



# ENVIRONMENT REPORTER



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**HIGHLIGHTS****NO<sub>x</sub> Cuts of 1.1 Million Tons Sought in Rule on Transported Pollution**

Twenty-two states and the District of Columbia will have to cut their nitrogen oxide emissions by more than 1.1 million tons annually between 2003 and 2007, under a final rule announced by the Environmental Protection Agency to reduce transported ozone pollution. **Page 1093** . . . The rule provides states with too little time to investigate and develop plans for cutting NO<sub>x</sub> emissions, state and industry officials assert. **Page 1096**

**Multisector Storm Water General Permit Sets Industry-Specific Guidelines**

Industry-specific best management practices to control storm water discharges from various facilities are included in the final modification of the storm water multisector general permit for industrial activities published by EPA. The notice also says EPA will terminate the storm water baseline industrial general permit, which expired in September 1997. **Page 1111**

**Democrats Ask President to Veto Bills With 'Anti-Environmental' Riders**

Budget bills containing "anti-environmental riders" should be vetoed, 145 Democrats assert in a letter to President Clinton. **Page 1118**

**Refusal to Sign Consent for Inspection Held No Basis for Penalty**

A chemical company's refusal to sign a "voluntary" consent form granting EPA unconditional access to inspect possible contamination on its property does not warrant civil penalties that totaled \$195,000, according to the U.S. Court of Appeals for the Ninth Circuit. **Page 1109**

**EPA Authority to Regulate HFCs, PFCs Due to Global Warming Opposed**

Title VI of the Clean Air Act does not give EPA the authority to regulate hydrofluorocarbons and perfluorocarbons because of concerns over their global warming potential, according to comments submitted to EPA. **Page 1098**

**Rule, Guidance on Pollutant Limits in U.S. Waters Expected in Winter**

A proposed regulation and guidance to revamp the total maximum daily load program for protecting U.S. water bodies will probably be published in "late winter," an EPA official says. **Page 1112**

**GE Agrees to Pay \$200 Million To Clean Up Contamination From Plant**

General Electric will pay \$200 million in damages and cleanup costs for contamination from polychlorinated biphenyls and other hazardous substances at a plant no longer in use in Pittsfield, Mass. **Page 1115**

**Analysis & Perspective**

**CITIZEN SUITS:** Two recent court decisions could put an end to virtually all citizen enforcement of U.S. environmental laws, and it may be up to Congress to restore the viability of citizen suits, environmental attorney James D. Brusslan says in a BNA Analysis & Perspective article. **Page 1126**

**ALSO IN THE NEWS**

**SUPERFUND:** The Senate Environment and Public Works Committee does not plan to consider during the current congressional session a targeted superfund reform bill that would provide liability exemptions for recyclers, a Senate staff member tells BNA. **Page 1105**

**WATER POLLUTION:** A revised Clean Water Act funding allocation formula being contemplated by EPA that may put more emphasis on nonpoint source pollution could mean a loss to some states of thousands of dollars, 10 senators write in a letter to the agency. **Page 1113**

**SUPERFUND:** Asarco Inc. is entitled to summary judgment that it is not liable for almost \$1 billion in superfund cleanup costs for mining pollution in Idaho, the company argues in a court brief. **Page 1107**

**DRINKING WATER:** An advisory work group is expected to submit final recommendations by mid-November about the range of benefits EPA should consider when writing new drinking water regulations, an agency official says. **Page 1114**

**EMERGENCY PLANNING:** EPA has revised a portion of the 1997 toxic release reporting expansion rule affecting how companies report the toxic chemicals in wastes that are destroyed by combustion. **Page 1116**

# Analysis & Perspective

## LITIGATION

### CITIZEN SUITS

On March 4, 1998, the United States Supreme Court ruled that the U.S. Constitution prevents a citizens group from suing a company that, by its own admission, had violated the Emergency Planning and Community Right-to-Know Act for seven years. In *The Steel Company v. Citizens for a Better Environment*, the court ruled that a citizens group could not satisfy the "redressability" requirement for standing under Article III. This article reviews the court's decision and a recent ruling by the United States Court of Appeals for the Fourth Circuit expanding on *The Steel Company*. It concludes that, in the absence of congressional action, these cases could put an end to virtually all citizen enforcement of our nation's environmental laws. It then suggests ways in which Congress could restore the viability of citizen suits.

