Standing on Its Last Legs: Bennett v. Spear and the Past and Future of Standing in Environmental Cases

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Cover Page Footnote
I would like to thank the participants in my environmental law seminar in the spring of 1997, as well as many others who provided comments and insights, particularly Steve Davison. Needless to say, however, the views expressed in this article, including any errors or omissions, are solely those of the author.

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STANDING ON ITS LAST LEGS: BENNETT V. SPEAR
AND THE PAST AND FUTURE OF STANDING IN
ENVIRONMENTAL CASES

SAM KALEN

Table of Contents
I. Introduction ........................................................................................................................................... 1
II. Citizen Access to the Courts ................................................................................................................ 4
III. An Emerging Barrier to the Courthouse ............................................................................................. 9
   A. Sierra Club v. Morton ....................................................................................................................... 9
   B. Twenty Years Later: The Early 1990s ........................................................................................... 18
IV. Structural Fault in the Barrier .......................................................................................................... 32
   A. Bennett v. Spear ............................................................................................................................ 32
   B. The Trail Behind Bennett ............................................................................................................. 41
V. Cementing the Faults: A Simple Recognition of the
   Modern Paradigm ............................................................................................................................. 54
VI. Conclusion .......................................................................................................................................... 67

No man is an Iland, intire of itselfe; every man is a peece of the Continent,
a part of the maine; if a Clod bee washed away by the Sea, Europe is the
lesse, as well as if a Promontorie were, as well as if a Mannor of thy friends
or of thine owne were; any man's death diminishes me, because I am
involved in Mankinde; And therefore never send to know for whom the bell
tolls; it tols for thee.1

I. INTRODUCTION

The law of “standing” in environmental disputes appears to be
resting on its last legs, and well it should be. Arguably, standing’s

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Clark University, 1980; J.D., Washington University School of Law, 1984. I would like to thank
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JOHN DONNE, DEVOTIONS XVII).
fate has been sealed since its conception in the 1970s. Now, approximately a quarter of a century later, standing is on the verge of collapsing onto its weak intellectual foundation. The standing doctrine is that part of the "law of judicial jurisdiction" that "determines whom a court may hear make arguments about the legality of an official decision." Almost twenty years ago, Joseph Vining viewed standing with "a sense of intellectual crisis." In the years since, that intellectual crisis has grown. The Supreme Court's recent decision in Bennett v. Spear reflects one aspect of how this crisis has become too unwieldy. As such, the Bennett decision either marks a turning point in the treatment of standing in environmental cases or, in conjunction with other looming issues, highlights the need for the Court to reconsider the prudential and constitutional aspects of the doctrine of standing. Anything less will leave the law of standing in environmental cases in disarray.

The law of standing consists of both constitutional and prudential components. In order to satisfy the constitutional requirement for standing under Article III of the United States Constitution, which limits federal courts to deciding "cases" or "controversies," a party must suffer an "injury in fact" from a governmental action, and that injury must be fairly traceable to the challenged action and redressible by a favorable decision. To suffer an injury in fact, the plaintiff must be among those injured by the action. The prudential aspect of standing is somewhat a misnomer because it reflects the Court's interpretation or "gloss" on section 10 of the Administrative Procedure Act (APA), which allows parties who are "adversely affected or aggrieved by [Federal] agency action within the meaning of a relevant statute" to seek judicial review. The Court developed the "zone of interests" test to serve as a guide for determining when, "in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision." This zone of interests

2. See Joseph L. Sax, Standing to Sue: A Critical Review of the Mineral King Decision, 13 NAT. RESOURCES J. 76, 82 (1973) (observing, shortly after the Court adopted its current approach, that the "user equals standing" test was doomed to fail).
4. Id.
5. 117 S. Ct. 1154 (1997), rev'g Bennett v. Plenert, 63 F.3d 915 (9th Cir. 1995).
6. See id. at 1161.
7. See Bennett, 117 S. Ct. at 1161; Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-71 (1992); see also infra note 150 and accompanying text.
10. Id.
test requires that "a plaintiff’s grievance must arguably fall within the zone of interests protected or regulated by the statutory provi-
sion or constitutional guarantee invoked in the suit."\textsuperscript{12}

This article argues that the Supreme Court's standing decisions,
employing the above requirements in environmental disputes, have
been flawed. Those flaws have led to considerable confusion and
disagreement among the lower federal courts on how to apply the
rules of standing, primarily in cases involving the National Environ-
mental Policy Act of 1969 (NEPA)\textsuperscript{13} and the Endangered Species Act
(ESA).\textsuperscript{14} The article concludes that those flaws are so serious and
fundamental that the law of standing in environmental cases can
only be rescued if the original principles are revisited.\textsuperscript{15} Going back
to original principles entails reexamining the justification for both the
zone of interests test and the requirements for Article III standing.
Neither the zone of interests test nor the Court’s current articulation
of the Article III standing requirements can appropriately or even
logically define the group of litigants entitled to bring lawsuits

\textsuperscript{12} Bennett, 117 S. Ct. at 1161. That the zone of interests test reflects the Court's interpre-
tation of section 10 of the APA is not necessarily consistent with the Court's other state-
ments that the test applies to constitutional guarantees and that it serves to ensure a proper
role for the judiciary in a democratic society. See id. Although the Clarke Court arguably sug-
gested limiting the test to instances where it appropriately applied (in cases under the APA),
see 479 U.S. at 400 n.16, the Court in Bennett exhibited no such tendency.


\textsuperscript{15} Two of the more recent and better articles discussing standing are David Sive,
Environmental Standing, NAT. RESOURCES & ENV'T, Fall 1995, at 49, and Cass R. Sunstein,
What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III, 91 MICH. L. REV. 163 (1992); see
also Beth Brennan & Matt Clifford, Standing, Ripeness, and Forest Plan Appeals, 17 PUB. LAND &
RESOURCES L. REV. 125 (1996); Martha Colhoun & Timothy S. Hamill, Environmental Standing in
the Ninth Circuit: Wading Through the Quagmire, 15 PUB. LAND L. REV. 249 (1994); Susan L.
Gordon, Recent Developments, The Ninth Circuit Standing Requirements for Environmental
Organizations, 13 J. ENERGY NAT. RESOURCES & ENVTL. L. 264 (1993); George K. Pash, Note,
NEPA: As Procedure It Stands, As Procedure It Falls: Standing and Substantive Review in Idaho
Conservation League v. Mumma, 29 WILLAMETTE L. REV. 365 (1993); Jonathan Poisner,
Comment, Environmental Values and Judicial Review After Lujan: Two Critiques of the Separation
of Powers Theory of Standing, 18 ECOLOGY L.Q. 335 (1991); Karin P. Sheldon, Lujan v. Defenders of
Wildlife: The Supreme Court's Slash and Burn Approach to Environmental Standing, 23 Envtl. L.
Actions: Is it a Constitutional Requirement?, 78 YALE L.J. 816 (1969); Lea Brilmayer, The Jurispru-
dence of Article III: Perspectives on the "Case or Controversy" Requirement, 93 HARV. L. REV. 297
(1979); William A. Fletcher, The Structure of Standing, 98 YALE L.J. 221 (1988); Louis L. Jaffe,
Standing Again, 84 HARV. L. REV. 633 (1971); Louis L. Jaffe, The Citizen as Litigant in Public
Actions: The Non-Hohfeldian or Ideological Plaintiff, 116 U. PA. L. REV. 1033 (1968); Henry P.
Monaghan, Third Party Standing, 84 COLUM. L. REV. 277 (1984); Gene R. Nichol, Jr., Rethinking
Standing, 72 CAL. L. REV. 68 (1984); Michael A. Perino, Comment, Justice Scalia: Standing,
Environmental Law, and the Supreme Court, 15 B.C. ENVT'L AFF. L. REV. 135 (1987); Bruce Teicher,
Note, Informational Injuries as a Basis for Standing, 79 COLUM. L. REV. 366 (1979); Mark V.
Stephen L. Winter, The Metaphor of Standing and the Problem of Self-Governance, 40 STAN. L. REV.
1371 (1988).
claiming violations of the ESA or NEPA. While the Court’s recent decision in *Bennett v. Spear* may signal a limited future, if any, for the zone of interests test in many environmental cases, a similar fate should await the Article III standing requirements as they are presently applied. The need for litigants, particularly environmental organizations, to show that they or one of their members is personally injured can no longer serve as a viable and intellectually honest requirement for environmental cases, at least for those cases brought under NEPA or the ESA.

