1993

The Clean Water Act, Standing, and the Third Circuit's Failure to Clean up the Quagmire: Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.

Arthur G. Carine III

Follow this and additional works at: http://digitalcommons.law.villanova.edu/elj

Part of the Environmental Law Commons

Recommended Citation

Available at: http://digitalcommons.law.villanova.edu/elj/vol4/iss1/8

This Casenote is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Environmental Law Journal by an authorized editor of Villanova University Charles Widger School of Law Digital Repository. For more information, please contact Benjamin.Carlson@law.villanova.edu.
I. INTRODUCTION

The standing doctrine has been harshly criticized by legal scholars. Critics have focused on the federal courts' manipulation of the doctrine in deciding whether or not to reach the merits of a particular case. Such manipulation has created a quagmire of both strict and liberal applications of the standing requirements. Nevertheless, environmental group plaintiffs, protecting our nation's natural resources, have not faced great barriers in...
meeting the standing requirements. Despite environmentalists enjoying very liberal standing requirements, some commentators and Supreme Court Justices have even suggested that inanimate objects, such as trees, mountains, and rivers be granted standing to sue. Recent Supreme Court standing analysis, however, strongly suggests that environmentalists will have more difficulty meeting standing requirements in the future.

Nevertheless, in Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc. (PIRG), the United States Court of Appeals for the Third Circuit, examining standing under the Federal Water Pollution Control Act (Clean Water Act), added to the standing quagmire by disregarding recent, more stringent Supreme Court standing analysis and by expounding a liberal causal nexus requirement needed to link a plaintiff’s injury to a defendant’s conduct.

This Note briefly discusses the genesis and general intent of both the Clean Water Act and its “citizen suit” provision. Also, as a background, the development of constitutional standing requirements is examined. Further, this Note discusses the factual and procedural history of PIRG, in addition to reprising the court’s standing analysis. The Third Circuit’s standing discussion is also critically examined. Concluding this Note is the recent impact of the Third Circuit’s decision on environmental group plaintiffs.

II. THE CLEAN WATER ACT

The impetus behind Congress’s enactment of the Clean Water Act was the restoration and maintenance of the “chemical, physical, and biological integrity of the Nation’s waters” by eliminating the discharge of pollutants into navigable waters by 1985. The 1972 Clean Water Act represented a significant alteration of federal water pollution control policy.

4. See infra notes 78-85 and accompanying text.
5. See infra notes 78-82 and accompanying text.
6. See infra notes 86-95 and accompanying text.
8. See infra notes 86-95, 155-67 and accompanying text.
9. See infra notes 133-54, 176-87 and accompanying text.
cus of federal water pollution control centered on the protection of receiving waters through quality standards. This control measure resulted in enforcement problems because precise effluent limitations for receiving waters were difficult to establish. The 1972 Clean Water Act, however, significantly changed the focus of federal policy. Rather than applying quality standards to receiving waters, the 1972 Clean Water Act applied effluent limitations to specific polluters.

The Clean Water Act flatly prohibits the discharge of pollutants, except where authorized by a National Pollutant Discharge Elimination System (NPDES) permit. These permits contain parameters for the types and concentrations of pollutants a permittee may discharge. The Clean Water Act also requires the permittee to install and maintain equipment to test its effluent pollution level. The test results are compiled in a Discharge Monitoring Report (DMR) and are then reported to the Environmental Protection Agency (EPA), where non-compliance is discovered by comparing the reported concentrations to the permit parameters. Section 505 of the Clean Water Act further allows citizens to sue permit violators.

The 1972 Amendment, unlike its 1965 predecessor, used water quality as a measure of success rather than a means to success. This approach was "limited in its success" because: (1) many states failed to approve water quality standards; (2) time schedules were not met; and (3) various disagreements erupted over state-federal standards. Possibly the greatest limitation was that a proper relationship between pollution and water quality could not be found. The 1972 legislation contained "a major change in the enforcement mechanisms of the Federal water pollution control program from water quality standards to effluent limits."
The citizen suit provision of section 505,\(^ {22} \) intended to mirror the constitutional standing requirements set forth in *Sierra Club v. Morton*,\(^ {23} \) was the result of compromise between the House of Representatives and the Senate.\(^ {24} \) The House bill attempted to restrict standing to affected citizens within a local area or groups actively participating in the administrative process.\(^ {25} \) In sharp contrast to the House proposal, the Senate bill permitted "any person" to sue.\(^ {26} \) In compromise form, section 505 of the Clean Water Act empowers "citizens" to sue violators.\(^ {27} \) A "citizen" is defined as "a person or persons having an interest which is or may be adversely affected."\(^ {28} \) A "person," defined for purposes of the Clean Water Act, includes corporations and associations; consequently, environmental group plaintiffs qualify as citizens under the Clean Water Act.\(^ {29} \)

### III. The Constitutional Requirements for Article III Standing

The standing doctrine is derived from the "case or controversy" requirement of Article III of the Constitution.\(^ {30} \) In effect, 

\(^{22}\) See id. and accompanying text.  
\(^{23}\) 405 U.S. 727 (1972). For a discussion of *Sierra Club*, see infra notes 42-48 and accompanying text.  
\(^{25}\) H.R. 11,896, 92d Cong., 2d Sess. (1972), reprinted in 1972 LEGISLATIVE HISTORY, supra note 12, at 1077. The House bill stated: 
(g) For the purposes of this section the term 'citizen' means (1) a citizen (A) of the geographic area and (B) having a direct interest which is or may be affected, and (2) any group of persons which has been actively engaged in the administrative process and has thereby shown a special interest in the geographic area in controversy.  
\(^{26}\) S. 2770, 92d Cong., 1st Sess. (1971), reprinted in 1972 Legislative History, supra note 12, at 1709. The Senate bill stated that "any person may commence a civil action on his own behalf . . . ." Id.  
\(^{27}\) CWA § 505(a)(1), 33 U.S.C. § 1365(a)(1). For pertinent part of statute, see supra note 21.  
\(^{28}\) CWA § 505(g), 33 U.S.C. § 1365(g).  
\(^{30}\) U.S. Const. art. III, § 2, cl. 2. For discussions of the caselaw which comprises the framework of standing, see Nichol, *Causation*, supra note 1, at 186-213; Alison L. Galer, Note, *Public Interest Research Group of New Jersey, Inc. v. Powell*.
Article III standing focuses on whether the parties before a federal court have a sufficient stake in the case's outcome. The modern standing doctrine has evolved into a three-part constitutional test, as outlined in Valley Forge Christian College v. Americans United for Separation of Church and State: (1) the plaintiff must show actual or threatened personal injury; (2) the injury must be fairly traceable to the defendant's action; and (3) the injury must be redressable through the judicial process. Other requirements also exist where a court considers "prudential limitations" or where Congress requires the plaintiff to be within the "zone of interests" protected by a specific piece of legislation.

The first part of the three-part standing construct, whether the plaintiff has shown actual or threatened personal injury, has been termed as "injury-in-fact." The "injury-in-fact" requirement for Article III standing was originally formulated in Association of Data Processing Service Organizations, Inc. v. Camp. In Data Processing, providers of data processing services challenged a ruling of the Comptroller of the Currency which permitted national banks to provide data processing services. The plaintiffs, Data Processing Services, suing both the Comptroller and the American National Bank & Trust Company (the Bank) under the Administrative Procedure Act (APA), alleged that the competition created by the Comptroller's ruling would not only result in a loss of future profit but also had already motivated the Bank to commandeer two of the plaintiff's contractually bound clients.

