

# “Standing”: Who Can Sue to Protect the Environment?

Marisa A. Martin

*In recent decades, the environment has become a focus of intense national interest. Increasingly, individuals, organizations, and governmental entities have turned to the courts for resolution of environmental debates. Litigants in the courts must, however, clear the initial hurdle of “standing” to have their cases heard. In this article, Chicago-based lawyer Marisa Martin explains the crucial role of standing in environmental litigation and looks at the ongoing debate in the courts over who should be able to sue to protect our environment.*

Environmental lawsuits range from the highly local to the global. A plaintiff may file a lawsuit challenging the pollution of a nearby stream, the threats facing polar bears in the Arctic, or the increase in global warming due to unregulated greenhouse gas emissions. Whether alleging a global or local concern, parties bringing claims in federal court must satisfy the same hurdles before the merits of their particular case can be heard. One such hurdle is known as “standing”; it requires the parties bringing the lawsuit to demonstrate that they are the appropriate parties to bring the case in front of a court.

The basic idea behind “standing”—that only parties that have an interest in the case can bring the lawsuit—is relatively straightforward. In practice, however, developing a principled basis upon which standing can be demonstrated has proven to be extremely difficult, especially for those cases involving environmental issues. This article outlines the basic requirements for constitutional standing and how standing can be demonstrated in environmental cases. The article also discusses the Supreme Court’s recent standing analysis in *Massachusetts v. EPA*, which involved claims related to global warming and greenhouse gas emissions.

## Background

The principle of standing is premised on the U.S. Constitution. Under Article III of the Constitution, judicial power extends over “cases” and “controversies.” In simplified terms, this has been interpreted to mean that only lawsuits alleging an injury to the plaintiff can be heard by the federal courts.<sup>1</sup> The Supreme Court has noted that notwithstanding how many persons have been injured by the challenged action, the plaintiff bringing the lawsuit must demonstrate that the action injures him or her in a personal way. The requirement of standing ensures that the action brought is an adversarial one, which tends to sharpen the issues in front of the court.

Economic harm has been the traditional means by which to show a plaintiff suffered an injury. However, many environmental harms—such as polluted water, species in threat of extinction, and contaminated air—may not translate into an economic injury to a particular plaintiff. In the 1970s, the Supreme Court held that non-economic injuries such as harm to recreational, conservational, and aesthetic interests can represent an “injury-in-fact” so long as the plaintiff is among the injured.

Decades later, in the 1990s, the Supreme Court more fully elaborated Article III standing requirements as applied to an environmental case. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), environmental plaintiffs challenged a new rule by the Department of Interior, which interpreted a section of the Endangered Species Act as not applicable to actions in foreign nations. Plaintiffs included individuals who had visited Egypt in order to view the Nile crocodile and Sri Lanka to view the Asian elephant and Asian leopard. Plaintiffs alleged that the Department of Interior’s rule would negatively affect their future ability to view these species in their natural habitats.

The *Lujan* Court delineated three elements that must be met to demonstrate the constitutional minimum of standing to sue. First, a plaintiff must show an “injury-in-fact.” The “injury-in-fact” must be “concrete and particularized” and “actual or imminent,” not conjectural or hypothetical. The Court has noted that “particularized” means that the injury must affect the plaintiff in a personal and individual way. Second, the plaintiff must demonstrate a “causal connection between the injury and the conduct complained of.” The injury must be “fairly traceable” to the defendant’s challenged actions. Third, the plaintiff’s injury must be one that is likely to be redressed by a favorable decision in the case.

Applying this test, the Court determined that the plaintiffs did not have standing to sue because it found no “imminent” injury to the plaintiffs. The Court noted that the members of the Defenders



People carry signs during a protest against global warming in Montreal on December 3, 2005. The demonstration coincided with the 10-day UN Climate Change Conference underway in Montreal, where officials were reviewing and updating the Kyoto Protocol on lowering greenhouse gas emissions. (AP Photo/Ian Barrett, CP)

of Wildlife who had visited Egypt and Sri Lanka only expressed an “intent” to return to these places and did not have concrete plans. The Court found these “some day” intentions were insufficient for the purposes of showing an “actual and imminent” injury.

