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# Environmental Law, *Clapper v. Amnesty International USA*, and the Vagaries of Injury-in-Fact: “Certainly Impending” Harm, “Reasonable Concern,” and “Geographic Nexus”

*Patrick Gallagher\**

## ABSTRACT

*Clapper v. Amnesty International USA* further muddies the already confusing doctrine of injury-in-fact in the law of Article III standing. This article examines *Clapper* and proposes clarification of three problematic aspects of injury-in-fact, which arise in environmental litigation: the concepts of “certainly impending harm,” “reasonable concern,” and “geographic nexus.” *Clapper’s* broad language suggesting that imminent injury must meet a very strict, “certainly impending” standard should be viewed in light of the case law adjudicating probabilistic harms, which reveals that “certainly impending” does not even approach a preponderance standard. Rather, it encompasses a wide range of environmental and public health risks where the plaintiffs have established a nexus to the challenged action. *Clapper* should be interpreted as denying standing because of the plaintiffs’ inability to establish a nexus to surveillance activities, akin to the geographic nexus required in environmental cases. *Clapper* can also be distinguished because of its reliance on the uncertainty associated with subsequent, intervening actions required to consummate the alleged injury. *Clapper’s* language conflating the “reasonable concern” doctrine from *Friends of the*

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*Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.* with the “certainly impending” test must be corrected, and “reasonable concern” should be presumed in future cases where the plaintiffs establish a geographic nexus to violations of environmental law. Finally, the test for geographic nexus in environmental cases should account for indirect and cumulative impacts, and should not depend on proof of nexus to precise acreages.

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## I.

### INTRODUCTION

Standing law continues to perplex the environmental bar. Criticism of modern “injury-in-fact” doctrine began over twenty years ago, and continues unabated today.<sup>1</sup> Calls for reform

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1. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988); Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163 (1992); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393 (1996); Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459 (2008); Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781 (2009); Jan G. Laitos, *Standing and Environmental Harm: The Double Paradox*, 31 VA. ENVTL. L.J. 55 (2013).

include: special Article I courts for environmental litigation;<sup>2</sup> special rules for complex ecosystems;<sup>3</sup> special rules for statistical harm;<sup>4</sup> and a “neo-federalist” overhaul of standing doctrine.<sup>5</sup> Joining the fray, this article examines the Supreme Court’s recent decision in *Clapper v. Amnesty International USA*<sup>6</sup> and proposes some clarifications of three vexing ambiguities in standing law: the concepts of “certainly impending harm,” “reasonable concern,” and “geographic nexus.”

*Clapper* denied standing to a group of attorneys and human rights, labor, legal, and media organizations (“Respondents”), all of whom challenged the constitutionality of Section 702 of the Foreign Intelligence Surveillance Act of 1978.<sup>7</sup> Section 702 authorizes warrantless government surveillance targeting the communications of non-U.S. persons located abroad.<sup>8</sup> It allows the Attorney General and Director of National Intelligence to obtain surveillance authorization from the Foreign Intelligence Surveillance Court (“FISC”), subject to certain conditions, but not requiring probable cause or the identification of specific geographies or individuals targeted.<sup>9</sup>

The Court never reached the merits in *Clapper*, holding that the Respondents failed to establish injury-in-fact under Article III of the Constitution. It found that any alleged surveillance of the Respondents was not “certainly impending” enough, as several intervening actors, including the FISC, Attorney General, and Director of National Intelligence, would make future, uncertain decisions about whether, how, and where

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2. Laitos, *supra* note 1, at 100.

3. Hope M. Babcock, *The Problem with Particularized Injury: The Disjuncture Between Broad-Based Environmental Harm and Standing Jurisprudence*, 25 J. LAND USE & ENVTL. L. 1 (2009).

4. Bradford Mank, *Standing and Statistical Persons: A Risk-Based Approach to Standing*, 36 ECOLOGY L.Q. 665 (2009).

5. Pushaw, *supra* note 1.

6. 133 S. Ct. 1138 (2013).

7. 50 U.S.C. § 1881(a) (2008).

8. *Clapper*, 133 S. Ct. at 1144.

9. *Id.* Authorization can be obtained to target “categories of foreign intelligence targets.” See Julian Sanchez, *Further Thoughts on Clapper v. Amnesty International*, CATO INSTITUTE (Mar. 1, 2013, 4:24 PM), <http://www.cato.org/blog/further-thoughts-clapper-v-amnesty-international>.

surveillance would be conducted.<sup>10</sup> *Clapper* also held that any countermeasures taken by the Respondents to avoid surveillance were not based on “reasonable concern,” because actual surveillance was not “certainly impending.”<sup>11</sup>

*Clapper* muddies an already confusing body of law, in at least two respects. First, the Court’s application of the “certainly impending” test for injury-in-fact has heightened concerns over the level of proof required for standing, including a four-Justice dissent questioning why a “realistic threat” or “realistic danger” of harm no longer suffices for standing.<sup>12</sup> Second, *Clapper* improperly merges the doctrine of “certainly impending” harm with the doctrine of “reasonable concern” articulated in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*<sup>13</sup> These two doctrines must be kept independent for standing law to make any sense in the environmental context.

The broad language in *Clapper* has generated concern over its application to environmental litigation.<sup>14</sup> Applied incorrectly, *Clapper* could produce new standing obstacles for environmental plaintiffs. With some clarification, its impact on environmental law will be minimal. Specifically, the “certainly” language in *Clapper* must not be interpreted as requiring environmental plaintiffs to demonstrate anything near a preponderance of evidence that future harm will occur. The expanding case law on probabilistic harm indicates that much lower risks of harm are justiciable, and that courts will take into account the congressional intent behind the law being enforced, the magnitude of the harm alleged, and the plaintiff’s nexus to the disputed action.<sup>15</sup>

In addition, *Clapper* must not be interpreted as making certainly impending harm a prerequisite to a plaintiff’s reasonable concern over violations of environmental laws and decisions to curtail use of a natural resource area, as in *Laidlaw*. Instead, *Clapper* should be read only as requiring a geographic

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10. *Clapper*, 133 S. Ct. at 1147-49.

11. *Id.* at 1151.

12. *Id.* at 1160 (Breyer, J., dissenting).

13. 528 U.S. 167, 183 (2000).

14. Jeremy P. Jacobs, *Wiretap Ruling Could Haunt Environmental Lawsuits*, GREENWIRE (May 20, 2013), <http://www.eenews.net/stories/1059981453>.

15. *See infra* pp. 16-20.

or other nexus between the plaintiff and the environmental violations to justify reasonable concern, a view that is consistent with *Laidlaw* and other precedent.

Ultimately, *Clapper* can be distinguished from most environmental cases on two bases. First, one can say that the *Clapper* plaintiffs failed, in the majority's view, to establish a geographic or other nexus between their personal interests and the unconstitutional surveillance alleged.<sup>16</sup> The *Clapper* plaintiffs were justifiably frustrated in this regard, given the intense secrecy surrounding warrantless surveillance.<sup>17</sup> Nonetheless, for environmental advocates, *Clapper* echoes similar reasoning in *Summers v. Earth Island Institute*.<sup>18</sup> In *Summers*, the Court denied standing to environmental plaintiffs who failed to establish a geographic nexus with specific forest tracts to be logged under revised Forest Service policies governing citizen appeals of timber sales.<sup>19</sup> In this respect, *Clapper* is nothing new.

*Clapper* can also be viewed as another, albeit troubling, extension of prior cases denying standing where subsequent, intervening actions were required to consummate the injury-in-fact. The "intervening actor" hurdle began afflicting environmental plaintiffs with *Florida Audubon Society v. Bentsen*,<sup>20</sup> and continues to create problems for environmental plaintiffs challenging certain types of programmatic agency actions.<sup>21</sup> The "intervening actor" doctrine affects a minority of environmental cases, but could represent trouble if expanded following *Clapper*.

First, *Clapper* treated *both* the defendant and the non-party FISC tribunal as intervening actors; the Court found plaintiffs' injuries too speculative because of the uncertainty surrounding future decisions of the defendant National Intelligence Director

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16. See *Clapper*, 133 S. Ct. at 1147-49.

17. See Sanchez, *supra* note 9.

18. 555 U.S. 488 (2009).

19. *Id.* at 491-96 (Forest Service policies at issue were promulgated as Forest Service Handbook procedures).

20. 94 F.3d 658 (D.C. Cir. 1996).

21. See, e.g., *Appalachian Voices v. Bodman*, 587 F. Supp. 2d 79, 86-89 (D.D.C. 2008) (Department of Energy clean coal tax credit program); *Californians for Renewable Energy v. U.S. Dep't of Energy*, 860 F. Supp. 2d 44, 52-53 (D.D.C. 2012) (Department of Energy loan guarantee regulations).

and the FISC as to whether, how, and where surveillance might occur.<sup>22</sup> In contrast, the only intervening actors at issue in *Florida Audubon* were non-party corn and sugar growers.<sup>23</sup> Now that *Clapper* has included party-defendants in the “intervening actor” rubric, one can imagine a future court applying *Clapper* to an agency defendant in an environmental case. For example, a court may be tempted to hold that the Forest Service’s approval of a programmatic logging plan does not give rise to injury-in-fact, because the agency’s future decisions on where to log are too uncertain. As discussed in Parts II and IV below, this problem is more properly treated as a “geographic nexus” issue for environmental cases where an identified tract of land or water, no matter how large, will be affected by programmatic agency decisions.

A more nefarious extension of *Clapper* would have the “intervening actor” doctrine apply to the holders of federally-issued permits. At least one district court has already cracked open this door, ruling that future injury to environmental plaintiffs with an interest in preserving Blair Mountain, West Virginia, was too speculative because the mining permit holder for a particular site may not actually mine in the future.<sup>24</sup> This misguided reasoning has been rejected by at least one circuit court, and *Clapper* absolutely must be limited to cases where the geographic location of injury is unknown or so highly speculative as to warrant the denial of jurisdiction.

