

**FAIRLY HAZY: FILLING LAIDLAW’S FAIR TRACEABILITY
GAP ON POLLUTION CITIZEN-SUIT STANDING**

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INTRODUCTION

The early-to-mid 20th century saw an increasing deterioration in the quality of the nation's environment, and by implication an increased public perception of the need for action to protect the environment.¹ This public perception led to an advent of new environmental regulatory legislation, including the dominant modern pollution-control statutes: the Clean Water Act (CWA)² and the Clean Air Act (CAA).³

But this advent of new environmental concern also led to a new era of private environmental litigation.⁴ Such was the case in *Sierra Club v. Morton*⁵ in 1972, where the environmental organization plaintiffs sought to enjoin a construction project in a national forest.⁶ After a majority of the Supreme Court found no Article III standing,⁷ Justice Blackmun cautioned in dissent:

The case poses—if only we choose to acknowledge and reach them—significant aspects of a wide, growing, and disturbing problem, that is, the Nation's and the world's deteriorating environment with its resulting ecological disturbances. Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?⁸

Almost 50 years following Justice Blackmun's caution, the question remains as to whether our laws and procedures have adapted to new and ever-growing environmental problems.

1. Brigham Daniels et al., *The Making of the Clean Air Act*, 71 HASTINGS L. J. 901, 911–12 (2020) (discussing a 1971 poll which found that, among other things, “[79%] of respondents” ranked “air and water pollution as [a very important] issue” similar to crime or unemployment, that “[77%] of the public favored closing down any factory which ‘continually violates laws regulating pollution,’” and that “88% of the public similarly favored heavy fines against companies who continually violate pollution control laws.”).

2. 33 U.S.C. §§ 1251–1387 (2018).

3. 42 U.S.C. §§ 7401–7671q (2018).

4. Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 835–36 (1985); David E. Adelman & Robert L. Glicksman, *Reevaluating Environmental Citizen Suits in Theory and Practice*, 91 U. COLO. L. REV. 385, 395–96 (2020) (discussing the “significant numbers” of environmental citizen suits that began to be filed in the 1980s).

5. 405 U.S. 727 (1972).

6. *Id.* 728–30.

7. *Id.* 741.

8. *Id.* 755–56 (Blackmun, J., dissenting).

In considering this question, this Article analyzes how the federal courts have approached Article III standing in private citizen suits brought under the CWA and CAA, namely the requirement that a plaintiff's injury be "fairly traceable" to the respective defendant.⁹ Part I provides a brief overview of the pollution control statutes and their citizen-suit provisions. Part II explores the lack of Supreme Court guidance on Article III standing, namely the traceability element in the pollution citizen suit context.¹⁰ Part III outlines how lower federal courts have filled in the gaps left by the Supreme Court's limited guidance on traceability. Part IV analyzes whether the lower court approaches are consistent with both the requirements of Article III standing and its functions. Lastly, Part V explores the practical implications of the lower courts' approaches to citizen suit standing in this context.

I. THE POLLUTION CONTROL STATUTES AND THEIR CITIZEN SUIT PROVISIONS

The 1970s wrought sweeping environmental legislation.¹¹ Out of this environmental revolution arose the nation's two primary pollution control statutes: the CWA and CAA. Both statutes included "an unprecedented innovation": the citizen suit provision.¹² These provisions allow for private enforcement actions against polluting violators of the Acts, and their inception stemmed from a belief that "neither the federal government nor the

9. Article III standing requires a plaintiff to demonstrate that he or she "suffered an 'injury in fact,'" that the injury is "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court," and that the injury can be redressed by the court ruling in his or her favor. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (alterations in original).

10. This Essay will not address Article III standing issues as to other citizen suit provisions, such as those brought under the Endangered Species Act, because Article III traceability presents unique challenges in the context of citizen suits brought under the pollution control statutes. Traceability might be more easily apparent in citizen suits under the Endangered Species Act (for example, whether a specific defendant improperly harmed an endangered species that the plaintiff was observing) and similar statutes. But in a pollution context where the injury-causing substances are dispersed by a defendant into expansive water bodies and into the (endless) expanse of the atmosphere, mixing with similar pollutants released by other parties, traceability as to a specific defendant or defendants can be far less apparent. See Shi-Ling Hsu, *The Identifiability Bias in Environmental Law*, 35 FLA. ST. U. L. REV. 433, 469 (2008) ("[I]t is very often impossible for victims of pollution or other environmental or ecological insult to identify their perpetrators. Air and water pollution usually have many emitters . . .").

11. E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L., ECON., & ORG. 313, 317 (1985) ("An extraordinary outburst of lawmaking relating to pollution and the environment occurred at the national level during the 1960s and 1970s as a dozen major federal pollution statutes were enacted.").

12. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 693 (1983) (discussing the CAA's citizen suit provision); see also Boyer & Meidinger, *supra* note 4, at 844–47 (providing a brief historical overview of the citizen-suit provisions of the CWA and CAA).

states had done an effective job of enforcing antipollution laws.”¹³ Congress intended that “citizen suits[,] or at least the threat of them[,]” act as a backup to compensate for lackluster agency nonenforcement.¹⁴ Subpart A of this Section will outline the major provisions of the CWA, including its citizen suit provision. Subpart B of this Section will do likewise for the CAA.

A. *The CWA*

The legislation that formed the foundations of the modern CWA was enacted in 1972¹⁵ aimed at “restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation’s waters.”¹⁶ The CWA broadly prohibits the “discharge of any pollutant.”¹⁷ “[D]ischarge of a pollutant” includes “any addition of any pollutant to navigable waters from any point source.”¹⁸ Certain levels of discharges may be allowed, however, if a party has first obtained a permit setting forth certain limitations.¹⁹ Failure to obtain the appropriate permit before discharging pollutants into jurisdictional waters or to abide by the conditions violates the Act.²⁰ The Environmental Protection Agency (EPA) is charged with enforcing the Acts, including by assessing civil penalties.²¹

The CWA brings private citizens into the enforcement process. It empowers them to “commence a civil action . . . against any person . . . who is alleged to be in violation of” the statute, such as “an effluent standard or limitation” contained in a permit.²² Citizens may only bring such an action if they first notify the EPA (or Army Corps of Engineers for actions respecting dredge and fill permits) and “any alleged violators” of their intent to sue.²³

13. *Id.*; see also Adelman & Glicksman, *supra* note 4, at 394 (“[Citizen-suit] provisions were novel for their breadth and because they empowered citizens to file enforcement suits directly against private or public entities for alleged statutory deficiencies or regulatory violations. Congress believed that citizen enforcement actions by third parties would supplement or prod agency enforcement by ‘shaming [an agency] or by forcing it to intervene.’”).

14. Roger A. Greenbaum & Anne S. Peterson, *The CAA Amendments of 1990: Citizen Suits and How They Work*, 2 FORDHAM ENV’T L. REP. 79, 80–81 (1991); see also Boyer & Meidinger, *supra* note 4, at 844 (describing the CWA’s and CAA’s citizen suit provisions as the “most frequently used”).

15. William L. Andreen, *The Evolution of Water Pollution Control in the United States: State, Local, and Federal Efforts, 1789-1972: Part II*, 22 STAN. ENV’T L.J. 215, 260–286 (2003) (discussing congressional proceedings giving rise to the CWA).

16. 33 U.S.C. § 1251(a)(1).

17. *Id.* § 1311(a).

18. *Id.* § 1362(12).

19. There are two permit types available to a party seeking to discharge pollutants into jurisdictional waters: a National Pollutant Discharge Elimination System permit under § 1342 or a permit for “dredged or fill material” under § 1344. *Id.* at § 1311(a).

20. *Id.* § 1311(a); *id.* at § 1342(h); *id.* at § 1342(s).

21. *Id.* § 1319.

22. *Id.* § 1365(a).

23. *Id.* § 1365(b)(1)(A)–(B).