---


31. Sierra Club v. Morton, 405 U.S. 727, 732 (1972). The focus of standing analysis is whether "a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." Id. at 731.


33. See, e.g., Warth v. Seldin, 422 U.S. 490 (1975). "Prudential considerations" are limitations on standing, other than the minimum constitutional requirements, which a court can use to deny a plaintiff access to federal court, such as a "generalized grievance" shared by many individuals or a claim based on a third party interest. Id. at 499. For a discussion of Warth, see infra notes 65-68 and accompanying text.


35. Id. at 152.

36. Id. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 79-80 (1978) [hereinafter TRIBE, CONSTITUTIONAL LAW]. See also Perino, supra note 30, at 138.

37. Data Processing, 397 U.S. at 151. The suit was dismissed by the district court for lack of standing and affirmed by the court of appeals. Id.

38. Id. at 152.
In its examination of whether Data Processing had standing, the Supreme Court rejected the standard "legal interest" test and instead applied an "injury-in-fact" construct. The Court criticized the "legal interest" test as inappropriately investigating the merits of a case. The Court found that Data Processing's allegations of the potential loss of future profits and the confiscation of contractually bound clients was a sufficient "injury-in-fact" to satisfy Article III standing.

In Sierra Club v. Morton, the Supreme Court further defined and broadened what constituted an "injury-in-fact." In Sierra Club, an environmental group brought suit under the APA against the United States Forest Service alleging that several federal statutes had been violated when a Walt Disney resort was granted approval for construction in the Mineral King Valley of the Sequoia National Forest. The Court explained that an aesthetic injury could amount to an "injury-in-fact." However, a sincere interest in the situation was insufficient for Article III standing. Specifically, the plaintiffs themselves had to be among the injured. Consequently, a complaint containing affidavits reciting that the environmental group members used the Mineral King area for recreational activity would have been sufficient to meet the "injury-in-fact" test. The environmental group failed to allege use of the Mineral King area in its pleadings or affidavits; consequently, the Court could not find Article III standing.

Only one year after its decision in Sierra Club, the Supreme Court readdressed the "injury-in-fact" requirement and reaffirmed the lesson of careful pleading in United States v. Students Challenging Regulatory Procedures (SCRAP). In SCRAP, an environmental group formed by five law students brought suit under the

---

39. *Id.* at 152-57.
40. *Id.* at 153.
41. *Id.* at 152.
42. 405 U.S. 727 (1972).
43. *Id.* at 730.
44. *Id.* at 734-35.
45. *Id.*
46. Sierra Club, 405 U.S. at 735. The "injury-in-fact" test requires that the "party seeking review be himself among the injured." *Id.* The Sierra Club's "longtime concern" for the use of natural resources was insufficient to grant it standing. *Id.* at 736.
47. *Id.* at 736 n.8.
48. *Id.* at 735. The Sierra Club did not allege that its members used the resources of Mineral King or would be affected by any of the proposals to the Mineral King area. *Id.*
APA\textsuperscript{50} to force the Interstate Commerce Commission (ICC) to suspend a railroad rate surcharge.\textsuperscript{51} The environmental group alleged that the ICC's failure to suspend the surcharge would discourage the use of recyclable materials and encourage the use of new raw materials.\textsuperscript{52} Unlike the plaintiffs in \textit{Sierra Club}, the environmental group in \textit{SCRAP} properly pled that they used the affected area and were directly injured.\textsuperscript{53} The environmental group alleged that the rate structure's effect of reducing recyclables would injure them by inflating prices of finished products and increasing the litter content in the Seattle, Washington area.\textsuperscript{54}

In finding that the environmental group members' injuries in \textit{SCRAP} satisfied standing requirements, the Supreme Court further defined an "injury-in-fact." As indicated in \textit{Sierra Club}, an aesthetic injury could still be the basis for standing.\textsuperscript{55} However, standing would not be denied simply because many individuals in the Washington Metropolitan area could claim similar injury.\textsuperscript{56} Further, the Court explained that the magnitude of an alleged injury was unimportant with regard to standing, so long as some identifiable injury was present.\textsuperscript{57}

The value of \textit{SCRAP} lies not only in the Court's further defining an "injury in fact," but also in the lesson of specificity in pleading.\textsuperscript{58} Clearly, the environmental group in \textit{SCRAP} learned from the pleading error in \textit{Sierra Club} and properly pled that they used the area in question and were directly injured. Conse-

\begin{center}
\begin{tabular}{lll}
50. & Administrative Procedure Act § 10(a), 5 U.S.C. § 702 (1988) [hereinafter APA]. Section 10 provides, in pertinent part, "A 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." & \textit{Id}.
\hline
51. & \textit{SCRAP}, 412 U.S. at 675-77. & \textit{Id.}
\hline
52. & \textit{Id.} at 676. & \textit{Id.}
\hline
53. & \textit{Id.} at 678. The student group also maintained that recreational and aesthetic value of the area's natural resources had been diminished, as well as increased pollution and poorer air quality. & \textit{Id.}
\hline
54. & \textit{Id.} at 687. For further discussion of \textit{Sierra Club}, see supra notes 42-48 and accompanying text. & \textit{Id.}
\hline
55. & \textit{SCRAP}, 412 U.S. at 687-88. "[S]tanding is not to be denied simply because many people suffer the same injury . . . ." & \textit{Id.} at 687.
\hline
\hline
57. & \textit{SCRAP}, 412 U.S. at 688. The injury alleged by the environmental group in \textit{SCRAP} was "far less direct and perceptible" than the injury alleged in \textit{Sierra Club}. & \textit{Id.}
\end{tabular}
\end{center}
quently, unlike *Sierra Club*, the Court was able to approach the question of causation. In *SCRAP*, the environmental group had standing despite the obviously tenuous chain of causation. The railroads argued that the environmental group could never prove a general rise in freight rates effectuated a simultaneous rise of pollution levels in the Seattle, Washington area. The Court, however, never truly analyzed the causal chain. The Court noted that if the causal chain was tenuous, the railroads should have moved earlier for summary judgment before the district court.

With the demise of the "legal interest test," the advent of the "injury-in-fact" requirement, and the characterization of an "identifiable trifle" as the minimally acceptable degree of injury, the Supreme Court significantly expanded standing. Consequently, the Supreme Court fashioned a causation requirement in an attempt to restrict the expansion of standing created by the "injury-in-fact" test. The Court's attempts to restrict standing through a causation requirement were revealed through the lesson of specificity in pleading. In *Warth v. Seldin*, a plaintiff group challenged the constitutionality of zoning ordinances allegedly designed to exclude low and moderate income families. Although the plaintiffs' complaint alleged various injuries, the Court found the allegations inadequate to establish causation. The Court explained that a plaintiff seeking to challenge the exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices caused harm. The Court held that a plaintiff lacked standing to challenge exclusionary zoning schemes by failing to identify specific housing that they

59. *Id.* at 687. "Here by contrast, the appellees claimed that the specific and allegedly illegal action . . . would directly harm them in their use of the natural resources . . ." *Id.* (emphasis added).

60. *Id.* at 688.