Part One of this article briefly reviews the doctrinal history of injury-in-fact and its many prominent critics. Part One reiterates the widely espoused view that Justice Scalia’s Separation of Powers view of standing is weak, and that Congress’ role in delineating justiciable injury remains highly unsettled, especially given Justice Kennedy’s position on the issue. Part One also reiterates and emphasizes that Article III standing requires proof of *personal* harm, not environmental harm.

Part Two examines the various standards lower courts have applied to determine whether Article III injury is “certainly

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22. *Clapper v. Amnesty Int’l*, 133 S. Ct. 1138, 1148-51 (2013).

23. *Florida Audubon*, 94 F.3d at 667-68.

24. *Sierra Club v. Salazar*, 894 F. Supp. 2d 97 (D.D.C. 2012).

impending.” These standards range widely, from “non-negligible”<sup>25</sup> risk to “substantially probable” risk.<sup>26</sup> Following *Laidlaw*, we know that “certainly impending” does not mean certainly impending *environmental* harm. It means harm to a person’s aesthetic, recreational, health, or other interests in their environment.<sup>27</sup> Part Two reviews the approach of several recent appellate decisions addressing probabilistic injuries to the environment or public health. In these decisions, “certainly impending harm” was measured by several factors, including the underlying statutory intent and the factual nexus of the plaintiff to the illegal conduct. Following these decisions, Part Two argues that “certainly impending” means a credible, non-speculative risk, not something approaching or exceeding 50% probability, as some fear from the language in *Clapper*. Part Two proposes that *Clapper*’s “certainly impending” test has more to do with geographic nexus and intervening actors than any quantitative metric of proof.

Part Three argues that courts should presume “reasonable concern” in the face of illegal conduct affecting a forest, lake, or other natural resource. Applying *Laidlaw*, Part Three argues that *Clapper* improperly predicates “reasonable concern” on “certainly impending” injury, a mistake also made by a handful of recent decisions and commentators in the environmental field. Part Three argues that “reasonable concern” should be presumed where a plaintiff is reacting to violations of environmental law.<sup>28</sup> Courts should acknowledge that Congress imposed strict liability on polluters and errant agencies for a reason, and that citizens are entitled to rely on these safeguards. From a historical perspective, Professor Fletcher might say that courts should not be delving into hydrological analyses or computer models to second-guess the concerns of “truth-telling” citizens.<sup>29</sup>

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25. *Am. Bottom Conservancy v. U.S. Army Corps of Eng’rs*, 650 F.3d 652, 658 (7th Cir. 2011).

26. *Pub. Citizen, Inc. v. Nat’l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1295-96 (D.C. Cir. 2007).

27. *Friends of the Earth, Inc. v. Laidlaw Envntl. Serv. (TOC), Inc.*, 528 U.S. 167, 181-82 (2000).

28. *See id.* at 181-82.

29. *See Fletcher, supra* note 1, at 249.



Part Four examines the concept of “geographic nexus,” an often-difficult barrier to standing for environmental plaintiffs.<sup>30</sup> Part Four posits that geographic nexus overlaps significantly with “certainly impending” in the environmental context, as both doctrines measure the likelihood that a particular plaintiff will suffer injury. For example, a plaintiff living or recreating in close proximity to a disputed logging project or pollution discharge will have a higher likelihood of suffering injury.

After reviewing judicial applications of the geographic nexus doctrine, Part Four asserts that geographic nexus and “certainly impending” harm must be evaluated in light of direct, indirect, and cumulative environmental impacts, as opposed to a narrow, tract-by-tract assessment of the plaintiff’s interests. Part Four reviews the law and science on indirect and cumulative impacts, which are not confined to discrete locations. Just as the Supreme Court allowed Oklahoma to litigate pollution discharges originating in Arkansas thirty-nine miles upstream of its border,<sup>31</sup> courts should look for a credible connection between the plaintiff and the areas directly, indirectly, and cumulatively affected by violations of environmental law.

## II.

### ARTICLE III STANDING AND ITS CRITICS

#### A. *A Brief Review*

Modern standing doctrine attracted harsh criticism from its inception.<sup>32</sup> This critical commentary continues today.<sup>33</sup> A recent

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30. See *Florida Audubon Soc’y v. Bentsen*, 94 F.3d 658, 667-68 (D.C. Cir. 1996).

31. *Arkansas v. Oklahoma*, 503 U.S. 91, 94-95 (1992).

32. See, e.g., *Fletcher*, *supra* note 1, at 221 (criticizing the formulaic nature of modern standing doctrine); Sunstein, *supra* note 1, at 163 (arguing that modern standing doctrine is inconsistent with its common law origins); Pushaw, *supra* note 1, at 293 (comparing modern standing doctrine to its common law origins).

33. Laitos, *supra* note 1, at 55 (arguing that modern environmental standing doctrine is paradoxical); Elliot *supra* note 1, at 459 (arguing that modern standing doctrine hinders rather than enhances the separation of powers goals it seeks to promote); David N. Cassuto, *The Law of Words: Standing, Environment, and Other Contested Terms*, 28 HARV. ENVTL. L. REV. 79, 86-87 (2004) (arguing that modern standing doctrine improperly defines harm based

empirical analysis of decisional law concludes that standing doctrine has been driven by political ideology.<sup>34</sup> Conservatives now lament their inability to obtain standing as much as liberals.<sup>35</sup> None of this seems to have affected the Supreme Court's growing inclination to deny standing to environmental plaintiffs, from *Lujan v. Defenders of Wildlife*<sup>36</sup> through *Summers v. Earth Island Institute*.<sup>37</sup>

Beginning in 1970 with *Association of Data Processing Service Organizations, Inc. v. Camp*,<sup>38</sup> and followed by *Sierra Club v. Morton* two years later,<sup>39</sup> the Court began to require that plaintiffs demonstrate "injury-in-fact" to their recreational, aesthetic, or other personal interests.<sup>40</sup> Such injury can be either "actual" or "imminent," which translates roughly to present or future.<sup>41</sup> Following *Morton*, three distinct types of actual and imminent injuries to environmental plaintiffs appear in the case law, described here as "physical injury," "diminution injury," and "curtailment injury."<sup>42</sup>

"Physical injury" occurs when the defendant's conduct directly affects the plaintiff's person or property. One example would be exposing the plaintiff to illegal air pollution.<sup>43</sup> Another would be eroding the plaintiff's coastal property, addressed in *Massachusetts v. EPA*.<sup>44</sup> Physical injury decisions range from

on individual injury instead of considering larger systemic harm).

34. Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921–2006*, 62 STAN. L. REV. 591, 597–99, 632–47 (2010).

35. Heather Elliott, *Standing Lessons: What Can We Learn When Conservative Plaintiffs Lose Under Article III Standing Doctrine*, 87 IND. L.J. 551, 563–86 (2012).

36. 504 U.S. 555, 560–62 (1992).

37. 555 U.S. 488, 494–97 (2009).

38. 397 U.S. 150, 154 (1970). Although *Sierra Club v. Morton* is often cited as the origin of "aesthetic" environmental injury, the phrase first appeared in *Data Processing*.

39. 405 U.S. 727, 734–36 (1972).

40. *Id.* at 738–41; see also *Lujan*, 504 U.S. at 560–61.

41. *Summers*, 555 U.S. at 493.

42. Economic injury is also cognizable, but is not the focus of this article. See *Bennett v. Spear*, 520 U.S. 154, (1997).

43. *Texans United for a Safe Econ. Educ. Fund v. Crown Cent. Petroleum Corp.*, 207 F.3d 789, 792 (5th Cir. 2000) (breathing polluted air constitutes injury).

44. 549 U.S. 497, 522–23 (2007).

the relatively simple – breathing polluted air<sup>45</sup> – to the very complex – increased risk of disease.<sup>46</sup> Some recent opinions have adopted the view that increased risk of disease itself constitutes Article III injury, though this law is far from settled.<sup>47</sup>

“Diminution injury” occurs when the plaintiff experiences a diminished enjoyment of a resource, without necessarily curtailing her use of the resource. These cases primarily involve aesthetic harm. For example, in *Fund for Animals, Inc. v. Lujan*,<sup>48</sup> the court found standing based on a diminished opportunity to view bison in Yellowstone National Park.<sup>49</sup> Diminution injury was denied in *Summers* because the Court found insufficient evidence of the plaintiffs’ geographic nexus to the locations affected by the illegal Forest Service rule.<sup>50</sup>

“Curtailment injury” occurs when the plaintiff curtails her use of a resource, as in *Laidlaw*.<sup>51</sup> Numerous cases involve plaintiffs asserting Article III injury based on reduced participation in outdoor activities such as swimming, boating, and hiking.<sup>52</sup>

Beginning with *Lujan v. Defenders of Wildlife*,<sup>53</sup> the Court also now requires that any type of injury-in-fact be traceable to (caused by) the defendant and redressable by a favorable judgment.<sup>54</sup> These latter two “prongs” of the standing inquiry have generated their own critical literature.<sup>55</sup> Aside from a brief

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45. *Texans United*, 207 F.3d at 789.

46. *Natural Res. Def. Council v. U.S. Env'tl. Prot. Agency*, 464 F.3d 1, 6-7 (D.C. Cir. 2006).

47. See *infra* pp. 19-20.

48. 962 F.2d 1391 (9th Cir. 1992).

49. *Id.* at 1396-97; see also *Friends of the Earth v. Consol. Rail Corp.*, 768 F.2d 57, 61 (2d Cir. 1985); *In Defense of Animals v. U.S. Dep't of Interior*, 808 F. Supp. 2d 1254, 1262 (E.D. Cal. 2011).

50. 555 U.S. 488, 495-96 (2009).

51. 528 U.S. 167, at 181-83 (2000).

52. See, e.g., *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505 (4th Cir. 2003) (Watersports and conservationist groups had standing to sue hog farms for alleged violations of the Clean Water Act); *Pub. Interest Research Grp. of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64 (3rd Cir. 1990) (recreationalists’ affidavits claiming that water pollution would affect their ability to enjoy certain public waterways was sufficient to establish standing).

53. 504 U.S. 555 (1992).

54. *Id.* at 560-61.