And they may seek either (a) an injunction or (b) civil penalties.²⁴ If a plaintiff is successful in seeking civil fines, the penalties are not paid to the private party but instead to the U.S. Treasury.²⁵ Ultimately, a court “may award costs of litigation to any prevailing party” such as attorney fees.²⁶ The possibility of such costs being assessed, in addition to the notice requirement, was in part meant to deter frivolous litigation by overzealous plaintiffs.²⁷

B. The CAA

The CAA preceded the CWA and pioneered the original citizen suit provision.²⁸ The primary means of controlling air pollution under the CAA is the setting of National Ambient Air Quality Standards (NAAQS) by the federal government,²⁹ which are then implemented by the states.³⁰ The CAA also: regulates the emissions of toxic pollutants;³¹ imposes additional limitations on emitting sources in areas that do not satisfy the NAAQS;³² and imposes other limitations to preserve compliance with the NAAQS in areas where they are satisfied.³³ A facility’s obligations can vary across programs and are usually included in a single permit, known as a Title V permit.³⁴ Violating “any requirement of such a permit” is unlawful under the CAA.³⁵

Under the CAA’s citizen suit provision, citizens “may commence a civil action . . . against any person . . . who is alleged to have violated” the statute.³⁶ The provision and its requirements are largely analogous to those respecting the CWA’s citizen suit provision. For instance, a successful plaintiff in a private citizen suit can obtain relief in the form of civil fines payable to the

24. *Id.*; *But see* Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 343 (1990) (quoting “Judges . . . seem to be more reluctant to impose civil fines in private environmental enforcement actions than in comparable cases brought by the government.”).

25. 33 U.S.C. § 1319(d); *see also* *Friends of the Earth v. Laidlaw Envt’l Servs. (TOC), Inc.*, 528 U.S. 167, 175 (2000) (quoting “The Act authorizes district courts in citizen-suit proceedings the enter injunctions and to assess civil penalties, which are payable to the United States Treasury.”).

26. 33 U.S.C. § 1365(d).

27. Stephen Fotis, Note, *Private Enforcement of the CAA and the CWA*, 35 AM. U. L. REV. 127, 147 (1985) (quoting “[A] citizen guilty of harassment faces the prospect of not only bearing his or her own litigation costs, but the defendant’s costs as well.”); *cf. infra* notes 39–40 and accompanying text.

28. Boyer & Meidinger, *supra* note 4, at 844 (“The first private enforcement provision, section 304 of the CAA of 1970, was passed a few months after the first Earth Day was organized. . . .”).

29. 42 U.S.C. § 7409(a).

30. 33 U.S.C. § 7410(a).

31. *Id.* § 7412.

32. *Id.* § 7502.

33. *Id.* § 7471.

34. *Id.* § 7661c(a).

35. *Id.* § 7661a(a).

36. *Id.* § 7604(a).

U.S. Treasury.³⁷ Furthermore, Congress included a fee-shifting provision³⁸ intended to deter frivolous citizen suits.³⁹

II. CITIZEN SUIT STANDING AGAINST PRIVATE INDUSTRIAL FACILITIES: THE SUPREME COURT'S TRACEABILITY GAP IN LAIDLAW

Plaintiffs bringing civil actions in federal court under the pollution statutes' citizen suit provisions face several procedural hurdles; Article III standing is perhaps the largest hurdle.⁴⁰ As a constitutional requirement, Article III standing requires a plaintiff to demonstrate that they "suffered an 'injury in fact'"; that the injury is "fairly . . . trace[able] to the challenged action of the defendant, and not . . . [the] result [of] the independent action of some third party not before the court"; and that the injury can be redressed by the court ruling in the plaintiffs favor.⁴¹ Furthermore, Article III standing is satisfied for an organizational plaintiff if any of its members have standing.⁴² Although precedent stemming from environmental litigation composes much of the Supreme Court's significant standing jurisprudence,⁴³

37. *Id.* § 7604(g).

38. *Id.* § 7604(d).

39. See S. REP.No. 91-1196 at 38 (1970) (quoting "Concern was expressed that some lawyers would use [citizen suits] to bring frivolous and harassing actions. The Committee has added a key element in providing that the courts may award costs of litigation The court could thus award costs of litigation to defendants where the litigation was obviously frivolous or harassing."); see also *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 692-93 (1983) ("[T]he central purpose of [the CAA's citizen-suit provision] was to check the 'multiplicity of [potentially meritless] suits,' that Congress feared would follow the authorization of suits under the CAA.") (alterations in original); Greenbaum & Peterson, *supra* note 14, at 94-95; Fotis, *supra* note 27 at 147.

40. See, e.g., Boyer & Meidinger, *supra* note 4, at 936 (quoting "Despite [a] clear indication that Congress wished to expand private enforcers' standing . . . , there has been a considerable amount of litigation over standing in the current wave of citizen suits."); Ann E. Carlson, *Standing for the Environment*, 45 UCLA L. REV. 931, 933 (April 1998) (noting that, while plaintiff environmental organizations were benefited by "liberalized standing rulings of the 1970s," the Supreme Court has since "threatened that access" to the federal courts "by tightening standing rules" in environmental cases); see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (stating that a "party invoking federal jurisdiction bears the burden of establishing" standing).

41. *Lujan*, 504 U.S. at 560-61 (alterations in original).

42. *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009) (quoting "It is common ground that the respondent organizations can assert the standing of their members.").

43. See Christopher Warshaw & Gregory E. Wannier, *Business as Usual? Analyzing the Development of Environmental Standing Doctrine Since 1976*, 5 HARV. L. & POL'Y REV. 289, 289-99 (2011) (outlining environmental standing jurisprudence of the Supreme Court).

the Court has left many questions unanswered—especially those regarding standing in citizen suits against polluters⁴⁴ and the traceability element.⁴⁵

The only case decided by the Court in the pollution-citizen-suit context is *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*,⁴⁶ which involved a citizen suit against a private facility under the CWA.⁴⁷ In *Laidlaw*, the defendant-respondent company operated a hazardous waste incinerator facility with a NPDES permit to discharge into a river from that facility.⁴⁸ But the facility regularly “exceeded the discharge limits set by the permit.”⁴⁹ Plaintiff environmental organizations sued the company under 33 U.S.C. § 1365(a) seeking declaratory and injunctive relief, including the assessment of civil penalties against the defendant.⁵⁰

The Court found that the plaintiffs had Article III standing sufficient to bring a citizen suit under the CWA.⁵¹ But the traceability element was largely a non-factor in the Court’s analysis. As to the injunctive relief sought by the plaintiffs, the primary issue was whether the plaintiffs’ members had suffered an “injury in fact.”⁵² The Court held that affidavits submitted by plaintiffs’ members rose above “general averments” because the affidavits described

44. Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, ‘Injuries,’ and Article III*, 91 MICH. L. REV. 163, 165–66 (1992) (noting that after the Supreme Court found a lack of standing under 16 U.S.C. § 1540, the Endangered Species Act’s citizen-suit provision, “[t]he place of the citizen in environmental and regulatory law has . . . been drawn into sharp question.”). Furthermore, the Court’s only decision addressing standing in the context of a private citizen-suit against a polluter is *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167 (2000); See *Warshaw & Wannier*, *supra* note 443, at 289–99 (outlining environmental standing jurisprudence of the Supreme Court).

45. Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1463–64 (1988) (“Judgments about whether or not causation is speculative depend on no clear metric. . . . The new law of standing has in this respect come to be less crisp and certain than the previous regime [and a] large amount of doctrinal confusion is the consequence.”).

46. See *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167 (2000) (explaining that while *Massachusetts v. EPA* is a significant Supreme Court on standing involving the CAA is well-known for its causation analysis, it is distinct from the context of private citizen suits against polluters discussed in this essay. *Massachusetts v. EPA* involved state government plaintiffs, deemed by the Court to have “special solicitude in [its] standing analysis.” *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007). Non-state actors lack such special solicitude.).

47. *Laidlaw*, 528 U.S. at 173.

48. *Id.* at 175–76.

49. *Id.* at 176.

50. *Id.* at 177.

51. *Id.* at 180–88.

