

USALSA Report

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Environmental Law Division Notes

Case Law

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Land Use Controls and Federal Common Law in Real Property Transfers

Introduction

A question has arisen regarding whether federal case law could be read to find a federal property right sufficiently strong to supersede traditional state common law rules in the area of land use controls (LUCs). Specifically, in states that have not enacted statutes in the area of land use controls, there is some support for the notion that federal property interests could be used to enforce LUCs, even though under traditional state law the LUC (likely a deed restriction on future use of the land) would not be enforceable. The lack of enforceability would be predicated upon the fact that the covenant did not run with the land¹ in a transfer to a subsequent transferee, and upon the basis that an equitable servitude² was not recognized in that particular state.

There are three federal cases in this area that could lend support to the position that federal property law interests trump state property law based in common law in the area of land use.

*United States v. Little Lake Misere Land Company*³

In this case, the U.S. Supreme Court considered the question of whether a Louisiana statute which had the effect of making a reservation of mineral rights “imprescriptible” with respect to lands acquired by the United States subject to reservations was properly applied. Pursuant to the Migratory Bird Conservation Act,⁴ the United States acquired two parcels of land in Louisiana, one by deed in 1937 and one by condemnation in 1939.⁵ Both the deed and condemnation judgment reserved oil, gas, sulfur, and other mineral rights to the Little Lake Misere Land Company for a period of ten years.⁶ At the end of ten years (assuming other conditions had not been met), the reserved rights would terminate, and complete fee title would become vested in the United States.⁷ The parties stipulated that the fee title ripened ten years from the date of creation of the rights.⁸ Little Lake relied upon Louisiana Act 315 of 1940 (Louisiana Act)⁹ in continuing to claim its mineral rights. Little Lake claimed that the Louisiana Act rendered inoperative the conditions set forth in the deed and judgment for the extinguishment of the reservations.¹⁰ In reversing the federal district court and

1. A “covenant running with the land” is a covenant that is annexed to the estate, and which cannot be separated from the land and transferred without it. Essentials of a covenant running with the land are that the grantor and grantee must have intended that the covenant run with the land, that the covenant must effect or concern the land with which it runs, and that there must be privity of estate between the party claiming the benefit and the party who rests under the burden. BLACK’S LAW DICTIONARY 329 (5th ed.) (citing *Greenspan v. Rehberg*, 224 N.W. 2d 67, 73 (Mich. Ct. App. 1974)).

2. An equitable servitude is “[a] restriction on the use of land enforceable in court of equity. It is broader than a covenant running with the land because it is an interest in land.” BLACK’S LAW DICTIONARY 484 (5th ed.).

3. 412 U.S. 580 (1973).

4. Migratory Bird Conservation Act, 16 U.S.C.S. § 715 (LEXIS 2000).

5. *Little Lake Misere*, 412 U.S. at 582.

6. *Id.*

7. *Id.* at 583.

8. *Id.* at 584.

9. Louisiana Act 315 of 1940, LA. REV. STAT. ANN. § 9:5806 A (West Supp. 1973). The Act provides:

When land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America, or any of its subdivisions or agencies from any person, firm or corporation, and by the act of acquisition, order or judgment, oil, gas or other minerals or royalties are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas or other minerals or royalties, still in force and effect, the rights so reserved or previously sold shall be imprescriptible.

Id.

the Fifth Circuit, the U.S. Supreme Court held that the federal land interests were not necessarily defined by state law, and that the Louisiana Act does not apply to the mineral reservations agreed to by the parties.¹¹ The Court ruled that since the land acquisition agreement was explicitly authorized, though not precisely governed by, the Migratory Bird Conservation Act, and because the United States was a party to the agreement, it would be construed by federal law.¹² The Court ruled that the Louisiana law would not be borrowed in this case because it was plainly hostile to the interests of the United States.¹³ Finally, the Court held that the terms of the agreements were unequivocal regarding the termination of the reservations.¹⁴ In a telling passage, the court stated:

To permit state abrogation of the explicit terms of a federal land acquisition would deal a serious blow to the congressional scheme contemplated by the Migratory Bird Conservation Act and indeed all other federal land acquisition programs. These programs are national in scope. They anticipate acute and active bargaining by officials of the United States charged with making the best possible use of limited federal conservation appropriations. Certainty and finality are indispensable in any land transaction, but they are especially critical when, as here, the federal officials carrying out the mandate of Congress irrevocably commit scarce funds.¹⁵

Equally noteworthy in this case is the fact that the Court rejected the government's argument that "virtually without qualification . . . land acquisition agreements of the United States should be governed by federally created federal law."¹⁶

In this case, the principle set out in *Little Lake Misere* was extended. In *Albrecht*, the Eighth Circuit affirmed a district court's decision ordering a farmer to restore drainage ditches on his land and permanently enjoining further drainage of potholes on the land.¹⁸ The issue arose from a waterfowl easement to the United States Fish and Wildlife Service (USFWS), which included a prohibition against draining prairie potholes on the land.¹⁹ The USFWS discovered through aerial surveillance that ditching was present on the land in violation of the terms of the easement.²⁰ The defendant argued that North Dakota law did not recognize waterfowl easements, and that the easement was therefore invalid.²¹ Relying on *Little Lake Misere*, the court stated:

[U]nder the context of this case, while the determination of North Dakota law in regard to the validity of the property right conveyed to the United States would be useful, it is not controlling, particularly if viewed as aberrant or hostile to federal property rights. Assuming *arguendo* that North Dakota law would not permit the conveyance of the right to the United States in this case, the specific federal governmental interest in acquiring rights to property for waterfowl production areas is stronger than any possible "aberrant" or "hostile" North Dakota law that would preclude the conveyance granted in this case. *Little Lake*, supra at 595, 596. We fully recognize that laws of real property are usually governed by the particular states; yet the reasonable property right conveyed to the United States in this case effectuates an important national concern, the acquisition of necessary land for waterfowl production

10. *Little Lake Misere*, 412 U.S. at 584.

11. *Id.* at 590-604.

12. *Id.* at 590-93.

13. *Id.* at 594-97.

14. *Id.* at 604.

15. *Id.* at 597.

16. *Id.* at 595.

17. 496 F.2d 906 (8th Cir. 1974).

18. *Id.* at 912.

19. *Id.* at 908.

20. *Id.* at 909.