61. *Id.* at 689. The Court explained that the railroads should have moved for summary judgment on the standing question and brought forth evidence to the district court that the students' allegations were false and therefore raised no issues of genuine fact. *Id.* Although the Supreme Court ultimately found the attenuated line of causation satisfactory with regard to the "injury in fact" standard, "pleadings must be something more than an ingenious academic exercise in the conceivable." *Id.* at 688.


63. *Id.*

64. *Id.* at 195. For a discussion of the criticisms of pleading specificity as it relates to Article III standing, see *infra* notes 199-207 and accompanying text.


66. *Id.*

67. *Id.* at 505-06.
The strictness of the standing causation requirement was evidenced in *Simon v. Eastern Kentucky Welfare Rights Organization*, where a plaintiff challenged an Internal Revenue Service ruling which gave a favored tax status to non-profit hospitals that only provided emergency room service to indigent individuals. In *Simon*, the Court denied standing because the plaintiffs' injury was not "fairly traceable" to a defendant's action where no hospital was a named defendant.

However, the apparent strict causation requirement set forth in *Warth* and *Simon* was reduced for environmental plaintiffs in *Duke Power Co. v. Carolina Environmental Study Group*. In *Duke Power*, the Supreme Court fashioned a more flexible causation requirement for an environmental group that alleged an injury with a highly attenuated causal chain. In *Duke Power*, environmental groups, attacking the constitutionality of the Price-Anderson Act, brought suit against an investor-owned public utility. The environmental group alleged that the Price-Anderson Act, in limiting the liability of a nuclear plant operator, violated the Due Process Clause of the Fifth Amendment. In addressing the environmental group's standing, the Court found that the environmental and aesthetic consequences of the power plants satisfied the "injury-in-fact" requirement. However, the question of whether the environmental group's injuries were "fairly traceable" to the Price-Anderson Act was more difficult. The Court determined that there was a "substantial likelihood" that the nuclear plant would not be completed and operational "but for" the protection of the Price-Anderson Act. The Court found a causal connection because testimony by industry spokespersons expressed a "categorical unwillingness" to produce nuclear power without limited

---

68. Id. at 508. See Nichol, *Causation*, supra note 1, at 194.
70. Id. at 41-43.
74. Id. at 69.
75. Id. at 71.
76. Id. at 76-77.
Although the standing doctrine as applied to environmental plaintiffs in the 1970's through SCRAP, Sierra Club, and Duke Power was fairly flexible and easily met by careful pleading, an even more liberal environmental standing doctrine was suggested by Justices Douglas and Blackmun in the dissenting opinions of Sierra Club78 and SCRAP.79 The Justices suggested that the standing doctrine had become too complicated and inflexible; therefore, their proposed answer was to allow inanimate objects, such as trees, mountains, and rivers, to have standing.80 Although admittedly an “imaginative expansion” of the traditional standing concepts, Justice Blackmun explained that such expansion only added one additional requirement—that the representative for the inanimate object be established, knowing, and sincere.81 The other requirements, such as a genuine dispute, adversariness, and adequate representational interests, remained unchanged.82

Although the proposals suggested by Justices Douglas and Blackmun were not ultimately embraced, standing for environmental plaintiffs was relatively easy to achieve. After Sierra Club and SCRAP, it was quite obvious that for an environmental plaintiff to meet the standing requirements, it would be only necessary to allege injury and use of the affected environmental resource.83 Consequently, environmental group plaintiffs historically have not encountered much difficulty meeting standing requirements.84 Early standing cases revealed that whether an environ-

77. Id. at 75.
78. 405 U.S. 727 (1972).
81. Id. at 757-58 (Blackmun, J., dissenting).
82. Id. at 758. Justice Blackmun attempted to assuage concerns of a more radical standing approach by stating, “We need not fear Pandora’s box will be opened or that there will be no limit to . . . environmental litigation . . . The courts will exercise appropriate restraints . . . as they have exercised them in the past.” Id.
mental group met the standing requirements was no more than a matter of prudent, informed pleading. 85 Today's Supreme Court, however, appears to be moving away from the liberal standing requirements of Sierra Club and SCRAP and towards more rigorous standing requirements. 86

Recently, in Lujan v. National Wildlife Federation, the Supreme Court required more specific allegations by environmental plaintiffs to achieve standing. 87 In Lujan, an environmental group attacked a land withdrawal review program applied by the Bureau of Land Management (BLM). 88 Under the BLM's program, millions of acres of previously protected lands were reclassified and exempted from preservation. 89 The environmental group brought suit under the APA 90 and alleged that the reclassification violated federal statutes. 91 The Court held that the environmental group did not have standing under the APA because the environmental group's affidavits did not specifically identify the used lands. 92 The environmental group, facing a motion for summary judgment, brought forth affidavits of members stating that they used the lands "in the vicinity" of those affected by the reclassification program. 93 Although appearing to satisfy the standards used in SCRAP, the affidavits were insufficient to meet the amount have been particularly liberal in granting standing to environmental group plaintiffs); Adeeb Fadil, Citizen Suits Against Polluters: Picking Up the Pace, 9 HARV. ENVT. L. REV. 23, 38-39 (1985) (explaining citizen suit provisions, such as § 505 of CWA, have not been substantial hurdle for environmental group plaintiffs). 85. See supra notes 42-61 and accompanying text.
of specificity required to survive a motion for summary judgment. Justice Scalia, writing for the majority, distinguished *SCRAP* not only on its facts, but also by the type of motion involved. *SCRAP* involved a motion to dismiss which requires less specificity in pleading than does a summary judgment motion.

**IV. Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc. (PIRG)**

A. Factual Background and Procedural History

In *PIRG*, the defendant permit holder, Powell Duffryn Terminals (PDT), operated a bulk chemical storage facility in Bayonne, New Jersey. PDT was situated on approximately thirty acres adjacent to the highly industrialized Kill Van Kull (the Kill) waterway. PDT operated a service which stores clients' chemical commodities for later transportation. When transferring the chemicals, some spillage, overflow, and condensation were mixed with rainwater and captured by PDT's collection system which discharges the effluent through a four-inch pipe into the Kill. Since 1977, PDT had monitored its discharge into the Kill through a series of NPDES permits. However, the DMRs examined over that period indicated that PDT "consistently and uninterruptedly" discharged pollutants in excess of that allowed by its NPDES permit. The environmental group plaintiffs, Public Interest Research Group of New Jersey, Inc. and Friends of the Earth (collectively PIRG) filed suit against PDT under section 505

94. *Lujan*, 111 S. Ct. at 3189.
95. Id. Justice Scalia, in distinguishing *SCRAP*, explained:

The *SCRAP* opinion, whose expansive expression . . . under its particular facts has never since been emulated by this Court . . . involved not a Rule 56 motion for summary judgment but a Rule 12(b) motion to dismiss . . . . The latter, unlike the former, presumes that general allegations embrace those specific facts that are necessary to support the claim.

Id. at 3189. (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).
97. *PIRG*, 913 F.2d at 68.
99. *PIRG*, 913 F.2d at 68.
100. Id.
101. Id. at 69.
102. Id.
of the Clean Water Act. The plaintiffs alleged that PDT was violating its NPDES permit, and thus sought a judgment of liability, civil penalties, and injunctive relief.