52. One member provided testimony that “he lived a half-mile from [defendant]’s facility” and that he stopped recreating “between 3 and 15 miles downstream from the facility” on the river “because he was concerned that the water was polluted by [defendant]’s discharges.” *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 181–182 (2000). Two other members who lived within two miles from the defendant’s facility testified as to similar injuries. *Id.* at 182. A fourth member who “lived [twenty] miles” from the area claimed that she stopped recreating on the river near where she lived out of “concerns about illegal discharges.” *Id.* A fifth member, who lived close to the facility, claimed that she was injured due to a lower economic value of her home compared to other farther away homes, and “she believed the pollutant discharges accounted for some of the discrepancy.” *Id.* at 182–83. A sixth member, who “canoed approximately [forty] miles downstream of the [defendant]’s facility,” claimed that he stopped doing so “because he was concerned that the water contained harmful pollutants.” *Id.* at 183.

how defendant's discharges "directly affected" the plaintiffs' members interests and adequately established standing.⁵³ Besides the Court's usage of that "directly affected" language, no other analysis significantly respected the traceability element of standing.⁵⁴

Similarly, as to whether the organizational plaintiffs had standing to seek civil penalties, the primary issue was the redressability element.⁵⁵ Citing the legislative history of the CWA, the Court discussed how Congress intended for "civil penalties [to] deter future violations."⁵⁶ Finding that said deterrent function sufficed for redressability, the Court again engaged in no explicit analysis of the traceability element.⁵⁷

Notably, as indicated above, *Laidlaw* left several questions unexplored. For example, besides the lack of any traceability analysis, the majority opinion did not address the separation of powers concerns raised by Justice Kennedy's concurrence and Justice Scalia's dissent. Although Justice Kennedy considered "exaction of public fines by private litigants" to be a "[d]ifficult and fundamental question" about "the delegation of Executive power," he declined to explore the issue because it was not raised "in the petition for certiorari . . . with particularity."⁵⁸ Justice Scalia went slightly further, recognizing that Article II of the U.S. Constitution "commits . . . the President to 'take care that the Laws be faithfully executed.'"⁵⁹ Scalia described how plaintiffs invoking environmental citizen suits function as "self-appointed mini-EPA[s]."⁶⁰ According to Scalia, allowing private citizens to engage in such actions "entirely deprive[s] [elected officials] of their discretion to decide that a given violation should not be the object of a suit at all, or that the enforcement decision should be postponed."⁶¹

III. FILLING LAIDLAW'S TRACEABILITY GAP: THE INFERIOR COURTS' POWELL DUFFRYN-EXXONMOBIL FRAMEWORK

Given the lack of Supreme Court guidance on the traceability element of standing in citizen suits against polluters, both before and after *Laidlaw*, lower federal courts are left to fill in the gaps. Subpart A of this section will discuss how federal circuit courts have approached analyzing traceability in CWA citizen suits like *Laidlaw*. Subpart B of this section will then outline

53. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 183-84 (2000).

54. *See id.* at 182-85 (excluding the traceability element from the discussion of causation).

55. *Id.* at 185.

56. *Id.*

57. *See id.* at 185-88 (excluding the traceability element from the discussion of redressability).

58. *Friends of the Earth Inc. v. Laidlaw Env't Serv. (TOC), Inc.*, 528 U.S. 167, 197 (2000) (Kennedy, J., concurring).

59. *Id.* at 209-10 (Scalia, J., dissenting).

60. *Id.*

61. *Id.* at 210.

the recent extension of the traceability standard for water pollution citizen suits to air pollution citizen suits.

A. Water Pollution Citizen Suits and the Powell Duffryn Traceability Standard

In *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*,⁶² a Third Circuit decision that predated *Laidlaw*, the defendant, corporation Powell Duffryn Terminals (PDT), was a NPDES permit holder with a facility located adjacent to a navigable waterway—the Kill Van Kull.⁶³ As indicated by PDT’s monitoring reports, PDT “consistently and uninterruptedly dumped pollutants into the Kill Van Kull in concentrations greater than that allowed by [the] permit.”⁶⁴ As a result, plaintiff environmental groups filed a citizen suit under the CWA alleging a total of 386 violations.⁶⁵ The court found that the plaintiffs’ members had suffered sufficiently concrete interests for Article III standing purposes.⁶⁶

However, the Third Circuit adopted a new standard for CWA cases to assess whether “there [was] a ‘substantial likelihood’ that defendant’s conduct caused [the] harm.”⁶⁷ To prove “substantial likelihood,” the court seemingly held *ipse dixit* that a CWA citizen suitor must satisfy three elements: (1) the defendant “discharged some pollutant in concentrations greater than allowed by its permit”; (2) the discharge was “into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant”; and (3) that the type of said “pollutant causes or contributes to the kinds of injuries alleged.”⁶⁸ Because the plaintiffs alleged aesthetic injuries, and the oil and grease discharged by PDT was a type of pollutant

62. Pub. Int. Rsch. Grp. of N.J. v. Powell Duffryn Terminals Inc., 913 F.2d 64, 64 (3d Cir. 1990).

63. *Id.* at 68 (noting that the defendant “operat[ed] a bulk storage facility” by the Kill Van Kull, where it “use[d] large tanks . . . to store various liquids” such as “petroleum products and industrial chemicals”). The Kill Van Kull “is a tidal strait” separating a portion of New York City and New Jersey. *Kill Van Kull Channel*, U.S. ARMY CORPS OF ENG’RS, <https://www.nan.usace.army.mil/Portals/37/docs/harbor/Harbor%20Program%20Images/KVK3.pdf> (last visited January 17, 2021). In addition to “oil spills” and pollution attributable to “chemical processing facilities” and “heavy ocean traffic,” the Kill Van Kull received “60 million gallons of treated sewage” daily at the time *Powell Duffryn* was decided. *Powell Duffryn*, 913 F.2d at 89 (Aldisert, J., concurring); see also Melissa Checker, *Staten Island’s Toxic Stew*, GOTHAM GAZETTE: ENVIRONMENT (May 26, 2009), <https://www.gothamgazette.com/environment/227-staten-islands-toxic-stew> (discussing the history of environmental troubles and attempted remedial efforts on the Kill Van Kull, including more recent troubles such as how “[s]ome experts estimate that over 300 oil spills occur in the kull every year.”).

64. *Powell Duffryn*, 913 F.2d at 69.

65. *Id.*

66. *Id.* at 71 (holding that the plaintiffs’ members suffered “injur[ies] to their aesthetic and recreational interests” on the Kill Van Kull).

67. *Id.* at 72 (citing *Duke Power Co. v. Carolina Env’t Study Grp., Inc.*, 438 U.S. 59, 75 n.20 (1978)).

68. *Id.*

that could cause aesthetic injuries, the court found that traceability was established under this new standard.⁶⁹ The court's primary rationale for adopting this standard was that the traceability element could be satisfied without "scientific certainty" or satisfying "tort-like causation."⁷⁰

Concurring only out of "a belief that somehow the Supreme Court might be inclined to relax its stringent requirements of standing in environmental cases," Judge Aldisert discussed a point largely unaddressed by the majority: that the river was already "one of the most industrialized waterways in the United States."⁷¹ Thus, while the pollutants present in the river were almost certainly traceable to some actor, "there [was] very shaky proof that the stated injuries were traceable to this polluter"—PDT.⁷² Each of the plaintiff's members only "complained of pollution in general" on the expansive industrialized waterway, rather than specifically linking any of their injuries to PDT's pollution.⁷³

The Third Circuit's *Powell Duffryn* type-centric "fairly traceable" standard has been adopted by other circuits in the water pollution citizen suit

69. Specifically, in applying its new traceability test, the court explained:

This will require more than showing a mere exceedance of a permit limit. Thus if a plaintiff has alleged some harm, that the waterway is unable to support aquatic life for example, but failed to show that defendant's effluent contains pollutants that harm aquatic life, then plaintiffs would lack standing. In this case, several affiants stated that the water had an oily or greasy sheen they found offensive. PDT's permit contained limits on the oil and grease PDT could discharge in its effluent. . . . PDT's reports to the EPA indicate that PDT has discharged oil and grease in excess of these limits. Thus the aesthetic injury suffered by the plaintiffs may fairly be traced to PDT's effluent. *Id.* at 72–73.

The Supreme Court subsequently denied certiorari review of *Powell Duffryn*. *Powell Duffryn Terminals, Inc. v. Pub. Int. Rsch. Grp. of N.J., Inc.*, 498 U.S. 1109, No. 90-867 (1991).

70. *Powell Duffryn*, 913 F.2d at 73 n.10.

71. *Id.* at 84–875 (Aldisert, J., concurring).