21. *Id.*

areas, and should not be defeated by any possible North Dakota law barring the conveyance of this property right. To hold otherwise would be to permit the possibility that states could rely on local property laws to defeat the acquisition of reasonable rights to their citizens' property pursuant to 16 U.S.C § 718d(c) and to destroy a national program of acquiring property to aid in the breeding of migratory birds. We, therefore, specifically hold that the property right conveyed to the United States in this case, whether or not deemed a valid easement or other property right under North Dakota law, was a valid conveyance under federal law and vested in the United States the rights as stated therein. Section 718d(c) specifically allows the United States to acquire wetland and pothole areas and the "interests therein."²²

*North Dakota v. United States*²³

This case also dealt with federal acquisition of waterfowl easements. Section 3 of the Wetlands Loan Act of 1961²⁴ provided for state governor approval of waterfowl habitats. Between 1961 and 1977, the governors of North Dakota consented to the acquisition of easements covering approximately 1.5 million acres of wetlands in North Dakota.²⁵ In the mid-1970s, cooperation between the state and federal government began to break down.²⁶ In 1977, North Dakota enacted statutes restricting the ability of the United States to acquire easements over wetlands, permitting landowners to drain wetlands created after the negotiation of the waterfowl easements, and limiting the maximum terms of easements to ninety-nine years.²⁷ The Court ruled that gubernatorial consent could not be revoked at will, as nothing in the federal legislation authorized the withdrawal of approval previously given.²⁸ Citing to *Little Lake Misere*, the Court further ruled that the state law provisions authorizing the drainage of after-created wetlands and limiting the terms of easements to ninety-nine years were hostile to federal interests and may not be applied.²⁹ The Court stated, "The

United States is authorized to incorporate into easement agreements such rules and regulations as the Secretary of the Interior deems necessary for the protection of wildlife, 16 U.S.C § 715e, and these rules and regulations may include restrictions on land outside the legal description of the easement."³⁰

Application to U.S. Army Land Use Controls

The cases set out above arguably establish a federal position of strength in those states where land use controls are difficult to enforce under traditional common law property doctrines. The position that federal interests would be viewed as superior to aberrant or hostile state laws could certainly be argued in an attempt to enforce land use controls against subsequent transferees. It appears, however, that there are factors that distinguish the rule of the above cases from the scenario with which the Army may find itself faced in the enforcement of land use controls.

The paramount limiting factor of the above cases is that the federal courts were deciding state-federal disputes in which federal action was backed by specific federal law (Migratory Bird laws) authorizing the United States to acquire wetlands and the "rights therein." State legislation was then passed to specifically undermine the federal interests as enunciated in the statutes. Under these circumstances, the federal courts were willing to elevate the federal interest over the state interest.

In the context of land use controls, we are dealing with a situation in which there really is no federal law authorizing or encouraging the creation of federal rights. The Army could argue that the purposes of human health and environmental protection under environmental statutes provide a federal interest akin to the federal interests in land acquisition in the above cases. The states could counter, however, that outside of the environmental statutes, public health and safety and traditional police powers are local in nature. In addition, real property law is a traditional area of state law preeminence. Rather than the existence of state laws hostile to federal interests, we are most concerned with the absence of state law in the area of LUCs that

22. *Id.* at 911.

23. 460 U.S. 300 (1983).

24. Pub. L. No. 87-883, 75 Stat. 813 (1961).

25. *North Dakota*, 460 U.S. at 305.

26. *Id.* at 306.

27. *Id.* at 306-08.

28. *Id.* at 312-16.

29. *Id.* at 316-20.

30. *Id.* at 319.

potentially impedes the future enforcement of LUCs. This situation is distinguishable from the case law described above.

Based upon the foregoing, it is recommended that the *Little Lake Misere* line of cases be used as a fallback position should traditional state law enforcement mechanisms fail in future attempts to enforce LUCs. Working within existing state property laws is a more reasonable approach in light of an analysis of the case law and its application to situations we are likely to face in the transfer of Army properties. Major Tozzi.

Friends of the Earth Has Friends at the Court

On 12 January 2000, the Supreme Court decided the latest in a series of significant environmental standing cases.³¹ In *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, the Court addressed constitutional article III standing requirements, deciding that citizen-suit plaintiffs have standing to bring an action for civil penalties payable to the United States Treasury. The seven-to-two majority, however, remanded the case, directing the lower courts to decide whether the case was now moot, the basis upon which the Fourth Circuit had dismissed the action.³² The decision in this closely watched case arguably lowers the standard of proof for environmental plaintiffs in pursuing citizen suits to enforce environmental laws.

The state of South Carolina issued a National Pollution Discharge Elimination System (NPDES) permit to Laidlaw shortly after Laidlaw bought a hazardous waste incineration facility in that state in 1986. The permit allowed Laidlaw to discharge wastewater into the North Tyger River, subject to effluent limitations on specified pollutants. Laidlaw exceeded permit limits almost 500 times between 1987 and 1995.

Friends of the Earth³³ properly gave sixty-days' notice to Laidlaw, the EPA, and the state of its intent to file a citizen suit to enforce the effluent limitations in Laidlaw's permit.³⁴ In response, Laidlaw invited South Carolina to sue it, drafted a complaint for the state, and reached a settlement with regulators on the fifty-ninth day of the sixty-day notice period. The settlement required Laidlaw to pay a \$100,000 penalty, and to promise to make "every effort" to comply with the permit.

Before the district court, Laidlaw challenged the plaintiffs' standing to sue, and argued that the state's "diligent prosecution" precluded further citizen enforcement.³⁵ The district court denied both motions, finding that plaintiffs proved standing "by the slimmest of margins" and that the state's enforcement was not "diligent prosecution."

Five years later, the district court rendered final judgment, making several critical findings. First, the district court found that Laidlaw had violated its NPDES permit thirty-six times between the start of the lawsuit and the final judgment. Second, Laidlaw had enjoyed \$1,092,581 in economic benefits through its pattern of non-compliance before the suit was brought. Third, Laidlaw's permit violations did not harm the environment or human health. Fourth, notwithstanding the thirty-six violations, Laidlaw had been in substantial compliance with its permit since 1992. As a consequence of this last finding, the court denied plaintiffs' prayer for injunctive relief. Instead, it imposed \$405,800 in civil fines to be paid to the United States Treasury, an appropriate amount, the trial court felt, given its "total deterrent effect."

Friends of the Earth appealed to the Fourth Circuit, contending that the civil fine was inadequate. It did not appeal the denial of injunctive relief. *Laidlaw*, in turn, cross appealed and pressed its position that the plaintiffs lacked standing and that the action was barred by South Carolina's diligent prosecution.

In an unusual twist, the Fourth Circuit assumed that plaintiffs had standing, but dismissed the case for mootness. The Fourth Circuit reasoned that a plaintiff must maintain the three elements of standing throughout the litigation, or else the case becomes moot. The court observed that civil penalties were "the only remedy currently available" because the district court declined to grant injunctive relief. It concluded that civil penalties paid to the United States would not redress plaintiffs' claimed injury, and that plaintiffs' case was moot. Once again, *Friends of the Earth* sought review, and the Supreme Court granted certiorari.

Justice Ginsburg wrote the majority opinion for the Supreme Court. After reviewing the procedural history of the case, her opinion undertook the standing analysis the Fourth Circuit had assumed away. Because standing must be found in every federal case, Justice Ginsburg analyzed standing on the record available to the district court.

31. *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 120 S. Ct. 696 (2000). In 1998, the Court decided *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998) (finding no standing for citizens seeking civil penalties for wholly past violations of the Emergency Planning and Community Right to Know Act); and in 1997, the Court in *Bennett v. Spear* (520 U.S. 154 (1997)) found that ranchers had standing, under the prudential "zone of interests" test to challenge Fish and Wildlife Service's biological opinion proposing restricted use of reservoir water in order to protect endangered sucker fish.

