



# The Shifting Sands of

# “Citizen

# After *Cleveland Cliffs*

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In an effort to clarify the permissible bounds of legislated standing, the Michigan Supreme Court may have affirmed that “many are called, but few are chosen.”<sup>1</sup> *National Wildlife Federation v Cleveland Cliffs Iron Co*<sup>2</sup> sharpens the doctrine of standing in a critical manner, by signaling that perhaps the legislature may not automatically confer standing on individuals who do not otherwise fit within the constitutional confines of standing, as such an exercise violates separation of powers principles.

Michigan’s Constitution<sup>9</sup> differs from standing principles under the United States Constitution,<sup>10</sup> and drawing deeply upon similarities it perceived between the federal and Michigan constitutional grants of judicial power, the majority in *Cleveland Cliffs* found that plaintiffs had established “constitutional” standing without reaching the question of whether the plaintiffs had standing pursuant to the provisions of MEPA alone, which grants standing to “any person.” The plaintiffs in *Cleveland Cliffs* provided affidavits from individuals who resided near the mine or enjoyed recreation in the area of the mine expansion, expressing concern that expansion would irreparably harm their enjoyment

# Suit” Standing

In *Cleveland Cliffs*, plaintiffs brought suit on behalf of their members pursuant to the Michigan Environmental Protection Act (MEPA),<sup>3</sup> seeking an injunction to prevent a mining company from expanding its operations at a mine in Marquette County. Plaintiffs complained that expansion of the mine would cause pollution and impair natural resources. Plaintiffs, in an effort to establish the elements of environmental standing as articulated in *Friends of the Earth v Laidlaw Environmental Services Inc*,<sup>4</sup> alleged that they “bird watched, canoed, bicycled, hiked, skied, fished, and farmed in the area” and that the mine expansion would “irreparably harm their recreational and aesthetic enjoyment of the area.”<sup>5</sup> MEPA’s citizen suit provision provides that “any person may maintain an action . . . for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.”<sup>6</sup> The plaintiffs originally sought to intervene in the defendants’ administrative permit process by requesting a contested case hearing with the

Michigan Department of Environmental Quality. The administrative law judge found that the plaintiffs had no standing in the administrative matter. This decision was upheld by the circuit court and the Michigan Court of Appeals denied review. Plaintiffs then filed suit in circuit court using MEPA to request a preliminary injunction to halt expansion of the mine. The trial court denied the injunction, finding that the plaintiffs lacked standing under *Lee v Macomb County Board of Commissioners*.<sup>7</sup> The Court of Appeals reversed, finding that, pursuant to the language of MEPA, standing was conferred to “any person” to bring suit. The Michigan Supreme Court granted leave limited to the issue of “whether the Legislature can by statute confer standing on a party who does not satisfy the judicial test for standing.”<sup>8</sup> This inquiry comes some 30 years after the enactment of MEPA’s citizen suit provision and is seemingly prompted by the Court’s newly articulated standing requirements as set forth in *Lee*.

After a heated disagreement among the justices as to what extent standing under

of the area. The Court found that the affidavits met its constitutional test for standing as set forth in *Lee*, but cautioned that the plaintiffs could not rely simply upon the affidavits throughout the entire proceeding to prove that standing exists. In fact, the Court articulated—with deference, if not outright approval—the U.S. Supreme Court’s analysis of standing in *Lujan v Defenders of Wildlife*,<sup>11</sup> and indicated that the plaintiff must demonstrate an injury-in-fact to survive a motion for summary judgment and continue to meet its standing burden at trial. Most importantly, the Court did not reach the constitutionality of MEPA’s standing provision or ultimately the very question on which it granted leave, creating more questions than it answered as to the standing requirements for plaintiffs invoking citizen suit provisions, and the legislature’s ability to confer standing upon citizens.<sup>12</sup>

The genesis for this discourse stems from the Court’s decision in *Lee*, in which it fundamentally changed Michigan’s standing requirements. Through *Lee*, the Court adopted into Michigan jurisprudence the Article III constitutional standing requirements imposed

upon plaintiffs seeking to invoke federal jurisdiction. Article III of the Federal Constitution limits federal courts to the adjudication of “cases” and “controversies.” The full scope of this limitation was articulated and imposed by the U.S. Supreme Court a little over a decade ago in the landmark decision of *Lujan*.<sup>13</sup> Justice Antonin Scalia, writing the majority opinion, set forth the “irreducible constitutional minimum” for standing within Article III’s “case or controversy” limitation. In *Lujan*, environmental groups challenged a regulation promulgated by the Secretary of the Interior interpreting § 7 of the Endangered Species Act of 1973 (ESA). The groups challenged the regulation pursuant to the ESA’s citizen suit provision, which provided that “any person may commence a civil suit on his own behalf to enjoin any person . . . who is alleged to be in violation of any provision of this chapter.”<sup>14</sup> The Court, finding that the plaintiffs failed to establish standing, set forth a comprehensive standing threshold never before fully articulated. The Court in *Lujan* determined that to establish standing, plaintiffs must satisfy a three-part test. First, they must have suffered an “injury in fact”—an invasion of a legally protected interest that is (a) concrete and particularized, and (b) “actual and imminent, not ‘conjectural’ or ‘hypothetical.’” Second, there must be a causal connection between the injury and the conduct complained of, meaning the injury has to be “fairly traceable to the challenged action of the defendant, and not the result of independent action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”<sup>15</sup>

