It's not an environmental law case, but the Supreme Court's decision in Clapper v. Amnesty International has a lot of environmental law folks talking. Clapper was a lawsuit that sought to challenge the constitutionality of a provision of the Foreign Intelligence Surveillance Act (FISA) that allowed the government to monitor a range of communications by foreign citizens outside of the United States. The plaintiffs in Clapper were US citizens who argued that FISA surveillance might result in monitoring of their communications with foreign citizens and that as a result of the fear of that surveillance, they were having to take expensive steps (like foreign travel) to communicate securely with foreign citizens.

Why is Clapper relevant for environmental law? Because the Court dismissed the lawsuit on the basis of standing (i.e., a plaintiff's ability to raise a claim in court), and some analysts are concerned that the sweeping language of the majority opinion in Clapper might herald much more restrictive standing doctrine in the federal courts in general, keeping plaintiffs in environmental cases out of court as well.

While I agree that there is some language in Clapper that is broad and might be applied in ways that could fundamentally change standing doctrine in environmental law, I'm cautiously optimistic that this will not be the case. Analysis below the jump.

First, let's begin with why the Court tossed the lawsuit in Clapper (here's a good brief overview of the case). Standing doctrine requires plaintiffs to establish that they have suffered some sort of "injury-in-fact" and that this injury was caused by the actions of the defendant that are being challenged in the lawsuit. While the Court agreed that unconstitutional interception of the plaintiffs' communications would be an injury that could support standing, the majority concluded that the plaintiffs could not show that any threat of government interception of their communications was "certainly impending," and therefore there wasn't sufficient injury-in-fact. Moreover, the Court concluded that the plaintiffs couldn't show that any interception would be the result of the challenged FISA provision, as opposed to some other provision of FISA that might authorize government interception of communications. Here's the key reasoning of the majority:

> Respondents' argument rests on their highly speculative fear that: (1) the Government will decide to target the communications of non-U. S. persons with whom they communicate; (2) in doing so, the Government will choose to invoke its authority under §1881a [the challenged FISA provision] rather than utilizing another method of surveillance; (3) the Article III judges who serve on the Foreign Intelligence Surveillance Court [which reviews FISA surveillance] will conclude that the Government's proposed surveillance procedures satisfy

> §1881a's many safeguards and are consistent with the Fourth Amendment; (4) the Government will succeed in intercepting the communications of respondents' contacts; and (5) respondents will be parties to the particular communications that the Government intercepts. [p. 11 of the opinion]

The concern that I've seen some environmental lawyers and law professors express is that the Court is establishing a higher standard of certainty ("certainly impending") that plaintiffs must show in order for their injury to justify judicial intervention. In the context of environmental law, that kind of certainty can be difficult to show. For example, imagine a plaintiff who has been exposed to a carcinogenic chemical. Most of the time, this will result in an elevated risk of cancer (say, from 1 in 1 million to 1 in 10,000), but not a certainty of cancer. One could imagine framing that injury as not "certainly impending" because there's no guarantee of cancer. Moreover, in many circumstances we have a great deal of uncertainty about whether certain human actions will cause harm. For instance, there's lots of debate still about whether a range of chemicals (e.g., bisphenol A) actually cause cancer. If we took the "certainly impending" standard on its face, then plaintiffs would have to establish with certainty (almost impossible for so many environmental harms) that the exposure has caused an increased risk. Finally, there may be a lot of circumstances where the government has granted a permit for private activity to occur, but there is no guarantee (yet) that the private action will in fact occur. For instance, the government might issue a permit for a developer to fill in wetlands; but it's always possible that before the developer breaks ground, they might lose financing or run into other problems that will keep them from actually doing the development.

These concerns are not fanciful. In one case, the DC Circuit initially concluded that environmental plaintiffs did not have standing to challenge EPA's decision to not tighten regulations of methyl bromide, a chemical that depletes the ozone (NRDC v. EPA, 440 F.3d 476). Even though the plaintiffs could show that the higher levels of methyl bromide would result in an increase in cancer deaths in the United States (an increase of lifetime risk of about 1 in 200,000), the court concluded that this increased risk could not support standing, since the risk for any one individual plaintiff was so tiny. (This conclusion was reversed on rehearing by the DC Circuit, see 464 F.3d 1.)