32. *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 149 F.3d 303 (4th Cir. 1998).

33. Citizens Local Environmental Action Network (CLEAN) and the Sierra Club also joined as plaintiffs.

34. 33 U.S.C.S. § 1365(b)(1)(A) (LEXIS 2000).

35. *Id.* § 1365(b)(1)(B).

In federal courts, the concept of standing has a well-settled constitutional basis, firmly rooted in the so-called “case or controversy” requirements of article III, section 2 of the U.S. Constitution.³⁶ To prove standing to sue, a plaintiff must show three elements: injury in fact; causation; and redressability. Injury in fact is harm that is real and concrete, not merely speculative or conjectural. Causation requires a reasonable nexus between the action or inaction of the defendant and the claimed injury. To show redressability, a plaintiff must show that some relief the court might award would rectify plaintiff’s harm.³⁷

Federal courts have recognized that harm to recreational and aesthetic interests can suffice to show standing since at least the case of *Sierra Club v. Morton*.³⁸ In this case, the Court agreed that the record, largely in the form of affidavits, showed generally that plaintiffs were “concerned” with the pollution from Laidlaw’s facility and avoided using the river into which it discharged its waste water. There was also evidence that one plaintiff “believed” that pollution discharge accounted for the low value of her home relative to similar homes more distant from Laidlaw’s facility. Laidlaw countered that the district court specifically found that none of Laidlaw’s discharges had harmed the environment and therefore could not have caused the injury plaintiffs claimed. The Court, however, distinguished between a showing of harm to the environment and harm to the plaintiffs’ interests. Here, although the defendant’s discharges did no harm to the environment, the plaintiffs’ “reasonable concerns” about those discharges directly affected their enjoyment of the surrounding area, and led them to avoid use of the North Tyger River.

Justice Ginsburg next discussed the redressability requirement in the context of civil penalties.³⁹ Laidlaw argued that civil penalties paid to the United States Treasury could not redress the plaintiffs’ claimed loss of aesthetic and recreational enjoyment or any possible economic harm. The majority disagreed, reasoning that the deterrent effect of a civil penalty would redress plaintiffs’ injury by making the defendant more likely to meet its permit limitations in the future, resulting in a cleaner river and environment.

Having found standing, the majority turned its attention to the issue the Fourth Circuit found dispositive: whether Laidlaw’s voluntary conduct—compliance with its permit after the suit was filed or closing the waste incineration plant altogether—rendered the case moot. Here, Justice Ginsburg sympathized with the Fourth Circuit’s erroneous application of the Court’s past treatment of the mootness doctrine. In the past, the Court had seemingly equated mootness with “the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).”⁴⁰ The majority here, however, held that the correct standard for determining when a defendant’s voluntary conduct renders a case moot is not merely whether the elements of standing are met throughout the litigation. Rather, the test in such a case is whether “it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur”—a test Justice Ginsburg describes as a “formidable burden.”⁴¹

Having properly framed the mootness inquiry, the Court remanded the case. On remand, the parties are free to dispute whether it is absolutely clear that Laidlaw’s permit violations are not likely to recur, either because of its voluntary compliance, or because the facility is no longer operating. If so, then the case has been mooted, and presumably subject to dismissal.

Justice Scalia saw in all of this the impending collapse of democratic government. In Scalia’s view, article III is an appropriate starting point for standing analysis, but its three-part test should not have ended the inquiry. The dissent disapproved of citizen suits in general, and suggested that they run afoul of article II, section 3 of the Constitution. That provision directs the President to “take Care that the laws be faithfully executed.” Because this issue was not considered in the lower courts and was not briefed or argued, however, Justice Scalia did not focus on it in his dissent.⁴²

Instead, Justice Scalia analyzed the record using the same three part article III test that Justice Ginsburg applied. He arrived at several very different conclusions. First, he dis-

36. In fact, that section does not address “cases or controversies” in so many words. The relevant text states that:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority ; to all Cases affecting Ambassadors, other public ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2.

37. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83 (1998).

38. 405 U.S. 727, 735 (1972).

39. All parties agreed that a plaintiff must demonstrate standing with respect to each type of relief it seeks.

40. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 (1997).

41. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 120 S. Ct. 696, 709 (2000).

agreed that the plaintiffs' affidavits showed cognizable injury in fact. The "concern" they showed for the environment falls short of real injury and was based on the type of contradictory, unsubstantiated, conclusory allegations the Court had rejected in a previous standing case.⁴³ Justice Scalia concluded that a "concern for the environment" standard is a sham that will confer standing any time there is a permit violation.

Justice Scalia was no more convinced by the Court's redressability analysis, which he called "equally cavalier" to its consideration of the injury in fact question. To begin with, the Court had recently held that civil penalties could not redress citizen injury for past violations of environmental laws.⁴⁴ Furthermore, in Scalia's view, the deterrent effect of civil penalties in general is speculative, because past Supreme Court cases found no "logical nexus" between the threat of enforcement action and future compliance with various laws. He went on to analyze the lack of evidence that the specific penalty in this case would serve as a deterrent sufficient to redress plaintiffs' injuries, and concluded that the redressability test was not met.

This case leaves several unanswered questions, and could have serious consequences. First, what effect would a finding of mootness on remand have on the civil penalty imposed by the district court? Justice Stevens's concurring opinion expresses his view that the penalty should stand, whether or not the case became moot at some point. The majority opinion is silent on this issue. Second, the Court still has not squarely addressed Justice Scalia's argument that citizen suit provisions may run afoul of the "take care" clause of article II. Justice Kennedy's concurrence indicates that he is sympathetic with those concerns. Finally, the dissent raises legitimate concerns for the effect the Court's opinion will have on the law of standing. At the core, standing requirements are a limit on judicial power—recognizing that courts are best suited to resolve concrete disputes between interested parties with something real at stake. By finding that payment of civil penalties to the United States somehow offers "redress" for citizens' "concerns" for the environment, the Court effectively empowers those citizens

to usurp the government's enforcement prerogative. Because of the Court's willingness in this case to find injury in fact on such a scant record, it is very likely that more citizens will pursue citizen suits more vigorously. Lieutenant Colonel Connelly.

Fourth Circuit Cites *Laidlaw* to Lay Law Down

The U.S. Court of Appeals for the Fourth Circuit, sitting *en banc*, recently reversed its earlier decision in a Clean Water citizen suit. Citing the Supreme Court's recent *Laidlaw* case, the court of appeals found in *Friends of the Earth v. Gaston Copper Recycling Corporation*⁴⁵ that at least one of the citizens involved had jurisprudential standing to pursue the case.

Gaston Copper operated a smelting facility in South Carolina and was subject to a Clean Water Act National Pollution Discharge Elimination System (NPDES) permit.⁴⁶ The company's discharges frequently exceeded the limits in the permits.