72. *Id.* at 87; *see also* Kill Van Kull Channel *supra* note 633 (discussing the vast scale of other polluting activity on the Kill Van Kull besides PDT's discharges, alone).

73. *Id.* at 88. One of plaintiff's members had stated that he "ha[d] no personal claim" when asked if he "ha[d] been . . . adversely affected by [Powell Duffryn]'s discharge." *Id.* at 87–88. Another member only testified as to a "generalized assertion" that "any discharge" into the river "adversely affects [him]." *Id.* at 88 (emphasis added). A third member stated that her recreational use of the river was impaired because of "a smell" and "garbage floating" in the river. *Id.* But the evidence showed that Powell Duffryn's discharges "d[id] not cause the smell" and there was no "evidence that it dumped garbage in the water." *Id.*

context: namely, the Fourth,⁷⁴ Fifth,⁷⁵ and Ninth Circuits.⁷⁶ The Tenth Circuit has also indicated approval of *Powell Duffryn*'s traceability standard.⁷⁷ “[N]either [the Third Circuit] nor others have [since] concluded that subsequent Supreme Court decisions” to *Powell Duffryn* “require something different” to satisfy Article III traceability in water pollution citizen suits.⁷⁸

B. The Extension of Powell Duffryn to Air Pollution Citizen Suits in ExxonMobil

Despite the practical differences between water pollution and air pollution, the Fifth Circuit expanded *Powell Duffryn* to the CAA context in 2020's *Environment Texas Citizen Lobby, Inc. v. ExxonMobil Corporation*.⁷⁹ Plaintiff environmental organizations sought civil penalties under the CAA against the defendant ExxonMobil for alleged violations at one of its facilities, “the largest petroleum and petrochemical complex in the nation.”⁸⁰ In total, plaintiffs alleged that there were “16,386 days of violations”

74. See *Nat. Res. Def. Council, Inc. v. Watkins*, 954 F.2d 974, 980 (4th Cir. 1992) (adopting the “fairly traceable” standard pre-*Laidlaw*); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000) (adopting the “fairly traceable” standard post-*Laidlaw*).

75. See *Save Our Cmty. v. EPA*, 971 F.2d 1155, 1161 (5th Cir. 1992) (citing *Powell Duffryn* and *Watkins* with approval in a pre-*Laidlaw*, CWA citizen suit); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 557–58 (5th Cir. 1996) (applying *Powell Duffryn*'s traceability test to a pre-*Laidlaw*, CWA citizen suit); *But see id.* at 557 (conceding that “an overly broad application” of *Powell Duffryn* “may be problematic”). The Fifth Circuit reaffirmed *Powell Duffryn*'s vitality post-*Laidlaw*. See *Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 968 F.3d 357, 368 n.4 (5th Cir. 2020) (reasoning that, like *Powell Duffryn*, “*Laidlaw* . . . reiterates that the ‘fairly traceable’ requirement does not require tort-like causation with its proximate cause requirement.”). This assertion that *Laidlaw* “reiterate[d]” a principle about the causation element is odd, however, given that *Laidlaw* contains no substantial traceability analysis, even if the conclusion might be implicit in *Laidlaw*'s facts; See *supra* notes 51–57 and accompanying text.

76. See *Nat. Res. Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985, 994–95 (9th Cir. 2000) (adopting the “fairly traceable” standard pre-*Laidlaw*).

77. See *Bufford v. Williams*, 42 Fed. Appx. 279, 284 n.3 (10th Cir. 2002) (affirming summary judgment in a CWA citizen suit because plaintiffs failed on the merits of their claim but conceding that “it may not be necessary to link a specific discharge to a specific injury in order to meet standing requirements.” (citing *Powell Duffryn Terminals, Inc. v. Pub. Int. Rsch. Grp. of N.J., Inc.*, 498 U.S. 1109 (1991))).

78. *ExxonMobil Corp.*, 968 F.3d at 368 n.4 (discussing whether *Laidlaw* is at odds with *Powell Duffryn*).

79. *Env't Tex. Citizen Lobby Inc. v. ExxonMobil Corp.*, 968 F.3d 357 (5th Cir. 2020). The Second Circuit has applied *Powell Duffryn* in an air pollution context, but that application was distinct for two reasons: (1) it did not involve a private citizen suit, but instead a common law nuisance action and (2) because the suit was brought by plaintiff states, the standing analysis involved the “special solicitude” of state standing. See *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 345–47 (2d Cir. 2009) (applying *Powell Duffryn*'s traceability standard in a public nuisance action brought by eight states against defendant corporations, alleging that their air emissions contributed to global warming) (citing *Massachusetts v. EPA*, 549 U.S. 497 (2007)), *rev'd* 564 U.S. 410 (2011) (where the Court was equally divided 4-4 and thus affirmed on the standing question by default).

80. *ExxonMobil Corp.*, 968 F.3d at 362.

stemming from “nearly 4,000 emissions events” and “spanning 24 different pollutants.”⁸¹ The case was fully tried at the district court level before reaching the Fifth Circuit on the issue of Article III standing.⁸²

In a departure from both Supreme Court standing precedent, such as *Laidlaw*, and the other federal circuits’ standing precedent, the court first held that the plaintiffs needed to establish Article III standing for each individual day of violation alleged.⁸³ Then, in analyzing whether the plaintiffs demonstrated that their injuries⁸⁴ were “fairly traceable” to each of the facility’s alleged violations, the court applied *Powell Duffryn’s* water-pollution standard.⁸⁵ The court held that plaintiffs could satisfy said requirement by providing “evidence that the defendant’s violations were of a type that ‘causes or contributes to the kinds of injuries alleged by the plaintiffs.’”⁸⁶ The court used examples to illustrate how this standard applies in the air pollution context, such as how “seeing flares” is a type of pollution that could cause one of the types of injury alleged—observational.⁸⁷

Recognizing that the Fifth Circuit itself had recognized *Powell Duffryn’s* traceability standard as “incongruous with . . . Article III standing requirements” (albeit, when it was adopted by the court), Judge Oldham’s dissent criticized the “mess” of *Powell Duffryn’s* traceability framework.⁸⁸ Oldham first pointed out the practical differences between *Powell Duffryn’s* water pollution standard (pollution confined to a discrete waterway) and air

81. *Id.* at 363. Under the CAA’s citizen-suit provision, a plaintiff may seek a civil penalty “for each day of [a] violation.” *Id.* at 365 (quoting 42 U.S.C. § 7413(e)(2)).

82. *Id.* at 363–64. This was the second time the case reached the Fifth Circuit.

83. *ExxonMobil Corp.*, 968 F.3d at 365–67 (“Admittedly, no court appears to have found standing for some CAA violations but not others, and that gives us some pause. Numerous cases have instead recognized standing in environmental citizen suits without separate analyses for each violation. . . . But . . . we cannot say that Plaintiffs’ proving standing for some violations necessarily means they prove standing for the rest.”). The court rationalized this holding with the following example:

Assume that a citizen moved from Florida to a Baytown neighborhood near the Exxon complex in 2005. That citizen would not have standing to assert violations that occurred in 2004. So [CAA] plaintiffs cannot seek penalties for a particular violation if they would lack standing to sue for that violation in a separate suit

Id. at 365–66. The court later stated, however, that the plaintiffs were not required to link “their member’s injuries and specific incidents on particular days.” *Id.* at 369.

84. There were allegations that plaintiffs’ members, who lived in the vicinity of the facility, were injured by “regularly [seeing] flares, smoke and haze coming from the complex; smell[ing] chemical odors; suffered . . . respiratory problems; fear[ing] for their health; refrain[ing] from outdoor activities; or mov[ing] away.” *Id.* at 368.

85. *Id.* at 368–69.