## 'Stealing' Environmental Suits From Citizens: The *Steel Company* Decision and How Congress Can Restore Citizens' Rights

By JAMES D. BRUSSLAN

Most people would find it hard to believe that our Constitution prohibits Congress from authorizing courts to penalize polluters caught by citizens violating environmental laws. Yet that is the message of two recent decisions—*The Steel Company v. Citizens for a Better Environment*<sup>1</sup> and *Friends of the Earth Inc. v. Laidlaw Environmental Services Inc.*<sup>2</sup> In

<sup>1</sup> 523 U.S. \_\_\_, 118 S.Ct. 1003, 46 ERC 1097 (1998) (hereafter referred to by its Supreme Court Reporter citation).

<sup>2</sup> 149 F.3d 303, 46 ERC 2025, (4th Cir., July 16, 1998).

James D. Brusslan is an environmental attorney in Chicago. He successfully argued *The Steel Company* case on behalf of *Citizens for a Better Environment* in the United States Court of Appeals for the Seventh Circuit and was counsel of record for *Citizens for a Better Environment* in the United States Supreme Court. He was also a panelist on the 1997 ABA Videotape entitled "Citizen Suits." Any opinions expressed in this article are solely those of the author and do not reflect an editorial position by *The Bureau of National Affairs, Inc.*, which welcomes other points of view.

*The Steel Company*, the Supreme Court dismissed a citizen suit for environment violations that had ended by the time plaintiff filed suit. In *Laidlaw*, the Fourth Circuit went even further. It dismissed a citizen suit even though the violations continued after plaintiff had filed its complaint. This article discusses these cases and their implications.

### The *Steel Company v. Citizens for a Better Environment*

In a 1996 decision interpreting the Emergency Planning and Community Right-to-Know Act (EPCRA),<sup>3</sup> the United States Court of Appeals for the Seventh Circuit ruled that the unique language of EPCRA's citizen suit provision<sup>4</sup> authorized citizens to sue for late-filed re-

<sup>3</sup> In 1986, after the Bhopal disaster, Congress enacted EPCRA, 42 U.S.C. 11001 *et seq.* The purpose of EPCRA, among other things, is to protect the public from dangers associated with industrial releases of toxic chemicals, and inform citizens of the hazardous chemicals to which they are exposed. EPCRA requires companies using threshold quantities of hazardous chemicals to file annual reports with public agencies inventorying the chemicals and quantifying chemical releases into the environment.

<sup>4</sup> Unlike the Clean Water Act and most other environmental laws which authorize citizen suits only against those "alleged to be in violation," EPCRA's citizen suit provision allows citizens to sue "for failure" to file reports "under" various provisions of EPCRA, 42 U.S.C. 11046(a)(1). In 1987, the Supreme Court interpreted the "alleged to be in violation" language in the Clean Water Act to require a continuing or threatened violation at the time the suit is

ports, or "historical" violations.<sup>5</sup> This decision permitted citizens to sue companies which, after being caught by citizens, came into compliance before the 60-day notice period<sup>6</sup> expired and the suit began.<sup>7</sup> The Seventh Circuit explained that to rule otherwise would, in effect, transfer EPCRA's obligations from industry to citizens and render meaningless EPCRA's citizen suit provision.<sup>8</sup>

[To prevent suits for late-filed reports after receiving notice from citizens] would largely shift the cost of EPCRA compliance from regulated industrial users to private citizens. Private citizens would have to absorb much of the cost of monitoring chemical use and keeping up to date on changes in EPCRA requirements with little or no hope of recovering those costs through awards of litigation expenses. Private enforcement of the reporting requirements would undoubtedly drop off. This scenario is impossible to reconcile with the clearly expressed intent of Congress, or with the very existence of the citizen enforcement provision.