II. CITIZEN ACCESS TO THE COURTS

Not until the 1960s did litigants begin to view the courts as possibly objective arbiters in environmental disputes. During those years, a doctrinal shift began to take place that recognized the role of citizens and courts in the administration of governmental programs.\(^\text{16}\) This development in administrative law was seen by many as a victory in the effort to cast aside the private or common law model that had dominated for so many years.\(^\text{17}\) Previously, in both private or public disputes, courts generally applied the private law model that required that the plaintiff establish a “legal interest,” which effectively limited standing to those with an economic interest:

At both private and public law, the question was not whether the litigant was harmed or whether the governmental or nongovernmental defendant acted unlawfully, but whether the government breached some duty owed to the litigant. If the litigant had no common-law interest at stake—if it was not the “object” of the regulation—courts saw no legal duty suitable for legal redress.\(^\text{18}\)

However, once beneficiaries of regulatory programs began to convince courts of their right to seek judicial review of agency decisions on a par with those being regulated (such as the objects of the regulation), the private law model of a “legal interest” appeared problematic. Citizens who benefited by having an effective regulatory program could solicit help from the judiciary to control allegedly aberrant administrative behavior but could not claim a  

\(^{16}\) See generally Sunstein, *supra* note 15, at 183-85.  
\(^{18}\) Id. at 1435 (footnote omitted).
violation of any legal interest or express duty owed to them specifically.\textsuperscript{19} In 1970, therefore, the Supreme Court abandoned requiring a legal interest for cases brought under the APA.\textsuperscript{20} In\textit{ Association of Data Processing Service Organizations v. Camp}\textsuperscript{21} and\textit{ Barlow v. Collins},\textsuperscript{22} the Court broadened the class of those entitled to seek judicial review under the APA to include a party with an injury in fact that is "arguably within the zone of interest" protected by the statutory or constitutional provision at issue.\textsuperscript{23} These decisions offered the potential for increased citizen access to the courts, viewed by many as an important mechanism for avoiding what has been called "regulatory capture."\textsuperscript{24} Dan Tarlock observed that in the environmental area, "Professor Sax provided the most coherent justification for creative lawyers," in that Sax "attempted to reconcile environmental law precepts with New Deal administrative law and separation of powers principles."\textsuperscript{25} Joseph Sax explained that citizen participation and judicial involvement are consistent with our

\textsuperscript{19} See id. at 1441-44. Kenneth Culp Davis, Louis L. Jaffe and others debated the appropriate limits for standing in public actions, and Cass Sunstein and William Fletcher each have traced this debate. See Fletcher, supra note 15; Sunstein, supra note 15; Sunstein, supra note 17; cf. Abram Chayes, The Role of the Judge in Public Law Litigation, 89 HARV. L. REV. 1281 (1976) (a later influential article discussing public law litigation).


\textsuperscript{21} 397 U.S. 150 (1970).

\textsuperscript{22} 397 U.S. 159 (1970).

\textsuperscript{23} Data Processing, 397 U.S. at 152-54; see Barlow, 397 U.S. at 164; see also infra notes 41, 72-74 and accompanying text. The Data Processing and Barlow decisions abandoned the old "legal interest" test, which "represented not simply an incremental development, but a shift in the axioms of legal thinking." VINING, supra note 3, at 39.

\textsuperscript{24} Martin M. Shapiro, Prudence and Rationality Under the Constitution, in THE CONSTITUTION AND THE REGULATION OF SOCIETY 213, 220 (Gary C. Bryner & Dennis L. Thompson eds., 1988). "Beginning in the mid-fifties and rapidly accelerating in the sixties and seventies ... Congress and the courts came to fear that agency experts were being 'captured' by special-interest groups and turning out rules that favored those special interests over the public interest." \textit{Id}. For instance, Justice Douglas opined that federal agencies "are notoriously under the control of powerful interests who manipulate them through advisory committees, or friendly working relations, or who have that natural affinity with the agency" that develops over time. Sierra Club v. Morton, 405 U.S. 727, 745 (1972) (Douglas, J., dissenting). According to Professor Sunstein, however, the concern over regulatory capture "should not be overdrawn." Sunstein, supra note 15, at 184. Sunstein observed that "[t]he empirical literature did not establish a systematic risk of administrative abdication, and it did not demonstrate that regulated industries are always in a better position to influence government than beneficiaries." \textit{Id}. See generally WILLIAM L. CARY, POLITICS AND THE REGULATORY AGENCIES (1967); LOUIS M. KOHLMEIER, JR., THE REGULATORS: WATCHDOG AGENCIES AND THE PUBLIC INTEREST (1969); JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE (1985).

tripartite constitutional system and serve as an important check on how agencies evaluate and respond to environmental issues.26

This doctrinal shift occurred as the courthouse doors began to open for environmental disputes. Parties who had once attempted to use devices such as *qui tam* lawsuits to abate pollution27 now focused on other statutory programs, such as the environmental impact statement (EIS) requirement under NEPA28 and the United States Army Corps of Engineers’ permitting program under the Refuse Act29 to control discharges of pollution into our nation’s waterways, a program soon overtaken by the 1972 Clean Water Act (CWA).30 In the same year as the first Earth Day, Congress in the 1970 Clean Air

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26. See id.


Act (CAA) authorized citizen suits, a now accepted component of environmental legislation. These and other developments gave environmental advocates hope that environmental concerns would become part of the "public law."

The early 1970s, therefore, offered considerable promise for environmental groups to supervise possibly captive regulatory agencies by taking their concerns to court. NEPA provided the groups with a legally identifiable opportunity to question federal agency decisions and, if necessary, to litigate. Coupled with the APA, NEPA offered the promise of a federal judicial forum unencumbered by old private law model requirements. Additionally, precedent existed for the argument that parties interested in protecting the


34. See generally CONGRESSIONAL QUARTERLY INC., THE BATTLE FOR NATURAL RESOURCES 56 (1983).

35. See, e.g., Virginia F. Coleman, Possible Repercussions of the National Environmental Policy Act of 1969 on the Private Law Governing Pollution Abatement Suits, 3 NAT. RESOURCES LAW. 647 (1970); Eva H. Hanks & John L. Hanks, An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969, 24 RUTGERS L. REV. 230 (1970). More recently, Nicholas Yost described how NEPA ought to be construed to include a substantive mandate and how two of the first cases involving NEPA suggested such an approach. See Nicholas C. Yost, NEPA's Promise--Partially Fulfilled, 20 ENVT'L. L. 533, 536-37 (1990) (discussing Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970) and Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971)). As David Sive explains, standing during the first 20 years after NEPA was not perceived as a serious obstacle, as long as plaintiffs could demonstrate harm from an identifiable governmental action affecting a limited geographic area and the harm had some environmental component. See Sive, supra note 15, at 53-54; see also infra note 96.
environment had a cognizable interest sufficient to allow them to maintain a lawsuit. \(^{36}\) As early as 1943, Judge Jerome Frank interpreted language allowing "aggrieved" persons to seek judicial review as embracing a private attorney general theory. \(^{37}\) Less than twenty years later, Judge Bazelon echoed a similar theme when the Environmental Defense Fund challenged a federal agency action under the Federal Insecticide, Fungicide, and Rodenticide Act, \(^{38}\) with the injury described as the "biological harm to man and to other living things resulting from the Secretary's failure to take action which would restrict the use of DDT in the environment."  

Citing a variety of earlier cases, Judge Bazelon wrote that "[c]onsumers of regulated products and services have standing to protect the public interest in the proper administration of a regulatory system enacted

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36. In a 1965 case, a coalition of local groups and members challenged the Federal Power Commission's (FPC, now the Federal Energy Regulatory Commission) decision to license a pumped storage hydroelectric project on the top of Storm King Mountain, a scenic area on the northern entrance to the Hudson River Gorge. See Scenic Hudson Preservation Conference v. Federal Power Comm'n, 354 F.2d 608, 611 (2d Cir. 1965). One of the principal questions in Scenic Hudson was whether, under the Federal Power Act (FPA), 16 U.S.C. §§ 791-828c, the Commission should have considered the environmental impact of the project as well as whether gas turbines might serve as an alternative power source to a pumped storage project. See Scenic Hudson, 354 F.2d at 613. Section 313(b) of the FPA authorized judicial review for any party to a proceeding before the FPC who is aggrieved by an order of the Commission. See 16 U.S.C. § 825l(b). The Second Circuit held that the plaintiffs had standing because they were aggrieved by an order of the FPC and that the FPC should have engaged in a more thorough review. See Scenic Hudson, 354 F.2d at 616. The court also observed that the plaintiffs had an economic interest because of a transmission line for the proposed project, as well as the proposed flooding of one of the plaintiff members' trailways. See id. The Scenic Hudson decision was supported by decisions from the seventh and ninth circuit. See Namekagon Hydro Co. v. Federal Power Comm'n, 216 F.2d 509 (7th Cir. 1954); State of Washington Dep't of Game v. Federal Power Comm'n, 207 F.2d 391, 395 n.11 (9th Cir. 1953).

37. Many of the early high profile environmental disputes involved the construction of dams or hydroelectric projects along United States waterways. As one observer notes, "[t]hose dams were now seen by many as illegitimate concrete intrusions into wilderness areas that had their own integrity, their own beauty, and their own rights." Sale, supra note 33, at 18. Indeed, the Storm King litigation spurred the growth of one of the premier environmental litigation groups, the Environmental Defense Fund. See id. at 21; see also Robert L. Rabin, Federal Regulation in Historical Perspective, 38 Stan. L. Rev. 1189, 1298-1301 (1986) (describing the significance of Scenic Hudson). An earlier unsuccessful effort to stop the construction of the Hetch Hetchy dam in Yosemite was described as "the greatest cause célèbre in the early history of the national park movement in the United States." Alfred Runte, National Parks: The American Experience 79 (2d ed. 1987). Yet, the subsequent battle to block the Echo Park dam in Dinosaur National Monument was successful. See Jon M. Cosco, Echo Park: Struggle for Preservation (1995); see also John D. Echeverria et al., Rivers at Risk: The Concerned Citizen's Guide to Hydropower (1989) (instructing citizens and communities on how to preserve free-flowing rivers from hydropower development). However, the effort to stop the Glen Canyon Dam in court was dismissed due to a lack of standing. See National Parks Ass'n v. Udall, Civ. No. 3904-62 (U.S. Dist. Ct. 1962); see also Cosco, supra at 98-99.


for their benefit. The interest asserted in such a challenge to administrative action need not be economic." In the same year that Judge Bazelon handed down *Hardin*, Kenneth Culp Davis, the leading commentator on administrative law, argued that the law of standing had just been liberalized by four Supreme Court decisions from 1968 to 1970. Davis added that in doing so, the Court had left the law of standing in "turmoil."  