55. See *Wright & Miller*, 13A FED. PRAC. & PROC. JURIS. § 3531.6 (3d ed.) (“This third leg of the Article III standing stool [redressability] is no more stable than the other two. The simplest problem is that predictions of remedial benefit

detour into traceability relating to the *Clapper* decision, this article focuses on the first prong, injury-in-fact.

Two parts of the controversy over modern standing doctrine require emphasis here. First, the weight of scholarship reveals that federal courts were historically concerned with the legal rights of plaintiffs, not their factual circumstances.<sup>56</sup> While the courts have long declined to entertain “generalized grievances,” a statute conferring a legal right on the plaintiff historically made her case justiciable.<sup>57</sup> Professors Fletcher and Sunstein cite *Havens Realty Corp. v. Coleman*<sup>58</sup> as a modern replica of this history.<sup>59</sup> In *Havens*, an African American “tester” claimed damages under the Fair Housing Act of 1968 after being lied to about a rental apartment’s availability.<sup>60</sup> The tester had no intention of renting the apartment in question. Yet, the court entertained the suit, holding that injury to the “statutorily created right to truthful housing information” made the case justiciable.<sup>61</sup>

The issue of Congress’s ability to create statutory rights which define standing remains unresolved, as Justice Kennedy’s concurring opinions in both *Lujan* and *Summers* indicate a willingness to have Congress define some parameters of injury: “In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.”<sup>62</sup> The overwhelming weight of scholarship supports this view;<sup>63</sup> however, Justice Scalia insists that injury-in-fact is a “hard floor of Article III

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may be skewed so as to recognize, deny, or simply confuse standing.”); Mary Kathryn Nagle, *Tracing the Origins of Fairly Traceable: The Black Hole of Private Climate Change Litigation*, 85 TUL. L. REV. 477 (2010).

56. See Fletcher, *supra* note 1, at 223-25; Sunstein, *supra* note 1, at 169-79; Winter, *supra* note 1, at 1394-1409.

57. Fletcher, *supra* note 1, at 222-23.

58. 455 U.S. 363 (1982).

59. Fletcher, *supra* note 1, at 245; Sunstein, *supra* note 1, at 189-90.

60. *Havens*, 455 U.S. at 364.

61. *Id.* at 374.

62. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580-81 (1992) (Kennedy, J., concurring); see also *Summers v. Earth Island Inst.*, 555 U.S. 488, 501 (2009) (Kennedy, J., concurring).

63. See Sunstein, *supra* note 1, at 203-06, 253-55; see also Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 54 (1984).

jurisdiction that cannot be removed by statute.”<sup>64</sup> Meanwhile, lower courts have begun to factor congressional intent into their evaluations of standing under environmental and public health statutes.<sup>65</sup>

Second, the purported Separation of Powers basis for current standing doctrine appears quite tenuous. Justice Scalia looks skeptically at citizen enforcement of environmental laws, asserting repeatedly that strict standing doctrine protects the “Chief Executive’s most important constitutional duty, to ‘take Care that the Laws be faithfully executed.’ Art. II, § 3.”<sup>66</sup> However, Justice Scalia’s constitutional theory has been debunked and criticized as “baseless” for its lack of historical support and inconsistent application.<sup>67</sup>

Most commentators argue that the history of Anglo-American law enforcement embraced a wide variety of citizen enforcement mechanisms, from relator suits to mandamus to extraordinary writs.<sup>68</sup> Where Justice Scalia sees inter-branch conflict in the abstract, all signs indicate that the Executive Branch has wholeheartedly welcomed citizen enforcement as a supplement to its own efforts. For example, *qui tam* suits were specifically authorized by the first Congress and exist today.<sup>69</sup> The Environmental Protection Agency (“EPA”), a cabinet level agency of the Executive Branch, has consistently supported citizen enforcement of environmental law.<sup>70</sup>

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64. *Summers*, 555 U.S. at 497.

65. *See infra* pp. 19-20.

66. *Lujan*, 504 U.S. at 556; *Summers*, 555 U.S. at 492-93.

67. Sunstein, *supra* note 1, at 214; Pushaw, *supra* note 1, at 477-79; *see also* Winter, *supra* note 1, at 1395; John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1009-10 (2002).

68. Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1274 (1961); Winter, *supra* note 1, at 1394.

69. Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341 (1989). As Professor Caminker recounts, the Executive Branch has consistently welcomed private enforcement of claims against those who defraud the federal treasury or violate the law, historically termed “*qui tam*” or “who brings the action as well for the king as for himself,” and Congress reaffirmed this tradition in passing the False Claims Act in 1989. *Id.*

70. *See* Jeffery G. Miller, *Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens: Part One: Statutory Bars in Citizen Suit Provisions*, 28 HARV. ENVTL. L. REV. 401, 411 n.39 (2004) (citing the following authorities: *Pending Clean Water Act*

Where Justice Scalia sees interference with the Executive's power, scholars and critics point out that Article II imposes a power *and a duty* on the Executive Branch.<sup>71</sup> In Professor Pushaw's words, "separation of powers in our democracy is frustrated by justiciability doctrines that permit courts to abdicate their role of enforcing federal law."<sup>72</sup>

Professors Woolhandler and Nelson put forward a valiant defense of modern standing doctrine. They argue that the traditional division between private and public actions supports the Court's current reluctance to entertain suits asserting broad public rights.<sup>73</sup> However, the premise that a *constitutional* divide exists between private and public actions has itself come under withering criticism, starting with Professor Jaffe in 1961.<sup>74</sup> Woolhandler and Nelson admit as much; they disclaim that the historical differences between public and private actions *require* modern standing doctrine.<sup>75</sup>

### B. *What Standing Doctrine Does Not Require*

Despite its vagaries, standing law is clear on a few key points. It is settled that a plaintiff need not establish harm to the environment for Article III standing. Article III injury happens

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*Legislation: Hearings Before the Subcomm. on Env't and Nat. Res. Of the House Comm. on Merch. Marine and Fisheries*, 103d Cong. 212-13 (1994) (statement of Steven A. Herman, Assistant Administrator for Enforcement, EPA); *The Water Quality Act of 1994, and Issues Related to Clean Water Act Reauthorization: Hearings on H.R. 3948 Before the Subcomm. on Water Res. and Env't of the House Comm. on Pub. Works and Transp.*, 103d Cong. 290 (1994) (statement of Carol M. Browner, Administrator, EPA). *See also* Ashoff v. City of Ukiah, 130 F.3d 409, 411 n.2 (9th Cir. 1997) (stating that EPA sides with citizen position); *N. and S. Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552, 556 n.8 (1st Cir. 1991); *SPIRG of N.J., Inc. v. Fritzsche, Dodge & Olcott, Inc.*, 759 F.2d 1131, 1135 n.3 (3d Cir. 1985); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 890 F. Supp. 470, 474 (D.S.C. 1995) (EPA brief "generally supported" citizens).

71. Pushaw, *supra* note 1, at 484.

72. *Id.* at 469.

73. Ann Woolhandler and Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004).

74. *See generally* Jaffe, *supra* note 68. *See also* Winter, *supra* note 1, at 1394-1409.

75. Woolhandler and Nelson, *supra* note 73, at 691.

to the plaintiff, not the environment.<sup>76</sup> Of course, harm to the environment will often impair a plaintiff's personal interests, e.g., by contaminating water supply,<sup>77</sup> or despoiling air quality.<sup>78</sup> However, proof of environmental harm is not a prerequisite to justiciability.

Justiciable injury occurs when the disputed action adversely affects the plaintiff's relationship with a natural resource, hence the recognition of curtailment injury.<sup>79</sup> For example, a plaintiff may stop using her tap water and resort to bottled water after learning that a neighboring underground storage tank has leaked pollutants illegally into the groundwater. The plaintiff need not prove the magnitude of the contamination or quantify the health risk; all *Laidlaw* requires is that the plaintiff's response to the defendant's actions be "reasonable."<sup>80</sup>

As *Laidlaw* held, the conflation of environmental harm with Article III injury creates an irrational outcome: it raises the evidentiary burden for standing higher than for the merits.<sup>81</sup> This stems from the fact that most environmental complaints allege either strict liability for violations of environmental statutes, or reversible error by an agency. Neither requires proof of environmental harm.

Under federal pollution statutes, any violation of a pollution standard creates strict liability.<sup>82</sup> Under the Administrative Procedure Act ("APA"),<sup>83</sup> courts reverse agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not

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76. *Friends of the Earth, Inc. v. Laidlaw Env'tl Serv. (TOC) Inc.*, 528 U.S. 167, 181-83 (2000); *see also* *Ecological Rights Found. v. Pacific Lumber Co.*, 230 F.3d 1141, 1151-53 (9th Cir. 2000); *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 517-18 (4th Cir. 2003).

77. *See, e.g., City of Greenville, Ill. v. Syngenta Crop Prot., Inc.*, 756 F. Supp. 2d 1001 (S.D. Ill. 2010).

78. *Texans United for a Safe Econ. Educ. Fund v. Crown Cent. Petroleum Corp.*, 207 F.3d 789, 792 (5th Cir. 2000).

79. *Laidlaw*, 528 U.S. at 181-83.

80. *Id.* at 169.

81. *Id.* at 181.

82. Clean Air Act, 42 U.S.C. §§ 7604(a), (f) (strict liability for violations of "emission standard or limitation"); Clean Water Act, 33 U.S.C. §§ 1365(a), (f) (strict liability for violations of "effluent standard or limitation"); *see also* *Ecological Rights Found. v. Pacific Lumber Co.*, 230 F.3d 1141 (9th Cir. 2000).