86. *Id.*

87. *Id.* at 370. The court also held that, in addition to satisfying this *Powell Duffryn* pollutant-type approach, a plaintiff must also demonstrate presence in a “geographic nexus” to pollution attributable to the violations, except where the plaintiff might be so close that “their proximity speaks for itself.” *Id.*

88. *Id.* at 375 (Oldham, J., dissenting in part) (quoting *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 558 n.24 (5th Cir. 1996)).

pollution (pollution released into an expanse).⁸⁹ Second, Oldham’s dissent posed the example of “a hypothetical plaintiff Bob” who lived near a polluting facility and whose Article III injury was asthma.⁹⁰ Judge Oldham then contrasted *Powell Duffryn*’s “inherently indeterminate,” pollutant-type-focused traceability standard to what one might expect under Article III’s requirements.⁹¹ Seemingly contrary to Article III, Bob could have standing to “recover” CAA penalties that occurred while he was outside the country, simply because his type of injury (asthma) could be caused by the facility’s type(s) of emitted pollutants.⁹²

The Fifth Circuit’s analysis produced a starkly different outcome on remand. Rather than arguing traceability as to the original 16,386 days of violations, the *ExxonMobil* plaintiffs argued to the district court that they establish traceability “as to 9,803 days of violations.”⁹³ The plaintiffs voluntarily excluded “any violations involving the release of one pound or less of a pollutant.”⁹⁴ On the other hand, ExxonMobil argued that traceability was established for only 40 days of violations.⁹⁵ The district court ultimately found that traceability was established for 3,651 days of violations, less than a quarter of the days of violations initially alleged.⁹⁶ Notably, in reaching this conclusion, the district court’s analysis focused heavily on evidence adduced at the initial trial.⁹⁷

Alas, when “[t]his long-pending CAA suit” again reached the Fifth Circuit in 2022 after remand, the court retreated from its causation-per-

89. *ExxonMobil Corp.*, 968 F.3d at 378 (Oldham, J., dissenting in part) (“Whatever sense [*Powell Duffryn*] might make in water-pollution cases, it makes little or none in air-pollution cases.”).

90. *Id.*

91. *Env’t Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 968 F.3d 357, 378 (5th Cir. 2020), Judge Oldham also posed the following example, which is further illustrative as to how *Powell Duffryn*’s focus on pollutant/injury type operates:

[*Powell Duffryn*] says that the plaintiff need only prove that the relevant pollutant “causes or contributes to the *kinds of injuries* alleged by the plaintiffs.” That eliminates traceability altogether. Think about it. Would we ever say: my house burned down; arsonists burn down houses; therefore, an arsonist burned down my house? Of course not. My house could have burned down because the wiring was faulty, I left the stove on, my dog tipped over a candle, a bolt of lightning struck the roof, a litterbug’s cigarette started a wildfire, or myriad other potential causes.

Id. at 375 (citations omitted).

92. *Id.*

93. *Env’t Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 524 F. Supp. 547, 555 (S.D. Tex. 2021).

94. *Id.*

95. *Id.*

96. *Id.*

97. *See id.* at 555–77.

violation innovation.⁹⁸ The majority recognized that its prior innovation could not “be reconciled with *Laidlaw*,”⁹⁹ despite the majority’s earlier willingness to craft the concededly new rule.¹⁰⁰ The majority refused to retreat, however, from its extension of *Powell Duffryn* to the skies: the CAA.¹⁰¹ Given the possibility of en banc rehearing, whether the causation-per-violation innovation will be revived—and whether *Powell Duffryn*’s clean air extension will survive—remains to be seen.¹⁰²

IV. EVALUATING *POWELL DUFFRYN–EXXONMOBIL*’S “FAIRLY TRACEABLE” GAP-FILLING

This Section evaluates both whether *Powell Duffryn–ExxonMobil* is a constitutionally permissible construction of Article III standing’s traceability element and whether it serves or detracts from oft-cited functions of Article III standing. Subsection A argues that *Powell Duffryn–ExxonMobil*’s relaxed traceability standard—the type-of-pollutant/type-of-harm approach for environmental citizen suits—is incompatible with the constitutional minimum to satisfy Article III traceability. Subsection B argues that despite the constitutional incompatibility, the adequate-stake and separation-of-powers functions are enhanced, rather than defeated, by *Powell Duffryn–ExxonMobil*’s relaxation of the traceability element. Subsection B cautions, however, that said enhancements would be defeated by courts employing *ExxonMobil*’s standing-per-violation rule.

98. *Env’t Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 2022 U.S. App. LEXIS 24584, at *3 (5th Cir. Aug. 30, 2022) (hereinafter “Unpublished Exxon Opinion”). In an odd about-face, the same panel characterized the causation-per-violation innovation as “Exxon’s position” rather than its prior holding, *id.* at 11 (noting this “position” was “unconvincing”), and reasoned that said “position [wa]s an outlier”; *id.* at *13. Judge Oldham, in a dissent largely mirroring his former, disagreed that Exxon pulled the so-called argument out of thin air. *See id.* *27 (“[We] explained that in the context of the CAA, we must do ‘a separate standing inquiry for each violation asserted as part of that claim.’ 968 F.3d at 365. That is, plaintiffs must show—for *each violation*, not just each claim—an injury in fact that is fairly traceable to the violation and that is likely to be redressed by a favorable judicial decision.”).

99. *Id.* at *12.

100. *See supra* text accompanying note 83 (citing *ExxonMobil Corp.*, 968 F.3d at 368–69).

101. Unpublished Exxon Opinion, at *13 (“We are bound by our prior articulation of the test for traceability, and we stand by it.”).

102. This latest iteration of *ExxonMobil Corp.* was decided by the Fifth Circuit during the editing process for this Essay, and the full court has not yet decided on whether the case will be reheard en banc—which has ExxonMobil has recently requested. *See* Juan Carlos Rodriguez, *Exxon Wants En Banc Review of \$14M Air Pollution Fine*, LAW360 (Oct. 14, 2022), <https://www.law360.com/articles/1540057/exxon-wants-en-banc-review-of-14m-air-pollution-fine>. Of course, given the case’s repeated trips to the court and its novel standing issues, an en banc rehearing would not be surprising.

A. Powell Duffryn–ExxonMobil Does Not Pass Constitutional Muster

Judge Aldisert in *Powell Duffryn* and Judge Oldham in *ExxonMobil* both cautioned that relaxing the traceability element of standing to a type-of-pollutant/type-of-harm approach, without regard for some element of but-for causation, might be constitutionally impermissible. Further, in adopting *Powell Duffryn*'s traceability standard, the Fifth Circuit itself recognized that it “may produce results incongruous with our usual understanding of Article III standing requirements.”¹⁰³ As to CWA citizen suits, specifically, the Fifth Circuit stated that “it may not be an appropriate standard in other CWA cases,” such as where the waterway at issue is “so large” and suggests a more attenuated causal connection.¹⁰⁴ And Judge Oldham's dissenting opinion that the connection would be inherently more attenuated in any air-pollution citizen suit bears consideration.¹⁰⁵ But are these concerns about the constitutional threshold of *Powell Duffryn–ExxonMobil*, as determined by Supreme Court jurisprudence, warranted? Despite “the precise nature of the causation requirement [being] quite obscure[,]”¹⁰⁶ this article argues that such constitutional concerns are merited.

Because substantial speculation is inherent in its type-of-pollutant/type-of-harm approach, *Powell Duffryn–ExxonMobil*'s traceability framework is incongruous with traditional notions of what Article III standing requires. The Supreme Court has consistently stated that, to satisfy the fair traceability element and thus an “irreducible constitutional minimum of standing,” a plaintiff must show that their harm is not the result of some third party's action “not before the court.”¹⁰⁷ Thus, in such cases where the link between

103. *ExxonMobil Corp.*, 968 F.3d at 375 (Oldham, J., dissenting in part) (quoting *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 558 n.24 (5th Cir. 1996)).

104. *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 558 n.24 (5th Cir. 1996) (“[S]ome ‘waterways’ covered by the CWA may be so large that plaintiffs should rightfully demonstrate a more specific geographic or other causative nexus in order to satisfy the ‘fairly traceable’ element of standing.”).

105. *ExxonMobil Corp.*, 968 F.3d at 378 (Oldham, J., dissenting in part) (“Whatever sense [Powell Duffryn] might make in water-pollution cases, it makes little or none in air-pollution cases.”).

106. *Standing and the Privatization of Public Law*, *supra* note 45, at 1463–64.

107. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)); *see, e.g.*, *Bennett v. Spear*, 520 U.S. 154, 167 (1997) (explaining that the “fairly traceable” standard is not enough if the action is a result of another's action); *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 106 n.7 (1998) (“[T]he causation requirement asks whether the injury is ‘fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] resul[t] [of] the independent action of some third party not before the court.” (quoting *Simon*, 426 U.S. at 41–42)); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013) (“[P]laintiffs bear the burden of pleading and proving concrete facts showing that the defendant's actual action has caused the substantial risk of harm. Plaintiffs cannot rely on speculation about ‘the unfettered choices made by independent actors not before the court.’” (quoting *Lujan*, 504 U.S. at 562)).

the plaintiff's harm and defendant's action is too speculative, the Supreme Court has found a lack of traceability.¹⁰⁸

But by focusing only on the type of injury and whether a specific type of pollutant *could* cause that injury, the *Powell Duffryn–ExxonMobil* framework makes no attempt to link an injury to the specific defendant(s) joined in a lawsuit, or any specific party. Take the facts of *Powell Duffryn*, for example: although the Court held that there was a “substantial likelihood” that PDT’s pollution discharges caused the plaintiffs’ harms,¹⁰⁹ that holding can hardly be true given the sheer volume of daily pollutant discharges on the Kill Van Kull by an indeterminate number of actors who came and went.¹¹⁰ And as a slight variation on Judge Oldham’s hypothetical, “Bob” may have standing to sue a polluting facility for CAA penalties in one country for an injury suffered in another. Bob has standing so long as he ordinarily lives near the defendant facility (satisfying the nexus requirement) and said facility emits a type of pollutant that causes or contributes to the type of injury suffered by Bob (ex. some pollutant that *can* cause asthma).¹¹¹ Thus, *Powell Duffryn–ExxonMobil* theoretically fails to account for whether the violations complained of by plaintiffs are actually “fairly traceable” to the specific defendant hailed into court, rather than some actor left out of the litigation entirely.

B. Squaring *Powell Duffryn–ExxonMobil* with Article III Standing Functions

Even if the *Powell Duffryn–ExxonMobil* traceability framework is incongruous with traditional notions of what is constitutionally required by

108. See *What’s Standing After Lujan?*, *supra* note 44, at 194 (supporting that injuries must be fairly traceable and not purely speculative).

109. *Pub. Interest Res. Grp. of N.J., Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 72–73 (3d Cir. 1990).

110. See *supra* note 63 (citing *Pub. Int. Rsch. Grp. of N.J. v. Powell Duffryn Terminals Inc.*).

111. *Cf. Env’t Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 968 F.3d 357, 378 (5th Cir. 2020) (Oldham, J., dissenting in part) (comparing Judge Oldham’s arsonist hypothetical which is similarly illustrative on this flaw in the *Powell Duffryn–ExxonMobil* framework); see *supra* note 89 (showing Oldham’s critique of the *Powell Duffryn* framework).

Admittedly, in a case like *ExxonMobil*, it might be more likely that Bob’s injury could be traced to a defendant who operates one of the largest pollutant-emitting facilities in the country under *Powell Duffryn–ExxonMobil*’s traceability standard. However, relying on federal judges to draw the line between cases like *ExxonMobil* (one significantly larger polluter in the area) and cases like *Powell Duffryn* (an indeterminate amount of polluters) could exacerbate inconsistencies in applications of the traceability requirement; See *id.* at 378 (Oldham, J., dissenting) (“*Powell Duffryn* and its progeny . . . cannot generate predictable results . . .”). Instead, especially for organizational plaintiffs, the burden of providing clearer support for traceability should lie with plaintiffs; See George Wyeth et al., *The Impact of Citizen Environmental Science in the United States*, 49 ENV’T L. REP. NEWS & ANALYSIS 10237, 10237 (2019) (“An increasingly sophisticated public, rapid changes in monitoring technology, the ability to process large volumes of data, and social media are increasing the capacity for members of the public and advocacy groups to gather, interpret, and exchange environmental data.”).

Article III, should that incongruity be cause for concern? This subsection argues that the incongruity should not be concerning. First, Article III standing is only a threshold matter to ensure that the plaintiff has an adequate stake in the outcome—and *Powell Duffryn–ExxonMobil’s* relaxed traceability standard does not hinder that goal. Second, *Powell Duffryn–ExxonMobil’s* relaxed traceability standard might enhance separation of powers, rather than detract from it.

1. The Adequate Personal Stake Function

An oft-cited function of standing is to provide a threshold determination that a party bringing a lawsuit in the federal courts has an adequate stake in the outcome.¹¹² *Powell Duffryn–ExxonMobil’s* relaxation of the traceability requirement for citizen suits under the CWA and CAA does not hinder this function.

Powell Duffryn–ExxonMobil’s emphasis on plaintiffs having some geographic nexus to the violating discharges or emissions prevents those asserting undifferentiated, public-value-interest grievances from accessing the courts. Even if a plaintiff’s injury might not be fairly traceable to a specific defendant’s discharge/emission in violation of the CWA or CAA, “persons who live in an area or pursue recreational opportunities there can reasonably be considered aggrieved by a violation of that environmental law involving their environment.”¹¹³ This consideration should carry additional weight given the uncertain potential of irreversible environmental harms.¹¹⁴ As a practical example, even if the floating pollutive substances observed on the Kill Van Kull (causing the observational and recreational injuries) were substantially more traceable to a facility besides PDT, said environmental pollution was still likely.¹¹⁵ Thus, given this level of personal interest ensured by a geographic nexus, plaintiffs successfully invoking *Powell Duffryn–ExxonMobil* still have some interest separate from the public at large.

112. See, e.g., *Baker v. Carr*, 369 U.S. 186, 204 (1962) (describing the requirement that plaintiffs have “such a personal stake in the outcome of a controversy as to assure that concrete adverseness [that can] sharpen[] the presentation of issues” as “the gist of . . . standing.”); Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 469 (2008) (“A dispute that satisfies Article III thus has at least two sides, each of which has a stake in winning, and the doctrine of standing [purportedly] ensures that the plaintiff has such a stake.”).

113. Daniel A. Farber, *A Place-Based Theory of Standing*, 55 UCLA L. REV. 1505, 1551 (2008).

114. See Jonathan Remy Nash, *Standing and the Precautionary Principle*, 108 COLUM. L. REV. 494, 511 (2008) (proposing the precautionary principle into the standing doctrine).

115. Cf. Farber, *supra* note 110113, at 1551 (“[P]eople who have a meaningful relation to that body of water—whether it be a fisherman, a canoeist, a zoologist, or a logger—must be able to speak for the values which the river represents and which are threatened with destruction.” (quoting *Sierra Club v. Morton*, 405 U.S. 727, 743 (1972) (Douglas, J., dissenting))).

However, *ExxonMobil's* holding as to air pollution goes a step further than *Powell Duffryn* as to water pollution (and farther than any citizen-suit standing jurisprudence): *ExxonMobil's* holding requires traceability to each individual violation alleged. This approach risks keeping litigants out of federal court, despite having an adequate personal stake in the outcome. Notably, the district court on remand in *ExxonMobil* had the benefit of evidence being fully developed at a prior trial before having to apply the Fifth Circuit's new standing test. But, for a court without the benefit of a fully developed record, the Fifth Circuit's per-violation rule risks converting Article III standing from a *threshold question* of assessing personal stake¹¹⁶ into an analysis that "threaten[s] . . . considerable discovery, factfinding, and, worst of all, judicial speculation."¹¹⁷ Without considerable discovery and factfinding, a citizen suit plaintiff would likely be hard-pressed to establish Article III standing for every single violation alleged—despite potentially having an apparent, individualized interest in seeing all violations remedied. And without such discovery and factfinding, a federal judge would lack the information necessary to accurately rule on the issue of standing per each violation. To avoid hindering any enhancement of standing's personal stake function from *Powell Duffryn–ExxonMobil's* type-of-pollutant/type-of-harm approach, other federal courts should refrain from adopting the per-violation rule.

2. The Separation-of-Powers Function

One of the primary functions of the Article III standing doctrine is to preserve separation of powers.¹¹⁸ As to pollution citizen suits, specifically, separation of powers concerns purportedly arise by empowering private citizens to act as a pseudo private attorney general.¹¹⁹ For example, in *Laidlaw*, both Justices Kennedy and Scalia expressed concern about congressional authorizations allowing private citizens to exact public fines from private parties, given the role of the executive branch in enforcing the law under Article II of the Constitution.¹²⁰

116. See e.g., *United States v. Bearden*, 328 F.3d 1011, 1013 (8th Cir. 2003) (stating that "Article III standing is a threshold question in every federal court case").