III. AN EMERGING BARRIER TO THE COURTHOUSE  
A. Sierra Club v. Morton  

Against this background, the Sierra Club waged its challenge to the Forest Service's proposed activities in the Mineral King Valley of California and in the process launched the modern law of environmental standing. In *Sierra Club v. Morton*, a plurality of the Court

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41. See Kenneth Culp Davis, *The Liberalized Law of Standing*, 37 U. Chi. L. Rev. 450, 450 (1970). The four cases were *Barlow v. Collins*, 397 U.S. 159 (1970); *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970); *Flast v. Cohen*, 392 U.S. 83 (1968); and *Hardin v. Kentucky Util. Co.*, 390 U.S. 1 (1968). According to Davis, *Data Processing and Barlow*: superseded a large batch of law that was built on such doctrine as that of the *Kansas City Power & Light Co. v. McKay*, 225 F.2d 924 (D.C. Cir. 1954)] case that something in the nature of a "legal right" or "legal interest" was necessary for standing. That shift is a great accomplishment and it deserves strong emphasis, for federal law of standing now has a new and better orientation.  

Davis, supra, at 457. The problem with the Court's opinions, according to Davis, is that they added the additional requirement that the litigant show that the interest asserted is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Id. (quoting *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972)). Davis opposed adding this requirement and suggested that the better reasoned view was expressed in *Scanwell Lab., Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970); see Davis, supra, at 467-68. In *Scanwell*, the court reviewed the development of standing in public actions, referring to Davis extensively, and concluded that the legal interest test for standing must be abandoned. See *Scanwell*, 424 F.2d at 865-73. The court found unsupported the fear that expanding standing would open the Pandora's box of litigation and offered the following observation:  

Of course it is true that the grant of standing must be carefully controlled by the exercise of judicial discretion in order that completely frivolous lawsuits will be averted. There must be a practical separation of the meritorious sheep from the capricious goats—a recognition that *cucullus non facit monachum*. However, responsible federal judges will be able to discern a case in which there is injury in fact, sufficient adversary interest to constitute a case or controversy under Article III, and an otherwise reviewable subject matter to prevent the dockets from becoming overcrowded.  

*Scanwell*, 424 F.2d at 872.  
42. See Davis, supra note 41, at 450.  
43. 405 U.S. 727 (1972).
established three principles that would guide the law of standing in environmental cases for the next twenty-five years.\textsuperscript{45} First, the Court held that the type of injury to support standing could be non-economic, that is, harm to the aesthetics and ecology of an area are sufficient interests to constitute a cognizable injury.\textsuperscript{46} Second, the Court rejected the "notion that an injury that is widely shared is \textit{ipso facto} not an injury sufficient to provide the basis for judicial review."\textsuperscript{47} Finally, and most importantly, the Court limited the first two principles with a requirement that the plaintiff provide sufficient "allegations of individualized injury."\textsuperscript{48}

Nestled between the Sequoia National Park and the Sequoia National Forest, Mineral King Valley offered great promise for commercial and recreational development.\textsuperscript{49} This scenic valley located within the Sierra Nevada Mountains in California was the site of an old mining village, and when Congress established the national park in 1890, it excluded the mining area, which became part of the national forest.\textsuperscript{50} By the 1960s, many considered Mineral King as possibly becoming one of the country's premier skiing areas, and the United States Forest Service sought bids for the development of a recreational facility at Mineral King.\textsuperscript{51} Walt Disney was the successful bidder, and over the next few years Disney developed plans for a resort on a grand scale, exceeding previous expectations.\textsuperscript{52} The Disney plan ultimately contemplated accommodations for 3,310 visitors, parking for approximately the same number of vehicles, twenty-two ski lifts, an ability to handle at one time 20,000 skiers, a restaurant capacity of over 2,000 people, and an expected visitation

\textsuperscript{44.} Only three other Justices joined Justice Stewart's opinion. Justices Powell and Rehnquist did not participate in the consideration or decision of the case, and Justices Douglas, Brennan and Blackmun dissented.

\textsuperscript{45.} The Court specifically declined to comment on the application of the zone of interests test to the facts of the case. See Sierra Club, 405 U.S. at 733 n.5.

\textsuperscript{46.} See id. at 734-36.

\textsuperscript{47.} Id. at 738 (emphasis added).

\textsuperscript{48.} Id. at 736. For a critique of Sierra Club, see generally Sax, supra note 2.


\textsuperscript{50.} Although part of the national forest, the Mineral King Valley was designated as a game refuge. See 16 U.S.C. § 45f.

\textsuperscript{51.} The Forest Service had solicited bids in the 1940s, but to no avail. Responding to inquiries by Walt Disney Productions, the Forest Service again solicited bids in 1965. Mineral King Valley, supra note 49, at 178.

\textsuperscript{52.} See id. at 180-81.
rate of over one million people per year.\(^\text{53}\) This master plan included construction of a new highway to accommodate visitors, as well as installation of a transmission line to carry electric power to the resort.\(^\text{54}\) Construction of the highway and transmission line required the approval of the National Park Service (Park Service), whose property had to be crossed to gain effective access to the valley.\(^\text{55}\) Less than a year after the Park Service reluctantly agreed to support a permit for crossing its land, and shortly before a scheduled meeting between the Park Service and the California Highway Department, the Sierra Club filed suit for injunctive relief.\(^\text{56}\) In its complaint, the Sierra Club argued that the authorization for Disney to develop a resort violated Mineral King’s status as a game refuge and that the Park Service lacked the statutory authority to grant a permit to construct roads through park property.\(^\text{57}\)

The Sierra Club obtained a preliminary injunction from the district court, but when the case proceeded to the Ninth Circuit, the Sierra Club’s standing became the primary issue.\(^\text{58}\) The Sierra Club relied upon the notion that it had standing because the Sierra Club was acting as a private attorney general, a concept for which adequate precedent had been developed.\(^\text{59}\) Indeed, Judge Moore of the Second Circuit relied on this argument when he concluded that “the public interest in environmental resources—an interest created by statutes affecting the issuance of this permit [under the Rivers and Harbors Act]—is a legally protected interest affording these plaintiffs, as responsible representatives of the public, standing to obtain judicial review of agency action alleged to be in contravention of that public interest.”\(^\text{60}\) However, Judge Trask of the Ninth Circuit was not receptive to this public organization standing theory. Judge

\(^{53}\) See id.

\(^{54}\) See id. at 182.

\(^{55}\) See id.

\(^{56}\) See id. at 190.


\(^{58}\) See Sierra Club, 433 F.2d at 28.

\(^{59}\) See supra notes 37-42 and accompanying text; see also infra note 80. The Sierra Club alleged that it was a non-profit organization, with approximately 78,000 members nationally, of whom 27,000 resided in the San Francisco Bay area, and that the organization had a special interest in the protection of the national parks and forests. See Sierra Club, 433 F.2d at 29. This interest would be “vitally affected by the acts ... described and [it] would be aggrieved by” the challenged federal actions. Id.

\(^{60}\) Citizens Committee for the Hudson Valley v. Volpe, 425 F.2d 97, 105 (2d Cir. 1970). David Sive, one of the leading experts on the law of standing and a champion of modern environmental law, represented the plaintiffs in this case. See Sive, supra note 15, at 52. See generally David Sive, Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law, 70 COLUM. L. REV. 612 (1970) (reviewing administrative rulings in the field of environmental law).
Trask distinguished the cases the district court relied upon when it allowed public organization standing, as well as other recent standing cases, and concluded that the Sierra Club lacked standing because the Sierra Club did not allege that either it or its members had a sufficient interest such that the Club or its members were "aggrieved" or "adversely affected" within the meaning of the rules of standing.

A plurality of the Supreme Court sided with Judge Trask, although the opinion failed to articulate any justification for what has since become the requirement for an "individualized injury." The Court began its analysis by asking whether the Sierra Club alleged facts entitled the case to judicial review. Next, the Court

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62. Although he distinguished Judge Moore's case by noting that there the litigants were users of the affected area, Judge Trask nevertheless opposed broadly applying the private attorney general theory. The private attorney general concept, according to Judge Trask, is limited to instances where Congress has authorized parties to bring suit to prevent unlawful actions. See Sierra Club, 433 F.2d at 33 n.9. Of course, in Hudson Valley, like the Sierra Club, the parties sought review under the APA. See Hudson Valley, 425 F.2d at 100. Elsewhere in his opinion, Judge Trask indicated that the APA did not itself provide a right to review, "absent judicially articulated notions of 'legal wrong' of adversely affected or aggrieved . . . within the meaning of any relevant statute." Sierra Club, 433 F.2d at 32 (quoting Judge Burger's concurring opinion in National Ass'n of Sec. Dealers, Inc. v. SEC, 420 F.2d 83, 101 (D.C. Cir. 1969), rev'd, 401 U.S. 617 (1971)). Earlier, in United Church of Christ, Judge (later Chief Justice) Burger had considered whether a public consumer seeking to intervene in a proceeding before the Federal Communications Commission had standing. See United Church of Christ, 359 F.2d at 997. There, Judge Burger rejected limiting standing only to those with an economic interest and allowed the consuming public the opportunity to participate during the agency's decision-making process, emphasizing the need for and role of public participation. See id. at 999-1000. This opinion should be compared to Burger's concurring opinion and the majority opinion in National Ass'n of Securities Dealers, Inc., 420 F.2d 83 (D.C. Cir. 1969), which together illustrate the influence of Louis Jaffe and the debate over how to explain and at the same time limit standing in a public litigation model.