The Federal District Court of New Jersey bifurcated the case, first determining whether liability existed in *Student Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc. (PIRG I).* Civil penalties and injunctive relief were considered afterward in *Student Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc. (PIRG II).* In *PIRG I,* PIRG moved for summary judgment on the liability issue. PDT opposed the motion arguing that PIRG lacked standing and that material facts as to liability were in dispute. The district court granted summary judgment to PIRG. The district court found that PIRG had standing and that PDT violated its NPDES permit numerous times over a seven year period. Shortly thereafter, the court granted PIRG a second and third summary judgment on additional PDT violations. In *PIRG II,* the district court found that PDT had consistently violated its NPDES permit and should be fined the maximum penalty. However, the penalty was reduced because EPA and the New Jersey Department of Environmental Protection (NJDEP) were lax in prosecuting PDT. The district court ordered PDT to pay the penalty into a trust fund to finance the improvement of New Jersey’s environment and entered a permanent injunction prohibiting future violations.

103. Id. at 69. For a discussion of § 505 of the CWA, see supra notes 10-29 and accompanying text.
104. *PIRG,* 913 F.2d at 69.
108. Id. at 1078, 1080.
109. Id. at 1090.
110. Id. at 1081-83, 1085-89.
111. *PIRG,* 913 F.2d at 69.
112. Id.
113. *PIRG II,* 720 F. Supp. at 1166. The district court assessed the maximum penalty totaling $4,205,000. *Id.*
114. Id. The maximum penalty was reduced by $1,000,000. Id. at 1166-67.
115. Id. at 1168. Rather than place the penalty money into the United States Treasury, the district court felt a New Jersey trust fund would properly
Both PDT and PIRG appealed to the Third Circuit Court of Appeals. PDT argued that PIRG did not have standing; that the district court improperly held that no statute of limitations was applicable; and that summary judgment was wrongly granted on the issue of liability. Further, PDT attacked the district court’s factual conclusions supporting civil penalties and argued that the injunction was overbroad. PIRG contended that EPA and NJDEP’s failure to prosecute should not reduce PDT’s penalty. The Third Circuit affirmed the district court’s decision in finding that PIRG had standing; summary judgment against PDT was not clearly erroneous; and the permanent injunction direct the funds where needed and “vindicate” the efforts of the environmental group plaintiffs. 

116. PIRG, 913 F.2d at 68.
117. Id. at 70.
118. Id.
119. Id.
120. Id. at 71-76.
121. PIRG, 913 F.2d at 76-77. PDT made three arguments in objecting to the district court’s grant of summary judgment on the issue of liability. Id. at 76. PDT first argued that the single operational upset (SOU) defense of 33 U.S.C. § 1319(c)(5), (d), (g)(3) indicated congressional intent that a single discharge which violates several permit violations amounts to a single violation. Id. at 76-77. The court of appeals examined EPA guidelines and determined that SOU meant some “unusual or extraordinary” event. Id. The court found that PDT did not offer any evidence of an exceptional event and noted that it was “disingenuous at best” for PDT to claim it was in a continuous state of upset for the six years at issue in the lawsuit. Id. Consequently, PDT was not entitled to the SOU defense. Id.

Second, PDT argued that the district court improperly found it was liable for exceeding biochemical oxygen demand (BOD) and total suspended solids (TSS). Id. PDT maintained that BOD and TSS limitations were applicable only to continuous dischargers and not an intermittent discharger, such as PDT. Id. The court of appeals disagreed, however, noting that under New Jersey law, a permittee must request agency review 30 days from the receipt of its permit. Id. at 78 (citing N.J. ADMIN. CODE tit. 7, § 14A-8.9). Here, because PDT had not challenged the BOD and TSS limits in an earlier agency proceeding, PDT could not raise the issue before the court of appeals. Id.

Third, PDT argued that the district court improperly granted summary judgment on violations that were “double counted” by PIRG. Id. PDT gave two examples of the alleged overcounting. First, PDT argued a single exceedance was counted as both a violation of the average and maximum concentration limits. Id. The court of appeals held that the daily average and daily maximum concentration limits were “clearly separate limitations,” thus, PDT should be penalized for exceeding both. Id. Second, PDT argued that the district court improperly counted a single exceedance as a violation of both the 7 and 30 day average limitations. Id. Here, the court of appeals restated that the SOU defense was not available to PDT. Id. at 78-79. The court did note, however, that it was possible that the district court undercounted the number of violations. Id. at 79 n.29. The Eleventh Circuit interpreted section 1319(d) as requiring that a violation of the 30 day average limitation be counted as 30 violations. Id. (citing Atlantic States Legal Found. v. Tyson Foods, Inc., 897 F.2d 1128, 1139-40 (11th Circuit)).
was proper. However, the circuit court reversed the district court and held that a five year statute of limitations applied and remanded the case to the district court for an adjustment of the penalty. Further, the circuit court reversed the reduction in

[122. Id. at 82-83. The district court's permanent injunction stated, in pertinent part:

[PDT] is hereby restrained and enjoined from making any discharges into the Kill Van Kull from its waste plant in Bayonne, New Jersey that exceed any limitation and/or fail in any way to comply with the terms and conditions of the NPDES [permit] . . . including its present permit . . . any and all additions and/or amendments and any and all permits that may hereafter be issued by any agency, state or federal, that is issued pursuant to the Clean Water Act.

Id. (quoting PIRG II, 720 F. Supp. at 1169). The court of appeals noted that a permanent injunction is proper only "after a showing of both irreparable injury and inadequacy of legal remedies, and a balancing of competing claims of injury and the public interest." Id. at 83 (quoting Natural Resources Defense Council v. Texaco Ref. & Mktg., Inc., 906 F.2d 934, 941 (3d Cir. 1990)). PDT argued that because there was no evidence of irreparable injury, the district court improperly granted the permanent injunction. Id. The appellate court noted that the district court, in an unpublished opinion, originally denied PIRG's motion for a preliminary injunction because it was not persuaded that irreparable harm was impending. Id. The district court originally denied PIRG's motion for a preliminary injunction because PDT's DMRs indicated great improvement with its permit compliance. Id. However, PDT again violated its permit after the district court denied PIRG's earlier motion for a preliminary injunction. Id. The appellate court concluded that since PDT had violated its permit after PIRG's motion was denied, the district court did not abuse its discretion by issuing the permanent injunction. Id.

PDT also argued that the district court's order was an overbroad "obey the law" because it enjoined PDT from violating both present and future permits. Id. The appellate court limited the permanent injunction to the permit existing "at the time of the action." Id. Consequently, the portion of the permanent injunction that enjoined PDT from violating any future Clean Water Act permits was removed from the permanent injunction. Id.

123. PIRG, 913 F. 2d at 75-76. The district court decided that a statute of limitations should not be applied to citizen lawsuits brought under the Clean Water Act. Id. at 74. PDT argued that the five year statute of limitations contained in 28 U.S.C. § 2462 should be applied. Id. at 73-74. In contrast, PIRG argued that 33 U.S.C. § 1370 authorizes states to implement stricter requirements against polluters than federal law. Id. at 74. However, New Jersey imposed no limitations period on similar lawsuits brought under state environmental law. Id. Consequently, PIRG maintained that the stricter state procedural rule should prevail and no limitations period should be applied. Id. Although recognizing that ordinarily a federal court would follow state law and borrow its limitations period where a federal statute contains no limitations period, the court of appeals decided that the five year limitations period imposed on the government under 28 U.S.C. § 2462 would apply. Id. The court explained that since plaintiffs suing under a citizen suit provision are acting as an "adjunct" to government enforcement, they should be subject to the same statute of limitations. Id.