117. *Standing and the Privatization of Public Law*, *supra* note 45, at 1464.

118. See generally Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983) (arguing that "the judicial doctrine of standing is a crucial and inseparable element of" separation of powers).

119. See Greve, *supra* note 24, at 341–92 (arguing that, by passing environmental citizen-suit provisions, Congress intruded into "law enforcement" by "creat[ing] what amounts to an environmentalist enforcement cartel.>").

120. *Friends of the Earth, Inc. v. Laidlaw Env'tl Servs. (TOC), Inc.*, 528 U.S. 167, 197 (2000) (Kennedy, J., concurring) ("Difficult and fundamental questions are raised when we ask whether exactions

Relaxing the traceability standard for environmental citizen suits, however, would seem to respect separation of powers more so than a more stringent traceability standard. First, the CWA and CAA's citizen-suit provisions are unlikely to usurp any executive power under Article II. At least when the citizen-suit provisions are used against private defendants, "the executive is not even a party" to the action.¹²¹ In addition, the Take Care Clause of Article II can be viewed as "a duty" to enforce the law, "not a license."¹²² If the Executive declines to enforce the law or is unable to do so, there should not be any significant separation of powers concerns by allowing private citizens to use the judicial process in a congressionally sanctioned scheme (and Executive sanctioned, given that the Executive signed the citizen suit provisions into law).

In addition, relaxing the traceability requirement for citizen suitors against industrial facilities indicates a respect for Congress by the judiciary.¹²³ By lowering the Article III bar to CWA and CAA citizen suits, Congress's legislated environmental mandates are more likely to be respected by the executive branch. Having citizen suits as a supplement to federal enforcement prevents underenforcement of Congress's mandates "at particular facilities" when the executive succumbs to "agency capture" problems."¹²⁴

But again, *ExxonMobil's* standing-per-violation invention might frustrate any gains to the separation-of-powers function from the type-of-pollutant/type-of-harm approach. A standing-per-violation rule risks both underenforcement and total non-enforcement of the legislative mandates in the CWA and CAA. This concern extends not only to violations that might be considered more minor¹²⁵ (making it less likely that the Executive will

of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II of the Constitution of the United States."); *id.* at 209 (Scalia, J., dissenting) ("[T]he [Clean Water] Act does not provide a mechanism for individual relief in any traditional sense, but turns over to private citizens the function of enforcing the law."); *see also* U.S. CONST. Art. II § 3 (stating that the President "shall take Care that the Laws be faithfully executed.").

121. *What's Standing After Lujan?*, *supra* note 44, at 231–32.

122. *Standing and the Privatization of Public Law*, *supra* note 45, at 1471.

123. *Cf. id.* (discussing, in the context of when a citizen suit is used against the executive, "a [judicial] decision is necessary in order to vindicate congressional directives.").

124. Sarah L. Stafford, *Private Policing of Environmental Performance: Does It Further Public Goals?*, 39 B.C. ENV'T'L AFF. L. REV. 73, 78 (2012); *see also* Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1111 (D.C. Cir. 1971) (stating that the "duty" of the judiciary in "litigation seeking judicial assistance in protecting our natural environment" is to ensure "that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.").

125. It bears recognizing that despite smaller violations seeming more "minor," perhaps such as those violations alleged in *ExxonMobil* where the emissions involved "the release of one pound or less of a pollutant," repeated so-called minor emissions can have a cumulative impact on the environment that

expend enforcement resources).¹²⁶ The underenforcement/non-enforcement concern similarly exists for violations that might not be considered minor, but nevertheless disregarded under the per-violation approach.¹²⁷ On remand in *ExxonMobil*, for example, the district court held traceability was not satisfied as to more than 6,000 CAA violations (those emissions releasing a pound or more of a pollutant).¹²⁸ Where citizen-suit plaintiffs have an adequate personal stake in the health of their surrounding environment, such as the residents living near the emitting facility in *ExxonMobil*, the judiciary should respect Congress's intent that those citizen-suit plaintiffs enforce Congress's legislative mandates in court. Otherwise, the per-violation rule's disregard of congressional intent would defeat the separation of powers gained from *Powell Duffryn–ExxonMobil's* relaxed type-of-pollutant/type-of-harm traceability approach.

V. PRACTICAL IMPLICATIONS FOR FUTURE ENVIRONMENTAL ENFORCEMENT

Absent *Powell Duffryn–ExxonMobil's* implications for Article III standing in environmental citizen suits against polluters, practical considerations are also implicated. In Subsection A, this article argues that relaxation of the traceability standard to *Powell Duffryn–ExxonMobil's* type-of-pollutant/type-of-harm approach enhances the deterrent function of citizen suits. In Subsection B, this article discusses how the federal circuits' relaxed traceability standard might affect standing determinations in the growing realm of climate change litigation.

the pollution control statutes were intended to prevent. Cf. Deborah Behles, *Examining the Air We Breathe: EPA Should Evaluate Cumulative Impacts When It Promulgates National Ambient Air Quality Standards*, 20 PACE ENV'T L. REV. 200, 201 (2010) (arguing that “[c]onsideration of cumulative impacts” in forming NAAQS would be “consistent with the [Clean Air] Act’s statutory mandate.”).

126. Maxwell L. Stearns, *From Lujan to Laidlaw: A Preliminary Model of Environmental Standing*, 11 DUKE ENV'T L. & POL'Y F. 321, 354–55 (2001) (“[T]he federal agency, which has a general mandate to enforce the federal environmental statutes, is subject to significant political pressures and resource constraints. As a result, the agency is motivated to pursue the most severe violations first, and to leave the minor violations for later, if at all.”).

127. See Corey Moffat, *Establishing Causation in Private Party Climate Change Suits: Correcting the Mistakes of Washington Environmental Council v. Bellon*, 44 ENV'T L. 959, 966 (2014) (“In promulgating the foundational environmental statutes, Congress recognized that government enforcement alone would be insufficient to ensure that the goals of the statutes were met. Given the constant flow of environmental law violations and limited governmental resources, it is unreasonable to assume that state and federal regulatory authorities could engage in the inspections and enforcement measures necessary to ensure adequate compliance. Accordingly, Congress included citizen suit provisions as a means to ensure that ‘if the Federal, State, and local agencies fail to exercise their enforcement responsibility, the public is provided the right to seek vigorous enforcement action.’” (footnote omitted)).

128. See *Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 524 F. Supp. 3d 547, 555-57 (S.D. Tex. 2021) (detailing the district courts findings as to traceability of CAA violations).9397

A. The Deterrent Function of Citizen Suits

The threat of a private citizen suit, including environmental citizen suits, is intended to serve a deterrent function. As indicated by the legislative history to the CWA and CAA, Congress intended environmental citizen suits penalties to have such an effect and prevent environmental harms before they occur.¹²⁹ In *Laidlaw*, the Supreme Court went as far as to hold that the possibility of such deterrence attributable to civil penalties could satisfy the redressability element of Article III standing.¹³⁰

Assuming that CWA and CAA citizen suits have a deterrent effect on private dischargers and emitters, deterrence is likely enhanced by *Powell Duffryn–ExxonMobil’s* type-of-pollutant/type-of-harm approach to traceability. For example, in water pollution citizen suits where “a waterway is being polluted by multiple dischargers,” defendants tend to argue for lack of standing because “plaintiffs have not been uniquely harmed” by the defendant’s discharges.¹³¹ Traditional traceability requirements could thus be a strong defense even if the dischargers are egregious violators. *Powell Duffryn’s* type-of-pollutant/type-of-harm approach signals to dischargers or emitters that they cannot engage in tactical violations of the Acts first, and then later take advantage of Article III traceability to avoid liability.