63. Sierra Club, 433 F.2d at 32. Here, Judge Trask quoted from Black's Law Dictionary that an aggrieved person is one that has suffered a loss or injury. See id. at 32 n.8. In a concurring opinion, Judge Hamley stated that he would have granted the Sierra Club standing. See id. at 38 (Hamley, J., concurring). Judges Hamley and Trask had this same difference of opinion over standing a year later. See Alameda Conservation Ass'n v. California, 437 F.2d 1087 (9th Cir. 1971). In fact, in Alameda Conservation Ass'n, a majority of the court granted standing to a wider class of plaintiffs than Judge Trask would have. Judge Trask expressed concern over expanding the realm of parties entitled to bring lawsuits. See id. at 1090-93. In Environmental Defense Fund, Inc. v. United States Army Corps of Engineers, 325 F. Supp. 728 (E.D. Ark. 1971), aff'd, 470 F.2d 289 (8th Cir. 1972), the court opted to follow the concurrences in Alameda Conservation Ass'n rather than Judge Trask's opinion, reasoning that the underlying rationale of Data Processing suggests that organizational plaintiffs with an interest in protecting the environment have standing. See id. For a critique of the Ninth Circuit's decision in Sierra Club, see Mineral King Valley, supra note 49, at 198-200; Recent Development, Conservation Group Refused Standing to Contest Agency Action Which Would Affect National Park--Sierra Club v. Hickel, 46 N.Y.U. L. Rev. 177 (1971).

examined whether the Sierra Club alleged facts to show that it had a "sufficient stake in an otherwise justiciable controversy."65 Quoting from *Baker v. Carr,*66 a case decided before the Court "liberalized" the law of standing, the Court converted "sufficient stake" into a "personal stake in the outcome of the controversy."67 In doing so, the Court overlooked its own statement that the requirement for a "personal stake" only applies when the party does not rely on any specific statute authorizing judicial review.68 Here, the Court correctly described the Sierra Club as relying on section 10 of the APA.69 The Court recognized that section 10 granted the Sierra Club the right to judicial review if the organization is, *inter alia*, "adversely affected or aggrieved by agency action within the meaning of a relevant statute."70 The appropriate question then became whether the Sierra Club was "adversely affected or aggrieved," a test the Court concluded requires a showing of "injury in fact."71 The Court adopted the injury in fact requirement from two cases, *Association of Data Processing Service Organizations, Inc. v. Camp*72 and *Barlow v. Collins.*73 However, the Court did not, in either of those cases,

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65. See id.
67. *Sierra Club*, 405 U.S. at 732. In *Baker*, the Court began its analysis by noting that a federal or state statute could not be invalidated except when adjudicating the "legal rights of litigants in actual controversies." *Baker*, 369 U.S. at 204. The Court then phrased the question as "[h]ave the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions?" *Id.* The Court concluded that voters had standing to challenge an apportionment scheme that affected them: "They are asserting a plain, direct, and adequate interest in maintaining the effectiveness of their votes," not merely a claim of "the right possessed by every citizen to require that the government be administered according to the law." *Id.* at 208 (citations omitted). The Court, therefore, refers to the "personal stake in the outcome of the controversy" as a way of ensuring that parties are truly adversarial. *See Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 n.16 (1976) (repeating the concept from *Baker*); *Roe v. Wade*, 410 U.S. 113, 123 (1973) (referring similarly to the necessary degree of contentiousness); *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 151-52 (1970) (quoting *Flast v. Cohen*, 392 U.S. 83 (1968)); *see also* *Laird v. Tatum*, 408 U.S. 1, 13 n.7 (1972) (quoting *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166 (1972)).
68. See *Sierra Club*, 405 U.S. at 732.
69. See *id*.
70. 7 U.S.C. § 702.
71. *Sierra Club*, 405 U.S. at 734.
73. 397 U.S. 159 (1970). Justice Stewart explained that the injury in fact requirement replaced the old "legal wrong" or "legal interest" test articulated in some older decisions under the APA. *See Sierra Club*, 405 U.S. at 733; *supra* notes 23 and 41. Cass Sunstein opined that the Court basically invented the injury in fact test in *Data Processing* and *Barlow*, positing that the test comes from Kenneth Culp Davis' interpretation of the APA. *See Sunstein*, *supra* note 15, at 185-86. According to Sunstein, Davis misread the APA, overlooking that the "adversely affected or aggrieved" clause is modified by "within the meaning of a relevant statute." *Id.* at 186. Sunstein argues that this part of section 10(a) of the APA was designed to allow:
"address itself to the question, which has arisen with increasing frequency in federal courts in recent years, as to what must be alleged by persons who claim injury of a noneconomic nature to interests that are widely shared." The Court closed this purported gap by holding that noneconomic injuries can satisfy the "injury in fact" requirement as follows:

We do not question that [the type of harm identified by the Sierra Club] may amount to an "injury in fact" sufficient to lay the basis for standing under § 10 of the APA. Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.

Without any further support, the Court added that the injury in fact test requires more than an injury to a "cognizable interest." Justice Stewart required "the party seeking review be himself among the injured." The additional requirement of personalized injury contradicts the Court's assertion that a "personal stake" in the outcome is not necessary where Congress has authorized judicial review, as with the APA. In effect, under the APA, the Court superimposed the same test that would apply if Congress had not authorized judicial review.

Next, the Court responded to the Sierra Club's challenge to the personalized injury requirement, concluding with an unsupported

People [to] bring suit if they could show that 'a relevant statute'—a statute other than the APA—granted them standing by providing that people 'adversely affected or aggrieved' were entitled to bring suit. In this way, the APA recognized that Congress had allowed people to have causes of action, and hence standing, even if their interests were not entitled to consideration by the relevant agency. Such people could act as "private attorney general . . . ." The APA thus provided for congressional authorization of actions by people lacking legal injuries.

Id. at 182. William Fletcher, on the other hand, explains that section 10(a) of the APA was designed to incorporate existing law and be flexible enough to account for subsequent developments, such as those presented by NEPA. See Fletcher, supra note 15, at 255-57. See also Vining, supra note 3, at 40. The Court had "long since rejected that interpretation, however, which would have made the judicial review provision of the APA no more than a restatement of pre-existing law." Lujan v. National Wildlife Fed’n, 497 U.S. 871, 883 (1990).


75. Sierra Club, 405 U.S. at 734.
76. See id. at 734-35.
77. Id. at 735 (emphasis added).
78. See id.
79. This analysis further confuses Article III standing with what is required under the APA. See Sunstein, supra note 15, at 186 (noting that similar reasoning in Data Processing failed to address the relationship between Article III and the injury in fact test).
assertion that "the party seeking review must himself have suffered an injury." The Court rejected the argument that the Sierra Club should be able to bring a "public action" as if it were acting as a "private attorney general," but the Court's reasoning appears circular. The Court interpreted prior decisions as only allowing parties with a statutory right to seek review to argue for the public interest. However, in Sierra Club, the Court shifted its focus back to the recognition that, while noneconomic injuries are sufficient to bring a person within the meaning of "the statutory language," the party seeking review must herself be among the injured. The Court does not provide an explanation for this holding, nor will one find the answer in the remaining four paragraphs of Justice Stewart's plurality opinion. Justice Stewart's part of the opinion is devoted to the policy argument that any other construction of the APA would allow parties with a special interest in a matter to litigate, implicitly voicing the concern that the courts would be flooded without any effective barrier to the courthouse. The personal injury requirement, therefore, "serve[s] as at least a rough attempt to put the

80. Sierra Club, 405 U.S. at 738 (emphasis added). Amici explained, as the Court apparently knew, that the Sierra Club had members who would have satisfied the personalized injury requirement, but the organization refused to rely on those members and instead chose to press the ideological argument against requiring the need for such a showing. See id. at 735 n.8. See also infra note 89. The Sierra Club sought to confirm what other judges recognized:

[Organizations such as the Sierra Club are] non-profit organizations composed of members who have a sincere and vital common interest in protecting those environmental values which they deem to be most important to this, and future, generations of American citizens. It is true that they have no direct private and personal economic interest in the . . . [areas being affected]; but these organizations wish to represent what they deem to be the "public" interest in this river and environs. Each of the organizations has demonstrated its interest in such matters as that represented by this lawsuit.


81. See Sierra Club, 405 U.S. at 726.


83. See Sierra Club, 405 U.S. at 736-38.

84. See id. at 738 n.13. No statute is specified, but the Court cites to several lower court cases where parties with noneconomic interests challenged various agency decisions. See id. Two of the cases were Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970), and Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965). See Sierra Club, 405 U.S. at 738 n.13.

85. See Sierra Club, 405 U.S. at 738.

86. The Court acknowledges instances where organizations alleging an organizational interest were granted standing, but dismisses those cases by observing that they also involved at least one party or one member of the organization who suffered an individualized injury. See id. at 739 n.14.

87. See id. 739-41.
decision as to whether review will be sought in the hands of those who have a *direct stake* in the outcome.\textsuperscript{88}

Justices Douglas, Brennan, and Blackmun dissented.\textsuperscript{89} In particular, Justice Douglas championed Christopher Stone's\textsuperscript{90} view that inanimate objects adversely affected by governmental action, such as the trees or Mineral King Valley, should be able to sue in their own right through a representative guardian, such as the Sierra Club.\textsuperscript{91} Justice Douglas argued that "[c]ontemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation."\textsuperscript{92} Justice Blackmun, overtly concerned with the possible loss of the Mineral King Valley to development, offered two alternatives in his dissent.\textsuperscript{93} He stated that he would either allow the Sierra Club to amend its complaint to satisfy the standing requirement and then reinstate the district court judgment granting a preliminary injunction, or he would allow organizations such as the Sierra Club to maintain the lawsuit, due to its well-recognized interest in

\textsuperscript{88} Id. at 740 (emphasis added).