The Seventh Circuit's ruling conflicted directly with a 1995 ruling by the United States Court of Appeals for the Sixth Circuit, which held that EPCRA barred citizen suits for "historical" violations.<sup>9</sup> In February 1997, the Supreme Court granted *certiorari* purportedly to resolve this conflict between the circuits in interpreting the language of EPCRA's citizen suit provision.

### Proceedings in the Supreme Court

Once the case reached the Supreme Court, the arguments shifted from the statutory language to whether Citizens for a Better Environment had Article III standing.<sup>10</sup> Citizens for a Better Environment asserted that it satisfied the requirements for standing, including the three-prong standing test of *Lujan v. Defenders of Wildlife*:<sup>11</sup> injury in fact, a traceable connection between plaintiff's injury and conduct of defendant, and a likelihood that the requested relief will redress the injury.<sup>12</sup>

filed. *Gwaltney of Smithfield Ltd. v. Chesapeake Bay Foundation Inc.*, 484 U.S. 49, 26 ERC 1857 (1987).

<sup>5</sup> Sections 312 and 313 of EPCRA require reports to be filed on dates certain each year. 42 U.S.C. 11022-23. When a report is filed late, it can never comply with the mandates of EPCRA. Nonetheless, once the late reports are filed, courts have considered the violation to have ended. Courts term the late reports as "past" or "historical" violations. See *Citizens for a Better Environment v. The Steel Company*, 90 F.3d 1237, 42 ERC 2057 (7th Cir. 1996), vacated March 4, 1998; *Atlantic States Legal Foundation v. United Musical Instruments, U.S.A., Inc.*, 61 F.3d 473, 41 ERC 1091 (6th Cir. 1995).

<sup>6</sup> Most environmental laws, including EPCRA, require a citizen to notify the alleged violator and the government of its intent to file suit and then wait 60 days to bring the action. See, e.g., Section 326(d)(1) of EPCRA, 42 U.S.C. 11046(d)(1).

<sup>7</sup> The Steel Company ignored sections 312 and 313 of EPCRA, 42 U.S.C. 11022-23, for seven years. Upon receiving Citizens for a Better Environment's 60-day notice of intent to sue, and before suit commenced on Aug. 7, 1995, The Steel Company filed seven years of overdue reports all on one day. Some of these reports were due as early as March 1, 1988, and were more than seven years late.

<sup>8</sup> *Citizens for a Better Environment v. The Steel Company*, 90 F.3d 1237, 42 ERC 2057 (7th Cir. 1996), vacated March 4, 1998.

<sup>9</sup> *Atlantic States Legal Foundation v. United Musical Instruments, U.S.A., Inc.*, 61 F.3d 473, 41 ERC 1091 (6th Cir. 1995).

<sup>10</sup> The Seventh Circuit did not address Article III standing because The Steel Company mentioned it, if at all, only in passing. Instead, the briefs in the Seventh Circuit focused on the statutory language of EPCRA's citizen suit provision, 42 U.S.C. § 11046.

<sup>11</sup> 510 U.S. 555, 559-60, 34 ERC 1785 (1992).

<sup>12</sup> Citing, among other things, *qui tam* actions and historical Supreme Court precedent, Citizens for a Better Environment asserted that redressability is not required under Article III in a case, as

First, the group and its members suffered both an informational and financial injury arising out of The Steel Company's failure to file the required EPCRA reports.

1. *Informational Injury*—The purpose of EPCRA, as indicated by the "Community Right-to-Know" part of its name, is to provide information to citizens about toxic and hazardous chemicals used by industry. By failing to file the required reports, The Steel Company deprived Citizens for a Better Environment and its members of information the group was compiling on releases by companies in Chicago.<sup>13</sup>

2. *Financial Injury*—The Steel Company's failure to comply with EPCRA also forced the citizens group to undertake an independent and costly investigation<sup>14</sup> of The Steel Company's hazardous chemical operations. Through its investigation, Citizens for a Better Environment, rather than The Steel Company, accomplished EPCRA's statutory purpose of providing The Steel Company's releases to citizens.<sup>15</sup> If the company had filed its reports on time, Citizens for a Better Environment could have accessed the company's releases within seconds on the internet. Instead, the group detected the information by conducting independent research resulting in the expenditure of the group's limited resources.

