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Alito, Scalia and Access to Courts

The nickname “Scalito” is a rather crass oversimplification of the views and judicial temperament of Supreme Court nominee Samuel Alito. But in one critical area of environmental law -- standing and access to courts -- the similarity between the views of Judge Alito and Justice Scalia is both real and very disturbing. A 1997 opinion joined by Judge Alito in *Public Interest Research Group (PIRG) v. Magnesium Elektron* suggests that Judge Alito would join Justice Scalia in interpreting the Constitution to shut the courthouse doors on citizens, even when they can prove that polluters have broken the law.

A major innovation of modern environmental statutes is the power Congress granted to citizens to ensure that environmental laws are faithfully enforced and carried out, through citizen suits, which allow citizens to sue polluters. But Justice Scalia has repeatedly, often successfully, tried to close the courthouse doors that Congress explicitly opened by making it difficult or impossible for environmental plaintiffs to show that they have standing to sue. Alito, too, has interpreted the Constitution to impose unreasonably high burdens on people seeking to vindicate the rights that Congress gave them to pursue a clean environment.

In *Public Interest Research Group (PIRG) v. Magnesium Elektron*, Judge Alito joined the majority in a 2-1 ruling that dramatically undermined the citizen suit provision of the Clean Water Act and reversed a trial court finding that a polluter should pay more than \$2 million in fines for violating the Act. Relying heavily on a standing opinion by Justice Scalia, the majority opinion held that environmental plaintiffs had to do more than show that they lived near a waterway that a company was polluting with excessive discharges, including 150 violations of its Clean Water Act permit. Instead, the plaintiffs had to hire experts that could trace specific detrimental impacts to the polluter’s discharge. This high hurdle contravenes the intent of Congress, which in the Clean Water Act had explicitly substituted this difficult, expensive process of tracing pollution impacts to specific sources with an easy-to-monitor system of pollution limits. But Judge Alito deemed Congress’ intent to give groups like PIRG standing irrelevant.

Three years later Supreme Court rejected Alito’s analysis. In *Friends of the Earth v. Laidlaw*, the Court ruled (over an angry dissent by Justice Scalia) that what matters for standing “is not injury to the environment, but injury to the plaintiff.” To focus on environmental harm, rather than plaintiffs’ harm “is to raise the standing hurdle higher than ... necessary...”

Judge Alito’s view of citizen suits, standing, and access to courts is of critical importance to environmentalists and anyone concerned with making sure that judges respect the will of

Congress. Community Rights Counsel urges the Senate to give Judge Alito's views on environmental standing the closest scrutiny during the confirmation process.