This brief paper was researched and written by a student enrolled in the SUNY Buffalo Law School Environmental Law Pollution Control course in Spring 2013. Earlier versions of this work received minor edits and feedback from professors, but the work is that of a law student and does not represent any positions of the law school, or anyone other than the author. For more information on the course, contact Professor Kim Diana Connolly, kimconno@buffalo.edu .

Morris Ingemanson 5/17/2013

Implications of the recent standing ruling by U.S. Supreme Court in Clapper v. Amnesty International

I. I. Introduction

Standing is the foundation upon which all litigation sits. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." Warth v. Seldin, 422 U.S. 490, 498 (1975). When the Supreme Court issues decisions about standing, those decisions have the capacity to change entire fields of litigation far removed from the original case for which the ruling was decided. The Supreme Court recently issued such a decision on standing in, Clapper v. Amnesty International USA, 132 S. Ct. 2431 (2012) (hereinafter "Clapper").

In Clapper, journalistic plaintiffs sought to challenge the FISA Amendments Act of 2008 due to indeterminate future harm. The plaintiffs' alleged that it was inevitable that the government would use the FISA amendments to spy upon them, a position which has been vindicated through the Justice Department's recent appropriation of the records for two months' worth of outgoing calls from the Associated Press and Journalists employed thereby.

The Supreme Court dismissed the case on the grounds that the plaintiffs lacked standing.

I. II. The Effects of Clapper V. Amnesty International on standing

Clapper stands from the principal that plaintiffs alleging indeterminate or in the words of the court, speculative, future harm do not have standing to sue. "[T]he journalists, lawyers and human rights advocates who challenged the constitutionality of the law could not show they had been harmed by it and so lacked standing to sue." Liptak, Adam (26 February 2013). "Justices Turn Back Challenge to Broader U.S. Eavesdropping". The New York Times.

In Clapper the Supreme Court set down a new rule for future harm, now future harms must be "certainly impending." This new standard is much more restrictive and harder to meet. A chain of events such as in Clapper which is incredibly likely to happen, and if the Associated Press is to be believed has

happened now, is no longer enough to satisfy standing. This is of incredible import to environmental litigation because so much of environmental litigation is based on speculative future harm. The impact of newly developed chemicals on area water supplies, for example, or the destruction of the habitat of an endangered species of biting fly, are not generally injuries which can be proven to be "certainly impending." In addition, the costs of preventing such a harm pre-emptively cannot be used as a basis standing either. The Supreme Court in Clapper noted that "[The plaintiffs] cannot manufacture standing by incurring costs in anticipation of nonimminent harms," in other words, mitigation efforts for future harms which are not "certainly impending" cannot be used as a basis standing.

I. III. Storm King Mountain, the Scenic Hudson case and Standing to sue

Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608 (2d Cir. 1965) (hereinafter "Storm King Mountain"); is a landmark 2nd Circuit case regarding standing to sue in environmental litigation. In 1965, Consolidated Edison sought to place a power plant on the scenic banks of the Hudson River valley. The Scenic Hudson Preservation Conference, an unincorporated coalition of several non-profit conservationist organizations, objected to the orders of the Federal Power Commission granting leave to build the plant and sued in order to set the orders aside.

The respondents in the case "argue[d] that 'petitioners do not have standing to obtain review' because they 'make no claim of any personal economic injury resulting from the Commission's action.'" Scenic Hudson Pres. Conference v. Fed. Power Comm'n, 354 F.2d 608, 615 (2d Cir. 1965). Indeed the petitioners made no such claim, alleging only indeterminate future harm from the destruction of the scenic beauty of the Hudson River Valley.

The federal court responsible for the Storm King Mountain decision, determined the issue of the respondents' standing to bring the case based on "the specific circumstances of [the] individual situation," noting that:

> The 'case' or 'controversy' requirement of Article III, § 2 of the Constitution does not require that an 'aggrieved' or 'adversely affected' party have a personal economic interest. Even in cases involving original standing to sue, the Supreme Court has not made economic injury a prerequisite where the plaintiffs have shown a direct personal interest. Scenic Hudson Pres. Conference v. Fed. Power Comm'n, 354 F.2d 608, 615 (2d Cir. 1965).

Instead of personal injury, the court in Storm King Mountain determined standing based on whether the interests of the parties were infringed upon:

> In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of "aggrieved" parties under sec.

313(b). Scenic Hudson Pres. Conference v. Fed. Power Comm'n, 354 F.2d 608, 615 (2d Cir. 1965).

This method of determining standing, imminent harm to the interests of the aggrieved parties, rather than "certainly impending" harm to the aggrieved parties is a crucial difference from the Supreme Court's decision in Clapper. If the standing issue in Clapper had been determined in the same manner as Storm King Mountain, standing would have been found because the journalist plaintiffs have "by their activities and conduct have exhibited a special interest in" the areas of surveillance.

I. IV. The need for indeterminate future harm in environmental cases

Indeterminate future harm, rather than "Certainly Impending" harm is the standard by which environmental cases must be judged if we wish to protect environmental interests. The classic example of environmentalism, the destruction of the Amazon rainforest, provides no "certainly impending" harm to most of us living on earth. There is certainly harm caused by the destruction, countless species and natural biodiversity is being lost as a result, it's quite probable that as a result of this destruction we have already lost many species which science could use to create new medicines or technologies. But it is impossible to qualify such harm as "certainly impending" under the Clapper standard.

In order to protect our environment through the use of legal methods we must have the possibility of bringing cases for indeterminate future harm. The new standard for standing in Clapper pulls the rug out from under all but the smallest fraction of environmental cases, and deprives activists of the tools that they need to protect everyone's environmental interests.