One may argue that relaxing the traceability requirement can cause overdeterrence, presumably stemming from increased citizen-suit litigation. But the attorney fee provisions of the CWA and CAA function (as they were intended to function) as a counter-deterrent against frivolous litigation.¹³²

129. See Jeannette L. Austin, *The Rise of Citizen-Suit Enforcement in Environmental Law: Reconciling Private and Public Attorneys General*, 81 NW. U. L. REV. 220, 237 (1987) (“[O]ne of the primary purposes of [civil] penalties, according to the legislative history of the CWA, is to remove the economic benefit of noncompliance.”) (citing H.R. REP. NO. 294, 95th Cong., 1st Sess. 70, reprinted in 1977 U.S. CODE CONG. & ADMIN. NEWS 1148); see also Daniels et al., *supra* note 1, at 929 (discussing how the Senate drafters of the CAA’s citizen-suit provision intended for it to incentivize industrial actors into compliance with the Act’s provisions).

130. See *Friends of the Earth, Inc. v. Laidlaw Env’tl Servs. (TOC), Inc.*, 528 U.S. 167, 185–88 (“[A]ll civil penalties have some deterrent effect. More specifically, Congress has found that civil penalties in CWA cases do more than promote immediate compliance by limiting the defendant’s economic incentive to delay its attainment of permit limits; they also deter future violations. . . . To the extent that [civil fines] encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct.” (citations and internal quotations omitted)).

131. Boyer & Meidinger, *supra* note 4, at 936–37.

132. See *supra* notes 26–27 and accompanying text; *supra* note 38–39 and accompanying text. (explaining further how the CWA and CAA both contain provisions specifically designed to minimize frivolous lawsuits).

Thus, if a private industrial facility complies with the Acts, overdeterrence should not be a concern.¹³³

An approach like *ExxonMobil's* standing-per-violation caveat—albeit seemingly abandoned by the Fifth Circuit for the time being—would prevent citizens from having Article III standing to challenge a kitchen-sink of CWA or CAA violations in federal court. Even if less of a causative nexus is necessary under the type-of-pollutant/type-of-harm approach to establish Article III traceability, attempting to do so would be cumbersome. The *ExxonMobil* plaintiffs themselves seemed to recognize this reality on remand by conceding a lack of traceability as to almost half of the violations that they initially alleged.¹³⁴

However, other courts should refrain from adopting *ExxonMobil's* standing-per-violation approach because it is incompatible with the deterrent function of citizen suits for largely the same reasons as being incompatible with the functions of standing. Requiring citizen-suit plaintiffs to engage in cumbersome fact-finding simply to satisfy the threshold matter of Article III standing would disincentivize citizen-suits, even where the plaintiffs have a readily apparent personal stake.¹³⁵ Furthermore, the per-violation approach incentivizes private industrial facilities to employ tactical emissions methods aimed at forcing potential plaintiffs to engage in such intensive fact-finding before being able to bring suit. For those reasons, the per-violation approach does not simply prevent overdeterrence from relaxing the Article III traceability analysis—it promotes underdeterrence.

B. Air Pollution and Private Climate Change Litigation

Environmental litigation is increasingly centered around ongoing and impending climate change stemming from emissions of greenhouse gases (GHGs) and other air pollutants.¹³⁶ Citizen-plaintiffs typically face significant standing hurdles in climate change-related actions.¹³⁷ Often, federal courts “have not been . . . willing to find causation,” despite usually

133. This contention is further supported by the presence of so-called permit shields in the CWA and CAA, which bar any citizen-suit against an industrial facility so long as said facility is in compliance with all the conditions of its permits. See 33 U.S.C. § 1342(k); 42 U.S.C. § 7661c(f). Thus, given reporting requirements on private facilities that monitor whether they are actually in compliance with the Acts (which should indicate whether a citizen suit may have merit), a facility should be reassured that a court will be able to ascertain whether a certain citizen suit is frivolous for purposes of assessing litigation costs.

134. *Env't. Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 524 F. Supp. 3d 547, 555 (S.D. Tex. 2021).

135. *Supra* text accompanying notes 78–81.

136. See generally Niran Somasundaram, *State Court Solutions: Finding Standing for Private Climate Change Plaintiffs in the Wake of Environmental Council v. Bellon*, 42 *ECOLOGICAL Q.* 491 (2015).

137. See *id.* at 501 (explaining how climate change related claims struggle to gain standing because of issues stemming from causation and redressability of the injuries recognized).

finding an adequate Article III injury.¹³⁸ Much of the climate change-related citizen litigation has been to force government action on climate change; “[r]elatively few individual climate change plaintiffs have sued private actors.”¹³⁹

Where private plaintiffs bring climate change-related lawsuits against private facilities, plaintiffs have been limited to common law claims rather than invoking the CAA’s citizen-suit provision.¹⁴⁰ The CAA was not designed to address the problems of GHGs and climate change.¹⁴¹ Due to that shortcoming and the lack of federal regulation on GHGs, the CAA’s citizen-suit provision in 42 U.S.C. § 7604(a) does not currently provide a private cause of action against private contributors to climate change. There have been several proposals, however, to bring GHGs contributing to climate change within the CAA’s gambit.¹⁴² Expanding the CAA’s coverage to GHGs would theoretically provide a private cause of action against industrial violators under § 7604(a).¹⁴³

If the CAA is ultimately amended—or regulatory rules are successfully promulgated—to directly address GHGs, *ExxonMobil* could frustrate the availability of § 7604(a) citizen suits enforcing any new GHG standard against private industrial facilities. Under the *Powell Duffryn–ExxonMobil* type-of-pollutant/type-of-harm approach to Article III traceability, standing would likely not be a significant hurdle for plaintiffs.¹⁴⁴ But given that any

138. *See id.* (explaining that courts have been willing to recognize injuries suffered from climate change to satisfy the first prong for standing).

139. Margaret Rosso Grossman, *Climate Change and the Individual*, 66 AM. J. COMP. L. 345, 375 (2018).

140. *See id.* Climate change-related suits under the CAA’s citizen suit provision have been to force government action on climate change, rather than being used against private facilities contributing to climate change.

141. *See* David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENV’T L. 1, 36-37 (2003) (demonstrating that the CAA is primarily concerned with making sure the air that people breathe is healthy and that climate change is an issue outside the scope of the statute).

142. *See, e.g.,* Howard M. Crystal et al., *Returning to CAA Fundamentals: A Renewed Call to Regulate Greenhouse Gases Under the National Ambient Air Quality Standards (NAAQS) Program*, 31 GEO. ENV’T L. REV. 233 (2019) (arguing that NAAQS be formulated for greenhouse gases, which would cause § 7604(a) to provide a private cause of action against private facilities who violate the NAAQS); Holly Doremus & W. Michael Hanemann, *Of Babies and Bathwater: Why the CAA’s Cooperative Federalism Framework is Useful for Addressing Global Warming*, 50 ARIZ. L. REV. 799 (arguing that states include measures in their state implementation plans of NAAQS aimed at addressing greenhouse gas emissions).

143. *See* Doremus & Hanemann, *supra* note 139 at 833 (explaining how the broad citizen suit provision in the CAA would allow for citizens to enforce state implementation plans when the EPA fails to).

144. It would be difficult for a defendant to dispute that GHG is a type of pollutant that might ordinarily cause the plaintiff’s type of harm (climate change-related). *See, e.g.,* U.S. ENV’T PROT. AGENCY, *Climate Change Indicators: Greenhouse Gases*, <https://www.epa.gov/climate-indicators/greenhouse-gases> (last visited Apr. 4, 2021) (“Greenhouse gases from human activities are the most significant driver of observed climate change since the mid-20th century.”).

extension of the CAA to GHGs would likely lead to significantly more § 7604(a) litigation, federal courts may be more inclined to adopt *ExxonMobil's* restrictive standing-per-violation rule to temper a flood of climate change litigation.

CONCLUSION

Despite the CAA and CWA remaining the nation's primary pollution control statutes since their original enactment in the 1970s, the federal circuit court's *Powell Duffryn* water-pollution framework—and the recent extension of *Powell Duffryn* to air-pollution suits in *ExxonMobil*—signal an evolution of the Article III standing doctrine. Perhaps these courts are heeding Justice Blackmun's dissenting caution from *Sierra Club*, but time will tell whether the flexibility of the *Powell Duffryn* standard will be hindered by other courts adopting and restrictively applying *ExxonMobil's* per-violation requirement. The Supreme Court itself should intervene and resolve its traceability gap in *Laidlaw*.