Second, the injury was fairly traceable to the defendant. By failing to file the EPCRA reports, The Steel Company caused the citizens' injury.

As for the third element—redressability—Citizens for a Better Environment explained that a favorable decision would benefit it in two major ways.

1. *Deterrence*—Citizens for a Better Environment asserted that by ordering The Steel Company to pay civil penalties<sup>16</sup> the court would deter The Steel Company from future violations. Without suffering a penalty, The Steel Company could fall into violation again with little fear. If citizens happened to catch the company again, it could file late reports before suit, with no penalty. By contrast, if The Steel Company knew it would be fined, it would be less likely to violate EPCRA and reinjure Citizens for a Better Environment.

2. *Recovering Costs of Investigation*—Citizens for a Better Environment also asserted that it would be awarded its costs of litigation,<sup>17</sup> including the group's investigation costs. In *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, the Court ruled that to be included as costs of litigation, work by citizens must be "useful and of a type ordinarily necessary" to secure

here, in which a private party is suing another private party for a violation of law.

<sup>13</sup> Citizens for a Better Environment prepared a report for its members entitled *Guide to Southeast Chicago's Major Polluting Industries*, which did not include releases from The Steel Company due to the company's failure to comply with EPCRA.

<sup>14</sup> Citizens for a Better Environment detected the violation through FOIA requests, hazardous waste reports, discussions with public officials and evaluations of the releases of companies with similar operations.

<sup>15</sup> See quoted portion of the opinion in *Citizens for a Better Environment v. The Steel Company*, 91 F.3d 1237, 42 ERC 2057 (7th Cir. 1996), vacated March 4, 1998, in text, *supra*.

<sup>16</sup> Under sections 325 and 326(c) of EPCRA, 42 U.S.C. 11045, 11046(c), civil penalties are paid to the U.S. Treasury. It is irrelevant, for purposes of deterring the violator, to whom it pays its penalty.

<sup>17</sup> Section 326(f) of EPCRA, 42 U.S.C. 11046(f), authorizes the court to award a prevailing or substantially prevailing party its costs of litigation.

the final result from the litigation.<sup>18</sup> Citizens for a Better Environment's investigation of The Steel Company's toxic chemical use was necessary to gather facts which led to the filing of the complaint.<sup>19</sup>

### The Court's Ruling

A six member majority of the Supreme Court held that Citizens for a Better Environment did not have Article III standing<sup>20</sup> on grounds that the complaint failed the third test of standing, redressability.<sup>21</sup> It ruled that civil penalties paid to the U.S. Treasury (and not to citizens) give citizens only "psychic" satisfaction, which is inadequate under Article III.<sup>22</sup>

But although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.

The court held it irrelevant that civil penalties would deter the risk of future violations, and discourage The Steel Company from reinjuring Citizens for a Better Environment. In his concurring opinion, Justice John Paul Stevens pointed out that penalties deter future violations and harm to citizens.<sup>23</sup>

When one private party is injured by another, the injury can be redressed in at least two ways: by awarding compensatory damages or by imposing a sanction on the wrongdoer that will minimize the risk that the harm-causing conduct will be repeated . . . History supports the proposition that punishment or deterrence can redress an injury.

The court rejected Justice Stevens' views, stating, among other things, that "such a principle would make the redressability element vanish."<sup>24</sup>

The court conceded that if civil penalties were paid to Citizens for a Better Environment rather than the United States Treasury, they "might be viewed as a sort of compensation or redress to [the environmental group]" and presumably satisfy the redressability ele-

<sup>18</sup> 478 U.S. 546, 558, 24 ERC 1577 (1986). The Court in *Delaware Valley* construed the term "costs of litigation" in the Clean Air Act citizen suit provision. It authorized the payment by defendant of the fees incurred in connection with citizens' comments to an administrative agency in a nonjudicial proceeding. The Court explained that "the work done by counsel in the two phases was as necessary to the attainment of adequate relief for their client as was all of their earlier work in the courtroom." *Id.* at 560-61. See also *Public Interest Research Group of N.J. v. Widnall*, 51 F.3d 1179, 40 ERC 1577 (3d Cir. 1994); *Colorado Environmental Coalition, v. Romer*, 796 F.Supp. 457, 460, 35 ERC 1867 (D. Colo. 1992); *American Lung Ass'n v. Reilly*, 144 F.R.D. 622 (E.D.N.Y. 1992) (construing "costs of litigation" broadly).