PIRG also argued that if a five year statute of limitations period was applicable, the time period should begin when the defendant files its DMRs rather than
Penalties due to EPA's and NJDEP's nonfeasance and remanded for recalculation of penalties. 124 Finally, without appeal by either

at the time of the discharge. *Id.* at 75. The appellate court agreed with PIRG and held that the five year limitations period does not begin until the DMRs enumerating the violations are filed. *Id.* The appellate court reasoned that it would be unlikely that the public would know of any violation until the DMRs are filed, because the defendant has responsibility for monitoring the effluent. *Id.*

PIRG, however, further argued that the statute of limitations period should be suspended from the time the plaintiffs file their 60 day notice letter until the filing of the complaint. *Id.* The appellate court disagreed and held that the statute of limitations is suspended only for the 60 day notice period. *Id.* at 76. The court explained that the limitations period should not be suspended until the lawsuit is filed because that would allow citizens to file the 60 day notice and then delay filing the complaint which could ultimately extend the limitations period beyond five years. *Id.* The appellate court's application of the five year statute of limitations resulted in the removal of 12 of PDT's violations. *Id.* at 76 n.17.

124. *Id.* at 79-81. The Clean Water Act enumerates several factors in § 309(d) that a district court must weigh when imposing civil penalties:

In determining the amount of civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. *Id.* at 79 (citing 33 U.S.C. § 1319(d)).

Although the district court imposed the maximum penalty for each of PDT’s violations, it reduced the total amount by $1,000,000.00 because EPA and NJDEP did not diligently prosecute PDT. *Id.* PDT argued that the district court's fact finding on the seriousness of the violations and the economic benefit of noncompliance was clearly erroneous. *Id.* The court of appeals disagreed and found that the district court's fact finding on the both the seriousness of the violations and the economic benefit to PDT was not clearly erroneous. *Id.* at 79-80. The court of appeals noted that in determining the seriousness of the violations the district court properly relied on EPA reports and the “large number of gross exceedances” in finding that PDT’s violations were serious. *Id.* at 79. Further, the court of appeals held that the district court was not clearly erroneous in concluding that PDT’s economic benefit from noncompliance far exceeded the statutory maximum. *Id.* at 80. PDT argued that the district court, in determining whether it exceeded the statutory maximum for economic benefit due to noncompliance, improperly based its conclusions by using testimony of PDT’s own expert witnesses. *Id.* The appellate court disagreed and noted that the district court “would have been remiss” if it had not considered such “highly probative” evidence. *Id.*

Also, PIRG argued that the district court’s reduction of PDT’s penalty because EPA and NJDEP failed to diligently prosecute PDT was improper as a matter of law. *Id.* at 79-81. On this issue, the court agreed with PIRG and reversed the district court’s reduction of the penalty. *Id.* at 81. The court of appeals reasoned that where the permittee has in a good faith attempt failed to comply with permit limitations because of technical problems or where EPA had “affirmatively recognized and excused noncompliance justice may require” an adjustment of the penalty. *Id.* Although the district court reduced the penalty, it found that PDT did not act in good faith. *Id.* Consequently, the court of appeals reversed the district court’s reduction of the penalty and remanded for a recalculation. *Id.*
party, the circuit court reversed the district court’s order creating a New Jersey environmental trust fund and remanded with instructions that the penalties be paid to the United States Treasury. 125

B. The Third Circuit’s Standing Analysis

The appeal to the Third Circuit centered on the question of whether PIRG met the constitutional requirements for standing. PIRG sought to represent the concerns of its members; therefore, the court of appeals began its analysis by examining the appropriateness of “representational standing” in the case. 126 The court explained that “‘representational standing’ is appropriate where: (1) the group’s members would have individual standing; (2) the interests the group is attempting to protect are “germane” to the group’s objective; and (3) individual participation is unnecessary for the claim or relief requested. 127 PDT argued that because PIRG’s individual members lacked standing, PIRG lacked standing. 128

The court of appeals, using the three-prong Valley Forge test, determined that PIRG’s members had individual standing and

125. PIRG, 913 F.2d at 81-82. Although neither PIRG nor PDT appealed the district court’s order that PDT’s civil penalties be paid into a trust fund for New Jersey environmental problems rather than the United States Treasury, the court of appeals granted leave for EPA to intervene to contest the issue. Id. at 81. The court of appeals noted that although the Clean Water Act does not specifically address where the civil penalties are to be paid, the legislative history clearly suggests that Congress intended such payments to be made to the United States Treasury. Id. Congress intended that civil penalties be deposited as “miscellaneous receipts.” Id. (quoting S. Rep. No. 414, 92d Cong., 2d Sess. 133 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3745). Under the Miscellaneous Receipts Act, any individual holding public funds is required to deposit the funds in the Treasury within three days of receipt. Id. (citing 31 U.S.C. § 3302(c)(1) (1988)). Further, the court of appeals observed that “courts have consistently stated that penalties in citizen suits under the Act must be paid to the Treasury.” Id. at 82 (citing Sierra Club v. Simkins Indus., Inc., 847 F.2d 1109, 1113 (4th Cir. 1988), cert. denied, 491 U.S. 904 (1989); Gwaltney v. Chesapeake Bay Found., 484 U.S. 49 (1987); Middlesex County Sewerage Auth. v. National Sea Clammers Ass’n, 453 U.S. 1, 14 n.25 (1981); Sierra Club v. Electronic Controls Design, Inc., 909 F.2d 1350 (9th Cir. 1990); Atlantic States Legal Found. v. Tyson Foods, Inc., 897 F.2d 1128, 1131 n.5 (11th Cir. 1990); Sierra Club v. Chevron U.S.A., Inc., 834 F.2d 1517, 1522 (9th Cir. 1987)). Consequently, the court of appeals reversed the district court’s order crafting the New Jersey trust fund and ordered that PDT’s civil penalties be paid to the Treasury. PIRG, 913 F.2d at 82.

