granted standing under CWA's citizen suit provisions. The Court 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."\textsuperscript{16} Justice Ginsberg wrote that in contrast to the testimony provided in \textit{National Wildlife Federation}, the affidavits submitted by Friends of the Earth (FOE) members asserted that Laidlaw's NPDES permit violations directly affected the "recreational, aesthetic and economic interests" of the members, and alleged injury in fact sufficient to merit standing.\textsuperscript{17} The Court held that the injuries alleged were "more than mere 'general averments' and 'conclusory allegations,'" as was the defect in \textit{National Wildlife Federation}, and were not the type of speculative intentions found inadequate in \textit{Defenders of Wildlife}.\textsuperscript{18}

In the wake of \textit{Laidlaw}, the Ninth Circuit reversed the district court's grant of summary judgment to Pacific Lumber, rejecting the district court's assertion that a plaintiff must live within a specified distance of the area in question or visit the area at a specified interval, stating "the 'injury in fact' requirement in environmental cases is not... reducible to inflexible, judicially mandated time or distance guidelines, as \textit{Laidlaw} makes clear."\textsuperscript{19} Rejecting the notion that the injured party must live near the impacted area in question, the court noted "an individual who visits Yosemite National Park once a year to hike or rock climb and regards that visit as the highlight of his year is not precluded from litigating to protect the

\begin{itemize}
\item[15.] \textit{Id.} at 883, 889.
\item[17.] \textit{Id.} at 184.
\item[18.] \textit{Id.}
\item[19.] \textit{Ecological Rights Found. v. Pacific Lumber Co.}, 230 F.3d 1141, 1148 (9th Cir. 2000).
\end{itemize}
environmental quality of Yosemite Valley simply because he cannot visit more often."\textsuperscript{20}

The Ninth Circuit interpreted \textit{Laidlaw}'s injury in fact element as requiring that an individual show

a connection to the area of concern sufficient to make credible the contention that the person's future life will be less enjoyable – that he or she really has or will suffer in his or her degree of aesthetic or recreational satisfaction – if the area in question remains or becomes environmentally degraded.\textsuperscript{21}

This holding continues the Supreme Court's movement to broaden or relax the elements of the standing test,\textsuperscript{22} and arguably is an extension of \textit{Laidlaw} in that beyond allegations of damage to recreational and aesthetic interests, the test here does not additionally require allegations of economic harm.

In reaffirming the impairment of aesthetic and recreational enjoyment as a cognizable injury in fact, \textit{Ecological Rights Foundation} follows the Supreme Court's recent movement to reduce obstacles to citizen suits. This decision will bolster environmental group plaintiffs' abilities to enforce citizen suit provisions as Congress intended. Critics are likely to charge that this rule will favor environmentalists' interests over societally-beneficial economic development. By not reasserting the economic harm prong of the injury-in-fact test, it is true that \textit{Ecological Rights Foundation} provides a greater class of plaintiffs with access to redress harm to the lands they cherish, without an economic counterbalance. Yet it is important to remember that this decision merely impacts standing requirements. The plaintiffs must still succeed on the merits – for example, by proving a Clean Water Act violation. Furthermore, the courts continue to require that plaintiffs be injured, and that their injury be redressable.\textsuperscript{23}

Thus, rather than constituting a judicial shift against development interests, \textit{Laidlaw}, and its application in \textit{Ecological Rights Foundation}, simply carry out Congress's wishes in building citizen suit provisions into environmental statutes. Given cyclic shortages in resources and/or political will on the part of executive branch agencies to enforce regulations, citizen

\textsuperscript{20} Id. at 1150.
\textsuperscript{21} Id. at 1149.
\textsuperscript{22} See Hudson P. Henry, Note, \textit{A Shift in Citizen Suit Standing Doctrine: Friends of the Earth, Inc. v. Laidlaw Environmental Services, 28 ECOLOGY L.Q. 233, 247 (2001)}.
\textsuperscript{23} See id. at 249.
suits are an essential component of successful environmental policy.\textsuperscript{24} This decision thus represents the possibility of enhanced environmental compliance and a victory for our nation’s environmental health.

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\textsuperscript{24} \textit{Id.} at 250.