<sup>19</sup> Citizens for a Better Environment also asserted that a declaration that The Steel Company violated EPCRA would foreclose future violations, and an injunction authorizing the citizens group to inspect the company's facility and records would deter future violations. This relief would prevent future injury to Citizens for a Better Environment.

<sup>20</sup> The court explained that it was unnecessary to interpret EPCRA's statutory language, as the allegations of the complaint itself did not meet the standing test. 118 S.Ct. at 1017-20. In actuality, the court did interpret the "costs of litigation" language of EPCRA's citizen suit provision, as explained, *infra*.

<sup>21</sup> The court presumed, but did not rule, that the citizen group met the injury in fact element.

<sup>22</sup> 118 S.Ct. at 1019.

<sup>23</sup> 118 S.Ct. at 1029.

<sup>24</sup> 118 S.Ct. at 1018.

ment.<sup>25</sup> Justice Stevens, in his concurring opinion, explained that "under the Court's own reasoning, [Citizens for a Better Environment] would have standing if Congress had authorized some payment to [the group]."<sup>26</sup>

The court agreed that recovery of the citizens' investigation costs does redress a cognizable Article III injury.<sup>27</sup>

[Citizens for a Better Environment] asserts that the "investigation costs" that it seeks were incurred prior to the litigation, in digging up the emissions and storage information that [The Steel Company] should have filed, and that [Citizens for a Better Environment] needed for its own purposes. . . . The recovery of such expenses unrelated to litigation would assuredly support Article III standing.

The court ruled, however, that EPCRA does not allow citizens to recover their investigation costs. Despite the broad construction of "costs of litigation" in *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*,<sup>28</sup> the court described as frivolous<sup>29</sup> the claim that investigation costs were costs of litigation under the statute.<sup>30</sup> As attorney fees incurred during the lawsuit, as opposed to presuit investigation costs, could not create a redressable injury,<sup>31</sup> the court held that plaintiff did not have standing.<sup>32</sup> The judgment of the Seventh Circuit was vacated and the case remanded with instructions to direct that the complaint be dismissed.

### Friends of the Earth v. Laidlaw Environmental Services<sup>33</sup>

In *Laidlaw*, the United States Court of Appeals for the Fourth Circuit relied on *The Steel Company* to dismiss as moot a Clean Water Act citizen suit. In June 1992, plaintiff environmental groups (collectively re-

<sup>25</sup> *Id.*

<sup>26</sup> 118 S.Ct. at 1030. The court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572-73 (1992), appeared to acknowledge that a cash bounty to a successful plaintiff would provide adequate redress under Article III ("[This is not] the unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the government's benefit, by providing a cash bounty for the victorious plaintiff.").

<sup>27</sup> *Id.*

<sup>28</sup> 478 U.S. 546, 558 (1986). See discussion, *supra*.

<sup>29</sup> 118 S.Ct. at 1019, n.9. At oral argument, even The Steel Company's counsel admitted that if Citizens for a Better Environment prevailed, the court could award the group its investigation costs as part of "costs of litigation" provided by EPCRA's citizen suit provision. See transcript of oral argument, 1997 WL 631058 (Oct. 6, 1997).

<sup>30</sup> *But see Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, 478 U.S. 546, 558 (1986), discussed in the text, *supra*. Justice Stevens pointed out that if "Section 326(f) [of EPCRA] were construed to cover the cost of the investigation that preceded the filing of respondent's complaint, even under the Court's reasoning respondent would have alleged a 'redressable injury' and would have standing." 118 S.Ct. at 1027, n. 16.

<sup>31</sup> 118 S.Ct. at 1019, citing *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990) and *Diamond v. Charles*, 476 U.S. 54, 70-71 (1986).