83. 5 U.S.C. § 701 *et seq.*

in accordance with law.”<sup>84</sup> An APA case does not require proof of environmental harm; it focuses on the integrity of the agency’s decision-making process. For example, the question in a National Environmental Policy Act (“NEPA”) case<sup>85</sup> is whether the agency conducted a proper environmental review process, not whether its decision will harm the environment.<sup>86</sup>

Nor must a plaintiff prove a violation of law to obtain standing; the standing inquiry is independent of the merits adjudication.<sup>87</sup> The burden of proof required for standing progresses with the stage of the litigation: general allegations of the required elements suffice at the motion to dismiss stage; facts supported by affidavits or other evidence are needed to survive summary judgment; and proof of such facts is required at trial.<sup>88</sup> However, proof of facts at trial means establishing by a preponderance of evidence that one meets the test for injury-in-fact, whether that test is “substantial risk,” “certainly impending,” or some variant, all of which are defined by the case law. It does not mean proving that the underlying injury-in-fact is more likely than not.<sup>89</sup>

### III.

#### “CERTAINLY IMPENDING” AND UNCERTAIN HARM

Following *Laidlaw*, a “certainly impending” harm to an environmental plaintiff can be any of the three types of Article III injuries described above: physical, diminution, or curtailment

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84. *Id.* at § 706(2)(A).

85. Agency compliance with the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, is reviewed under the APA. *See* *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1008-09 (9th Cir. 2006) (“Agency decisions that allegedly violate [the] NEPA and [the] NFMA are reviewed under the Administrative Procedure Act (‘APA’), and may be set aside only if they are ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’”).

86. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989).

87. *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968); *see also* *Booker–El v. Superintendent, Indiana State Prison*, 668 F.3d 896, 899 (7th Cir. 2012) (courts should not “conflate[] standing with the merits of the case”).

88. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

89. *See, e.g., Maine People’s Alliance & Natural Res. Def. Council v. Mallinckrodt, Inc.*, 471 F.3d 277, 283-84 (1st Cir. 2006) (preponderance burden to show probabilistic harm).



injury. Just as present injury does not mean injury to the environment, a “certainly impending” harm does not mean a threat of harm to the environment.<sup>90</sup> In both cases, the focus is on the plaintiff, not the environment.

In *Clapper*, the plaintiffs challenged the constitutionality of the Foreign Intelligence Surveillance Act (“FISA”),<sup>91</sup> which authorizes surveillance targeting foreign suspects abroad.<sup>92</sup> The Court denied standing, relying heavily on the absence of proof that communications between the plaintiffs and foreign suspects had been or would be targeted successfully by the specific type of FISA surveillance being litigated.<sup>93</sup> Never mind that the *Clapper* plaintiffs were unable to gain access to classified surveillance information.

*Clapper* should give the environmental bar cause for concern. The Court’s application of a “certainly impending” test for future injury follows *Whitmore v. Arkansas*,<sup>94</sup> but leaves many questions unanswered, notably: what level of probability is required for injury-in-fact? The Court rejected the Second Circuit’s use of an “objectively reasonable likelihood” of harm standard, asserting that it was “inconsistent” with the “certainly impending” standard.<sup>95</sup> Only in a footnote did the Court acknowledge that “substantial risk” may be an acceptable variant of “certainly impending,” citing *Monsanto Co. v. Geertson Seed Farms*.<sup>96</sup> Unfortunately, *Clapper*’s superficial treatment of *Geertson* and the resulting vagueness of the “certainly impending” standard represent yet another chapter in standing law’s confusing evolution.

#### A. *Certainly Impending and Probabilistic Harm*

Prior to *Clapper*, “certainly impending” was interpreted by lower courts in environmental cases as “nonnegligible,

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90. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc.*, 528 U.S. 167, 181-82 (2000).

91. 50 U.S.C. § 1801 *et seq.*

92. 50 U.S.C. § 1881(a).

93. *Clapper v. Amnesty Int’l*, 133 S. Ct. 1138, 1147-49 (2013).

94. 495 U.S. 149, 158 (1990).

95. *Clapper*, 113 S. Ct. at 1147.

96. *Id.* at 1150, n.5 (citing *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2754-55 (2010)).

nontheoretical, probability of harm,”<sup>97</sup> “substantial risk,”<sup>98</sup> “distinct risk,”<sup>99</sup> “credible threat,”<sup>100</sup> or “reasonable probability.”<sup>101</sup> The definition is “far from fully resolved.”<sup>102</sup> Recent commentary bemoans the apparent erosion of standing in light of a drift toward a stricter standard.<sup>103</sup> As the *Clapper* dissent aptly noted, a “certainty” test makes little sense when facing environmental or similar harms that are inherently probabilistic.<sup>104</sup>

In *Geertson Seed Farms*, the Court evaluated the risk of gene flow from genetically modified alfalfa fields to regular alfalfa fields managed by the plaintiffs.<sup>105</sup> Noting with approval the district court’s finding of a “reasonable probability” of gene flow, the Court then discussed the particular types of actual and imminent injury associated with a “substantial risk” of gene flow.<sup>106</sup> Nowhere did the *Geertson* Court reject the lower court’s “reasonable probability” standard, and nowhere did the Court try to quantify the probabilities correlating to “substantial risk.”

The problem of correlating “certainly impending” to a quantitative risk of harm has become particularly acute in environmental cases, as courts contend with phenomena that are often probabilistic in nature. The rule arising from these cases suggests that “certainly impending” is not as certain as it sounds. Rather, these decisions indicate that a non-speculative

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97. *Am. Bottom Conservancy v. U.S. Army Corps of Engineers*, 650 F.3d 652, 658 (7th Cir. 2011); *Cf. U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689, n.14 (1973) (a “trifle” establishes standing).

98. *Public Citizen, Inc. v. Nat’l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1295-96 (D.C. Cir. 2007).

99. *Florida Audubon Soc’y v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996).

100. *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 950 (9th Cir. 2002).

101. *Geertson Seed Farms*, 130 S. Ct. at 2754.

102. *Virginia State Corp. Comm’n v. FERC*, 468 F.3d 845, 848-49 (D.C. Cir. 2006) (“The word ‘substantial’ of course poses questions of degree, questions far from fully resolved.”).

103. Bradford Mank, *Revisiting the Lyons Den: Summers v. Earth Island Institute’s Misuse of Lyons’s “Realistic Threat” of Harm Standing Test*, 42 *Ariz. St. L.J.* 837, 845-72 (2010).

104. *Clapper v. Amnesty Int’l*, 133 S. Ct. 1138, 1162-63 (2013) (Breyer, J., dissenting).

105. *Geertson Seed Farms*, 130 S. Ct. at 2754-55.

106. *Id.*

risk of harm is justiciable where the harm is serious and Congress intended to protect the plaintiff.

In *Mountain States Legal Foundation v. Glickman*,<sup>107</sup> the court found that a group aligned with timber interests had standing to challenge a forest plan for not allowing enough logging to reduce the risk of catastrophic fire. The court held that a ten percent differential in fuel loading between the alternative logging plans created a “realistic threat” of injury from wildfire, without detailed analysis of the risk.<sup>108</sup> However, it seems evident that any calculation of quantitative risk of catastrophic fire will be nowhere near fifty percent.<sup>109</sup> The *Glickman* court relied heavily on a twist to the “certainly impending” test: “The more drastic the injury that government action makes more likely, the lesser the increment in probability necessary to establish standing.”<sup>110</sup>

In *Natural Resources Defense Council v. E.P.A.*,<sup>111</sup> the court entertained a highly technical assessment of the skin cancer risk plaintiffs contended would arise from an EPA rule allowing critical uses of methyl bromide, an ozone-depleting compound. The D.C. Circuit had first denied standing to Natural Resources Defense Council (“NRDC”), finding that the probability of cancer fatality from EPA’s rule would be only 1 in 4.2 billion per person per year, and that such a risk did not constitute imminent harm.<sup>112</sup> Then the court granted rehearing, realized that its original calculations were erroneous, and reversed itself. On rehearing, the court accepted EPA’s assertions of a much higher risk—1 in 200,000—but hedged its ruling, stating, “Even if a quantitative approach is appropriate—an issue on which we express no opinion—this risk is sufficient to support standing.”<sup>113</sup>

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107. 92 F.3d 1228 (D.C. Cir. 1996).

108. *Id.* at 1235.

109. See Joe H. Scott, *An Analytical Framework for Quantifying Wildland Fire Risk and Fuel Treatment Benefit*, USDA Forest Service Proceedings RMRS-P-41 (2006).

110. *Glickman*, 92 F.3d at 1234.

111. *Natural Res. Def. Council v. U.S. Env'tl. Prot. Agency*, 464 F.3d 1 (D.C. Cir. 2006).

112. *Natural Res. Def. Council v. U.S. Env'tl. Prot. Agency*, 440 F.3d 476, 481-484 (D.C. Cir. 2006), *withdrawn on reh'g*, 464 F.3d 1 (D.C. Cir. 2006).

113. *Natural Res. Def. Council v. U.S. Env'tl. Prot. Agency*, 464 F.3d at 7.

A tandem of cases from the Second Circuit, though not technically dealing with environmental law, represent important precedents in the physical injury context. Both decisions hold that Article III injury can be established when plaintiffs allege increased risk of disease associated with an improper administration of food and drug safety laws. In *Baur v. Veneman*,<sup>114</sup> a citizen filed suit seeking judicial review of the United States Department of Agriculture's ("USDA") denial of his petition to ban the use of downed livestock as food for human consumption.<sup>115</sup> The court found standing, despite a fairly low risk of the plaintiff contracting disease from contaminated meat, by stressing the unique nature of food and drug safety laws.<sup>116</sup> The *Baur* court characterized Article III injury as "qualitative, not quantitative," and that it "logically varies with the severity of the probable harm."<sup>117</sup>

Similarly, in *Natural Resources Defense Council, Inc. v. U.S. Food & Drug Administration*,<sup>118</sup> the plaintiff organization challenged the Food and Drug Administration's ("FDA") failure to regulate two antimicrobial soap ingredients, triclosan and triclocarban. The court reaffirmed *Baur's* holding that "exposure to potentially harmful products' may satisfy the injury-in-fact requirement of Article III standing in 'the specific context of food and drug safety suits.'"<sup>119</sup>

The *Baur* and *NRDC v. FDA* cases are notable for several reasons, the first of which is their reliance on Congress' intent when enacting food and drug safety laws. As *Baur* noted, "there is a tight connection between the type of injury which *Baur* alleges and the fundamental goals of the statutes which he sues under—reinforcing *Baur's* claim of cognizable injury."<sup>120</sup> *Baur* analogized this statutory imperative to those under the environmental laws.<sup>121</sup>

Second, the Second Circuit recognized the difficulty in courts

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114. 352 F.3d 625 (2nd Cir. 2003).