Two environmental groups sued Gaston Copper under the citizens' suit provision of the Clean Water Act, which states that "any citizen may commence a civil action on his own behalf against any person . . . who is alleged to be in violation of an effluent standard or limitation under this chapter."⁴⁷ This includes violations of NPDES permits. The act defines "citizen" as "a person or persons having an interest which is or may be adversely affected."⁴⁸ Congress intended that this provision confer standing to the full extent allowed by the Constitution.⁴⁹

One plaintiff group member was Mr. Shealy. He lived next to a pond four miles downstream from the Gaston plant. He stated that the pollution or threat of pollution from Gaston had made his family curtail its fishing and swimming activities because of fear of the adverse effects the pollutants could cause. The district court dismissed the suit after a six-day trial, finding that none of the plaintiffs' members had standing because they had not shown "injury in fact."⁵⁰ The district court pointed to the absence of certain types of evidence: "No evidence was

42. Justice Kennedy wrote a separate concurrence expressing the same reservations about citizen suits, choosing to reserve judgment for another day and another case. *Id.* at 713.

43. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 888 (1990).

44. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998).

45. 204 F.3d 149 (4th Cir. 2000).

46. National Pollution Discharge Elimination System, Clean Water Act § 402, 33 U.S.C.S. § 1342 (LEXIS 2000).

47. *Id.* § 1365(a).

48. *Id.* §1365(g).

49. *See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 16, (1981) (citing S. CONF. REP. NO. 92-1236, at 146, *reprinted in* 1972 U.S.C.A.N. 3776, 3823).

50. *Friends of the Earth v. Gaston Copper Recycling Corp.*, 9 F. Supp. 2d 589 (D. S.C. 1998).

presented concerning the chemical content of the waterways affected by the defendant's facility. No evidence of any increase in the salinity of the waterways, or any other negative change in the ecosystem of the waterway was presented."⁵¹ The original panel of the court of appeals upheld this decision.⁵²

The *en banc* court began its discussion by setting out the article III constitutional minimum for standing: a plaintiff must allege (1) injury in fact; (2) traceability; and (3) redressability. The injury in fact prong requires that a plaintiff suffer an invasion of a legally protected interest which is concrete and particularized, as well as actual or imminent. The traceability prong means it must be likely that the injury was caused by the conduct complained of, and not by the independent action of some third party not before the court. Finally, under the redressability prong, it must be likely, and not merely speculative, that a favorable decision will remedy the injury.⁵³ The court also noted that the Supreme Court in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.* had recently held that an effect on "recreational, aesthetic, and economic interests" is cognizable injury for purposes of standing.⁵⁴

Examining the status of Mr. Shealy, the court of appeals found that he had produced evidence of actual or threatened injury to a waterway in which he had a legally protected interest. In fact, Shealy alleged precisely those types of threats to swimming and fishing that Congress intended to prevent by enacting the Clean Water Act.⁵⁵ The court continued:

Shealy is thus anything but a roving environmental ombudsman seeking to right environmental wrongs wherever he might find them. He is a real person who owns a real home and lake in close proximity to Gaston Copper. These facts unquestionably differentiate Shealy from the general public. The company's discharge violations affect the concrete, particularized legal rights of this specific citizen. He brings this suit to vindicate his private interests in his and his fam-

ily's well-being—not some ethereal public interest. We in turn are presented with an issue "traditionally thought to be capable of resolution through the judicial process."⁵⁶

Regarding the district court's requirement of actual evidence of damage to the water, the court found that this would eliminate claims of those who were directly threatened but not yet engulfed by the unlawful discharge. Shealy's reasonable fear and concern were sufficient; he did not have to wait for his lake to become barren. The court also noted that the Supreme Court did not require actual damage in *Laidlaw*.⁵⁷

Having found injury in fact,⁵⁸ the court also found that the injury was "fairly traceable" to Gaston Copper. Plaintiffs had produced evidence to show that Shealy's lake was within the range of the discharge. The court concluded that the injury was redressable by the court, especially since Gaston Copper's violations continued throughout the period of the litigation.

Interestingly, the court found not only that article III did not require rejection of Shealy's claims, but also that the Constitution's separation of powers structure *prohibited* it. To bar the suit would undermine the citizen suit provision of the Clean Water Act. This, in turn, would undermine Congress, and "separation of powers will not countenance it."⁵⁹

Army lawyers must still examine citizen suit claims carefully to determine whether plaintiffs or members of plaintiff organizations have standing. To the extent standing requirements may have been tightened under the original *Gaston Copper* decision, they have now been loosened again under *Laidlaw*. Lieutenant Colonel Howlett.

Where Does TSCA End and CERCLA Begin? *Be All That You Can PCB*

Question: When can a polychlorinated biphenyls (PBC)⁶⁰ cleanup be handled under the risk-based approach of the Comprehensive Environmental Response, Compensation, and Lia-

51. *Id.* at 600.

52. *Friends of the Earth v. Gaston Copper Recycling Corp.*, 179 F.3d 107 (4th Cir. 1999).

53. *Friends of the Earth v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 154 (4th Cir. 2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

54. *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 120 S. Ct. 693, 705 (2000). The concurring opinions to the court of appeals case under discussion argue that the *Laidlaw* decision itself, rather than preexisting jurisprudence, required reversal.

55. *Gaston Copper Recycling Corp.*, 204 F.3d. at 156. See 33 U.S.C.S. § 1251(a)(2) (LEXIS 2000).

56. *Gaston Copper Recycling Corp.*, 204 F.3d. at 156-57.

57. *Laidlaw*, 120 S.Ct. at 705.

58. The Court of Appeals remanded the case to the district court to determine "injury in fact" in the light of *Laidlaw*.

59. *Gaston Copper Recycling Corp.*, 204 F.3d. at 161.

bility Act⁶¹ (CERCLA), instead of the Toxic Substances Control Act's⁶² (TSCA) numerical cleanup standards?

Why Think About This: The CERCLA promotes the notion that cleanup standards should be based on risk and site-by-site assessments. The TSCA invokes the idea of numerical standards—clean to a certain level, unless there is a reason not to. So, suppose you are in the midst of a CERCLA cleanup and among the types of contamination to be addressed are PCBs. Which approach do you take—the risk-based CERCLA option, or a blanket application of the TSCA's numerical standards?

The answer will depend on the facts of the cleanup. Should you have the proper type of site—say, one with little likelihood of residual environmental impact—the Environmental Protection Agency (EPA) may permit a CERCLA-esque risk-based approach. Because your decision will be fact driven, the following background information will assist you in determining the appropriate course of action.