<sup>32</sup> The court also found plaintiff's request for a declaratory judgment that The Steel Company violated the Act was worthless, as The Steel Company admitted the violations. It found the citizens' claims for prospective injunctive relief (inspections and copies of future filings) inadequate to remedy the "past" violations that formed the basis of the complaint. The court added, however, that "[i]f respondent had alleged a continuing violation or the imminence of a future violation, the injunctive relief requested would remedy that alleged harm." 118 S.Ct. at 1019.

<sup>33</sup> 149 F.3d 303, 46 ERC 2025 (4th Cir., July 16, 1998).

ferred to as "Friends of the Earth") filed an action against Laidlaw alleging ongoing violations of the Clean Water Act.<sup>34</sup> In its complaint, Friends of the Earth sought civil penalties, injunctive and declaratory relief, and litigation costs. At trial, the district court found that Laidlaw had committed numerous violations, including post-complaint violations,<sup>35</sup> imposed a penalty of \$405,800 and stayed the time for plaintiffs' petition for attorney fees. Noting that Laidlaw had achieved substantial compliance during the suit, the district court ruled that injunctive and declaratory relief were unnecessary.<sup>36</sup> Both parties appealed the decision.

Referring to *The Steel Company*, the Fourth Circuit dismissed the case in its entirety and awarded no relief. In doing so, it expanded *The Steel Company's* ruling to a scenario in which a polluter comes into compliance after the complaint is filed but before the court's final order. The court denied all relief even though it had jurisdiction when plaintiff filed suit, at which time civil penalties and litigation costs presumably were accruing.

The court cited *The Steel Company* for the proposition that "the [plaintiffs] injury must be redressable by the relief sought."<sup>37</sup> It stated that the injury must be redressable not just at the time of the complaint, but throughout the lawsuit or the action becomes moot.<sup>38</sup> The court adopted the district court's ruling that injunctive and declaratory relief were no longer necessary in view of Laidlaw's post-complaint compliance. That left only two forms of relief sought by plaintiffs—civil penalties payable to the U.S. Treasury and litigation costs.

The court relied on *The Steel Company* to conclude that civil penalties themselves could not support standing.<sup>39</sup> With no other cognizable form of redress under Article III at the time of the final judgment, the court ruled that the district court had no jurisdiction. Disagreeing with several pre-*Steel Company* circuit court rulings, it reversed the lower court's order requiring Laidlaw to pay civil penalties.<sup>40</sup>

The court also denied all claims for costs of litigation. It ruled that because, at the time of the final order, the case was moot, plaintiffs "fail[ed] to obtain relief on

<sup>34</sup> The Clean Water Act, also known as the Federal Water Pollution Control Act, is codified at 33 U.S.C. 1251 et seq. The Clean Water Act citizen suit provision is found at 33 U.S.C. 1365.

<sup>35</sup> *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 956 F. Supp. 588, 607, n. 17, 44 ERC 1232 (D.S.C. 1997).

<sup>36</sup> *Id.* at 610. The district court ruled that Laidlaw had been in substantial compliance since August 1992, but for a few alleged violations up until 1995.

<sup>37</sup> 46 ERC 2025, 2026, citing *The Steel Company*, 118 S.Ct. at 1016-17.

<sup>38</sup> *Id.*, 46 ERC 2025, 2026, citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 117 S. Ct. 1055, 1068 (1997), and *United States Parole Comm'n v. Geraghty*, 455 U.S. 388, 397 (1980).

<sup>39</sup> *Id.*, 46 ERC 2025, 2027.

<sup>40</sup> *Atlantic States Legal Foundation Inc. v. Stroh Die Casting Co.*, 116 F.3d 814, 820, 44 ERC 1897 (7th Cir. 1997); *Natural Resources Defense Council Inc. v. Texaco Refining and Marketing Inc.*, 2 F.3d 493, 503-504, 37 ERC 1305 (3d Cir. 1993); *Atlantic States Legal Foundation Inc. v. Pan American Tanning Corp.*, 993 F.2d 1017, 1020-1021, 36 ERC 1960 (2d Cir. 1993); *Atlantic States Legal Foundation Inc. v. Tyson Foods Inc.*, 897 F.2d 1128, 1135-1136, 31 ERC 1201 (11th Cir. 1990); *Comfort Lake Association Inc. v. Dresel Contracting Inc.*, 138 F.3d 351, 356, 46 ERC 1289 (8th Cir. 1998) (dicta) (decided one day after *The Steel Company* ruling and not citing the decision); *Pawtuxet Cove Marina Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089, 1094, 25 ERC 1425 (1st Cir. 1986) (dicta).