115. *Id.*

116. *Id.* at 633-35.

117. *Id.* at 637.

118. 710 F.3d 71 (2nd Cir. 2013).

119. *Id.* at 80-81; *Baur*, 352 F.3d at 634.

120. *Baur*, 352 F.3d at 635.

121. *Id.* at 634-35.

attempting to engage in quantitative or similarly technical assessments of risk, stating, “[t]he evaluation of the amount of tolerable risk is better analyzed as an administrative decision governed by the relevant statutes rather than a constitutional question governed by Article III.”<sup>122</sup> The author could not agree more: federal courts should not be engaging in highly technical evaluations of environmental risk in standing analyses. Rather, they should be looking to Congress’ intent, a low threshold for “certainly impending,” and the individual plaintiff’s nexus to the claims asserted. After all, the genesis of modern standing law was the Court’s concern that plaintiffs just have a personal stake in the matter.<sup>123</sup>

Professor Mank has proposed that the courts adopt a one-in-one-million risk standard for injury-in-fact, corresponding to the risk threshold used by many regulatory agencies.<sup>124</sup> This might be appealing if one were resigned to federal courts becoming “super-agencies” overseeing risk assessments in the justiciability context. However, this article proposes that courts decline to take on that role.

Finally, both *Baur* and *NRDC v. FDA* take risk-of-injury to another level; they characterize the increased risk of disease as a present, not future, injury. Distinguishing *Clapper*, *NRDC v. FDA* held: “The injury at issue in this case is not one of speculative future injury, as in *Clapper*, 133 S. Ct. at 1147-49, but is based on the actual, present health risk arising out of actual, present exposure to triclosan.”<sup>125</sup>

In the end, whether increased risk of harm from exposure to chemicals is characterized as a present or future injury, one thing is clear: federal courts are not interpreting “certainly impending” as anywhere near fifty percent probability, as the phrase might imply. Rather, the courts are looking to the magnitude of harm, the underlying statute’s intent, and other factors, using a qualitative approach that invokes the traditional, “non-trivial” standard for Article III injury.

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122. *Natural Res. Def. Council v. U.S. Food and Drug Admin.*, 710 F.3d at 84 (citing *Baur*, 352 F.3d at 643).

123. *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1982).

124. *See* Mank, *supra* note 4, at 737-41.

125. *Natural Res. Def. Council v. U.S. Food and Drug Admin.*, 710 F.3d 71, 83 (2d Cir. 2013).

### B. *The Problem of Intervening Actors*

Leaving aside questions of quantitative risk, *Clapper* can also be viewed as just another, albeit troubling, extension of prior decisions denying standing where subsequent, intervening actions were required to consummate the injury-in-fact. *Clapper* denied standing for three reasons: 1) the Attorney General and Director of National Intelligence controlled the ways in which particular suspects or communications would be targeted for surveillance, and plaintiffs adduced no evidence of how that targeting worked or would affect them; 2) the Foreign Intelligence Court (“FISC”) might or might not authorize section 702 surveillance; and 3) the government had the option of using several different types of surveillance, only one of which was being litigated.<sup>126</sup>

*Clapper’s* reasoning echoes *Florida Audubon Society v. Bentsen*, *supra*, in which standing was denied where the plaintiffs claimed that a tax credit would cause more ethanol-based fuel production, which would cause more agricultural pollution from intensive corn and sugar cultivation on farmland bordering wildlife areas that plaintiffs’ members visited.<sup>127</sup> As the court characterized the issue, “[t]he presence of a particularized risk of injury to the plaintiffs’ interests requires even more exacting scrutiny when the challenged government action is not one located at a particular ‘site.’”<sup>128</sup> This reference to a known “site” is critical to a correct interpretation of *Clapper*.

Most environmental cases do not have an “intervening actor” problem, but this could change if *Clapper* is applied recklessly. For example, in air or water pollution cases, the pollution “site” and violator are known and third parties play no significant role in the injury. In most cases challenging agency actions, the site of a proposed dam, mine, or logging project is identified and the courts do not question whether the project approval will result in the types of harms anticipated.

Finally, the “intervening actor” doctrine could become a real problem for environmental plaintiffs if courts begin to view *permit holders* as uncertain, third-party actors. For example, in

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126. *Clapper v. Amnesty Int’l*, 133 S. Ct. 1138, 1148-49 (2013).

127. *Florida Audubon Soc’y v. Bentsen*, 94 F.3d 658, 667-68 (D.C. Cir. 1996).

128. *Id.* at 667.

*Sierra Club v. Salazar*,<sup>129</sup> the court denied standing based on the perceived uncertainty around whether mining permit recipients would actually conduct mining.<sup>130</sup> Fortunately, a similar argument was rejected by the Seventh Circuit in *American Bottom Conservancy v. U.S. Army Corps of Engineers*,<sup>131</sup> where the court presumed that the permit holder for a wetland fill project would follow through on its investment in getting a permit, and actually conduct the work.<sup>132</sup> *Salazar's* extension of the intervening actor doctrine to permittees at known locations reveals just how far some courts will go to deny standing, presumably out of allegiance to Justice Scalia's view of Separation of Powers. One hopes that *Clapper* will not give this trend any momentum.

There are countervailing trends. In a recent case adopting a "credible risk" standard for imminent harm, the Ninth Circuit, echoing the Fourth, emphasized the prophylactic function of standing in cases of imminent environmental harm:

The extinction of a species, the destruction of a wilderness habitat, or the fouling of air and water are harms that are frequently difficult or impossible to remedy. Thus, as the Fourth Circuit noted in *Gaston Copper*, plaintiffs need not wait until the natural resources are despoiled before challenging the government action leading to the potential destruction.<sup>133</sup>

This frame of reference on "certainly impending" reminds us that federal courts must act as protectors, as well as gatekeepers. Courts following *Clapper* hopefully will adopt the former role, and not let uncertainty defeat justiciability.

#### IV.

##### UNTANGLING "REASONABLE CONCERN" FROM "CERTAINLY IMPENDING HARM"

Following *Laidlaw*, the concept of "reasonable concern" has become a key part of standing doctrine.<sup>134</sup> It allows plaintiffs to

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129. 894 F. Supp. 2d 97 (D.D.C. 2012).

130. *Id.* at 109-11.

131. 650 F.3d 652 (7th Cir. 2011).

132. *Id.* at 658-60.

133. *Cent. Delta Water Agency v. U.S.*, 306 F.3d 938, 950 (9th Cir. 2002).

134. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000) addresses both concepts, first evaluating the plaintiffs' "reasonable

establish a curtailment injury in the absence of any imminent physical injury. In *Laidlaw*, the Court found that members of the plaintiff organizations had suffered a valid curtailment injury, because they reduced their use of the Tyger River based on “reasonable concern” over upstream mercury pollution.<sup>135</sup> The “concern” was not the injury—it gave rise to the “curtailment” injury. Following *Laidlaw*, “reasonable concern” may be linked to either a present or imminent harm by prompting the plaintiff to curtail recreational or aesthetic enjoyment of a natural resource, now or in the future.<sup>136</sup>

Unfortunately, courts and commentators are blurring the concepts of “reasonable concern” and “certainly impending.” *Clapper* illustrates the problem acutely. In *Clapper*, the plaintiffs asserted both imminent harm from future surveillance of their communications with clients, and present harm from “costly and burdensome measures to protect the confidentiality of their communications.”<sup>137</sup> The plaintiffs justified their present harm as a reasonable reaction to their concern over being subject to surveillance.<sup>138</sup> In this respect, the *Clapper* plaintiffs were alleging an injury analogous to the curtailment injuries asserted by environmental plaintiffs: a present disruption of the plaintiff’s behavior caused by reasonable concern over illegal conduct.

However, *Clapper* rejected the plaintiffs’ assertions of harm based on reasonable concern over surveillance, opining that:

Respondents’ contention that they have standing because they incurred certain costs as a reasonable reaction to a risk of harm is unavailing—because the harm respondents seek to avoid is not certainly impending. In other words, respondents cannot manufacture standing merely by inflicting harm on

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concerns” over using the Tyger River, then referencing the “certainly impending” test. 528 U.S. at 190 (citing *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)).

135. *Laidlaw*, 528 U.S. at 183-85.

136. See *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 556 (5th Cir. 1996) (“That this [curtailment] injury is couched in terms of future impairment rather than past impairment is of no moment.”).

137. *Clapper v. Amnesty Int’l*, 133 S. Ct. 1138, 1151 (2013) (“Respondents claim, for instance, that the threat of surveillance sometimes compels them to avoid certain e-mail and phone conversations, to ‘tal[k] in generalities rather than specifics,’ or to travel so that they can have in-person conversations”).

138. *Id.*



themselves based on their fears of hypothetical future harm that is not certainly impending.<sup>139</sup>

This statement suggests that “certainly impending harm” is somehow a prerequisite to reasonable concern and, by extension, curtailment injury. In this respect, *Clapper* and *Laidlaw* are at odds. Following *Laidlaw*, a court should examine Article III curtailment injury through the following lens: has the plaintiff curtailed her activities, or will she do so in the future, based on reasonable concern over the defendant’s illegal conduct? However, read literally, *Clapper* would require that a plaintiff’s “reasonable concern” be based on some other, “certainly impending” harm. This leads to a circle of illogic when applied to environmental litigation. Consider an environmental plaintiff alleging future curtailment injury arising from reasonable concern over water permit violations. Would *Clapper* require such a plaintiff to prove that her reasonable concern was based on a “certainly impending” curtailment injury? *Clapper’s* logic breaks down quickly.