126. PIRG, 913 F.2d at 70.


128. Id.
therefore, PIRG also had standing.\textsuperscript{129} Under the \textit{Valley Forge} test, standing is determined by three requirements: (1) "injury-in-fact" to plaintiffs; (2) the injury must be fairly traceable to the defendant; and (3) the injury must be redressable by a favorable decision.\textsuperscript{130} To determine whether PIRG's individual members satisfied the three-prong \textit{Valley Forge} test, the court of appeals examined the affidavits of five PIRG members.\textsuperscript{131} All of the affiants stated that they were members of PIRG, lived in the vicinity of the Kill Van Kull and suffered injury to their aesthetic and recreational interests as a result of pollution of the Kill.\textsuperscript{132}

The court of appeals, in examining the affidavits, found that all three prongs of the \textit{Valley Forge} test were satisfied.\textsuperscript{133} The first requirement, that the plaintiff suffered some "injury-in-fact," was easily satisfied and unchallenged by PDT.\textsuperscript{134} The affiants claimed injury to their aesthetic and recreational interests because of the pollution of the Kill.\textsuperscript{135} Harm to aesthetic and recreational interests is sufficient to provide standing.\textsuperscript{136} Although an extensive injury is not required and an "identifiable trifle" is sufficient to confer standing, the court clearly recognized the materiality of the affiants' injury.\textsuperscript{137}

The second requirement, that the injury be "fairly traceable" to the defendant, was also satisfied but contested by PDT.\textsuperscript{138} In support of its earlier motion for summary judgment, PDT submitted several affidavits by engineering consultants.\textsuperscript{139} The affidavits

\textsuperscript{129} Id. at 70-73.
\textsuperscript{130} Id. at 70 (quoting \textit{Valley Forge}, 454 U.S. at 472). This Note focuses upon the "injury-in-fact" and "fairly traceable" elements of Article III standing.
\textsuperscript{131} \textit{PIRG}, 913 F.2d at 71-73.
\textsuperscript{132} Id. at 71.
\textsuperscript{133} Id. at 73.
\textsuperscript{134} Id. at 71.
\textsuperscript{135} Id.
\textsuperscript{136} \textit{PIRG}, 913 F.2d at 71 (quoting \textit{SCRAP}, 412 U.S. at 689 n.14). For a discussion of \textit{SCRAP}, see \textit{supra} notes 49-61 and accompanying text.
\textsuperscript{137} Id. "The interests asserted by the plaintiffs in this case are more than trifles." \textit{Id.} See also \textit{Friends of the Earth v. Consolidated Rail Corp.}, 768 F.2d 57, 61 (2d Cir. 1985) (member's affidavit stating that he frequently passed by offensive body of water was sufficient to confer standing).
\textsuperscript{138} Id. at 71-73.
\textsuperscript{139} Id. at 71. Affidavit of LeRoy Sullivan, engineering consultant, stated that there was "a reasonable scientific certainty . . . [PDT's] operations do not adversely affect water quality in the Kill . . . or . . . Kill Van Kull Park . . . other location except perhaps in some purely speculative and theoretical way." \textit{Id.} at 71-72 (quoting Sullivan Aff. ¶ 2 at 93); Affidavit of Allen Dresdner, professional planner-consultant, stated that the poor Kill water conditions did "not originate from [PDT] nor are they related to [PDT's] discharges." \textit{Id.} at 72 (quoting Dresdner Aff. ¶ 18 at 126).
professed that PDT's operations did not have a deleterious effect upon the Kill's water quality and that the unfortunate condition of the Kill was unrelated to PDT's discharges. \(^{140}\) The district court found that the NPDES permit violations alone were enough to show causation. \(^{141}\) PDT argued that a strong causal connection was required. \(^{142}\) The court of appeals refused to adopt the polarity of either assessment. Strict tort causation was not required; however, something more than permit violations was necessary to meet the “fairly traceable” requirement. \(^{143}\) Instead, plaintiffs would have to demonstrate that there is a “substantial likelihood” that the defendant's action caused the plaintiffs' injury. \(^{144}\) This “substantial likelihood” is established by showing that: (1) the defendant discharged some pollutant in excess of its permit; (2) the discharged pollutant is in a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant; and (3) the pollutant causes or contributes to the types of harm alleged by the plaintiffs. \(^{145}\) In examining these requirements, the court of appeals again turned to the affidavits of several group members who stated that the Kill had an oily or greasy appearance which they found offensive. \(^{146}\) PDT's discharge permits limited the amounts of oil and grease it could discharge; \(^{147}\) however, its DMRs indicated that it discharged oil and grease in excess of the permit limits. \(^{148}\) Consequently, the court found that the aesthetic harm suffered by the affiants could be “fairly traceable” to PDT's discharge. \(^{149}\)

The third Valley Forge requirement, that plaintiffs demonstrate their injuries are redressable by a favorable decision, was also satisfied. \(^{150}\) PDT argued that neither injunctive relief nor civil penalties could redress the injuries alleged by PIRG's mem-

140. Id. at 71-72.
141. PIRG I, 627 F. Supp. at 1083. Other district courts have also concluded that a permit violation alone is enough to satisfy the causation requirement. See infra note 181.
142. PIRG, 913 F.2d at 72.
143. Id. The “fairly traceable” element does not require the plaintiffs to show with “scientific certainty” that defendant's effluent itself caused the specific injury to the plaintiffs. Id. Tort causation is not required. Id. (citing Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 78 (1978)).
144. Id. (quoting Duke Power Co., 438 U.S. at 75 n.20).
145. Id.
146. Id. at 73 n.9.
147. PIRG, 913 F.2d at 73.
148. Id.
149. Id.
150. Id.
bers. The court of appeals explained that injunctive relief would redress PIRG’s grievance of water quality damage due to permit excesses because forced compliance with its permit would lower the level of Kill pollution. Civil penalties were also appropriate because plaintiffs’ showing of a “distinct and palpable” injury could “invoke the general public interest in support of their claim.” Such penalties would serve the public interest by encouraging not only PDT but also other NPDES permit holders to comply with their effluent limits.

V. CRITICAL ANALYSIS

A. “Injury-in-Fact”

Judge Aldisert, in his concurring opinion of PIRG, analogized PIRG’s recruitment of injured individuals to satisfy standing requirements with an “old-time vaudeville performer’s ad.” Simply, PIRG had a case and needed “live bodies” sufficiently injured to meet the standing requirements. Nevertheless, Judge Aldisert conceded that the recruited, “live-bodied members/plaintiffs” established a sufficient “injury-in-fact” to move on to the causation tier of Article III standing requirements.

Although Judge Aldisert had greater problems in finding that PIRG’s averments met the causation requirement, two issues presented the question of whether PIRG met the “injury-in-fact” requirement. First, what level of geographical specificity should be required by the members of an environmental group who allege use of the natural resource at issue? Second, should the environmental group be required to show that either its recruited members or the local community support the action against the alleged polluter?

151. Id.
152. PIRG, 913 F.2d at 73.
153. Id. (quoting Warth, 422 U.S. at 501).
154. Id.
155. PIRG, 913 F.2d at 84. (Aldisert, J., concurring). Judge Aldisert characterized the environmental groups “in the position of the old-time vaudeville performer’s as in Variety: ‘Have tux, will travel.’” Id.
156. Id. at 84-85.
157. Id.
158. For a discussion of the extent to which geographic specificity is required to be alleged to meet Article III standing requirements, see infra notes 160-67 and accompanying text.
159. For a discussion of whether local community support is required under Article III standing, see infra notes 168-75 and accompanying text.
In *Lujan*, Justice Scalia, writing for the majority, held that the affiants for an environmental group plaintiff must allege use or enjoyment of the specific area in question to satisfy the "injury-in-fact" requirement of Article III standing.\(^{160}\) This appeared to directly conflict with *SCRAP* where use or enjoyment in the vicinity of the area in question sufficiently satisfied the "injury-in-fact" requirement.\(^{161}\) Justice Scalia, however, distinguished the unfavored "expansive" *SCRAP* opinion by noting that *SCRAP* involved a 12(b) motion to dismiss versus a Rule 56 motion for summary judgment.\(^{162}\) As in *Lujan*, PIRG involved a summary judgment motion.\(^{163}\) Consequently, by applying the *Lujan* distinction, PIRG's affidavits should have been subject to a more stringent standard because as in *Lujan*, PIRG's affiants stated that they lived or recreated in the vicinity of the affected area.\(^{164}\)