As noted by Justice Weaver, who concurred with the *Cleveland Cliffs* majority in the result while sharply dissenting with respect to the importation of the *Lujan* and *Lee* standing requirements into state jurisprudence, there has never been a federal case applying Article III’s standing requirements to state courts. In fact, it has been recognized often by both state and federal courts “that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other rules of federal justiciability. . . .”<sup>16</sup>

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Although Michigan’s Constitution contains no exact corollary to the Federal Constitution’s Article III “cases and controversies” restrictions on federal courts, the Court in *Lee* imported *Lujan*’s Article III standing requirements. The plaintiffs in *Lee* sought to compel the county board of commissioners to levy a tax to establish a veteran’s relief fund pursuant to the soldiers’ relief fund act. In seeking to articulate a more specific standing doctrine, the Court adopted *Lujan*’s standing criteria, finding that *Lujan*’s three-element test—*injury-in-fact*, causation, and redressibility—were “fundamental to standing.”<sup>17</sup> The Michigan Supreme Court, concerned with maintaining the separation of powers, reasoned that Michigan’s standing doctrine had developed on a parallel track with that of federal standing, and thus adopted the *Lujan* test.

While *Lee* did not involve a citizen suit provision in which the legislature granted an express cause of action as in *Cleveland Cliffs*, the majority’s decision in *Cleveland Cliffs*, fashioned upon the foundations of both *Lujan* and *Lee*, opens the door to question whether the legislature can confer standing. This is even more apparent, given that *Lujan* itself involved a citizen suit provision to an environmental statute. As *Cleveland Cliffs* makes abundantly clear, if the Article III requirements adopted in *Lee* and *Lujan* are met, MEPA plaintiffs—or any other plaintiffs—will be deemed to have standing. What is less clear, however, is whether a plaintiff has standing under MEPA itself without the additional showing of an actual “injury in fact.” Indeed, given the Court’s disposition in *Cleveland Cliffs*, it is clear that MEPA plaintiffs, and potentially any plaintiff seeking to invoke a citizen suit provision, will be required to satisfy the constitutional standing

requirements articulated in *Cleveland Cliffs* and *Lee* in addition to demonstrating statutory standing.

*Cleveland Cliffs* should have little practical effect on MEPA cases, if history is any guide. It is likely that almost every MEPA plaintiff thus far would have met the *Cleveland Cliffs* standing requirements, because MEPA cases are generally brought by plaintiffs seeking to protect local environments.<sup>18</sup> The irony of *Cleveland Cliffs*’ adoption of federal standing requirements is that MEPA plaintiffs may demonstrate standing under the injury-to-conservation-interests test adopted in *Laidlaw*, which requires injury to persons, not injury to the environment.<sup>19</sup> MEPA, of course, is designed to remedy injuries to the environment; thus, since an injury to the environment would also be an injury to conservation interests, it would appear that *Cleveland Cliffs* creates a distinction without a difference.

Given the sequence of the Court’s analysis in *Cleveland Cliffs*, it seems that the first inquiry by courts after *Cleveland Cliffs* will be to initially determine whether plaintiffs have met the constitutional standing threshold and only then analyze whether or not the plaintiff meets other statutory requirements. What is even less certain is the very issue that the Court granted leave for, but never reached in *Cleveland Cliffs*—namely, whether *Lee*’s standing requirements, imposed upon plaintiffs in bringing a citizen suit, supersede the legislature’s ability to confer standing through citizen suit provisions. If plaintiffs are now required, in addition to establishing their prima facie case pursuant to MEPA (or any other statute with a citizen suit provision), to demonstrate the constitutional standing requirements as set forth in *Cleveland Cliffs*, the Court has imposed additional limitations

on the legislature's ability to confer standing upon its citizens.

Since the Michigan Supreme Court did not expressly override legislated standing, it appears future cases will have to define the extent to which citizen suits under MEPA (or any other statute) can advance and succeed. However, the sharply divided decision leads one to wonder whether *Cleveland Cliffs* will survive a change in court personnel, as it was decided on the narrowest majority. For now, the direction of our Supreme Court appears to adopt the philosophy that, although the legislature may wish to throw open wide the gates to justice, there is still a constitutional gatekeeper controlling citizens' ability to pass. ◆



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### Footnotes

1. Matthew 22:14 (KJV).
2. 471 Mich 608; 684 NW2d 800 (2004).
3. MCL 324.1701 et seq.
4. 528 US 167, 120 S Ct 693, 145 L Ed 2d 610 (2000).
5. *Cleveland Cliffs*, supra, p 13.
6. MCL 324.1701(1) et seq.
7. 464 Mich 726 (2000).
8. *Cleveland Cliffs*, supra, p 1.
9. Mich Const 1963, art 6, § 1. Discussion of differences is found at *Cleveland Cliffs*, p 9.
10. Art III, § 1; US Const.
11. 504 US 555 (1992).
12. The Supreme Court describes *Cleveland Cliffs* as declining to consider whether the legislature can confer standing more broadly than *Lee's* test. *Associated Builders & Contractors v Wilbur*, 472 Mich 117, 127 n 16 (2005).
13. *Lujan*, supra.
14. 16 USC 1540(g).
15. *Lujan*, supra, p 560.
16. *ASARCO Inc v Kaddish*, 490 US 605, 617 (1989).
17. *Lee*, p 740.
18. The exception may be *Roberts v Michigan*, 45 Mich App 252 (1973), but it was decided on statutory interpretation and jurisdictional grounds, not standing.
19. 528 US at 181.