In a plurality decision, the Court found that the plaintiffs failed to show that a favorable decision would redress the harm because a change in regulation would not necessarily affect the species, and the agencies only provided a portion of funds for the projects at issue.

The Court in *Lujan* also rejected the argument that Congress waived Article III standing requirements in enacting the Endangered Species Act’s citizen-suit provision. The Court stated that Congress has the power to define injuries and provide for chains of causation that give rise to a case or controversy where none previously

existed, but held that Congress could not exceed the limitations on standing set forth in Article III.

The Court’s decision in *Lujan* highlighted a shift in the Court toward a stricter interpretation of standing in both environmental cases and other areas of the law. But the trend toward a more restrictive interpretation of standing was mitigated to some extent in 2000. In *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167 (2000), plaintiffs brought a suit against a corporation discharging pollutants in violation of the Clean Water Act. Members of Friends of the Earth alleged injuries to their recreational, economic, and aesthetic interests and stated that the river “looked and smelled polluted.” The Court recognized that plaintiffs held “reasonable concerns” about the alleged Clean Water Act violations that directly affected their inter-

ests. The Court stated that injury to the environment was not necessary to show Article III standing so long as injury to the plaintiffs was shown. Applying the *Lujan* three-part test, the Court found that the plaintiffs had standing to bring the suit.

Justice Scalia, who authored the *Lujan* decision, dissented in *Friends of the Earth*. In his dissenting opinion, Scalia stated that by accepting plaintiffs’ vague concerns about the environment even in the face of evidence that the environment was not harmed, the majority made the “injury-in-fact requirement a sham.”

### **The Global Warming Case—*Massachusetts v. EPA***

The cases described above illustrate the contentious nature of standing in environmental litigation and the lack of a consistent approach to standing in environmental cases. Standing analysis has been

further challenged by lawsuits alleging global environmental problems like global warming. Unlike other air pollutants that have health and environmental impacts on the ground, greenhouse gases interfere with our climate high in the Earth's atmosphere. As a result, most people do not experience direct harm from the emission of greenhouse gases.

The United States has not ratified the Kyoto Protocol, which is the international treaty that mandates greenhouse gas reduction targets for developed countries and creates incentives for the transfer of cleaner, lower-carbon technologies to developing countries. Nor has it implemented any greenhouse gas controls on the national level. This lack of regulation has led to legal challenges by environmental groups and others based on existing environmental statutes like the Clean Air Act or common law nuisance claims.

A significant obstacle in these types of cases is the ability of the plaintiffs to meet standing requirements. In part, the difficulty relates to the scientific basis underlying climate change. While the majority of mainstream scientists agree that carbon dioxide and other greenhouse gases cause increased global temperatures, there is less agreement about the effects of global warming. Without certainty about the effects of global warming, plaintiffs have a harder time proving that they will suffer an injury as a result of increased greenhouse gas emissions. The redressability element of standing is also problematic because greenhouse gases are emitted around the world and halting the greenhouse gas emissions of one particular country is not likely to reverse or stop climate change on its own.

The Supreme Court recently affirmed standing in a global warming case, *Massachusetts v. Environmental Protection Agency*, 127 S.Ct. 1438 (2007). This landmark case held that the Environmental Protection Agency (EPA) had the authority to regulate carbon dioxide, which was contrary to the EPA's position that it lacked such authority. The Court also provided some guidance on standing in global warming cases.

The actions leading up to the Supreme

Court's decision in *Massachusetts vs. EPA* began in 1999 when a group of 19 private organizations submitted a petition for rulemaking to the EPA requesting that standards be set for greenhouse gases emitted by new motor vehicles. Under Section 202(a)(1) of the Clean Air Act, standards must be set for "air pollution" emitted from motor vehicles when the pollution endangers public health and welfare.