\textsuperscript{89} Justices Douglas and Blackmun "felt so strongly about their dissents" that they read "them from the bench when the decision was announced." \textsc{Robert V. Percival et al., Environmental Regulation: Law, Science and Policy} 723 (2d ed. 1996). Justice Brennan attempted to have the case dismissed on the grounds that *certiorari* had been improvidently granted, but Justice Stewart modified his opinion to allow the Sierra Club to amend its complaint in order to maintain its challenge to proposed activity at Mineral King. See id. (citing to Robert V. Percival, \textit{Environmental Law in the Supreme Court: Highlights From the Marshall Papers}, 23 ENVTL. L. REP. 10606, 10620 (1993)). See Sierra Club v. Morton, 348 F. Supp. 219 (N.D. Cal. 1972) (allowing plaintiff to amend complaint to allege injury in fact and also to add NEPA count). The lawsuit continued until 1977, when it was finally dismissed without prejudice; the following year Congress made Mineral King part of the Sequoia National Park. See \textsc{Percival, supra} at 724.


\textsuperscript{91} See Sierra Club, 405 U.S. at 741-42.

\textsuperscript{92} Id. Justice Douglas was not clear in articulating who could serve as the representative for the inanimate object. He suggested that "those people who have so frequented the place as to know its values and wonders will be able to speak for the entire ecological community." Id. at 752. Unfortunately, it may be somewhat unrealistic to assume that those who frequent a place are a homogenous group with similar values and motives. Skiers, for instance, may have different interests than hikers. Who can speak for the inanimate object, therefore, entails a normative judgment, one that presumes knowledge of the interests of the inanimate object. To the extent that Justice Douglas would limit representatives to those who use and know the place, isn't he simply suggesting a similar inquiry as that required by the majority of the Court, albeit for a different reason? Would Justice Douglas' inquiry require examining the motives of the asserted representative of the inanimate object? Would all organizations speak with a similar voice? Whether or not inanimate objects may sue in their own right may not alleviate the issue of who can bring the lawsuit. Cf. \textsc{Hawksbill Sea Turtle v. Federal Emergency Management Agency}, No. 96-7662, 1997 U.S. App. LEXIS 26096, at *11 n.2 (3d Cir. Sept. 22, 1997) (discussing whether animals should have standing).

\textsuperscript{93} See Sierra Club, 405 U.S. at 756-58.

After Sierra Club, environmental advocates viewed standing merely as a technical hurdle. This outlook was particularly true in United States v. Students Challenging Regulatory Agency Procedures (SCRAP), where the Court held that law students and other environmental groups challenging a rate increase by the Interstate Commerce Commission (ICC) had standing to pursue their claim. The students alleged that the proposed rate increase for the railroads threatened to discourage the use of recycled materials, which in turn would promote the use of new raw materials that compete with recycled materials or scrap. The students further alleged that the increased need for raw materials would lead to increased mining, timber harvesting, and other resource extracting activities. As a result, the students claimed, the ICC was required to comply with NEPA before it could allow the increase to take effect. The Court, in another opinion by Justice Stewart, held that the students had standing because they used the forests, streams, mountains, and other resources that might be impacted by the nonuse of recycled materials occasioned by the rate increase. In a fairly dramatic passage, Justice Stewart distinguished this case from Sierra Club as follows:

Unlike the specific and geographically limited federal action of which the petitioner complained in Sierra Club, the challenged agency action in this case is applicable to substantially all of the Nation’s railroads, and thus allegedly has an adverse environmental impact on all the natural resources of the country. Rather than a limited group of persons who used a picturesque valley in

94. See id. at 757-58.
95. See id. at 755.
98. See id. at 689-90.
99. See id. at 676.
100. See id.
101. See id. at 679.
102. See id. at 689.
California, all persons who utilize the scenic resources of the country, and indeed all who breathe its air, could claim harm similar to that alleged by the environmental groups here. But we have already made it clear that standing is not to be denied simply because many people suffer the same injury. Indeed some of the cases on which we relied in Sierra Club demonstrated the patent fact persons across the Nation could be adversely affected by major governmental actions. See, e.g., Environmental Defense Fund v. Hardin, 138 U.S.App.D.C. 391, 428 F.2d 1093, 1097 (interests of consumers affected by decision of Secretary of Agriculture refusing to suspend registration of certain pesticides containing DDT); Reade v. Ewing, 2 Cir., 205 F.2d 630, 631-632 (interests of consumers of oleomargarine in fair labeling of product regulated by Federal Security Administration). To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and Government actions could be questioned by nobody. We cannot accept that conclusion.\(^\text{103}\)

The injury in fact requirement, Stewart added, served to distinguish litigants with a “direct stake in the outcome” from those with a “mere interest in the problem.”\(^\text{104}\) Justice Stewart acknowledged that the plaintiffs’ alleged injury required following a fairly attenuated chain of causation, which at the pleading stage of the lawsuit was sufficient to withstand defendant’s motion to dismiss, and which the defendants could have challenged in a summary judgment motion.\(^\text{105}\)

**B. Twenty Years Later: The Early 1990s**

The law of standing in environmental cases has since become dominated by two of Justice Antonin Scalia’s opinions in the 1990s: *Lujan v. National Wildlife Federation\(^\text{106}\)* and *Lujan v. Defenders of Wildlife*.\(^\text{107}\) In the first case, the National Wildlife Federation (NWF) sued the Department of the Interior over its management of public lands.\(^\text{108}\) In particular, NWF complained that the Department was not complying with the requirements of the Federal Land Planning

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103. Id. at 687-88.
104. Id. at 689 n.14.
105. See id. at 688-89. The following year, in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), Justice Stewart reaffirmed his view that standing will not be “found wanting because an injury has been suffered by many,” and distinguished the case from *SCRAP* “because none of the respondents has alleged the sort of direct, palpable injury required for standing under Art. III.” Id. at 229 (Stewart, J., concurring).
and Management Act (FLPMA)\textsuperscript{109} and NEPA when the agency reviewed the status of its lands that had been withdrawn from disposal or mineral leasing or location.\textsuperscript{110} After prevailing before the D.C. Circuit twice, the first time on a 12(b)(6) motion and the second on a summary judgment motion, NWF's five years of litigation came to a halt in 1990.\textsuperscript{111}

The principal question in \textit{National Wildlife Federation} was whether NWF had standing to seek review under the APA.\textsuperscript{112} Initially, NWF sought to justify its standing on the basis of affidavits by two of its members, Peggy Kay Peterson and Richard Erman.\textsuperscript{113} According to Justice Scalia, the only issue was "whether the facts alleged in the affidavits showed that those interests of \textit{Peterson and Erman} were actually affected."\textsuperscript{114} Peterson claimed recreational and aesthetic enjoyment of lands in the vicinity of South Pass-Green Mountain, Wyoming, while Erman claimed use of land "in the vicinity of Grand Canyon National Park, the Arizona Strip (Kanab Plateau), and the Kaibab National Forest."\textsuperscript{115} The Court accepted that the Peterson and Erman affidavits sought review of "agency actions" within the meaning of the APA but determined that the "actions" identified were two public land orders covering only a small portion of the acres embraced within the lawsuit.\textsuperscript{116} The Court interpreted the affidavits as merely alleging that Peterson and Erman used lands within the vicinity of some unspecified portion of the lands that would be affected by the land orders.\textsuperscript{117} The majority held that more

\textsuperscript{110} See \textit{National Wildlife Fed'n}, 497 U.S. at 875.
\textsuperscript{111} See \textit{id.} at 879-82.
\textsuperscript{112} The Court held that the plaintiffs easily satisfied the zone of interests test for their claims under NEPA and FLPMA. However, Justice Scalia offered the following example of how the test might apply to preclude standing:

\begin{quote}
[T]he failure of an agency to comply with a statutory provision requiring "on the record" hearings would assuredly have an adverse effect upon the company that has the contract to record and transcribe the agency's proceedings; but since the provision was obviously enacted to protect the interests of the parties to the proceedings and not those of the reporters, that company would not be "adversely affected within the meaning" of the relevant statute.
\end{quote}

\textit{National Wildlife Fed'n}, 497 U.S. at 883. Justice Scalia's example, however simple it might appear, is not so absolute. Suppose, for example, an agency that is required to hold hearings "on the record" adopts a regulation, pursuant to its generic rulemaking authority, requiring all reporting companies to provide parties to such on the record hearings a copy of the transcript in a particular format at a cost of one dollar per one hundred megabytes. It is unlikely that a court would deny that company standing to challenge the regulation, aside from whether the company had any basis for such a challenge.

\textsuperscript{113} See \textit{id.} at 885.
\textsuperscript{114} \textit{Id.} at 896.
\textsuperscript{115} \textit{Id.}
\textsuperscript{116} See \textit{id.} at 887-88.
\textsuperscript{117} See \textit{id.}
was needed to avoid a summary judgment motion. According to the Court, one cannot avoid a Rule 56 motion with “averments which state only that one of respondent’s members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action.” The Court rejected NWF’s reliance on SCRAP, distinguishing that case as involving a motion to dismiss (when the plaintiff’s averments are assumed to be true and are interpreted most favorably to the plaintiff) rather than a Rule 56 motion. Further, the Court observed that SCRAP’s “expansive expression of what would suffice for section 702 review under its particular facts has never since been emulated by this Court.”

After concluding that the Peterson and Erman affidavits were insufficient to support standing, the Court addressed whether four additional affidavits supplied by the NWF would suffice. After reviewing these affidavits, Justice Scalia found it difficult to discern the “final agency action” under review. He described the land withdrawal program as an amalgamation of many discrete actions, possibly as many as 1250 separate decisions, which he determined had to be reviewed individually. According to Justice Scalia, NWF was seeking a form of systematic improvement in how the agency was administering its program. However, there was no specific agency action that included all the separate classification terminations and withdrawal revocations. “[R]espondent,” he added, “cannot seek wholesale improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made.”