the merits of their claims." Plaintiffs were thus not "prevailing" or "substantially prevailing" parties—a requirement for recovering litigation costs under the citizen suit provision.<sup>41</sup> The court acknowledged that the Supreme Court in *Gwaltney*<sup>42</sup> authorized an award of litigation costs when, as in *Laidlaw*, defendant "voluntarily" came into compliance after suit was filed. Nonetheless, the court stated that *Gwaltney* did not apply. It ruled that the court in *Gwaltney* never considered a 1987 Clean Water Act amendment requiring a citizen to be a prevailing or substantially prevailing party to receive its litigation costs.

### The Implications

The Supreme Court's decision strikes a blow, though not fatal, to citizen suits. Congress has authorized citizen suits for past violations under only two of the many environmental laws — the Clean Air Act,<sup>43</sup> and arguably EPCRA. With no claim of a continuing or imminent violation, EPCRA and presumably Clean Air Act<sup>44</sup> citizen suits may not, under *The Steel Company*, go forward.

After the 1987 *Gwaltney* decision, citizen suits under other environmental laws already require allegations of a continuing or imminent violation. As long as plaintiff, at the time of the complaint, alleges "a continuing violation, or the imminence of a future violation, the injunctive relief requested would remedy the alleged harm"<sup>45</sup> and the citizen group has standing. Under some environmental laws, such as the Clean Water Act and Clean Air Act, companies often are unable to remedy their violations within the notice period and before suit. Compliance frequently involves extensive expense and changes in plant operations and equipment. Under these acts, in accordance with *The Steel Company*, citizens often could allege a continuing or imminent violation and the suit could proceed to final judgment. Citizens could then presumably secure a civil penalty and collect their costs of litigation and any other necessary relief.

Laidlaw is a different story. If *Laidlaw* becomes the law of the land, in the absence of congressional action, there will be very few citizen suits. The Third Circuit, in a pre-*Steel Company* case, *Natural Resources Defense Council Inc. v. Texaco Refining and Marketing Inc.*,<sup>46</sup> explains that defendants in these actions will stall the litigation until they come into compliance.<sup>47</sup> At this

<sup>41</sup> *Id.*, 46 ERC 2025, 2027, n.4.

<sup>42</sup> 484 U.S. 49, 67 n. 6 (1987).

<sup>43</sup> The Clean Air Act's citizen suit provision allows any person to commence suit against a person "who is alleged to have violated (if there is evidence that the alleged violation has been repeated)" standards, limitations or orders under the act. 42 U.S.C. 7604(a)(1).

<sup>44</sup> The Clean Air Act authorizes district courts to order up to \$100,000 of civil penalties to "be used in beneficial mitigation projects which are consistent with this chapter and enhance the public health or the environment." 42 U.S.C. § 7604(g)(2). While no court has addressed the issue, these judicially-ordered environmental mitigation projects may redress citizens' environmental injuries sufficiently to support Article III standing. See Hecker, J., *EPCRA Citizen Suits After Steel Co. v. Citizens for a Better Environment*, 28 ELR 10306 (June 1998).

<sup>45</sup> *The Steel Company*, 118 S.Ct. at 1019.

<sup>46</sup> 2 F.3d 493, 37 ERC 1305 (3d Cir. 1993)

<sup>47</sup> *Id.*, 37 ERC 1305, 1317. Bruce Terris, the attorney for Friends of the Earth in *Laidlaw*, reiterates how the decision could eliminate many citizen suits. "The Fourth Circuit has held it doesn't matter when you bring yourself into compliance, if you string out litigation long enough, then you're home scot-free if you get yourself

point, the case could be dismissed with no penalties and no litigation costs.