In 2003, the EPA denied the petition and stated that it lacked statutory authority to regulate greenhouse gas emissions under the Clean Air Act. The EPA also identified several policy reasons why its decision not to regulate greenhouse gases was appropriate, including that there were "numerous areas of scientific uncertainty" surrounding climate change and that the causal link between greenhouse gases and warmer temperatures "cannot be equivocally established."

Petitioners, including 12 states, three U.S. cities, an American territory, and various public health and environmental organizations, requested review of EPA's denial of the rulemaking petition by the U.S. Court of Appeals for the D.C. Circuit. On July 15, 2005, the court of appeals denied the petitions, although the judges each wrote separate opinions.

Judge Randolph announced the decision of the court. He avoided a definitive ruling on standing and assumed for the sake of argument that the EPA had authority under the Act to regulate greenhouse gas emissions from new motor vehicles. He found that the EPA properly declined to exercise that authority and could take into account scientific evidence as well as policy judgments when determining whether regulation is advisable. Judge Sentelle wrote separately and determined the petitioners lacked standing because global warming is harmful to humanity at large, and thus petitioners' grievances were too generalized to support standing. As a result, petitioners could not show that they would be personally injured by the failure of the EPA to regulate greenhouse gases and thus could not challenge the EPA's actions in court. However, Sentelle joined Randolph's decision to ensure a

majority of the panel could agree on the disposition of the case.

In a 38-page dissent, Judge Tatel determined that the State of Massachusetts had demonstrated all three elements of Article III standing—injury, causation and redressability. With respect to injury, Tatel stated that there was a "substantial probability" that global warming would result in sea level rise, which would threaten Massachusetts' coastline and coastal property. Tatel found that the plaintiffs adequately showed that EPA's failure to regulate greenhouse gases contributed to global warming, which caused projected sea level rises. With respect to redressability, Tatel decided that plaintiffs' expert testimony established that reductions of greenhouse gases from motor vehicles would delay and moderate many of the adverse impacts of global warming. Turning to the merits, Tatel determined that the EPA possessed statutory authority to regulate greenhouse gas emissions and that the policy considerations identified by the EPA fell outside its range of discretion.

Plaintiffs then sought review of the case by the Supreme Court, which was granted. The Court first addressed the question of standing and focused on the special position of the State of Massachusetts. The Court emphasized that the fact that the State of Massachusetts is a sovereign state and not a private party like in *Lujan* is of "considerable relevance" and that Massachusetts was given "special solicitude" in the standing analysis. However, exactly how this "special solicitude" affected the standing analysis was not clear from the Court's opinion.

With respect to the injury element of standing, the Court found that Massachusetts adequately demonstrated that rising global sea levels have already swallowed some of the state's coastal land and that if sea levels continue to rise as predicted, the state's injury will become more severe over time. As an owner of significant coastal property, the Court found that Massachusetts' injury was "actual" and "imminent."

With respect to causation, the Court noted that a substantial percentage of

greenhouse gases are emitted by motor vehicles and that 6 percent of worldwide carbon dioxide emissions can be attributed to the transportation sector in the United States. Thus, the Court found that the regulation of greenhouse gases from motor vehicles would make a meaningful contribution to reducing greenhouse gas concentrations.

The Court found the third element of standing—redressability—was also adequately demonstrated. The Court determined that the regulation of greenhouse gases emitted by motor vehicles would have some impact on global warming, thus reducing to some extent the harm to the State of Massachusetts.


After finding that the plaintiffs demonstrated standing, the Court addressed the merits of the case. The Court agreed with plaintiffs that greenhouse gases fall within the definition of “air pollutants” in the statute. As such, the EPA held the authority to regulate greenhouse gases from new motor vehicles under Section 202(a)(1) of the Clean Air Act. The Court found that the EPA provided no reasoned explanation for its refusal to determine whether greenhouse gases contributed to global warming and remanded the case for further proceedings.