TSCA and PCBs

The scope of the TSCA and its definitions is extraordinarily broad.⁶³ The bulk of the TSCA's key requirements apply to persons who manufacture and process chemical substances that are distributed into commerce. The TSCA section 2605 authorizes EPA to prohibit or limit the manufacture, processing, distribution, use, or disposal of chemical substances found to present an

unreasonable risk of injury to health or the environment. The EPA has sought to expand its authority to regulate specific substances, such as PCBs. In particular, the TSCA section 2605(e)(1) requires that the EPA Administrator promulgate rules for the disposal of PCBs, which led to the development of the PCB Mega Rule.⁶⁴ Note that although the TSCA does not generally apply to federal agencies, the Department of Defense (DOD) has been made subject to the TSCA by executive order and DOD policy.⁶⁵

The PCB Mega Rule on the TSCA and CERCLA

The PCB Mega Rule outlines PCB cleanup requirements, but does not say how the TSCA will interface with CERCLA (hazardous substance cleanups) or the Resource Conservation and Recovery Act (RCRA)⁶⁶ (hazardous waste corrective actions).⁶⁷ What it does say is this: (1) the TSCA does not affect the applicability of other laws, such as RCRA and CERCLA; and (2) when more than one requirement may apply, the more stringent approach must be taken.⁶⁸

The Mega Rule goes on to say that RCRA corrective actions and CERCLA remediation may result in “different outcomes” from the traditional the TSCA approach to PCB spills.⁶⁹ But the Rule does not provide any further detail on how to resolve conflicts among regulatory approaches—other than to advise taking the stricter approach.

60. This substance was once commonly used in electrical transformers and capacitors.

61. 42 U.S.C.S. § 9601 (LEXIS 2000).

62. 15 U.S.C.S. § 2601 (LEXIS 2000).

63. *Id.* The EPA's authority under the TSCA is focused on the ability to require the following:

- (a) Inventory of Chemical Substances.
- (b) Reporting and Recordkeeping Requirements.
- (c) Import and Export Requirements.
- (d) New Chemical Review and Premanufacture Notices.
- (e) Testing of Existing Chemicals.
- (f) EPA authority to refer responsibilities to other agencies.
- (g) Direct Regulation of Existing Chemical Substances.

64. *See generally* 40 C.F.R. pt. 761 (2000).

65. Exec. Order No. 12,088, Federal Compliance with Pollution Control Standards (1978); U.S. DEP'T OF DEFENSE, INST. 4715.6, ENVIRONMENTAL COMPLIANCE (24 Apr. 1996).

66. 42 U.S.C.S. § 6901.

67. *See* 40 C.F.R. pt. 761, subpt. G. Look in vain for more guidance. The TSCA's § 2608, entitled “Relationship to other Federal laws,” was intended to prevent overlap and unnecessary duplication of toxic substance regulation. This looks hopeful—at first. But, this section mainly provides the EPA with guidelines on how it can refer duties to other agencies. It provides little help on how to resolve conflicts among regulatory approaches.

Likewise, few cases craft a line between the TSCA and CERCLA. Instead, courts seem to assume that the two laws would work seamlessly together. In fact, the bite of specific the TSCA penalties often finds its origin in CERCLA's notion of strict and joint/several liability, meaning that the TSCA relies on CERCLA's overarching reach to bring in and hold liable parties to deal with past contamination. As such, little conflict is anticipated between CERCLA and the TSCA. *See, e.g., Reading Co. v City of Philadelphia*, 823 F. Supp. 1218 (D. Pa 1993).

68. 40 C.F.R. § 761.120(e)(1).

This implies that the TSCA's fairly strict numerical approach—one cleans to preset levels—should be favored over a more flexible, site-by-site consideration of risk. But the Mega Rule anticipates that a risk-based (CERCLA-type) approach may be quite appropriate for certain types of PCB cleanup. So what is a responsible party to do?

First, look at the TSCA's Mega Rule. If your remediation lends itself to a risk-based cleanup, you may be able to use a more flexible approach. Be aware, however, that large cleanups involving high levels of PCBs may require strict adherence to the TSCA's numerical standards.

PCB Cleanup Approaches

The TSCA's Mega Rule anticipates different approaches to remediation, including the use of risk-based standards. These options are:

- (1) *Spills that require more stringent cleanup levels.*⁷⁰ This may involve a site where there is a high potential that groundwater contamination will linger after cleanup.⁷¹
- (2) *Site-by-site application of less stringent or alternative cleanup requirements.*⁷² This is your risk-based option and is discussed below.
- (3) *Cleanup of spills exempted from the Mega Rule.* This option also allows for a site-by-site decision regarding cleanup standards, but the emphasis is on the necessity for more control or a totally different approach.⁷³

Risk-Based Cleanup

If circumstances provide, EPA will allow the use of more flexible standards in a PCB cleanup. The agency would require the responsible party to demonstrate that cleanup to numerical standards is "clearly unwarranted" or that such compliance is not feasible.⁷⁴ This means that you need to consider the following:

- (a) the determination can only be on a site-by-site basis;
- (b) the facts must demonstrate that a more extensive cleanup is not warranted because (i) risk-mitigating factors are present; (ii) compliance with the TSCA procedures or numerical standards is impractical given the circumstances at your site; or (iii) these site-specific issues make the cleanup cost-prohibitive; and
- (c) the EPA agrees that a risk-based approach is acceptable. (The EPA may consider the impact of this decision on other sites to ensure consistency of spill cleanup standards.)⁷⁵

As a practical matter, you will consider these options in light of your cleanup facts. The determinative issue will be the amount of PCBs released. If your cleanup does not involve significantly high levels of PCBs and the issue of potential contamination (mainly to groundwater) does not loom large, you may be able to use a flexible remediation approach. To justify your application to the EPA, you will be required to demonstrate that your proposed risk-based approach will be protective, given the facts of your cleanup. You do so by presenting data confirming your assumptions about the level of risk involved, while outlining the exact method of remediation.

PCB Disposal

Remediation often involves the issue of disposal—what do you do with the PCBs you have unearthed? Well, the PCB Mega Rule has also incorporated risk-based principles in its requirements for the disposal of PCB-contaminated soil. The general rule is that a responsible authority may dispose of soil contaminated with a PCB concentration of less than fifty parts per million (ppm) at a municipal nonhazardous waste site. If the soil is contaminated at a concentration equal to or in excess of fifty ppm, the responsible party would likely send the soil to a RCRA landfill or a TSCA-qualified landfill.⁷⁶ Disposal options are:

69. *Id.* § 761.120(e)(2). This paragraph states that "inevitably" there will be times when the TSCA standards will be applied to cleanups undertaken in accordance with other laws, such as CERCLA or RCRA. In such circumstances, alternate outcomes may result because these laws involve "different or alternative" decision-making factors. So, the EPA recognizes the problem, but provides little advice on how to resolve these potential conflicts.

70. *Id.* § 761.120(b).

71. *Id.* § 761.120(b)(1).

72. *Id.* § 761.120(c).

73. *Id.* §§ 761.120(d); 761.120(a)(1). The rationale is that some spills may involve more pervasive contamination, so a blanket approach should not be taken.

74. *Id.* § 761.120(c).

75. *Id.*

(1) *Self-implementing disposal*.⁷⁷ This form of disposal is similar to the PCB Spill Cleanup Policy. This approach also incorporates risk-based, site-specific issues into plans for disposal.

(2) *Performance-based disposal*.⁷⁸ This would involve the use of existing and approved disposal technologies.