Notwithstanding the *Lujan* opinion, it remains unclear whether geographical specificity is required for standing under the Clean Water Act. Prior cases under the Clean Water Act are inconsistent as to the degree of geographical specificity needed for standing.\(^{165}\) Some cases require allegations of resource use while others require a nexus with the geographical area in question.\(^{166}\) Unfortunately, the PIRG majority opinion fails to address *Lujan* or other Clean Water Act cases to clarify the degree of geographical specificity required.\(^{167}\)

Another argument that questions whether PIRG met the "in-
jury-in-fact” prerequisite is that environmental organizations, purporting to represent the interests of their injured members, should be required to offer proof of either local or individual support of the litigation.\textsuperscript{168} Industry commentators have suggested that Congress intended the Clean Water Act’s citizen suit provision to enable local individuals to band together and attack local pollution activities.\textsuperscript{169} This intent, however, has not been realized since most suits have been brought by national environmental groups whose pleadings are without allegations of local support.\textsuperscript{170} The demonstration of individual support of the litigation stems from the idea that the suit should reflect the wishes of the injured individual.\textsuperscript{171} Presently, however, only a member’s authority to litigate is necessary.\textsuperscript{172} Such authority is simply shown by affidavits of members alleging the required standing elements.\textsuperscript{173} The members’ procurement of affidavits itself demonstrates the authorization of the organization to litigate in their place.\textsuperscript{174} Nevertheless, the weakness of a reliance on affidavits to obviate authorization by the real party in interest becomes clear, as in \textit{PIRG}, where deposition testimony shows far less support for litigation. In \textit{PIRG}, although affidavits of five members satisfied standing requirements, the deposition testimony showed that the affiants had marginal support for the litigation against PDT.\textsuperscript{175}


\textsuperscript{169} Schwartz & Hackett, \textit{supra} note 24, at 342 (explaining that Congress “envisioned local citizen groups challenging local activities”); cf. Jordan, \textit{supra} note 168, at 843 n.84 (asserting litigants with sufficient stake in outcome were envisioned to pursue adversarial proceeding).

\textsuperscript{170} E.g., Schwartz & Hackett, \textit{supra} note 24, at 342.

\textsuperscript{171} E.g., Jordan, \textit{supra} note 168, at 843. The argument that a citizen’s wishes should be reflected in the litigation expresses the concern that the individual represented by the organization be the real party in interest. \textit{Id}. The argument also reflects the possibility of restricting the organization where it does not act on behalf of the interests of the represented individual. \textit{Id}.

\textsuperscript{172} \textit{Id}.

\textsuperscript{173} \textit{Id}.

\textsuperscript{174} \textit{Id}. If the represented members disagree with the organization representing their interests, they can remove their authorizations. \textit{Id}.

\textsuperscript{175} \textit{PIRG}, 913 F.2d at 87-88 (Aldisert, J., concurring). The deposition of C. Cummings revealed that she never read the complaint, did not think the outcome of the suit would have a personal effect on her, and that PIRG’s allegations were never explained to her. \textit{Id}. at 87. Deposition of S. Abrams revealed that he had no personal claim against PDT. \textit{Id} at 88. Deposition of D. MacNeil stated that he never asserted that PDT’s discharges directly injured him. \textit{Id}.
B. The Causation Requirement

Judge Aldisert's concurring opinion in PIRG expressed a deep concern over whether the circuit court's conclusions on standing would survive Supreme Court review. Judge Aldisert, convinced PDT was an intentional polluter and deserving of punishment, nevertheless questioned whether the "live bodies" used by PIRG as affiants satisfied the standing requirements, especially in light of the Supreme Court's decision in Lujan. Acknowledging that Lujan was not precise precedential authority because it construed neither Article III standing nor standing under the Clean Water Act, Judge Aldisert was concerned that the circuit court was not following the more stringent spirit of Lujan.

Although not acknowledging Lujan, the PIRG majority refuted the district court's assertion that a mere permit violation alone could satisfy the "fairly traceable" element of the Valley Forge test. The majority recognized that under the Duke Power causation construct the plaintiffs would have to show a "substantial likelihood" that the defendant's conduct caused plaintiffs' injuries to satisfy the "fairly traceable" test. However, the PIRG majority manufactured its own definition of the Duke Power "sub-
substantial likelihood" test. A "substantial likelihood" exists where the plaintiff shows that the defendant has "(1) discharged some pollutant in concentrations greater than allowed by its permit (2) into a waterway in which the plaintiffs have an interest that is or may be affected by the pollutant and that (3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs." 183

The court of appeals' own three-prong definition of the Duke Power "substantial likelihood" test was intended to "require more than showing a mere exceedance of a permit limit" to establish causation. 184 However, in PIRG, affiants satisfied the causation requirement by claiming they were personally offended by something discharged in excess of PDT's permit limitations. 185 In PIRG, the affiants stated they were offended by the oily, greasy sheen of the Kill. 186 PDT's discharge contained oil and grease in excess of its permit; consequently, the aesthetic injury was "fairly traceable" to PDT. 187

Uncomfortable with the feigned stringency set forth by the majority's causation analysis, Judge Aldisert reexamined whether the injuries alleged by the affiants were "fairly traceable" to PDT. 188 Judge Aldisert recognized that the Kill was already a highly industrialized ecological disaster; 189 therefore, it was difficult to trace the affiants' injuries to any one specific polluter. 190 Judge Aldisert, acknowledging the Supreme Court's direction in Lujan, that general averments are not assumed to be the specific facts required to find standing, searched for a stronger "link" be-

183. Id. The court further noted that in order to attain standing, a plaintiff "need not sue every discharger in one action, since the pollution of any one may be shown to cause some part of the injury suffered." Id. at 72 n.8 (citing SCRAP, 412 U.S. at 689 n.14).

184. Id. at 72. The court explained that "if a plaintiff has alleged some harm, that the waterway is unable to support aquatic life for example, but failed to show that defendant's effluent contains pollutants that harm aquatic life, then plaintiffs would lack standing." Id. at 72-73.

185. Id. at 73 n.9.

186. PIRG, 913 F.2d at 72 n.9.

187. Id. at 85 (quoting Valley Forge, 454 U.S. at 471 (citations omitted)).

188. Id. at 86. Judge Aldisert, recognizing the industrial nature of the area and the poor condition of the Kill, explained that "[t]he Kill lost its pristine beauty many years ago ...." Id.

189. Id. In this case, an "egregious polluter" discharged into an "already polluted industrial waterway located in a severely threatened ecosystem." Id. But cf. SPIRG v. Tenneco Polymers, Inc., 602 F. Supp. 1394, 1396-97 (D.N.J. 1985) (finding standing where body of water was already polluted and direct impact impossible to pinpoint).

190. PIRG, 913 F.2d at 89 (Aldisert, J., concurring).
between PDT's discharges and the affiants' injuries. Judge Aldisert noted that the affiants only complained of pollution in general and did not allege that their specific injuries were caused by PDT. Nevertheless, Judge Aldisert agreed with the majority and found that PIRG satisfied the standing requirements. Although somewhat uncomfortable in his decision, Judge Aldisert was assured that the evolving standing requirements "are perhaps expanded a bit when at stake are the great public policy considerations of insults to our environment."

