One of the recurring questions in standing law is the extent to which Congress can change the application of the standing doctrine. A recent Supreme Court opinion in a non-environmental case sheds some light – not a lot, but some – on this recurring question.

The Court has made it clear that there is a constitutional core of the doctrine with three elements: a concrete injury in fact, a causal link between the injury and the defendant's conduct, and a reasonable prospect that a court could remedy the injury. But Congress may be able to mold the way these requirements are applied.

Spokeo, Inc. v. Robbins was about a violation of credit reporting requirements, a subject seemingly far removed from environmental law. The Court quoted Justice Kennedy's language in *Lujan* (an earlier environmental case) to the effect that Congress can provide remedies for injuries that were previously unrecognized by the law and the it can also identify chains of causation that will then become legally recognized. In terms of the concreteness requirement, the Court says, "[B]ecause Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important."

This opinion leaves many questions unanswered: How does Congress go about identifying such intangible harms? Is it sufficient if a statute grants standing for redress of a type of harm or does Congress have to make some specific finding about concreteness? What are the limits on the idea of concreteness? For instance, could Congress grant standing to challenge a threat to an endangered species to any scientist who studies the species or to anyone works professionally with members of the species? (In *Lujan*, the Court found neither of these injuries was a valid basis for standing.) And how does Congress establish that injuries are sufficiently linked to the defendant's conduct?

The Court gives no clue about the answer to these questions. I'd like to offer some preliminary thoughts about one possible line of analysis. If we are to find our what aspects of injury and causation Congress identified as deserving protection, we are not going to find that in a statute's citizen suit or jurisdictional provisions. Instead, a plausible starting point is to look at other provisions in the statutes that identify types of injury or forms of causation or degree of risk that are dangerous. For instance, the Clean Air Act contains a number of recognitions that small amounts of pollution from multiple sources can cause health risks that may seem numerically small but are still significant. Consider the following provisions:

1. Section 101 includes a finding that "the growth in the amount and complexity of air pollution brought about by urbanization, industrial, development, and the increasing

use of motor vehicles, has resulted in mounting dangers to the public health and welfare."

1. Sections 108 snd 109 require EPA to identify emissions that "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare" when the emissions come from "numerous or diverse mobile or stationary sources."

1. Section 112 requires EPA to issue regulations under some circumstances that reduce the risk from lifetime exposure "to the individual most exposed to emissions from a source . . . "to less than one in one million."

Taken altogether, these provisions suggest that Congress recognized a causal link between emissions from any one source in an air basin and an increase in individual risk, which even if very small, Congress still considered significant. In other words, if the plaintiff is in the same air basin or is otherwise exposed to pollutants from the defendant, it should not be necessary for a plaintiff to prove a specific link between a specific defendant's illegal emissions and a measurable risk to the plaintiff's health, or to show that the increased risk passes some threshold.

Another example might be found in the Endangered Species Act, which includes a finding that threatened species "are of aesthetic, ecological, educational, historical, recreational and *scientific* value to the Nation and its people." This suggests that Congress recognized all of these types of interests as worthy of federal protection. Admittedly, the statute doesn't identify protected interests and causal chains as the Clean Air Act does. Still, the reference to scientific value does suggest, contrary to *Lujan*, that if the loss of a species will impair a scientists work, this type of injury should be enough for standing.

In a nutshell, the argument is that an injury should be recognized as concrete if Congress has identified it as a basis for regulation, while a risk level and chain of causation should be recognized as a basis for standing when Congress has made them the basis for regulation. *Spokeo* at least leaves the door open to this argument. It remains to be seen how courts will apply *Spokeo* to future standing disputes.