(3) *Risk-based disposal*.⁷⁹ As with risk-based remediation, this option allows for the disposal of PCB remediation waste in a manner different than options (1) or (2), as long as the EPA agrees.

Regulatory Roundup

The PCB Mega Rule explicitly provides the option of risk-based cleanup and disposal—largely based on the PCB concentrations at issue. This option would allow a remediation agent to step out of the TSCA’s numerically driven approach (clean to a preset level, no matter what) and move towards a CERCLA-esque approach (site-specific risk levels). This flexibility is particularly important when approaching the cleanup of moderately-sized sites where there is little likelihood of residual contamination. Should the regulator agree that a flexible approach makes sense, you could tailor a cleanup solution to meet your needs. Ms. Barfield.

What’s the Frequency Kenneth? FCC Case Broadcasts Guidance on Use of the NEPA Functional Compliance Doctrine

The U.S. Court of Appeals for the Second Circuit recently took a fresh look at the “functional compliance” doctrine. In *Cellular Phone Taskforce v. Federal Communications Commission*,⁸⁰ the court considered whether rulemaking by the Federal Communications Commission (FCC) met the requirements of the National Environmental Policy Act (NEPA).⁸¹

The FCC adopted a rule that set guidelines for radio frequency radiation from transmitters, including maximum permitted exposure (MPE). The FCC also categorically excluded

from formal NEPA review tower-mounted telecommunications antennae ten meters or higher above ground and rooftop antennae emitting less than 1000 watts of power. The FCC elected to exempt such facilities after determining that they pose no risk of exposing humans to radio frequency (RF) radiation in excess of MPE levels.

Petitioners challenged the rules on a variety of grounds, including FCC’s failure to perform a NEPA analysis for the radiation rule and the alleged arbitrariness of the categorical exclusion. The court dealt with the challenge to the categorical exclusion first. In light of the low probability of excluded facilities violating MPE levels, the court found it was reasonable to exclude them from detailed NEPA analysis. Moreover, the licensees were still responsible for compliance, and an interested person could petition the FCC for review of a site believed to violate the MPE levels. The court found the FCC’s approach was rational, and upheld the adoption of the categorical exclusion.

The court then decided the issue of whether the FCC was required to prepare an environmental impact statement (EIS) in conjunction with its rulemaking. To begin, a rulemaking can be subject to NEPA if it constitutes a major federal action significantly affecting the quality of the human environment. The court noted, however that “where an agency is engaged primarily in an examination of environmental questions, where substantive and procedural standards ensure full and adequate consideration of environmental issues, then formal compliance with NEPA is not necessary, but functional compliance is sufficient.”⁸²

The function of NEPA is to allow the decision-maker to take a hard look at the environmental impacts of a proposed action, to consider alternatives to it, and to allow public participation in the analysis. The court concluded that the FCC rulemaking functionally met the requirements of NEPA “both in form and substance.”⁸³

First, the rulemaking included public participation. The FCC also “consulted with and obtained the comments of any Federal agency which has jurisdiction by law or special expertise with respect to [the] environmental impact involved,” another requirement of NEPA.⁸⁴ The FCC also considered

76. *Id.* § 761.61(a)(5)(i)(B)(2)(ii) & (iii).

77. *Id.* § 761.61(a).

78. *Id.* § 761.61(b).

79. *Id.* § 761.61(c).

80. 205 F.3d 82 (2d Cir. 2000).

81. 42 U.S.C.S. § 4321 (LEXIS 2000).

82. *Cellular Phone Taskforce*, 205 F.3d at 94 (quoting *Environmental Defense Fund v. Environmental Protection Agency*, 489 F.2d 1247, 1257 (D.C. Cir. 1973)).

83. *Id.*

environmental impacts, including cumulative effects. Although the court did not mention this, the rulemaking also considered alternatives in that it looked at a variety of possible MPE levels. Finally, any site-specific impacts would be analyzed through the NEPA process when individual facilities are planned.⁸⁵ The court concluded that the FCC rulemaking met the functional compliance test.

*Army Regulation 200-2*⁸⁶ recognizes the functional compliance test. Generally, the regulation allows decision-makers to determine that an action has been adequately addressed by existing documents and found not to be environmentally significant.⁸⁷ The agency must memorialize its determination in a record of environmental consideration (REC). The regulation also recognizes that a CERCLA⁸⁸ feasibility study eliminates the need for a NEPA analysis “[i]n most cases.”⁸⁹ A REC is not required, but the cover of the feasibility study should state that it is meant to comply with NEPA.⁹⁰

Outside the world of CERCLA, it is quite risky for Army planners to rely on the functional compliance doctrine. If there is time to do a proper NEPA analysis, it should be done. If an existing study looked hard at environmental impacts, considered alternatives, and involved the public, it could be relied upon to serve the function of NEPA. This course of action, however, could result in a court returning the issue back for a real NEPA analysis. Lieutenant Colonel Howlett.

National Atlas of the United States Available Online

*Come forth into the light of things, Let Nature
be your teacher.*

-William Wordsworth (1798)

A public-private venture of the U.S. Geological Survey and various federal and non-governmental organizations has made the National Atlas of the United States available on the Internet. The address for the Atlas is <<http://www.nationalatlas.gov/>>. Environmental law specialists may find the atlas useful for a number of purposes. It includes zoom in and out features, as well as the ability to include or exclude point sources of pollution, Superfund sites, hazardous waste storage sites, as well as hydrologic, geographic, political, and census data. Major Rob-inette.

Litigation Division Note

Just How Hostile is “Hostile”? Eleventh Circuit Searches for the “Baseline of Actionable Conduct” in Hostile Environment Sexual Harassment Claims under Title VII

The U.S. Court of Appeals for the Eleventh Circuit recently attempted to further delineate the “baseline of actionable conduct” in Title VII hostile environment sexual harassment claims. In an effort to determine the “minimum level of severity or pervasiveness necessary for harassing conduct to constitute discrimination in violation of Title VII,” the court analyzed several decisions throughout the federal circuits where sexual harassment claims were rejected for failing to meet the minimum baseline of actionable conduct.

This practice note reviews the standard set forth by the Supreme Court for analyzing hostile environment sexual harassment claims,⁹¹ and discusses the Eleventh Circuit’s recent application of this standard in *Mendoza v. Borden*.⁹² Finally, this note reviews guidance published by the Equal Employment

84. 42 U.S.C.S. § 4332(c).

85. Essentially, this means that the non-NEPA rulemaking is serving a “tiering” function.

86. U.S. DEP’T OF ARMY, REG. 200-2, ENVIRONMENTAL EFFECTS OF ARMY ACTIONS (23 Dec. 1988) [hereinafter AR 200-2].

87. *Id.* para. 3-1a. Elsewhere in the regulation (paras. 2-3d(1) and 2-3e(1)), the previous document relied upon must be either a NEPA environmental assessment or an environmental impact statement. Reliance on coverage on non-NEPA documents is not shown in the regulation’s NEPA flow chart. To the extent this creates ambiguity, one must hope it will be resolved as AR 200-2 is rewritten.

88. Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.S. § 9601.

89. AR 200-2, *supra* note 86, para. 2-2a(8). Whether the documentation for a CERCLA removal action can legitimately serve as a NEPA substitute is beyond the scope of this article.

90. *Id.*

91. Title VII does not specifically describe sexual harassment as prohibited conduct. However, the Supreme Court has long recognized that the “phrase ‘terms, conditions, or privileges of employment’ evinces a Congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women in employment,’ which includes requiring people to work in a discriminatorily hostile or abusive environment.” *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)).

92. *Mendoza v. Borden, Inc.*, 195 F.3d 1238 (11th Cir. 1999), *cert. denied*, 2000 U.S. LEXIS 2606 (Apr. 17, 2000), *cited in* *Pryor v. Seyfarth*, 2000 U.S. App. LEXIS 9624 (7th Cir. May 11, 2000); *Abel v. Dubberly*, 2000 U.S. App. LEXIS 8249 (11th Cir. Apr. 27, 2000); *Lacy v. Amtrack*, 2000 U.S. App. LEXIS 2933 (4th Cir. Feb. 28, 2000); *Taylor v. Alabama*, 2000 U.S. Dist. LEXIS 5939 (M.D. Ala. Apr. 19, 2000); *Allen v. Amtrack*, 2000 U.S. Dist. LEXIS 2751 (E.D. Pa. Mar. 13, 2000). The court noted that “motions for summary judgment or judgment as a matter of law are appropriate to ‘police the baseline for hostile environment claims.’” *Id.* at 1244 (quoting *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 264 n.8 (5th Cir. 1999)).

Opportunity Commission to assist its investigators in determining whether offensive conduct has risen to the level of a Title VII violation.

“Severe and Pervasive Conduct”

In *Harris v. Forklift Systems, Inc.*,⁹³ the Supreme Court attempted to delineate the substantive contours of the hostile environment sexual harassment claim under Title VII. The Court held that sexual harassment constitutes actionable sex discrimination under Title VII only when the workplace is “permeated with ‘discriminatory intimidation, ridicule, and insult,’” that is “‘sufficiently *severe or pervasive* to alter the conditions of the victim’s employment and create an abusive working environment.”⁹⁴

In *Harris*, the Supreme Court rejected the district court’s holding that a plaintiff is required to prove psychological injury to prevail on a hostile environment sexual harassment claim. Instead, the Court adopted a “middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause psychological injury.”⁹⁵ The Court then described both objective and subjective components in the analysis of whether a hostile environment existed. Conduct that is not “severe or pervasive enough to create an *objectively* hostile or abusive environment” from the perspective of a reasonable person is “beyond Title VII’s purview” and not actionable.⁹⁶ In addition, “if a victim does not *subjectively* perceive the environment to be abusive,” the conduct has not actually affected the work environment and is not actionable.⁹⁷

Acknowledging that this analysis is not a “mathematically precise test,” the Court concluded that determining whether an

environment was “hostile” or “abusive” requires consideration of the totality of the circumstances.⁹⁸ Some of the factors to consider include:

- (1) the frequency of the discriminatory conduct;
- (2) the severity of the discriminatory conduct;
- (3) whether the conduct was physically threatening or humiliating, or a mere utterance; and
- (4) whether the conduct unreasonably interfered with the employee’s work performance.⁹⁹

The effect of the conduct on the “employee’s psychological well-being” is also relevant, but proof of a specific injury is not required so long as “the environment would reasonably be perceived, and is perceived, as hostile or abusive.”¹⁰⁰

Reiterating the standard established in *Harris*, the Supreme Court has recently stated, “We have made it clear that conduct *must be extreme* to amount to a change in the terms and conditions of employment.”¹⁰¹ “A recurring point in these opinions is that ‘simple teasing,’ offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the ‘terms and conditions of employment.’”¹⁰² Significantly, the Court noted that these demanding standards for assessing allegations of hostile environment were created to ensure that Title VII does not become a “general civility code.”¹⁰³

93. 510 U.S. 17 (1993).

94. *Id.* at 21 (quoting *Meritor Savings Bank*, 477 U.S. at 67) (emphasis added).

95. *Id.*

96. *Id.* (emphasis added). The “objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, considering ‘all the circumstances.’” *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (quoting *Harris*, 510 U.S. at 23).

97. *Harris*, 510 U.S. at 22 (emphasis added).

98. *Id.* at 23.

99. *Id.*

100. *Id.* (citing *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)).

101. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (emphasis added).

102. *Id.* (citations omitted).

103. *Id.* at 787-88. “Properly applied, they will filter out complaints attacking ‘the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.’” *Id.* at 788 (quoting B. LINDERMANN & D. KADUE, *SEXUAL HARASSMENT IN EMPLOYMENT LAW* 175 (1992)). See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (noting that Title VII does not prohibit “genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex”).

Mendoza v. Borden: Eleventh Circuit Searches for a Baseline of Actionable Conduct

The lower courts continue to struggle in determining the severity of offensive conditions necessary to constitute actionable hostile environment sex discrimination under Title VII. In *Mendoza v. Borden*, the Eleventh Circuit recently applied the *Harris* analysis to uphold a district court's dismissal of a hostile environment sexual harassment claim. The court also conducted an extensive review of the other federal circuits to examine how they have applied these factors and "to delineate a minimum level of severity or pervasiveness necessary for harassing conduct to constitute discrimination in violation of Title VII."¹⁰⁴

The plaintiff in *Mendoza* alleged that her supervisor was "constantly watching" her and "following" her around the office, in the lunchroom, and in the hallways; was "constantly . . . looking [her] up and down . . . in an obvious fashion"; twice "looked [her] up and down, and stopped in [her] groin area and made a . . . sniffing motion"; once "walked around her desk and sniffed"; and once "rubbed his right hip up against [her] left hip" while touching her shoulder and smiling.¹⁰⁵ In addition, once when she confronted the supervisor by entering his office and saying, "I came in here to work, period," he responded, "Yeah, I'm getting fired up too."¹⁰⁶

Applying the four *Harris* factors, the Eleventh Circuit found that the conduct alleged by plaintiff fell "well short of the level of either severe or pervasive conduct sufficient to alter Men-

doza's terms or conditions of employment."¹⁰⁷ The court also compared the facts in *Mendoza* to the facts in cases in other circuits where the alleged conduct was deemed insufficiently severe or pervasive to constitute discrimination.¹⁰⁸ The court concluded that "[m]any decisions throughout the circuits have rejected sexual-harassment claims based on conduct that is as serious or more serious than the conduct at issue in this appeal."¹⁰⁹

Examining the facts in light of the *Harris* factors, the Eleventh Circuit first found nothing in the record to show that the alleged conduct adversely affected the plaintiff's job performance.¹¹⁰ Second, the court found that Mendoza did not present evidence that the alleged conduct was "physically threatening or humiliating."¹¹¹ The court contrasted the conduct alleged by the plaintiff with more threatening conduct alleged by plaintiffs in other circuits.¹¹² Third, the court found that the alleged conduct was not "severe," finding her allegations were "much less severe than the incidents of sexual banter and inappropriate touching described, and found insufficient," in cases from other circuits.¹¹³ The final factor, frequency, was also "for the most part lacking, but to the extent Mendoza showed frequent conduct, the frequency of it [did] not compensate for the absence of the other factors."¹¹⁴ The court concluded that, given "normal office interaction among employees," the "following" and "staring" in the manner described by Mendoza did not give rise to an actionable claim, even if such conduct was, as she alleged, "constant," and thus satisfying the "frequent" factor under *Harris*.¹¹⁵

104. *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1246 (11th Cir. 1999).