I. V. The Pacific Rivers Council Case and what the granting of Cert might Imply for Future Environmental law litigation

All is not lost however. The Supreme Court has recently granted certiorari in United States Forest Service v. Pacific Rivers Council. As indicated in the Supreme Court's "questions presented", the first issue that the Supreme Court will be addressing is the presence of standing upon which the environmental plaintiffs bring the case. This offers the Supreme Court to clarify their rulings on standing in environmental cases and reinstate the feasibility of bringing environmental litigation as a tool for protecting environmental interests.

Bibliography:

1. Clapper v. Amnesty International USA, 132 S. Ct. 2431 (2012).

2. Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608 (2d Cir. 1965).

3. Mark Sherman, *Gov't Obtains Wide AP Phone Records in Probe* (May 13, 2013 10:53 PM) http://bigstory.ap.org/article/govt-obtains-wide-ap-phone-records-probe

3. Massachusetts v. EPA, 549 U.S. 497, 521 (2007)

4. American Electric Power v. Connecticut, 131 S.Ct. 2527, 2535 (2011)

5. United States Forest Service v. Pacific Rivers Council. petitioner's reply brief. http://www.justice.gov/osg/briefs/2012/2pet/7pet/2012-0623.pet.rep.pdf

6. Liptak, Adam, *Justices Turn Back Challenge to Broader U.S. Eavesdropping,* N.Y. Times, Feb. 26 2013. http://www.nytimes.com/2013/02/27/us/politics/supreme-court-rejects-challenge-to-fisa-surveillance-l

aw.html?_r=2&

7. Eric Biber, *Did the Supreme Court just shut the courthouse door on environmental plaintiffs?* (March 1, 2013), http://legalplanet.wordpress.com/2013/03/01/did-the-supreme-court-just-shut-the-courthouse-door-on-environmental-plaintiffs/

8. SCOTUS Blog, *Clapper v. Amnesty International USA* (Retrieved May 15, 2013) http://www.scotusblog.com/case-files/cases/clapper-v-amnesty-international-usa/

9. Nina Totenberg, Supreme Court Makes It Harder To Challenge Foreign Intelligence Surveillance Act (26 Feb. 2013) http://www.npr.org/2013/02/26/172998760/supreme-court-makes-it-harder-to-challenge-foreign-intelligence-surveillance-act

10. Edward P. Boyle, et al. *United States: The Impact Of The Supreme Court's Recent Decision In Clapper v. Amnesty International USA On Privacy And Data-Security Litigation*, Venable LLP (Mar. 12, 2013) http://www.mondaq.com/unitedstates/x/226244/Data+Protection+Privacy/The+Impact+Of+The+Supreme+Courts+Recent+Decision+In+Clapper+v+Amnesty+International+USA+On+Privacy+and+DataSecurity+Litigation

11. John Ferro, *Storm King environmental law principle at risk after ruling*, Poughkeepsie Journal (Mar. 30, 2013 12:43 AM) http://www.lohud.com/article/20130330/NEWS05/303300048/Storm-King-environmental-law-principle-risk-after-ruling?nclick_check=1

12. Marist Environmental History project, *The Scenic Hudson Decision*, Marist College http://library.marist.edu/archives/mehp/scenicdecision.html

13. *E-law: What Started It All?,* Natural Resources Defense Council (May 5, 2000) http://www.nrdc.org/legislation/helaw.asp

14. Eric Biber, *How the Pacific Rivers Council case could affect environmental law* (Apr. 6, 2013), http://legalplanet.wordpress.com/2013/04/06/how-the-pacific-rivers-council-case-could-affect-environmental-law/

15. Eric Biber, U.S. Supreme Court Grants Review in Pacific Rivers Council Case (Mar. 18, 2013), http://legalplanet.wordpress.com/2013/03/18/u-s-supreme-court-grants-review-in-pacific-rivers-council-case/

16. SCOTUS Blog, *United States Forest Service v. Pacific Rivers Council* (Retrieved May 15, 2013) http://www.scotusblog.com/case-files/cases/united-states-forest-service-v-pacific-rivers-council/

17. Mali Friedman, *Supreme Court Nixes FISA Surveillance Suit on Standing Grounds*, Covington & Burling

LLP. (Mar. 1, 2013)
http://www.insideprivacy.com/united-states/supreme-court-rejects-standing-to-challenge-fisa-surveillance-in-clapper/

18. Rebecca J. Schwartz, *New U.S. Supreme Court Decision Will Likely Impact Data Breach Litigation,* Shook, Hardy & Bacon, LLP. (Mar. 7, 2013)
http://www.datasecuritylawjournal.com/2013/03/07/new-u-s-supreme-court-decision-will-likely-impact-data-breach-litigation/

19. Devin McDougall, *Recent Supreme Court Decision May Affect Environmental Standing*, Sive Paget & Riesel P.C. (Mar. 13, 2013)
http://blog.sprlaw.com/2013/03/recent-supreme-court-decision-may-affect-environmental-standing/?utm_source=rss&utm_medium=rss&utm_campaign=recent-supreme-court-decision-may-affect-environmental-standing

20. Mark S. Melodia, Paul Bond, *In Clapper v. Amnesty International, Supreme Court Dismisses Privacy Suit for Lack of Article III Standing: Poses a Clear and Present Danger to Data Breach Class Actions* (Mar. 1, 2013)
http://www.reedsmith.com/In-Clapper-v-Amnesty-International-Supreme-Court-Dismisses-Privacy-Suit-for-Lack-of-Article-III-Standing--Poses-a-Clear-and-Present-Danger-to-Data-Breach-Class-Actions-03-01-2013/