Under *Laidlaw*, a reasonable concern can be based on water pollution permit violations, which are *not* the imminent harm in an environmental case; the curtailed use or diminished enjoyment of a natural resource might be the imminent harm.<sup>140</sup> *Clapper* glossed over this critical distinction between imminent harm and reasonable concern, but the peculiar facts of *Clapper* may explain why: in *Clapper*, the alleged imminent harm was the *same* as the basis of the reasonable concern: illegal surveillance.<sup>141</sup> In *Laidlaw*, and most similar pollution cases, they are not the same. Imminent harm in an environmental case is *not* the illegal act, i.e., the permit violation, but rather a curtailment, diminution, or physical injury arising from the illegal actions.

“Reasonable concern” and “certainly impending harm” must be kept conceptually distinct. *Laidlaw* tested the reasonableness of the plaintiffs’ concerns by focusing on the defendant’s violations of environmental law, not the imminence of some other harm. *Laidlaw* carefully distinguished “reasonable concern” from

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139. *Id.*

140. *Laidlaw*, 528 U.S. at 181-82.

141. *Clapper*, 133 S.Ct. at 1150-51.

“certainly impending,” holding that “the only ‘subjective’ issue here is [t]he reasonableness of [the] fear’ that led the affiants to respond to that concededly ongoing conduct by refraining from use of the North Tyger River and surrounding areas.”<sup>142</sup>

*Clapper* distinguished *Laidlaw* by citing the evidence of environmental violations in *Laidlaw*, and concluding, “*Laidlaw* would resemble this case only if (1) . . . the Government was using § 1881a-authorized surveillance to acquire respondents’ communications and (2) the sole dispute concerned the reasonableness of respondents’ preventive measures.”<sup>143</sup> In other words, *Clapper* would have accepted the plaintiffs’ assertions of present injury to their communications had they shown they were actually subject to surveillance. *Clapper* failed to acknowledge, however, that this approach improperly merges injury with reasonable concern and makes no sense when applied to environmental litigation.<sup>144</sup>

One way out of the *Clapper* dilemma is to read the Court’s treatment of “reasonable concern” as purely a traceability analysis. The *Clapper* opinion suggests as much, but is not entirely clear on whether the *Clapper* plaintiffs satisfied even the injury-in-fact prong of Article III standing.<sup>145</sup> Viewing *Clapper* as a traceability opinion, *Laidlaw* is distinguishable because the plaintiffs’ reasonable concern there was based on a geographic nexus to the environmental violations. In contrast, the *Clapper* plaintiffs did not demonstrate a similar nexus; the majority opinion relied heavily on the lack of evidence that the individual plaintiffs would ever come into contact with government surveillance.<sup>146</sup>

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142. 528 U.S. at 184.

143. *Clapper*, 133 S. Ct at 1153.

144. Justice Alito’s citation at 1151 to *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (per curiam) is unhelpful: in that case Pennsylvania enacted tax credit legislation to offset an unconstitutional tax collected by New Jersey on Pennsylvania residents working in New Jersey, and claimed Article III injury to its revenue collection interests. 426 U.S. at 664. The Court found that Pennsylvania could simply repeal the tax credit and suffer no injury, holding that “No State can be heard to complain about damage inflicted by its own hand.” *Id.* Citizens whose interests are affected by violations of environmental laws have no such luxury, and to the extent Justice Alito is taking aim at curtailment injury generally, we have an even bigger problem on our hands.

145. *Clapper*, 133 S. Ct at 1151-52.

146. *Id.* at 1147-49.

Accordingly, a proper view of “reasonable concern” under environmental law would hold that a curtailment injury based on reasonable concern must be traceable to the defendant through evidence of a geographic or other nexus to the defendant’s actions. But this is merely restating settled law: all Article III injuries must be traceable to the defendant.<sup>147</sup> Unfortunately, *Clapper’s* broad statement that reasonable concern must somehow be predicated on a certainly impending harm goes well beyond a mere traceability pronouncement, and could lead to serious confusion in future environmental litigation.

A statement in dicta from *Maine People’s Alliance & Natural Resources Defense Council v. Mallinckrodt, Inc.*<sup>148</sup> highlights the *Clapper* problem in an environmental case. In that case, the plaintiffs contended that mercury contamination downriver from a pollution source “may present an imminent and substantial endangerment to health or the environment,”<sup>149</sup> in violation of the Resource Conservation and Recovery Act (“RCRA”).<sup>150</sup> The plaintiffs asserted standing through evidence of their curtailed use of a polluted river.<sup>151</sup> The First Circuit correctly applied *Laidlaw* in distinguishing between injury to the plaintiff and the environment, and found standing.<sup>152</sup> However, the court also stated that “an individual’s decision to deny herself aesthetic or recreational pleasures based on concern about pollution will constitute a cognizable injury only when the concern is premised upon a realistic threat.”<sup>153</sup> Read literally, the *Maine People’s* statement would require a showing of realistic threat to the environment as a prerequisite to claiming impairment of a personal interest. This wrongly conflates the two concepts, mischaracterizes *Laidlaw*, and risks injecting proof of environmental harm back into the standing analysis.<sup>154</sup>

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147. *Laidlaw*, 528 U.S. at 180.

148. 471 F.3d 277 (1st Cir. 2006).

149. *Id.* at 281.

150. 42 U.S.C. § 6972(a)(1)(B) (2012).

151. *Mallinckrodt*, 471 F.3d at 284.

152. *Id.* at 283-84.

153. *Id.* at 284. “Realistic threat” is another synonym for imminent harm. *City of Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983).

154. Commentators in the environmental arena also blur the distinction

If we read *Clapper* as just restating the traceability requirement for injuries based on “reasonable concern,” then what is required to establish “reasonable concern” as the basis of a curtailment injury? Evidence of illegal conduct affecting the natural resource should suffice; even *Clapper* implies this possibility.<sup>155</sup> Courts should presume the reasonableness of a plaintiff’s concern when facing a violation of environmental laws designed to protect the resource at issue. *Laidlaw* suggested this approach, without explicitly establishing the principle.<sup>156</sup> Professor Farber has suggested a similar approach, proposing the Court adopt a new, “place-based” theory of standing for environmental cases.<sup>157</sup>

*Interfaith Community Organization v. Honeywell International, Inc.*<sup>158</sup> suggests how legal rights should influence a modern court’s view of injury-in-fact under environmental law. In *Honeywell*, a citizens’ group brought a claim that Honeywell’s pollution of an industrial site presented an imminent hazard. The company challenged the group’s standing, arguing, *inter alia*, that they did not live close enough to the site to be injured. The court found standing, holding:

Honeywell’s argument neglects *McConnell*’s observation that “standing . . . often turns on the nature and source of the claim asserted” . . . . Here, the action arose under a provision of RCRA authorizing suits initiated by “any person . . . . against any person . . . who [possesses a statutorily defined nexus to waste that] *may* present an imminent and substantial endangerment to health or the environment.”<sup>159</sup>

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between “reasonable concern” and the injury-in-fact. *See, e.g.*, Robin Kundis Craig, *Removing “The Cloak Of A Standing Inquiry”: Pollution Regulation, Public Health, And Private Risk In The Injury-In-Fact Analysis*, 29 CARDOZO L. REV. 149, 182-83 (2007); Laitos, *supra* note 1, at 76-83.

155. *Clapper v. Amnesty Int’l*, 133 S. Ct. 1138, 1153 (2013) (“pervasive illegal discharges” distinguish *Laidlaw*).

156. *See Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 182-86 (2000).

157. Daniel A. Farber, *A Place-Based Theory of Standing*, 55 UCLA L. REV. 1505 (2008). A violation of law would form one of three elements of standing under Farber’s proposal. *Id.* at 1550.

158. 399 F.3d 248 (3d Cir. 2005).

159. *Id.* at 257 (citations omitted).

Here, as in the cases discussed above addressing probabilistic harm, it appears that Congress' delineation of legal rights under RCRA influenced the Honeywell court's view of standing, as it should.

A presumption of reasonable concern in the face of environmental violations also makes common sense. Black's Law Dictionary defines "reasonable" as "having the faculty of reason."<sup>160</sup> Consistent with this plain meaning, courts have readily accepted that someone who lives, works, or recreates in or near a natural resource may be "reasonably concerned" *when there is a violation of environmental laws affecting the resource*. For example, in *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*,<sup>161</sup> the court held that concerns over future recreational impairment associated with unpermitted discharges of oil and production wastes into Galveston Bay gave rise to imminent injury under Article III.<sup>162</sup>

In sum, prior to *Data Processing*, the core question surrounding a plaintiff's standing was whether the plaintiff had a protected legal right at issue in the proceeding.<sup>163</sup> The premise that a violation of law presumably generates "reasonable concern" leading to curtailment injury fits well with this legal history.<sup>164</sup> Congress and the Executive Branch have defined the parameters of environmental protection through statutes and rules, and citizens must be able to rely on those safeguards when petitioning the courts.

## V.

### GEOGRAPHIC NEXUS, RISK OF HARM AND TOTAL ENVIRONMENTAL IMPACTS

The concept of "geographic nexus" first appeared in *Committee to Save the Rio Hondo v. Lucero*,<sup>165</sup> and now appears

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160. BLACK'S LAW DICTIONARY (9th ed. 2009).

161. 73 F.3d 546 (5th Cir. 1996).

162. *Id.* at 556; *see also* Am. Canoe Ass'n v. Murphy Farms, Inc., 326 F.3d 505, 517-20 (4th Cir. 2003).

163. *See supra* pp. 8-9.

164. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580-81 (1992) (Kennedy, J., concurring); *Summers v. Earth Island Inst.*, 555 U.S. 488, 501 (2009) (Kennedy, J., concurring).

165. 102 F.3d 445, 449 (10th Cir. 1996). Although the phrase "geographic nexus" is typically associated with NEPA litigation, this article refers to

frequently in environmental cases. This concept often determines whether plaintiffs are granted standing.<sup>166</sup> In *Rio Hondo*, the Tenth Circuit affirmed an environmental group's standing to challenge a NEPA document covering a use permit for a ski area located in the headwaters of the Rio Hondo River.<sup>167</sup> The court relied upon affidavits showing that the group's members "have used the waters of the Rio Hondo watershed for their entire lifetimes for irrigating, fishing, and swimming, and that they intend to continue their use."<sup>168</sup> As the Supreme Court subsequently described the test in *Laidlaw*, "environmental plaintiffs adequately allege injury in fact when they aver that they use *the affected area* and are persons "for whom the aesthetic and recreational values of the area will be lessened" by the challenged activity."<sup>169</sup> As discussed below, the definition of "affected area" should encompass areas directly, indirectly and cumulatively affected by environmental degradation.