The Court’s decision in *Massachusetts v. EPA* will have an impact on subsequent climate change lawsuits as well as on environmental standing and standing in general. The Court’s finding that carbon dioxide is considered a “pollutant” under the Clean Air Act has already been used to support separate litigation challenging the EPA’s failure to regulate greenhouse gases from stationary sources and other sources covered by the Clean Air Act. Also, the Court’s recognition of the injuries caused by global warming, the causation between increased greenhouse gases and global warming, and the EPA’s ability to mitigate harmful impacts of climate change will likely be used to demonstrate standing in other global warming-related cases.

The Court’s decision in *Massachusetts v. EPA* provides further guidance on standing analysis in environmental cases, but there are still remaining questions. The new battleground in environmental standing,

post-*Massachusetts*, will likely focus on the Court’s recognition of Massachusetts as a sovereign state deserving of “special solicitude” in the standing analysis. The Court did not elucidate precisely how the fact that Massachusetts is a sovereign state affected its standing analysis. Nor did the Court provide guidance on how the treatment of Massachusetts with respect to standing could be translated to a private individual, or if this is even possible. Whether or not the Court’s standing analysis in *Massachusetts v. EPA* is restricted to states or can be extended to private individuals will be important to determine, as many environmental lawsuits are filed by environmental organizations on behalf of their members. If the *Massachusetts v. EPA* standing analysis is ultimately restricted to states, there may be greater pressure on state litigants to sue on behalf of their citizens.

The *Massachusetts v. EPA* decision was not unanimous. Chief Justice Roberts and Justices Scalia, Thomas, and Alito strongly dissented from the decision. With respect to the majority’s standing analysis, the dissenters criticized the majority for treating Massachusetts different from pri-

vate litigants for standing purposes, stating that the Court adopted a “new theory of Article III standing for States.” Such a close division on the Court on the issue of standing portends further controversy in this area of law. While the legacy of *Massachusetts vs. EPA* remains to be seen, it is clear that the issue of environmental standing will continue to be a contentious one. 

#### Note

1. There are several prudential standing rules that plaintiffs are often required to meet in addition to the Article III constitutional standing requirements. This article focuses only on the issue of Article III constitutional standing.

**MARISA A. MARTIN** is an associate attorney in the Chicago office of Baker & McKenzie where she can be reached at Marisa.A.Martin@BakerNet.com or (312) 861-8000.

*The views expressed in this article are those of the author and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.*



## Dialogues in the Classroom



The American Bar Association Dialogue series is built upon the idea of stimulating conversations about law and its role in society. Often facilitated by a lawyer or judge, these conversations are intended to take place in high school classrooms or community settings.

Each Dialogue includes background information, focus questions, and advice on holding civil discussions, as well as resources and other related information. Each can be adapted to fit 1 to 4 classroom periods.

#### ABA DIALOGUE SERIES

- *\*New for 2008* Dialogue on the Rule of Law (PC 2350244)
- Dialogue on Youth and Justice (PC 2350232)
- Dialogue on the Separation of Powers (PC 2350222)
- Dialogue on the American Jury (PC 2350216)
- Dialogue on *Brown v. Board of Education* (Available only online)

For free downloads and video samples visit  
[www.abanet.org/publiced/features/dialogues.html](http://www.abanet.org/publiced/features/dialogues.html)



To order call 1-800-285-2221  
 or visit [www.abastore.org](http://www.abastore.org).  
 Each Dialogue available for \$1  
 (bulk discount applies).



# TEACHING ACTIVITY Standing and Environmental Law

## James Landman

In this activity, students will review the Court's current position on standing in environmental cases and debate how standing rules might apply in a hypothetical case.

### Step One

Share with students the three-part requirement for standing outlined in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Students can either read the description of *Lujan* in the accompanying article or you can write the three elements, listed below, on the board:

1. The plaintiff must show an "injury-in-fact" that is "concrete and particularized" and "actual or imminent," not conjectural or hypothetical.
2. The plaintiff must demonstrate a "causal connection between the injury and the conduct complained of" (i.e., the injury must be "fairly traceable" to the defendant's challenged actions).
3. The plaintiff's injury must be one that is likely to be redressed by a favorable decision in the case.