Judge Aldisert's search for a stronger causal standing requirement has been considered by other courts and commentators alike. Such an exploration is similar to an industry grievance that individuals alleging injury cannot identify the defendant as the specific polluter that caused the injury. This more stringent causation argument has been rebuffed as functionally unrealistic because such a task would be extraordinarily burdensome and would require extensive research on behalf of the individual. Further, a more stringent requirement would conflict with the Congressional intent of the citizen suit provision in removing "burdensome prerequisites."

C. The Return of Fact Pleading

Requiring environmental groups to plead geographic specificity, local support for litigation, or a more definitive causal chain to satisfy standing requirements would result in an apparent rebirth of the long-abolished fact pleading standard. Critics of

191. Id.
192. Id. at 88-89.
193. Id. at 88.
194. Id. at 89.
195. See Jordan, supra note 168, at 842; Schwartz & Hackett, supra note 24, at 341.
196. See Jordan, supra note 168, at 844; see also Schwartz & Hackett, supra note 24, at 341.
197. See Schwartz & Hackett, supra note 24, at 341-42.
198. Id. Such "burdensome prerequisites" would require extensive research to determine the biological impact of a certain violation — this type of showing would be beyond the means of most individuals and some citizen groups. Id. However, computer modeling is becoming more widely available and has been used in tracing pollutants. See, e.g., Marathon Oil v. EPA, 830 F.2d 1346, 1348-49 (5th Cir. 1987) (examining EPA's use of computer modeling to analyze discharge's effect on water quality standards); NRDC v. Zeller, 688 F.2d 706, 714 (11th Cir. 1982) (upholding validity of inter-agency agreement requiring use of computer modeling to analyze water quality).
199. For an excellent discussion on the relationships of fact pleading, notice pleading, and standing, see Roberts, supra note 1, at 390. Generally, fact
pleading specificity argue that the standing requirement has essentially become an "exercise in artfully drawn pleadings." This criticism is based upon the belief that litigation should be resolved on the merits, rather than pleadings fashioned to meet standing requirements. Nevertheless, the revival of fact pleading emerged through the causation analysis in Warth — a highly criticized case. In Warth, Justice Powell, writing for the majority, required that specific facts be pled in order to satisfy the "fairly traceable" component of standing. Justice Brennan, dissenting in Warth, and commentators have criticized the return of specificity in pleadings as inconsistent with the liberal notice pleading standard of the Federal Rules of Civil Procedure. Such criticism is valid since fact pleading hands judges an instrument that enables them to avoid addressing the merits of an unfavored case.

pleading is a description of the Field Code which required a "plain and concise statement of the facts constituting a cause of action without unnecessary repetition." Id. at 395 (quoting Act to Amend the Code of Procedure, ch. 479, § 142, 1851 N.Y. Laws 887). This pleading system became unpopular because it failed to produce consistency regarding what constituted an adequate averment. Id. at 396. Eventually, fact pleading was abolished by rule 8(a) which required "a short and plain statement of the claim showing that the pleader is entitled to relief." Id. at 396 (quoting FED. R. CIV. P. 8(a)(2)). Any further doubt of the demise of fact pleading was removed by the Supreme Court in Conley v. Gibson where the Supreme Court held all elements of a plaintiff’s claim were to be liberally construed. Id. at 396-97 (citing 355 U.S. 41 (1957)).


201. 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1286 (1969) ("Lawsuits should be determined on their merits and according to the dictates of justice, rather than in terms of whether or not the averments in the paper pleadings have been artfully drawn"); see GOVERNMENTAL INSTITUTES, supra note 83, at 45; Albert, supra note 1, at 425-26 (standing should be considered together with merits of case); Scott, supra note 1, at 667 (standing cases may turn on technical pleading rules).

202. See, e.g., KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE 332 (2d ed. 1983); C. Douglas Floyd, The Justiciability Decisions of the Burger Court, 60 NOTRE DAME L. REV. 862, 919 (1985); Nichol, Causation, supra note 1, at 195; Roberts, supra note 1, at 429.


204. Id. at 528 (Brennan, J., dissenting). In his dissent, Justice Brennan wrote that "[t]o require [plaintiffs] to allege such facts is to require them to prove their case on paper in order to get into court at all, reverting to the form of fact pleading long abjured in the federal courts." Id.

205. For a discussion of the criticisms of pleading specificity in the context of Article III standing, see supra note 202.

206. For Judge Aldisert’s criticism of this development in PIRG, see supra note 202.

207. See Nichol, Causation, supra note 1, at 185 (stating causation requirements are easily manipulated to satisfy judge's desire to reach merits of case).
VI. Conclusion

In *PIRG*, the Third Circuit essentially applies the conventional liberal standing guidelines set forth in *Sierra Club, SCRAP, Valley Forge*, and *Duke Power* to an environmental group plaintiff. Nevertheless, the Third Circuit, although ignoring *Lujan*, feignedly attempted to define the *Duke Power* causal relationship test with some stringency. In practice, however, the district courts have yet to utilize the *PIRG* causal formulation to prevent a case from reaching the merits. The Third Circuit’s three-part causation test has shown itself to be no more stringent than earlier cases where a permit exceedance automatically satisfied the causal requirement. A pleading pattern has developed which will result in environmental groups satisfying the causation requirement: (1) a defendant’s discharge permit indicates a type of exceedance; (2) an EPA report explains the effects of that type of exceedance; and (3) an environmental group supplies members’ affidavits complaining of the type of injury supported by the EPA report. Therefore, an environmental group plaintiff, suing under the Clean Water Act, can avoid causation hurdles by careful pleading. The environmental group, however, must be certain that the alleged injuries correspond with EPA’s conclusions on the effects of a particular discharge exceedance.

In *PIRG*, the Supreme Court refused to grant defendant PDT certiorari and the consistent polluter remained punished. Consequently, effluent dischargers subject to Clean Water Act provisions, will have a more difficult time preventing a federal court from reaching the merits of its case. More specifically, a discharge violator will not be able to argue that an already polluted waterway precludes an environmental group plaintiff from

---

208. For a discussion of the Third Circuit’s application of Article III standing requirements in *PIRG*, see *supra* notes 126-54 and accompanying text.

209. For a discussion of the Third Circuit’s three-part definition of the *Duke Power* causation requirement, see *supra* notes 133-49 and accompanying text.


211. See, e.g., Rice, 774 F. Supp. at 321-24 (defendant exceeded limits on ammonia discharge; EPA found ammonia contributes to unpleasant odor; affiants asserted water had unpleasant odor; causation requirement satisfied); *Star Enter., Inc.*, 771 F. Supp. at 661-63 (defendant exceeded limitations on suspended solids discharge; EPA report stated excess suspended solids decreases visibility of water; affiants asserted water had cloudy appearance; causation requirement satisfied).

meeting Article III standing requirements. Although the continuation of liberal standing requirements flies in the face of the recent, more stringent standing formulations made by the Supreme Court, liberal standing requirements certainly assist environmental group plaintiffs in pursuing the restructuring and cleanup of this nation’s natural resources. Ultimately, however, the Third Circuit’s attempt to cloak the liberality of its reformulation of the *Duke Power* causal element fails to clarify the amorphous standing doctrine and adds to the growing standing quagmire.

*Arthur G. Carine, III*