105. *Id.* at 1242-43.

106. *Id.* at 1243.

107. *Id.* at 1247.

108. *Id.* at 1246-48.

109. *Id.* at 1246. See, e.g., *Shepard v. Comptroller of Public Accounts of Texas*, 168 F.3d 871, 872-75 (5th Cir. 1999) (holding that several incidents over a two-year period, including comment "your elbows are the same color as your nipples," another comment that plaintiff had big thighs, touching plaintiff's arm, and attempts to look down the plaintiff's dress, were *insufficient* to support a hostile-environment claim).

110. *Id.* at 1249.

111. *Id.* at 1248 ("Even construing the evidence in the light most favorable to Mendoza, [her supervisor's] statement 'I'm getting fired up' and the sniffing sounds are hardly threatening or humiliating.").

112. The court compared the severe and threatening conduct found in *Hall v. Gus Const. Co.*, 842 F.2d 1010, 1012 (8th Cir. 1988) (finding sexual harassment was established by evidence that female employees were held down so that other employees could touch their breasts and legs) with the non-threatening conduct found in *Long v. Eastfield College*, 88 F.3d 300, 309 (5th Cir. 1996) (holding sexually-oriented joke is the kind of non-threatening "utterance" that *cannot* alone support hostile environment claim).

113. The court cited the Second Circuit's decision in *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 768 (2d Cir. 1998) (holding a comment about the plaintiff's "posterior" and touching of her breasts with some papers did not create a hostile environment) and the Fourth Circuit's decision in *Hopkins v. Baltimore Gas & Electric Co.*, 77 F.3d 745, 753-54 (4th Cir. 1996) (holding that multiple instances of inappropriate conduct, including placing a magnifying glass over the plaintiff's crotch, did not establish sexual harassment). The court also noted that the conduct was not alleged to be intimidating or threatening, and it was never described as "stalking," "leering," "intimidating," or "threatening." *Mendoza*, 195 F.3d at 1249.

114. *Mendoza*, 195 F.3d at 1248.

Affirming the district court's decision to dismiss the plaintiff's sexual harassment claim, the court noted, "Were we to conclude that the conduct established by [plaintiff] was sufficiently severe or pervasive to alter her terms or conditions of employment, we would establish a baseline of actionable conduct that is far below that established by other circuits."¹¹⁶

Equal Employment Opportunity Commission Guidance

In published guidance based on *Harris v. Forklift Systems, Inc.*, the Equal Employment Opportunity Commission (Commission) instructs its investigators, in "evaluating welcomeness and whether conduct was sufficiently severe or pervasive to constitute a violation . . . to 'look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.'"¹¹⁷ Citing the *Harris* factors, the Commission instructs investigators to "evaluate charges by considering the factors listed in *Harris* as well as any additional factors that may be relevant in a particular case."¹¹⁸

The Commission emphasizes that the *Harris* case applied the "reasonable person" standard for assessing hostile environment claims, and notes that the Commission had previously adopted such a standard: "In determining whether harassment is sufficiently severe or pervasive to create a hostile environment, the harasser's conduct should be evaluated from the objective standpoint of a 'reasonable person.'"¹¹⁹ Noting that the *Harris* decision did not "elaborate on the definition of reasonable person," the Commission states that the decision is nonetheless "consistent with the Commission's view that a rea-

sonable person is one with the perspective of the victim."¹²⁰ The Commission therefore instructs investigators to "continue to consider whether a reasonable person in the [victim's circumstances] would have found the challenged conduct sufficiently severe or pervasive to create an intimidating, hostile, or abusive work environment."¹²¹

In addition to the objective element, complainants must have subjectively perceived the environment as hostile or abusive. The Commission requires investigators to "consider whether the alleged harassment was 'unwelcome . . . verbal or physical conduct of a sexual nature.'"¹²² The Commission has adopted the Eleventh Circuit's definition of "unwelcome conduct": "in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive."¹²³

Applying *Mendoza*

As explained above, the Commission has adopted the *Harris* standard in its guidance to investigators. Obviously, labor counselors must be aware of the established boundaries of the hostile environment sexual harassment case as set forth in this guidance. But when applying this standard, labor counselors should also consider the "baseline of actionable conduct" that is developing in such cases as *Mendoza* and the numerous other federal circuit cases analyzed in that opinion.

In *Mendoza*, the Eleventh Circuit drew the baseline above certain misconduct that some employees might otherwise view as hostile and abusive.¹²⁴ Apparently in an effort to set a stan-

115. *Id.* at 1249.

116. *Id.* at 1238.

117. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE ON *Harris v. Forklift Systems, Inc.* (1994) (quoting 29 C.F.R. § 1604.11(b) (1994)) [hereinafter EEOC ENFORCEMENT GUIDANCE]. In 1999, following the Supreme Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the Commission published new guidance to address issues of vicarious liability raised by those decisions, but stated that the Commission's previous "guidance on the standards for determining whether challenged conduct rises to the level of unlawful harassment *remains in effect.*" EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE ON VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (1999) (emphasis added).

118. EEOC ENFORCEMENT GUIDANCE, *supra* note 117.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* (quoting 29 C.F.R. § 1604.11(a) (1999)).

123. *Id.* (quoting *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982)). "In making this analysis, the investigator should consider the charging party's behavior." *Id.*

124. As noted in a seething dissent by Circuit Judge Tjoflat, "Out of nowhere, the court has decided that evidence of stalking or leering by a harasser should be given short shrift when used by a plaintiff to support a claim for hostile environment sexual harassment." *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1269 (11th Cir. 1999) (Tjoflat, J., dissenting). "From on high, the majority has determined that female employees should feel no humiliation or anxiety when their bosses sniff in the direction of their groins, touch their hips, and follow them around the office, staring at them in a sexually suggestive manner; but the court never explains *why* this is the case." *Id.* at 1261 (Tjoflat, J., dissenting).

dard high enough to discourage frivolous lawsuits, the court determined that such conduct was not sufficiently severe or pervasive to be actionable. Thus, even where a plaintiff may subjectively perceive alleged harassment as abusive or hostile, the plaintiff must also prove that a reasonable person in his or her

shoes would have found the conduct to be severe or pervasive. As demonstrated in *Mendoza*, the baseline of such actionable conduct is not low. For labor counselors, the *Mendoza* holding will be a helpful analysis to employ in the defense of hostile environment claims before the Commission. Major Gilligan.