Unfortunately, this opinion obscures NWF’s concern with the Department of the Interior’s administration of public lands. When

118. See id. at 888-89.
119. Id. at 889.
120. See id.
121. Id.
122. See id. at 890.
123. See id.
124. See id. at 892-93. Justice Scalia acknowledged the inherent problem with such a view: The case-by-case approach that this requires is understandably frustrating to an organization such as respondent, which has as its objective across-the-board protection of our Nation’s wildlife and the streams and forests that support it. But this is the traditional, and remains the normal, mode of operation of the courts.
125. Throughout this part of the opinion, Justice Scalia referred to the need for final agency actions that are “ripe” for review; suggesting that the concern here has more to do with “ripeness” than standing. See id. at 890-94.
126. See id.
127. Id. at 891.
Interior Secretary James Watt took office under President Reagan, he brought with him a philosophy that focused on disposing of the public domain by privatizing as much of our natural resources and public lands as possible.\textsuperscript{128} The land withdrawal review program, although provided for under FLIMA, was one element of Watt’s strategy: the termination of the withdrawals might allow mineral leasing to occur and open land to mineral location under the 1872 Mining Law.\textsuperscript{129} Justice Scalia’s focus on the need to identify specific classification or withdrawal termination decisions overlooks how lands might become leased for oil and gas activities and also become subject to the operation of the Mining Law. For example, Justice Scalia suggests that the plaintiff might not become harmed until a mining claimant seeks a permit to conduct operations causing a cumulative surface disturbance of at least five acres.\textsuperscript{130} By that time, however, it is too late to halt mining activities. Under the Mining Law, once a withdrawal is terminated and lands are open to location, a mining claimant, who satisfies all the requirements under the Mining Law for location and discovery, effectively appropriates the mineral estate for private use and obtains a property right in the mining claim.\textsuperscript{131} Where and when the mining claims might be located is unknown until a mining claimant actually stakes her claim and establishes a discovery, at which point any other use of the land might be foreclosed absent the government purchasing the claim.\textsuperscript{132} Whether or not a permit might be needed before mining occurs is irrelevant; by the time of the permit application, the public land


\textsuperscript{130} See National Wildlife Fed’n, 497 U.S. at 892 n.3.


already may have become appropriated. NWF sought to avoid this situation.\textsuperscript{133}

Justice Scalia’s suggestion that the appropriate recourse is to go before Congress or the Department of the Interior is somewhat misdirected. Going to the Department offered little promise to NWF since it was challenging the legality of the Department’s actions for violating the laws that Congress had already adopted.\textsuperscript{134} No further Congressional action was necessary, and only the courts could force the Department to comply with the law. Moreover, NWF’s challenge was consistent with how the Department of the Interior and other agencies treated programmatic decisions: environmental groups sought review of the federal coal leasing program in the 1970s,\textsuperscript{135} parties challenged grazing policy on a programmatic basis,\textsuperscript{136} and the ability to challenge broad-based land use plans, such as one involving approximately 700,000 acres, and other programmatic decisions were not foreclosed.\textsuperscript{137}

For all its problems, National Wildlife Federation had more to do with deciding whether and when an action is subject to judicial

\textsuperscript{133} See National Wildlife Fed’n, 497 U.S. at 893.
\textsuperscript{134} See id. at 891.
\textsuperscript{136} See NRDC v. Morton, 388 F. Supp. 829 (D.C.D.C. 1974), aff’d, 527 F.2d 1386 (D.C. Cir. 1976). In NRDC v. Hodel, NRDC challenged a programmatic amendment to the regulations governing grazing on the public lands which would “have permitted selected ranchers to graze livestock on the public lands in the manner that those ranchers deem appropriate.” 618 F. Supp. 848, 852 (D.C. Cal. 1985). The court dismissed any concern over the group’s standing because they were “users of the public lands.” Id. at 854.
\textsuperscript{137} See NRDC v. Hodel, 624 F. Supp. 1045 (D. Nev. 1985), aff’d, 819 F.2d 927 (9th Cir. 1987) (reviewing adoption of a Management Framework Plan). In Conservation Law Foundation v. Harper, 587 F. Supp. 357 (D. Mass. 1984), various environmental groups challenged, in part, the Property Review Board’s failure to comply with NEPA when implementing the programmatic policy of the Board on the disposal of federal land. See id. The court accepted the programmatic policy as an “action” subject to review and noted that the regulations under NEPA specifically define “major federal actions” to include programs that may involve a group of concerted or connected actions. See id. at 364. In Sierra Club v. Watt, 608 F. Supp. 305 (D.C. Cal. 1985), the plaintiffs challenged the Department of the Interior’s order removing from its wilderness inventory (and thus from heightened environmental protection) over one million acres of public land. See id. The court granted standing, reasoning that the Sierra Club members’ aesthetic and recreational use of the public lands satisfied the personal injury requirement. See id. at 315. Addressing the government’s argument on causation and redressibility, the court concluded that the Secretary’s decision would have definite effects that could be remedied immediately through an injunction. See id. at 316. See also National Wildlife Fed’n v. Morton, 393 F. Supp. 1286, 1289-91 (D.D.C. 1975) (holding that NWF had standing to challenge the Bureau of Land Management’s regulation of off-road vehicles on several hundred million acres of land).
review than with who can sue. Justice Scalia's next opinion, in *Defenders of Wildlife*, not only addressed who can sue, but also outlined the minimum constitutional requirements for standing. In *Defenders of Wildlife*, various environmental groups challenged a rule promulgated by the Secretary of the Department of the Interior and the Secretary of the Department of Commerce implementing section 7 of the ESA. Pursuant to section 7(a)(2) of the ESA, all federal agencies, in consultation with the appropriate Secretary (or her delegated agencies, the United States Fish and Wildlife Service (USFWS) or the National Marine Fisheries Service (NMFS)), are required to insure that any federal action authorized, funded, or carried out by them "is not likely to jeopardize the continued existence of an endangered or threatened species or result in the destruction or adverse modification of [critical] habitat." In 1986, the USFWS and NMFS adopted a regulation implementing this proscription but limited the section 7 requirement to federal activities in the United States, an interpretation different from that contained in an earlier regulation. In order to establish standing on behalf of its members, Defenders of Wildlife (Defenders) submitted affidavits from two of its members, Joyce Kelly and Amy Skilbred. In Ms. Kelly's affidavit, she averred that she had traveled to Egypt to observe the endangered Nile crocodile and intended to do so again. She claimed that the United States' participation in the rehabilitation of the Aswan High Dam on the Nile River threatened the continued existence of the endangered Nile crocodile and thus threatened her ability to observe the species in the future. In the other affidavit, Ms. Skilbred indicated that she had traveled to Sri

138. Identifying a precise geographic area or areas affected by the agency action generally has not been a problem for litigants. See, e.g., Alaska Ctr. for the Env’t v. Browner, 20 F.3d 981, 985 (9th Cir. 1994) (holding that to establish injury in fact, plaintiffs need not establish that they used all the waters that would be affected, but rather only a representative sample). See also Resources Ltd. v. Robertson, 35 F.3d 1300, 1303 (9th Cir. 1994) (holding that failure to identify precise area of use not required); Sierra Club v. Hinkinson, 939 F. Supp. 865 (N.D. Ga. 1996) (standing not raised in challenge under the CWA concerning the adoption of total maximum daily loads throughout the state). Cf. Conservation Law Found. v. Reilly, 950 F.2d 38, 43 (1st Cir. 1991) (holding that nationwide injunction not appropriate when plaintiffs only had standing to challenge decisions in which they had a geographical nexus). For a discussion of standing in *Alaska Ctr.*, see Carl E. Bruch, Note, *Where the Swan Shall Meet: Standing and Remedy in Alaska Center for the Environment v. Browner*, 6 DUKES ENVTL. L. & POL’Y F. 157, 177-82 (1996).


140. See id. at 558.


142. See *Defenders of Wildlife*, 504 U.S. at 558-59 (discussing 51 C.F.R. 402.01 (1991)).

143. See id. at 563

144. See id.

145. See id.
Lanka and observed the habitat of the endangered Asian elephant and leopard at the current site of the Agency for International Development funded Mahaweli project. She intended to travel there again to observe the species themselves, but the Mahaweli project threatened the continued existence of the species and her chance to observe them. She subsequently admitted she had no specific plans to travel back to Sri Lanka.

Justice Scalia held that, even if these two international projects threatened the continued existence of the endangered species, the Kelly and Skilbred affidavits were insufficient to support Article III standing. He reached this conclusion after outlining the following requirements that a party must satisfy to establish standing:

1. The plaintiff must have suffered an injury in fact, an invasion of a legally-protected interest that is
   (a) concrete, and
   (b) particularized, which means in a
       (i) personal, and
       (ii) individual way, and which is
   (c) actual or imminent, not conjectural or hypothetical; and
2. There is a causal connection between the injury and the conduct complained of (i.e., the injury must be fairly traceable to the challenged actions of the defendant); and finally, that
3. It must be likely and not just speculative that the injury will be redressed by a favorable decision of the court.

Justice Scalia distinguished between those who are the objects of governmental action or inaction and those who are beneficiaries of the regulatory program, and indicating that when a litigant is not the object of governmental action or inaction it will be "substantially more difficult" to establish standing.