After *Rio Hondo*, the exactitude of geographic nexus required by lower courts varies considerably, from demands that plaintiffs establish a precise nexus to specific acreages, to more liberal recognitions of a nexus to broad resource areas, such as entire watersheds or wilderness areas. No court applying a geographic nexus test to a programmatic agency decision has held that the agency's future behavior was too uncertain to support standing, as the *Clapper* decision did. Instead, the courts have looked to evidence of the plaintiff's nexus to the areas affected by the decision.

As noted above, *Clapper* can be interpreted as a variant of a "geographic nexus" opinion, in that the plaintiffs' failure to

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geographic nexus more broadly, as the issue of a plaintiffs' geographic proximity to illegal conduct arises in all types of environmental litigation. *See, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (Clean Water Act); *Lujan*, 504 U.S. at 565 (Endangered Species Act).

166. *See, e.g.*, *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 485 (9th Cir. 2011) *cert. denied*, 132 S. Ct. 366, 181 L. Ed. 2d 232 (U.S. 2011) (plaintiffs established a geographic nexus); *Appalachian Voices v. Bodman*, 587 F. Supp. 2d 79, 85-86 (D.C. Cir. 2008) (plaintiffs failed to establish a geographic nexus).

167. *Rio Hondo*, 102 F.3d at 446.

168. *Id.* at 450-51.

169. *Laidlaw*, 528 U.S. at 183 (emphasis added).

establish a nexus with surveillance activities left the Court unconvinced that any impending harm existed. *Clapper* relied heavily on the absence of evidence that the *Clapper* plaintiffs would ever actually encounter surveillance in their particular communications with overseas targets.<sup>170</sup> Most environmental cases differ from *Clapper* in one key respect: the geographic location of a pollution source or a logging or mining project is generally well defined. As discussed below, even agency decisions covering large tracts of ocean or forest still identify a specific geography impacted by the decisions. In such cases, the standing controversy typically revolves around the geographic *scope* of impacts, *i.e.* what is the “affected area” under *Laidlaw*, how far downriver does pollution affect the plaintiff’s interest, or how broadly will the effects of logging extend across the landscape? This entails yet another evaluation of “certainly impending” risk to the plaintiff.

Often, only risk estimates can answer the question of whether an action will affect a plaintiff’s interest in a particular geographic area. For example, what degree of risk does groundwater withdrawal pose to a broader hydrologic system, or what degree of risk does logging pose to an animal’s population trends across a broader landscape? Where do we draw the lines of geographic nexus? As discussed below, a proper, risk-based evaluation of geographic nexus and Article III injury must take into account the direct, indirect, and cumulative impacts of an action (“total environmental impacts”).

#### A. *Geographic Nexus All Over the Map*

*Lujan* and *Summers* are often cited for the proposition that a plaintiff must show a very specific geographic nexus to the natural resource at issue in a case.<sup>171</sup> However, *Lujan* and *Summers* can also be understood as applying to cases involving immense geographic areas.<sup>172</sup> We know that even Justice Scalia would grant standing to a party living directly adjacent to a

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170. *Clapper v. Amnesty Int’l*, 133 S. Ct. 1138, 1147-50 (2013).

171. *See, e.g., Pollack v. U.S. Dep’t of Justice*, 577 F.3d 736, 740 (7th Cir. 2009).

172. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 495 (2009) (national forests affected by rule encompass 190 million acres).

proposed dam.<sup>173</sup> The space between next-door neighbors and “unspecified portions of immense tracts”<sup>174</sup> is what concerns us here.

Following *Lujan* and *Summers*, many courts still employ a reasonable, non-technical approach to geographic nexus. Others nitpick the metes and bounds of plaintiffs’ activities, past and future. A recent case from the Tenth Circuit epitomizes the discrepancy. In *Southern Utah Wilderness Alliance v. Palma*,<sup>175</sup> Judge Waddoups questioned the nexus of plaintiffs to Bureau of Land Management tracts approved for oil and gas exploration.<sup>176</sup> The district court denied standing, based on its judgment that the plaintiffs had not established sufficiently precise nexus to leased tracts spanning “tens of thousands of acres.”<sup>177</sup> Luckily, the Tenth Circuit reversed, holding that “[n]either our court nor the Supreme Court has ever required an environmental plaintiff to show it has traversed each bit of land that will be affected by a challenged agency action.”<sup>178</sup>

Beginning with *Japan Whaling Ass’n v. American Cetacean Society*,<sup>179</sup> numerous decisions have taken a broad view of geographic nexus. The plaintiffs in *American Cetacean Society* were granted standing to challenge the government’s compliance with international whaling quotas based on their interest in observing the “Western Division stock of Northern Pacific sperm whales.”<sup>180</sup> Presumably that population of whales roams an enormous patch of ocean, which may be why Justice Scalia referred to standing in that case as the “outermost limit of plausibility.”<sup>181</sup>

In *Cedar Point Oil Co.*,<sup>182</sup> the court found standing where the Sierra Club’s members established interests in Galveston Bay, a

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173. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572, n.7 (1992).

174. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 889 (1990).

175. 2011 WL 2565198 (D. Utah, Apr. 04, 2011).

176. *Id.* at \*3-5.

177. *Id.* at \*4-5.

178. *Southern Utah Wilderness Alliance v. Palma*, 707 F.3d 1143, 1155 (10th Cir. 2013).

179. 478 U.S. 221 (1986).

180. *Id.* at 227.

181. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 555-67 (1992).

182. *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc.*, 73 F.3d 546 (5th Cir. 1996).



618 square mile water body.<sup>183</sup> The court did not engage in a technical, acre-by-acre assessment of the plaintiffs' nexus, instead rationally concluding that affiants who live near Galveston Bay and use the bay for recreational activities had a "direct stake" in the outcome of a lawsuit challenging pollution in one part of the bay.<sup>184</sup>

Similarly, in *Sierra Club v. Kimbell*,<sup>185</sup> the court found standing where plaintiffs asserted recreational and aesthetic interests in the Boundary Waters Canoe Area Wilderness, a 1.1 million-acre wilderness area.<sup>186</sup> Again, there was no splitting of hairs on precise geographic coordinates.<sup>187</sup> Even in *Center for Biological Diversity v. United States Department of Interior*,<sup>188</sup> a decision generally hostile to environmental plaintiffs, the court found standing where the plaintiffs established an interest in watching indigenous animals within the oil lease areas along the outer continental shelf of Alaska, an area spanning 3 to 200 miles off the United States coast.<sup>189</sup>

In a case recently granted certiorari but then dismissed before argument, *Pacific Rivers Council v. United States Forest Service*,<sup>190</sup> the Ninth Circuit granted standing to an organization challenging the Forest Service's approval of a management plan for eleven national forests in the Sierra Nevada. The court found standing based on the affidavit of the plaintiff organization's chairperson. The chairperson attested that he and the group's 750 members regularly recreated in all of the national forests.<sup>191</sup> The court distinguished *Summers*, because the regulation challenged in *Summers* affected just small tracts scattered throughout 190 million acres of forest. The Sierra Nevada plan, on the other hand, would allow increased logging, grazing, and

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183. *Id.* at 546, 550.

184. *Id.* at 556. The *Cedar Point Oil Co.* opinion noted that only one of the plaintiffs' affiants recreated "in the vicinity of" the discharges, yet affirmed the interests of all the affiants in the health of the Galveston Bay. *Id.* at 556-57.

185. 623 F.3d 549 (8th Cir. 2010).

186. *Id.* at 557-58.

187. *Id.*

188. 563 F.3d 466 (D.C. Cir. 2009).

189. *Id.* at 472.

190. 689 F.3d 1012 (9th Cir. 2012), *vacated as moot*, U.S. Forest Serv. v. Pacific Rivers Council, 133 S. Ct. 2843 (2013) (Memorandum opinion).

191. *Id.* at 1022-23.

road building throughout the eleven national forests, often near recreational areas such as streams.<sup>192</sup> The court also noted that most of the plan's logging would occur on mountain slopes and "likely be visible from great distances."<sup>193</sup>

Contrast these decisions with two recent opinions from the Sixth Circuit, now apparently the stingiest gatekeeper of environmental claims. In *Heartwood, Inc. v. Agpaoa*,<sup>194</sup> the court denied standing to a forest conservation group where it failed to establish a nexus to a 5,000-acre area proposed to be logged, despite establishing an interest in the overall national forest.<sup>195</sup> The court held that "plaintiffs seeking to establish standing must identify particular segments of a river, sections and sub-sections of a forest, or passes in a mountain range that they use and will continue to use, and that agency action will detrimentally affect."<sup>196</sup> Similarly, in *Friends of Tims Ford v. Tennessee Valley Authority*,<sup>197</sup> standing was denied where the plaintiffs' nexus to one area of a TVA reservoir was held insufficient to challenge agency development approvals on another section of the reservoir.<sup>198</sup>

The *Agpaoa* and *Tims Ford* opinions illustrate the danger of hyper-technical standing jurisprudence. Where does the line drawing end: at 10 acres, 100 acres, 1,000 acres? Among other problems, can the court rest assured that the impacts of habitat and water quality degradation associated with logging or development in a specific locale will stay confined within that discrete area? What about fish and wildlife that migrate outside the project area into other parts of the national forest or reservoir? What about the much larger view shed from which one might witness aesthetic degradation? As explained below, the *Agpaoa* and *Tims Ford* approach does not square well with the science and law surrounding indirect and cumulative environmental harm.

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192. *Id.*

193. *Id.*

194. 628 F.3d 261 (6th Cir. 2010).

195. *Id.* at 268-69.

196. *Id.* at 268.

197. 585 F.3d 955 (6th Cir. 2009).

198. *Id.* at 969-71.