Clapper is in fact very similar to another recent Supreme Court case that concluded that environmental plaintiffs did not have standing: Summers v. Earth Island Institute. And it's that similarity that I think gives a clue about how one can limit the scope of the language in Clapper. The plaintiffs in Summers sought to challenge Forest Service regulations that they argued improperly restricted public notice and comment for certain forest development

activities. The Court concluded that the plaintiffs in Summers did not have standing because they had not identified a specific development project that would cause them injury (e.g., by diminishing their aesthetic enjoyment of the forest) and that had also gone through the process established by the challenged regulations. The plaintiffs in Summers (and the dissent, per Justice Breyer) objected that given the sheer number of projects that did proceed under the regulations, and the regular and continuous use of the National Forests by the plaintiffs, it did not make sense to deny standing in the case, since it was inevitable (or at least highly likely) that at some point one of the plaintiffs would suffer injury from the regulations.

The plaintiffs' standing argument in Summers is, in fact, very similar to the plaintiffs' argument in Clapper. The plaintiffs argued that given their regular and consistent communications with individuals that have previously been subject to US government surveillance, it was inevitable (or at least highly likely) that at some point their communications would be subject to surveillance pursuant to Section 1881a of FISA. As with Summers, the Court's response (quoted above) is that until and unless the plaintiffs can point to a specific piece of communications that they can show was subject to government surveillance pursuant to 1881a, there is no standing to sue. (Of course, a major difference between Summers and this case is that in Summers, plaintiffs likely would be able to meet that standard at some point in time by waiting for the right project, while in Clapper because the surveillance is secret, it is going to be very difficult, perhaps impossible, for plaintiffs to ever meet the Court's standing requirements.)

So one can read Clapper as standing for the same proposition as Summers: If you're challenging a general government program, you need to be able to show with specificity that a particular application of that program will injure your interests. You can't rely on probabilities that the program will likely cause you harm in the future.

Note that read this way, Clapper's main impact on environmental law cases will be to force plaintiffs to focus on challenging individual projects, rather than agency regulations or policy statements (or at least, when making those challenges to regulations or policy statements, plaintiffs will have to allege and show with specificity how an application of those regulations or policy statements are affecting them without an intermediate government action or step taking place). As such, this standing rule may put environmental groups with limited resources at a strategic disadvantage, but I don't think it will absolutely foreclose many challenges.

And read this way, Clapper shouldn't foreclose challenges in the kinds of cases that I discussed above. In all of those cases, plaintiffs are challenging a specific government action

that they alleged had a particular impact on them – a government regulatory program that would allow more emissions of harmful chemicals, or a permit that would result in a particular development project that would impact a particular location. In other words, the uncertainty that both Summers and Clapper find troublesome is whether a general government program will, in fact, actually result in an application that will affect the plaintiffs interests. But plaintiffs should still be able to rely on claims about probabilistic injury once they can show that there is such a particular application of the general program.

Footnote 5 in the majority opinion seems to support this distinction:

> Our cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about. In some instances, we have found standing based on a 'substantial risk' that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm. But to the extent that the 'substantial risk' standard is relevant and is distinct from the 'clearly impending' [sic – the court appears to have forgotten a find and replace here!] requirement, respondents fall short of even that standard, in light of the attenuated chain of inferences to find harm here. In addition, **plaintiffs bear the burden of pleading and proving concrete facts showing that the defendant's actual action has caused the substantial risk of harm**. Plaintiffs cannot rely on speculation about 'the unfettered choices made by independent actors not before the court.'" [fn. 5, p. 15-16; citations omitted; emphasis added]

Note that this interpretation is a way to reconcile the language in Clapper with broad language in a prior Supreme Court case, Friends of the Earth v. Laidlaw Environmental Services. In that case, the Court concluded that environmental plaintiffs had standing to challenge a company's illegal discharge of pollution into a river the plaintiffs used for recreation, even though plaintiffs had not shown that there would be any ecological or environmental harm from the discharge. Their fear of harm from the discharge was enough. Again, if you read Clapper as focusing on the kinds of government action challenged, Laidlaw is consistent with Clapper – after all, in Laidlaw the plaintiffs were challenging particular, specific actions by the company.

For ad law geeks out there, I think it's useful to see Clapper as a ripeness case – an argument that judicial review is premature and should wait for a particular application of a government program to a particular context. It's interesting to me that the Court is

thinking of ripeness as a standing doctrine. In fact, the parties in the Summers case thought that ripeness would be the central issue (incorrectly). And interestingly enough, the government is seeking cert in a lawsuit over environmental review for National Forest planning decisions, essentially arguing that a lack of ripeness means that there is no standing.

Of course, there's another way to distinguish Clapper: Some leading legal scholars and lawyers think this case is all about national defense and security, and that the Court is simply "adjusting" its standing doctrine to kick out a case it doesn't want to hear. This is entirely plausible to me as well, given the ways in which standing can (and I think often is) manipulated by judges to reach the results they want to reach.