A citizen suit would lose much of its effectiveness if a defendant could avoid paying any penalties by post-complaint compliance. If penalty claims could be mooted, polluters would be encouraged to "delay litigation as long as possible, knowing that they will thereby escape liability even for post-complaint violations, so long as violations have ceased at the time the suit comes to trial." Moreover, whether or not damage claims are mooted would depend on the vagaries of when the district court happens to set the case for trial. We cannot embrace a rule that would weaken the deterrent effect of the Act by diminishing incentives for the citizens to sue and encourage dilatory tactics by defendants.

While some citizen groups may continue to pursue violators, there is a significant risk under *Laidlaw*, even if the violations continue past the filing of the complaint, that the case will be dismissed. Citizen groups will have no claim for penalties or litigation costs. Defendants merely have to delay the litigation after they reach compliance for a sufficient amount of time to make injunctive and declaratory relief unnecessary. Defendants can use this tactic in every citizen suit against them. As the Seventh Circuit explained in *Citizens for a Better Environment v. The Steel Company*, private citizens will pursue actions "with little hope of recovering [their] costs through award of litigation expenses. Private enforcement . . . would undoubtedly drop off."<sup>48</sup> Citizen groups simply do not have the resources to fund litigation with virtually no hope of recovering their litigation costs. Additionally, private citizens will not achieve the deterrent effect of civil penalties. *Laidlaw* also disrupts the judicial system by encouraging stalling tactics by defendants.

### Restoring Citizens' Rights

The Supreme Court has left an opening for Congress to restore citizens' authority to pursue effectively viola-

into compliance. . . . You can imagine what's going to happen in the federal courts in these cases. One side has enormous incentive to drag out a case as long as possible. It's a decision that, if followed elsewhere, would be enormously damaging to citizen suits . . . and more important, enormously damaging to the enforcement of the statute" (29 ER 688, 7/31/98).

<sup>48</sup> *Citizens for a Better Environment v. The Steel Company*, 90 F.3d 1237 (7th Cir. 1996), vacated March 4, 1998. See note 8, *supra*.

tors of environmental laws, even for past violations. Congress could explicitly provide that citizens may recover their investigation costs. The court in *The Steel Company* agreed that "the recovery of such [investigation costs] unrelated to litigation would assuredly support Article III standing."<sup>49</sup> For instance, Congress could simply amend Section 326(f) of EPCRA by adding three words. It could authorize courts to award "investigation costs and costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party."<sup>50</sup>

Alternatively, Congress could provide citizens with a bounty, such as a portion of the civil penalties otherwise payable to the U.S. Treasury. The court in *The Steel Company* agreed that such penalties "might be viewed as a sort of compensation or redress to [the environmental group]."<sup>51</sup> For example, Congress could amend Section 326(c) of EPCRA to authorize the court to award 15 percent<sup>52</sup> of the civil penalty.<sup>53</sup>

### Conclusion

*The Steel Company* and *Laidlaw* have significantly limited citizens' authority to pursue violators of environmental laws. The Supreme Court has, however, offered a means for Congress to restore citizens rights to sue violators, even for past violations. It is up to Congress to decide the importance of citizen enforcement in achieving compliance with the nation's environmental laws.

<sup>49</sup> 118 S.Ct. at 1019. See discussion in text, *supra*.

<sup>50</sup> Section 326(f) of EPCRA, 42 U.S.C. 11046(f), now authorizes the court to award only "costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party."

<sup>51</sup> 118 S.Ct. at 1018. See also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572-73 (1992); concurring opinion of Justice Stevens, 118 S.Ct. at 1030 (quoted, *supra*).

<sup>52</sup> The False Claims Act authorizes citizens' filing *qui tam* actions to recover between 15 percent and 30 percent of the proceeds of the action or settlement, with the remainder going to the government. 31 U.S.C. 3730(d). False claims plaintiffs are also authorized to recover their expenses, attorney fees, and costs. *Id.*

<sup>53</sup> Section 326(c) of EPCRA, 42 U.S.C. 11046(c), now authorizes the court to, among other things, "impose any civil penalty provided for violation of [certain] requirements."