146. See id. at 563-64.
147. See id.
148. See id.
149. See id. at 564.
150. See id. at 560-61. A three part inquiry already had been used. See Foundation on Econ. Trends v. Lyng, 943 F.2d 79, 82 (D.C. Cir. 1991) (citing Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982)). See also Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976); Warth v. Seldin, 422 U.S. 490 (1975); Linda R.S. v. Richard D., 410 U.S. 614 (1973). In Allen v. Wright, 468 U.S. 737 (1984), the Court observed that the fairly traceable and redressibility requirements for standing represent aspects of a single causation requirement, and that if any difference exists, "it is that the former examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas the latter examines the causal connection between the alleged injury and the judicial relief requested." Id. at 753 n.19, 759 n.24 (discussing Simon).
151. See Defenders of Wildlife, 504 U.S. at 562. Earlier, the Court indicated that the "indirectness" of an asserted injury makes it more difficult to satisfy the causation and
In *Defenders of Wildlife*, Justice Scalia accepted that the desire to observe an animal species is a "cognizable" interest for purposes of standing, but he added that *Sierra Club* requires more: the party seeking review must herself be among the injured.152 Therefore, Defenders had to show through specific facts that the listed species were actually being threatened and that one of Defenders' members would be "directly" affected.153 According to Justice Scalia, Defenders failed to meet this requirement because neither Ms. Kelly nor Ms. Skilbred had specific plans to return to the affected area and, therefore, were not faced with "imminent injury."154 Mere professions of intent to return are simply not enough; rather, there must be "concrete plans" or, at the very least, specifics.155

Justice Scalia dismissed Defenders' argument that standing could be premised upon an *ecosystem nexus*, *animal nexus*, or *vocational nexus* redressibility requirements. See *Allen*, 468 U.S. at 757-58; *Simon*, 426 U.S. at 44-45; *Warth*, 422 U.S. at 505. Prior to the decision in *Warth*, these requirements had been implicitly addressed in *Linda R.S.*, 410 U.S. at 617-18. See *Winter*, supra note 15, at 1373 n.9 ("The causation/ redressibility requirement first appeared in *Linda R.S.* ... and was constitutionalized in *Warth* ... "). See also infra note 190.

Justice Scalia, however, appears to have extended that precedent to all situations and not just to instances where these requirements were surrogates for determining whether a litigant was asserting "generalized grievances." Cass Sunstein explained that Justice Scalia had a penchant for treating the objects of regulation differently than the beneficiaries of regulation. See Sunstein, supra note 15, at 195-97. According to Sunstein, this distinction is rooted in the common law model of litigation and should have become a "conceptual anachronism" after the New Deal and the rise of modern administrative law. See id. at 186-88. Justice Scalia's earlier law review article presaged his concern with any broad standing doctrine. See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

152. See *Defenders of Wildlife*, 504 U.S. at 562-63.
153. See id. at 563. However, Justice Scalia indicated in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), that these facts would have been sufficient to overcome a motion to dismiss at the pleading stage. See id. at 1012 n.3.
154. See *Defenders of Wildlife*, 504 U.S. at 564. Justice Scalia invoked *Los Angeles v. Lyons*, 461 U.S. 95 (1983), for this imminent injury requirement. See *Defenders of Wildlife*, 504 U.S. at 560, 564. The decision in *Lyons* involved an entirely different situation: the plaintiff initially sought preliminary injunctive relief against the allegedly unconstitutional practice of police bar-arm chokeholds. See *Lyons*, 461 U.S. at 97. When the case came before the Court five years later, the plaintiff was no longer seeking preliminary injunctive relief. See id. at 101. The plaintiff indicated that he was no longer under any threat of injury and that the illegal actions would continue against him. See id. He urged the Court either to dismiss the writ of certiorari as improvidently granted or to have the preliminary injunction vacated. See id. The Court nevertheless transformed the issue from one of mootness into one of standing and concluded that there was no case or controversy because the plaintiff could not show any immediate threat of direct injury. See id. at 100-11. At best, therefore, *Lyons* merely requires some likelihood that the allegedly illegal act that causes the injury is likely to occur before a court can award injunctive relief. The need for some imminence requirement arguably made sense because the injury was the illegal act itself. This situation is entirely different than the circumstance in *Defenders of Wildlife*, where the action being challenged is occurring. Steven Winter examined the *Lyons* decision in detail to illustrate the "incoherences" of standing law. See Winter, supra note 15, at 1374-75.
155. See *Defenders of Wildlife*, 504 U.S. at 564.
theory. He described the ecosystem nexus theory as claiming that "any person who uses any part of a 'contiguous ecosystem' adversely affected by a funded activity has standing even if the activity is located a great distance away." He described the animal nexus theory as asserting that "anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing." Finally, a vocational nexus would grant standing to anyone with a professional interest in the species. Justice Scalia rejected the ecosystem nexus theory with a reference to his opinion in National Wildlife Federation, reasoning that there was no showing of any perceptible effect on the plaintiffs. The other two theories he dismissed as too illusory, commenting that it is "pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection."

After concluding that the affidavits failed to establish an injury in fact, Justice Scalia added that the Defenders could not satisfy the redressibility element of standing. Only Justices Rehnquist, Thomas, and White joined this part of his opinion. The four Justices proffered that an invalidation of the rule, the relief Defenders sought against USFWS and NMFS, would not necessarily prevent the injury being complained of, that is, the harm from the overseas projects caused by parties not before the Court. The injury would not necessarily be prevented because the four Justices treated the rule as nonbinding and the agencies funding the overseas projects were free to proceed.

Justice Scalia ended his opinion with a response to Defenders' argument that the organization could press its complaint under the citizen suit provision of the ESA, which authorizes "any person" to
commence a lawsuit to enjoin a violation of the Act (in this case, the failure to engage in consultation under section 7(a)(2)).\textsuperscript{166} Defenders argued that the failure to consult was a procedural violation, which all persons are authorized to enforce under the citizen suit provision.\textsuperscript{167} Justice Scalia rejected this theory, referring to the argument as a "procedural rights" argument that would confer "upon all persons . . . an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law."\textsuperscript{168} He reasoned that the asserted violation of a procedural right must be accompanied by a showing of an injury to a concrete interest.\textsuperscript{169} Otherwise, the citizen suit provision might confer standing on a party where there is no case or controversy, thus conflicting with Article III, and possibly intruding into the Executive's constitutional function to ensure the laws are faithfully executed.\textsuperscript{170}

Most observers agree that Justice Scalia's opinion in \textit{Defenders of Wildlife} is easily questioned.\textsuperscript{171} His insistence on requiring "imminence" as a part of the injury in fact inquiry appears misplaced. Remember, Defenders was challenging a rulemaking: an action that

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166. See \textit{Defenders of Wildlife}, 504 U.S. at 571-78.
167. See \textit{id.} at 572.
168. \textit{Id.} at 573.
169. See \textit{id.} at 572-73. Although Justice Scalia agreed that procedural rights may be "special," he was only willing to relax the "normal standards for redressibility and immediacy." \textit{Id.} at 572 n.7. This led him to conclude as follows:

Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to provide an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years . . . . What respondents' "procedural rights" argument seeks, however, is quite different from this: standing for persons who have no concrete interests affected—persons who live (and propose to live) at the other end of the country from the dam.

\textit{Id.} Justice Scalia added that a procedural right can only be enforced when there is a nexus between the procedural violation and some concrete interest of the plaintiff. \textit{See id.} at 573 n.8.
170. See \textit{id.} at 574-78. Justices Kennedy and Souter concurred in all but the redressibility discussion of Justice Scalia's opinion. \textit{See id.} at 579-81 (Kennedy, J., and Souter, J., concurring). In their concurrence, the two Justices left open the possibility that one of the \textit{nexus} theories might apply in the appropriate case. \textit{See id.} at 579. While they recognized that modern litigation is not the same as the old common law (or private law) paradigm, they agreed that a showing of concrete injury is necessary to ensure the lawsuit is truly adversarial. \textit{See id.} at 579-81. Although Justice Stevens would have found against the Defenders on the merits, he rejected the majority's treatment of standing and concluded that the Defenders did have standing. \textit{See id.} at 581-89 (Stevens, J., concurring). Lastly, Justices Blackmun and O'Connor also disagreed with the majority's treatment of standing and dissented. \textit{See id.} at 589-606 (Blackmun, J., and O'Connor, J., dissenting).
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would have decided environmental consequences some time in the future, and would most assuredly affect those persons interested in protecting, observing, or researching endangered and threatened species. Justice Scalia would layer such a rulemaking challenge with the additional requirement that a litigant establish some degree of imminence in the asserted injury to their interest. Justices Kennedy and Souter would have avoided this issue by merely requiring that the two affiants purchase airline tickets to the Middle East, or at least have some concrete plans to do so. Justice Stevens, in his concurring opinion, would have defined imminence as the likelihood of the occurrence of environmental harm, regardless of when the individuals would likely visit the site.

