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Ecological Rights Found v. Pc. Lumber Co., 230 F.3d 1141 (9th Cir. 2000)

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to appeal the AO. Therefore, the court precluded Jolly from challenging the validity of the AO. The court stated Jolly's failure to exhaust his judicial review opportunities cost him consideration of his due process claims. Additionally, the preclusion of judicial review disallowed the court from considering his second issue of whether there was a genuine issue of fact as to the existence of an underground drinking water source.

The third issue Jolly raised on appeal was whether the district court abused its discretion in administering the injunction and civil penalties. Jolly argued the penalties were excessive in light of his financial hardship and history of family medical problems. He also argued the injunction was unwarranted because he did not violate UIC regulations requiring a response for information. The government stated the penalties were not an abuse of discretion given Jolly's history of noncompliance and explicit disregard of the regulations. Additionally, the government argued Jolly provided insufficient evidence to support economic hardship. The court examined the enforcement provisions of the SWDA. The SWDA provides that a violator of the UIC program may be assessed penalties of up to $25,000 a day. The provisions also state that a failure to reply to a request for information could result in an injunction. Jolly claimed he never received the information request. EPA presented evidence that they attempted to deliver the information. Federal Express returned letters sent to Jolly's and SI's listed addresses as undeliverable. However, EPA successfully sent a fax to Jolly and received a fax confirmation. The court therefore presumed Jolly received the request and did not respond.

The appellate court next examined the factors considered in assessing a civil penalty for violations of an AO. These factors included: 1) the seriousness of the violation; 2) the economic benefit resulting from the violation; 3) history of violations; 4) good faith efforts to comply; and 5) the economic impact of the penalty on the violator. The court affirmed the district court's assessment of penalties. The court found Jolly's history of bad-faith noncompliance in excess of seven years, his refusal to accept notices, his avoidance of liability through the transfer of assets from JAF to SI, and the seriousness of the violations were well within the discretion of the lower court's issuance of penalties.

Jon Hyman

NINTH CIRCUIT

Ecological Rights Found. v. Pac. Lumber Co., 230 F.3d 1141 (9th Cir. 2000) (holding environmental organizations' members showed sufficient injury-in-fact to confer Article III standing on the organizations to survive summary judgment on the standing issue).

Ecological Rights Foundation ("ERF") and Mateel Environmental Justice Foundation ("Mateel") (collectively, "environmental organizations") sued Pacific Lumber Co. ("Pacific Lumber") pursuant to the Clean Water Act ("CWA") citizen suit provision for violating its 1992 and 1997 General Permits. The district court granted Pacific Lumber's summary judgment motion on the ground that the environmental organizations lacked standing to sue. The environmental organizations appealed the standing ruling. The United States Court of Appeals for the Ninth Circuit concluded the district court's approach to standing was not consistent with *Friends of the Earth v. Laidlaw*, which was decided after the district court judgment. Accordingly, the Ninth Circuit found the environmental organizations had Article III standing.

Pacific Lumber operated two facilities, Yager Camp and the Carlotta sawmill, in Humboldt County, California. Yager Creek flowed through Yager Camp, a 150-acre site that included a truck wash operation, a composting area, and log storage decks. The sawmill, located downstream of Yager Camp, occupied approximately seventy acres and included truck shops, an aggregate crusher, and log storage decks. Yager Creek flowed into the Van Duzen River, which emptied into the Eel River, which in turn emptied into the Pacific Ocean about twelve miles from Pacific Lumber's facilities. The facilities were subject to the CWA and compliance with the 1992 and 1997 General Permits, which regulated pollutant discharges into California's waters.

Members of ERF and Mateel used Yager Creek for recreation. In particular, two individuals, Christopher Hinderyckx, a Mateel member, and Frederic Evenson, an ERF member, used Yager Creek for recreational activities, such as swimming, snorkeling, and fishing. However, they alleged possible pollutant discharges from the Pacific Lumber facilities impaired their enjoyment and continued use of the creek.

The environmental organizations' standing depended upon whether Hinderyckx and Evenson could allege an "injury in fact" that would give them standing in their own individual right. The district court found the members' contacts with Yager Creek too sporadic and attenuated. Furthermore, the district court found that none of the environmental organizations' affiants lived sufficiently near the creek or regularly used the creek for recreational or aesthetic purposes. The environmental organizations appealed. On review, the Ninth Circuit rejected such an inflexible approach based on *Laidlaw*.

The Ninth Circuit noted that *Laidlaw* involved a similar citizen suit under the CWA. In *Laidlaw*, several environmental organizations brought suit, alleging violation of a National Pollution Discharge Elimination System permit at a Laidlaw Environmental Services ("Laidlaw") hazardous waste incinerator on the banks of South Carolina's North Tyger River. Several of the plaintiff organizations' members filed declarations detailing the injury they had or would suffer because of suspected river pollution. While some of the members lived within two miles of the incinerator, another lived

twenty miles away. Some members indicated they had used the river for recreational purposes, while Laidlaw's alleged pollutant discharge deterred others from such activities. The United States Supreme Court held these individuals had stated injuries to their aesthetic and recreational interests sufficiently specific enough to allow standing.

Accordingly, the Ninth Circuit recognized that, under *Laidlaw*, individuals could establish "injury in fact" by showing that their aesthetic or recreational enjoyment would suffer if the area became environmentally degraded, without demonstrating that they live within some geographical proximity. The Ninth Circuit stated this flexible approach was the only approach consistent with the nature of the aesthetic and recreational interests that typically provided the basis for standing in environmental cases.

In response, Pacific Lumber alternatively argued that the environmental organizations lacked standing because they demonstrated neither actual environmental harm to Yager Creek nor the company caused any such harm. However, the Ninth Circuit declared that the district court correctly recognized the threshold question concerning citizen standing under the CWA, which was whether an individual could show she had been injured due to concerns about environmental law violations, not whether she could show that actual environmental harm existed. The Ninth Circuit pointed out that a CWA citizen suit did not need to prove harm because any violation, even those that were purely procedural, was subject to suit. Requiring a plaintiff to demonstrate actual environmental harm in order to obtain standing would compel a plaintiff to prove more to show standing than she would have to prove to succeed on the merits.

Thus, the Ninth Circuit reversed the district court and held the environmental organizations had standing to sue.

John A. Helfrich

Natural Res. Def. Council v. S.W. Marine, Inc., 236 F.3d 985 (9th Cir. 2000) (finding (1) Natural Resources Defense Council had standing and gave proper notice to Southwest Marine pursuant to the Clean Water Act; (2) Southwest Marine committed continuing violations; and (3) proper remedies against Southwest Marine included an injunction and civil penalties).

Southwest Marine operated a shipyard on San Diego Bay. In order to repaint ships, Southwest Marine first blasted off the old paint with copper particles. Then they repainted the ships with a paint containing compounds toxic to aquatic marine life. Southwest Marine then discharged the waste from the repainting procedure into adjacent water. Studies of the adjacent water indicated it contained a high level of the same materials found in the waste. Southwest Marine held permits for pollutant discharge and storm water runoff from