### B. *The Problem of Indirect and Cumulative Effects*

Environmental impacts occur directly, indirectly, and cumulatively. Federal courts should account for all three when determining the justiciability of environmental complaints; otherwise, the will of Congress and the Executive Branch to address such impacts will be undermined. As noted in a recent commentary, “[m]any of environmental law’s greatest remaining problems are caused by the cumulative effects of many actions, each of which contributes only a small increment to the larger problem.”<sup>199</sup>

As defined by NEPA and Council on Environmental Quality regulations, “direct effects” are caused by the action and occur at the same time and place.<sup>200</sup> “Indirect effects” are caused by the action, but occur later in time or farther removed in distance.<sup>201</sup> “Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.”<sup>202</sup> Cumulative effects are “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency...undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.”<sup>203</sup>

A host of decisions have affirmed NEPA’s requirement that agencies take a hard look at the cumulative effects of related agency actions. As *Natural Resources Defense Council, Inc. v. Hodel*<sup>204</sup> reiterated: “The purpose of this requirement is to

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199. Dave Owen, *Critical Habitat and the Challenge of Regulating Small Harms*, 64 FLA. L. REV. 141, 143 (2012) (citing William E. Odum, *Environmental Degradation and the Tyranny of Small Decisions*, 32 BIOSCIENCE 728, 728 (1982); J.B. Ruhl & James Salzman, *Climate Change, Dead Zones, and Massive Problems in the Administrative State: A Guide for Whittling Away*, 98 CAL. L. REV. 59, 64-65 (2010)).

200. 40 C.F.R. § 1508.8(a) (2013).

201. *Id.* at § 1508.8(b).

202. *Id.*

203. 40 C.F.R. § 1508.7 (2013).

204. 865 F.2d 288 (D.C. Cir. 1988).

prevent agencies from dividing one project into multiple individual actions ‘each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.’”<sup>205</sup>

In addition to NEPA, federal pollution control statutes also target the cumulative effects of water and air pollution. For example, Clean Water Act permits must account for a “total maximum daily load” of pollutants in impaired watersheds, based on the cumulative pollution load from multiple sources.<sup>206</sup> Similarly, Prevention of Significant Deterioration permits under the Clean Air Act must account for the consumption of a clean air “increment” in the region, accounting for the cumulative deterioration of air quality.<sup>207</sup>

As far back as *Ethyl Corp. v. EPA*,<sup>208</sup> federal courts have recognized the cumulative effect of airborne pollution, affirming EPA’s standards for lead emissions that were based in part on cumulative exposure.<sup>209</sup> In the water pollution context, consider that the Court did not question standing in *Arkansas v. Oklahoma*,<sup>210</sup> where Oklahoma challenged a Clean Water Act permit for pollution discharges thirty-nine miles upstream of the state’s border, and where the permitting agency found no detectable change in Oklahoma’s water quality associated with the discharge.<sup>211</sup> In sum, the science of indirect and cumulative harms has gained wide acceptance; its application to standing law should not be controversial.

The view that Article III injury must account for cumulative harm was recently articulated in *American Bottom*

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205. *Id.* at 297.

206. 33 U.S.C. § 1313(d) (2000); *see also* Eric M. Larsson & Jill M. Marks, *Construction and Application of Clean Water Act’s Total Maximum Daily Loads (TMDLs) Requirement for Waters Failing to Achieve Water Quality Standards Under 33 U.S.C.A. § 1313(d)*, 53 A.L.R. Fed. 2d 1 (2011).

207. 42 U.S.C. § 7475(d) (2013); *see* Alabama Power Co. v. Costle, 636 F.2d 323 (D.C. Cir. 1980); *Natural Res. Def. Council v. U.S. Env’tl. Prot. Agency.*, 937 F.2d 641 (D.C. Cir. 1991).

208. 541 F.2d 1 (D.C. Cir. 1976).

209. *Id.* at 29-31 (affirming EPA’s cumulative effects approach to regulating lead).

210. 503 U.S. 91, 101 (1992).

211. *Id.* at 94.

*Conservancy*.<sup>212</sup> In that case, an environmental group sought to protect 18.4 acres of wetlands permitted for destruction in connection with a landfill.<sup>213</sup> Judge Posner dismissed the defense's argument that no perceptible reduction in wildlife viewing would result from the wetland fill, holding: "[I]f a really substantial elimination of wildlife were required to establish standing, a cumulatively immense elimination of wildlife could occur as a result of numerous small projects requiring destruction of wetlands, none of which would create an injury great enough to support standing if such a requirement were imposed."<sup>214</sup>

Although Judge Posner's reference to cumulative harm goes more to the *magnitude* of injury than its geographic location,<sup>215</sup> the opinion still validates the basic premise espoused here: injury-in-fact cannot be assessed without reference to the total environmental impacts of an action.

In a case more directly on point, *United States v. Alpine Land & Reservoir Co.*,<sup>216</sup> the Ninth Circuit overturned a trial court's holding that a tribe had no standing to contest upstream land classifications allowing for greater water withdrawals; the lower court had found that each change in classification (and associated water impacts) were too negligible to establish standing. Finding that the trial court disregarded cumulative effects, the Ninth Circuit correctly held that the tribe's water supply problem was "ultimately the sum of the individual parts" and the only way for the tribe to effectively defend its interests was to participate in individual land classification determinations.<sup>217</sup>

Similarly, in *Western Land Exchange Project v. U.S. Bureau of Land Management*,<sup>218</sup> the court wrestled with the fact that plaintiffs did not establish an immediate geographic nexus to a

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212. 650 F.3d 652 (7th Cir. 2011).

213. *Id.* at 655.

214. *Id.* at 660 (citing Pub. Interest Research Grp. of New Jersey, Inc. v. Powell Duffryn Terminals Inc., 913 F.2d 64, 72 & n. 8 (3d Cir. 1990)).

215. *See id.* at 656-57 (the plaintiffs in *American Bottom Conservancy* established close geographic proximity to the wetlands at issue).

216. 887 F.2d 207 (9th Cir. 1989).

217. *Id.* at 208.

218. 315 F. Supp. 2d 1068 (D. Nev. 2004).

desert tract that was privatized by the Bureau of Land Management.<sup>219</sup> The plaintiffs asserted that the cumulative and indirect effects of the privatization and related development would alter regional hydrology beyond the specific tract.<sup>220</sup> The court accepted this view, finding it “reasonable to assume” that a water development would affect regional hydrology and the plaintiffs’ interests in a wider hydrologic basin.<sup>221</sup>

Recognizing injury-in-fact from cumulative and indirect harm is also consistent with the settled law that traceability of injury is not defeated by the presence of multiple, cumulative causes. In *Massachusetts v. EPA*,<sup>222</sup> the Court rejected EPA’s argument that the greenhouse gas emissions of China and India defeated plaintiffs’ ability to trace climate change to EPA’s inaction.<sup>223</sup> The Court stated: “EPA overstates its case. Its argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum.”<sup>224</sup> Similarly, in conventional pollutant cases, a plaintiff need not “show to a scientific certainty that defendant’s effluent, and defendant’s effluent alone, caused the precise harm suffered by the plaintiffs.”<sup>225</sup> This doctrine essentially mirrors the proposal here that, before even getting to traceability, injury-in-fact must be evaluated with reference to multiple, cumulative causes.

In contrast to the expansive view of geographic nexus espoused above, a hair-splitting approach to geographic nexus burdens the court system, sometimes to a ludicrous extent. Take the long-running case of *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*<sup>226</sup> In *Gaston Copper*, the en banc Circuit ruled that plaintiffs had standing because of their recreational and aesthetic interests in areas downstream of water pollution

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219. *Id.* at 1076-80.

220. *Id.* at 1077-78.

221. *Id.* at 1079.

222. 549 U.S. 497 (2007).

223. *Id.* at 523-24.

224. *Id.* at 524.

225. *Save Our Cmty. v. U.S. Evtl. Prot. Agency*, 971 F.2d 1155, 1161 (5th Cir. 1992) (quoting *Pub. Interest Research Grp. of N.J., Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 72 (3rd Cir. 1990)); *see also* *Natural Res. Def. Council v. Watkins*, 954 F.2d 974, 980 n.7 (4th Cir. 1992).

226. 263 F.Appx. 348 (4th Cir. 2008).

discharges.<sup>227</sup> However, following the death of a plaintiff's member, the defendant moved to amend the judgment and revisit the geographic nexus issue, despite the fact that several other individuals had demonstrated an interest in the water body near the pollution source.<sup>228</sup> The appellate court was unable to decide from the record whether geographic nexus still existed, and remanded the case one more time for a standing analysis.<sup>229</sup> Twelve years after the case was originally filed, the district court found standing again and the Fourth Circuit affirmed.<sup>230</sup>

Talk about "a lawyer's game."<sup>231</sup>

## VI.

### CONCLUSION

Standing law continues to frustrate the environmental bar, both intellectually and practically. Long discredited notions that our Constitution requires stingy treatment of environmental plaintiffs continue to influence the federal bench. *Clapper v. Amnesty International USA* continues this trend and further complicates the law.

*Clapper's* reach can be limited and its holdings distinguished from most environmental cases. A growing number of lower courts recognize the inherently probabilistic nature of environmental harm and take jurisdiction when the risk of harm exceeds a *de minimis* level. Most courts will also accept jurisdiction where the plaintiff establishes a geographic nexus to the defendant's actions.

*Clapper's* weight in future decisions must be limited to those fact patterns where uncertainty surrounding a harm's geographic location or third-party actions move the plaintiff's claims into the realm of sheer speculation. Citizens who establish a nexus to violations of environmental law deserve

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227. *Id.* at 351-52.

228. *Id.*

229. *Id.* at 356.

230. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 387, 396-97 (4th Cir. 2011).

231. *Massachusetts v. U.S. Env'tl. Prot. Agency*, 549 U.S. 497, 548 (2007) (Roberts, J., dissenting).

their day in court. Otherwise, “separation of powers in our democracy is frustrated by justiciability doctrines that permit courts to abdicate their role of enforcing federal law.”<sup>232</sup>

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232. Pushaw, *supra* note 1, at 469.