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Natural Res. Def. Council v. S.W. Marine, Inc., 236 F.3d 985 (9th Cir. 2000)

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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

California's Regional Water Quality Control Board and State Water Resources Control Board. To obtain the permits, California required that Southwest Marine create and implement plans limiting the pollutant discharge into the surrounding water.

Natural Resources Defense Council ("NRDC"), among others, sought an injunction to force Southwest Marine to prepare adequate plans and comply with its plans and permits. More than sixty days prior to filing its suit, NRDC sent a notice letter to Southwest Marine. After receiving the notice letter, but before NRDC filed its complaint, Southwest Marine revised its plans. The United States District Court for the Southern District of California issued an injunction and civil penalties against Southwest Marine. Southwest Marine appealed that decision and contested the court's jurisdiction based on NRDC's lack of standing, inadequate notice, and an erroneous finding of ongoing violations. The Court of Appeals for the Ninth Circuit affirmed.

The court of appeals first determined NRDC met the standing requirements to gain standing under the Clean Water Act's ("CWA") citizen enforcement provision. The court recognized an association had standing to sue on behalf of its members, where members otherwise had individual standing and the organization's interests are germane to the purpose. First, NRDC demonstrated an injury in fact existed because its members used the affected area, and the CWA violation lessened the area's aesthetic and recreational value. Second, the injury was traceable to the violation, since a causal connection existed between the discharged waste and the absence of marine life in the area around the shipyard. Finally, the injury was redressable. To establish redressability when seeking injunctive relief, a plaintiff must show continuing violations. The court found NRDC had adequately established continuing violations by Southwest Marine. Therefore, the court concluded NRDC had standing.

The court of appeals next considered the district court's jurisdiction. The court noted that in order to obtain subject matter jurisdiction pursuant to the CWA, a plaintiff must give notice to an alleged violator. Notice must be sufficiently specific to inform the alleged violator of the wrong, so the violator can take corrective actions to avoid a lawsuit. NRDC argued its notice focused on Southwest Marine's failure to prepare and implement adequate plans. Southwest Marine argued NRDC did not refer to a specific provision in the plan. However, the court noted Southwest Marine added specific provisions to its plan only after it received the notice letter. The court held the CWA did not require NRDC reference a specific provision that did not exist at the time it gave notice. Therefore, the court found the notice was sufficiently specific.

Southwest Marine also argued the alterations it made following the receipt of the notice rendered the notice inadequate. However, the court concluded the notice was adequate as of the date it was given to the violator. The court reasoned that an otherwise proper notice letter was not defective when a defendant subsequently prepares a new plan. The court held the notice was adequate, although Southwest

Marine altered its plans subsequent to the notice. Therefore, the court concluded the district court possessed subject matter jurisdiction over NRDC's citizen enforcement suit.

The court of appeals then considered another aspect of the district court's subject matter jurisdiction—continuing violations. The Ninth Circuit stated that a court has jurisdiction over citizen suits where a plaintiff makes a good-faith allegation of continuous or intermittent violations. To establish a good-faith allegation, a plaintiff must prove either that violations continued after the filing of a complaint or a continuing likelihood of recurrence existed. Moreover, the court explained that such violations were ongoing until no real likelihood of repetition existed. The Ninth Circuit noted that the district court found Southwest Marine neither made inspections nor kept inspection records. Also, the district court concluded Southwest Marine maintained poor housekeeping during the action. As the district court's findings of fact were not clearly erroneous, the appellate court upheld both the district court's determination that ongoing violations occurred and its jurisdiction.

Furthermore, the court of appeals found the district court's injunction against Southwest Marine was proper. Southwest Marine argued the injunction constituted an abuse of discretion because requirements in the injunction were not contained in either the permits or the plans. The court of appeals declared the district court had broad latitude in fashioning equitable relief. While the district court could enforce violated standards, it could not impose measures that were either wholly unrelated to the violation or would override the permit's terms. The court concluded the requirements imposed by the district court were consistent with and complementary to the existing requirements.

Finally, the Ninth Circuit found the civil penalties imposed against Southwest Marine were not excessive. The appellate court noted that once a court concluded a CWA violation existed, civil penalties were mandatory. Therefore, the district court properly considered the offense's seriousness, the violation's benefits, any history of violations, good faith efforts, and the possible effect of the penalty before it imposed a fine of \$1,000 per day of violation. The court also noted that the district court found Southwest Marine could offset the penalty by the cost of physical alterations. Because the civil penalty could be zero, the Ninth Circuit concluded the penalties were not excessive.

Sara Wagers

United States v. Muckleshoot Indian Tribe, 235 F.3d 429 (9th Cir. 2000) (holding incidental or occasional fishing by an Indian tribe's ancestors did not meet the "usual and accustomed" standard to establish fishing rights under treaty provisions).