Make sure that students understand that the "injury-in-fact" suffered by the plaintiff does not have to be an economic injury. Injuries to a recreational or aesthetic interest, for example, can also satisfy the "injury-in-fact" requirement. Also point out that, in *Massachusetts v. EPA*, the Court gave "special solicitude" to a state that was seeking standing to challenge an action by the Environmental Protection Agency.

### Step Two

Share with students the following scenario:

*Pleasant Lake lies along the border of two states. The lake's shoreline in State A lies along the edge of a state park and is largely undeveloped; only a few small structures (outhouses and a shower) for a rustic campground in the state park have been built near the shoreline. More development, primarily private single-family vacation homes, has occurred along the shoreline in State B. A public access boat landing is also on the State B shoreline.*

*Getaway Resorts, a private company, has proposed a major resort development on one of the last remaining tracts of undeveloped land along the shoreline in State B. The edge of this tract lies along the border with State A. It is zoned for single-family residences. Getaway Resorts has applied for a zoning variance to allow development of the resort.*

*An environmental assessment of the proposed development has identified possible impacts if the property is developed as a resort instead of as single-family residences. These include increased traffic from motorboats and other recreational watercraft on the lake, and a slight increase in runoff of lawn fertilizers as likely impacts*

*of the proposed resort development. The resort will also border the state park in State A and may disrupt wildlife populations at the edge of the park.*

*A number of parties have challenged Getaway Resorts' application for a zoning variance.*

### Step Three

Using the three standing requirements outlined in *Lujan v. Defenders of Wildlife* and the "special solicitude" ruling in *Massachusetts v. EPA*, ask students to debate whether any of the following parties should have standing to sue. You may want to divide the students into small groups to discuss standing of the parties. Then have small groups share their conclusions and discuss with the class as a whole.

1. A group of owners of lakeside private residences in State B argues that the presence of a large resort property will diminish the economic value of their properties.
2. A group of individuals who use the public access boat landing for recreational fishing argues that increased runoff of fertilizers into the lake will have a negative impact of fish populations and diminish their recreational enjoyment of the lake.
3. A family who vacations every year at the state park campsite argues that increased traffic on the lake will diminish their enjoyment of the sense of solitude they experience when camping in the state park.
4. State A challenges the resort project, citing its interest in conserving wild places for its citizens to enjoy.

### Step Four (Optional)

*Sierra Club v. Morton*, 405 U.S. 727 (1972), an early Supreme Court decision on standing in an environmental case, included a dissenting opinion by Justice William O. Douglas, a well-known conservationist. Justice Douglas proposed a federal rule "that [would allow] environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage."

Have your students read Justice Douglas's dissent. Ask them to consider how the standing rule proposed by Douglas would work in the Pleasant Lake scenario described above. What arguments could be made on behalf of Pleasant Lake? Which of the parties described above would be best suited to speak for the lake? Would Pleasant Lake, as a party, be able to meet the three requirements of standing defined in *Lujan v. Defenders of Wildlife*?

**JAMES LANDMAN** is associate director of the American Bar Association Division for Public Education in Chicago, Illinois.

## RESOURCES

The ABA Division for Public Education's 2008 National Online Youth Summit is focusing on environmental law and policy. Curriculum featured in the summit is available for free download at [www.abanet.org/publiced/noys/08/home.shtml](http://www.abanet.org/publiced/noys/08/home.shtml).

Earthjustice (formerly the Sierra Club Legal Defense Fund) is a nonprofit public interest law firm dedicated to environmental protection. Its website, [www.earthjustice.org](http://www.earthjustice.org), offers a listing of current cases that provides brief summaries of cases pending before the courts.

The Environmental Protection Agency offers a "Kids, Students, and Teachers" website with

specific resources and activities for elementary, middle, and high school students at [www.epa.gov/epahome/students.htm](http://www.epa.gov/epahome/students.htm).

The Worldwatch Institute website features an online timeline of 89 key moments in the environmental movement from the 1960s to today. Available at [www.worldwatch.org/taxonomy/term/59](http://www.worldwatch.org/taxonomy/term/59).