Upon closer examination, any independent requirement for imminence would be inappropriate. Justice Scalia would have imminence relate to the litigant's asserted interest or injury from the alleged governmental violation. In this case, that could mean that the allegedly invalid regulation impacted the Defenders' or its members' opportunity or ability to observe and study certain species and their habitat, or their actual observation and study of the species and their habitat. So, how would the imminence requirement apply? In the first scenario, when plaintiffs are "injured" depends upon the timing of when the ability or opportunity to observe and study the species and habitat is adversely affected, i.e., when and if the governmental action is likely to occur and cause the effect plaintiffs oppose. Under these circumstances, any imminence requirement would apply to the substantive governmental decision. Yet, that is what Justice Scalia refused to accept. Justice Stevens, on the other hand, embraced such an application, but a showing of environmental harm caused by the agency's substantive decision goes to the merits of the case and seems premature in a rulemaking challenge. Furthermore, Justice Scalia implicitly rejected such a showing. This suggests that Justice Scalia's analysis would have the imminence requirement presume the environmental harm and, instead, relate to the effect on a plaintiff's asserted interest. However, in this respect,

172. See Defenders of Wildlife, 504 U.S. at 564.
173. See id.
174. See id. at 579 (Kennedy, J., and Souter, J., concurring). Without a doubt, the airline tickets would be far less costly than having to litigate the standing issue.
175. See id. at 583 (Stevens, J., concurring).
176. See supra note 154.
177. See Defenders of Wildlife, 504 U.S. at 564, 565 n.2.
178. See id. at 564.
179. See id. at 583-84 (Stevens, J., concurring).
180. See id. at 564, 572 n.7.
Justice Scalia refused to accept the ability or opportunity to observe and study the species and habitat as the asserted interest and, instead, focused on the actual observation and study of the species and habitat.\footnote{See id. at 567.} In short, he treated imminence as part of a required showing for geographical nexus.\footnote{Justice Scalia began his analysis by stating that the claimed injury is the increased rate of extinction of endangered and threatened species caused by defendant’s allegedly invalid rule. See id. at 562. He then questioned whether the plaintiff’s members would be “directly” affected by this increased rate of extinction, reasoning that the lost opportunity to observe and study those species is not enough to produce a direct effect. See id. at 563-64. In effect, he redefined the alleged injury as one involving an alleged use of the affected area. See id. But cf. Sunstein, supra note 15, at 204-05 (suggesting that, because of the wording of the ESA, the plaintiff should have characterized the injury as one of a diminished opportunity).} This posture is consistent with his statement that in a claim involving procedural rights, the plaintiff must nonetheless have a concrete interest, either a legal interest (e.g., a cash bounty or a private tort)\footnote{See Defenders of Wildlife, 504 U.S. at 572-73.} or a geographical nexus to or use of the affected area.\footnote{For instance, the person living near the proposed site of a federally licensed dam or the whale watchers in Japan Whaling Ass’n v. American Cetacean Soc’y, 478 U.S. 221 (1986), would have standing, according to Justice Scalia, because of their geographic relationship to the affected area. See Defenders of Wildlife, 504 U.S. at 572 n.7, 573 n.8.} This is not so much imminence as it is simply translating the concrete injury requirement into a geographical nexus or actual use requirement. Reduced to its essentials, Justice Scalia’s analysis reflects a decided bias towards only conferring standing upon those persons asserting easily perceptible harm that occurs when one lives near or actually uses an allegedly affected area. This bias is further evidenced by his dismissal of the three nexus theories proposed by the Defendants.

Justice Scalia’s rejection of these theories is suspect. His response to the ecosystem nexus theory proceeds from a simple misunderstanding of the basis of the Defenders’ argument. As his reliance on National Wildlife Federation demonstrates, Justice Scalia treated the “ecosystem” as a geographically identifiable area, rather than accepting that the species of this world are inextricably linked and the loss of any species, anywhere, affects us all. Ecosystem nexus has nothing to do with the location of a species. In responding to Justice Blackmun, however, Justice Scalia acknowledged that geographic remoteness might be overcome by sufficient facts “showing that the impact upon animals in those distant places will in some fashion be reflected here.”\footnote{Defenders of Wildlife, 504 U.S. at 567 n.3.} Yet such a showing would be illogical. First,
Congress already recognized this point when it passed the ESA. Second, *Defenders of Wildlife* involved a rulemaking challenge, which, if *Defenders* prevailed, would require an inquiry into the effect of the particular projects on the listed species. To require litigants to *establish* such a fact for standing would threaten to overtake the merits of the case. Just how Justice Scalia envisions *Defenders* would establish that the loss of the species (a loss he conceded for purposes of the inquiry) affects people in this country, absent further support from biologists, is uncertain, particularly when this type of inquiry is irrelevant to the litigation and is of a nature ill-suited for a court to address. Similar problems exist with his dismissal of the *animal* and *vocational nexus* theories. Must the ornithologist demonstrate the impact on her work from the possible loss of the California condor? Must one whose avocation is to observe and study all reptiles wait until the world is down to its last group of nile crocodiles to demonstrate harm to her interests? Such an approach would most assuredly be ineffective and contrary to the philosophy animating the passage of the ESA.

Furthermore, Justice Scalia’s redressibility analysis, joined in by only three other Justices, appears conceptually and factually flawed. To say that the plaintiffs’ asserted personal *injury* must be redressible ignores the principal issue in the case: the rule challenge. An additional requirement of redressibility when a plaintiff alleges an injury in fact under any standard involves unnecessary speculation into what will or will not occur if the government observes the law, particularly in this case as illustrated by the dispute among the Justices. Justices Stevens, Blackmun, and O’Connor all agreed that an invalidation of the rule would in all likelihood have prevented the harm to the identified species caused by the projects in Sri Lanka and Egypt. Redressibility relates to whether a court can award the relief sought and whether that relief demonstrates that the parties truly are adverse to one another. Here, *Defenders* sought

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187. See *Defenders of Wildlife*, 504 U.S. at 564.
188. This type of inquiry is better suited to the situation in which a federal agency with technical expertise makes an informed scientific judgment and a court is called upon to review that judgment.
189. See infra note 401 (discussing somewhat similar interests).
190. See *Defenders of Wildlife*, 504 U.S. at 584-85, 595-601.
191. Redressibility, an aspect of the causation requirement, appears to have originated primarily as an outgrowth of the nexus requirement articulated in cases such as *Flast v. Cohen*, 392 U.S. 83, 102-03 (1968), and *United States v. Richardson*, 418 U.S. 166, 174-76 (1974). Redressibility further served as a prudential mechanism for limiting when litigants could seek to assert
invalidation of the rule, clearly within a court’s power to award. The relief assuredly would benefit the plaintiffs, because it would protect their *interest* in ensuring that the government does not contribute to the extinction of species.

Lastly, the majority’s suggestion that citizen suit provisions are subject to Article III limitations and could become unconstitutional is simply hyperbole. As David Sive explains, “the suggestion that citizen-suit provisions may be held unconstitutional need not be taken seriously.” A court would be more likely to deny standing to particular plaintiffs before taking the next step of holding an act of Congress unconstitutional. Also, the Court’s suggestion overlooks the fact that we are not governed solely by judge-made law. Congress has a role in establishing legal interests as well. If Congress intended to create a legal interest, then a party who shares that interest clearly has standing to protect the interest. The legal interest

the rights of third parties. See Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 474 (1984) (referring to “prudential principles” for asserting rights of third parties); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 80-81 (1978). See also *supra* notes 149-50. In *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), the Court applied a causation/redressibility requirement and concluded that the plaintiffs lacked standing because it would be wholly speculative whether the Court’s relief would even affect the plaintiffs’ asserted interest. See *id.* at 42-43. The plaintiffs challenged a Treasury Department revenue ruling that allegedly discouraged hospitals from treating indigents. See *id.* at 43. The Court stated that it was too uncertain whether third party hospitals, not parties to the litigation, would necessarily treat indigents but for that revenue ruling. See *id.* Regardless of the efficacy of the *Simon* opinion, it is a different situation from that in *Defenders of Wildlife*, where the plaintiff’s asserted interest would be remedied by judicial relief.

192. Sive, *supra* note 15, at 56. In their concurrence, Justices Kennedy and Souter suggested possible ways for Congress to remedy an otherwise broad grant of standing. See *Defenders of Wildlife*, 504 U.S. at 579-81 (Kennedy, J., and Souter, J., concurring). What is interesting about the treatment of the citizen suit provision is how the issue was treated in the past. Until *Defenders of Wildlife*, according to Richard Pierce, “the Court deferred to congressional intent with respect to standing where it was able to discern that intent.” Pierce, *supra* note 171, at 1179. In *Sierra Club*, the Court specifically noted that Congress could confer standing to sue as long as the suit was not a friendly suit and did not seek an advisory opinion or ask to resolve a political question. See *Sierra Club*, 405 U.S. at 732 n.3. In the same year it decided *Sierra Club*, the Court found standing solely on the basis of a statutory right to sue in a case where standing may not have existed absent the statute. See *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 212 (1972). See also Linda R.S. v. Richard D., 410 U.S. 564, 617 n.3 (1973) (“But Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.”); *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (indicating that Congress could confer standing if the plaintiff alleged a “distinct and palpable injury to himself”); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41 n.22 (1976) (discussing footnote in *Linda R.S.* and the statement in *Warth*). Other courts have accepted Congress’ ability to confer standing absent any indication that the parties are not adversarial. In *Animal Welfare Institute v. Kreps*, 561 F.2d 1002 (D.C. Cir. 1977), for example, the court indicated that, while Congress cannot authorize judicial review in the absence of a case or controversy, it can create legal rights. See *id.* at 1005-06. The court thus implied that by conferring standing, Congress essentially creates the legal right to ensure against a violation of the statute at issue.
can be the "right" to challenge agency violations of environmental statutes. Cass Sunstein suggests that Congress could establish a legal interest in the substantive outcome or create a cash bounty at the end of a victorious lawsuit.193

IV. STRUCTURAL FAULT IN THE BARRIER

Such gimmicks might be premature, however. The confluence of three developments may doom the current law of standing for most environmental disputes. The first development is the Court's recent decision in Bennett v. Spear,194 and the second development is the likely effect of that decision on the application of the zone of interests test in cases under NEPA. Third, courts are currently unsuccessfully struggling with the articulation of a coherent approach for applying the language and requirements of Defenders of Wildlife to cases under NEPA. Taken together, these developments demonstrate that a wholesale review of the current law of standing is, if not fast approaching, at least warranted.

A. Bennett v. Spear

The dispute in Bennett illustrates the confusion surrounding the application of the zone of interests test in general, and more specifically in the context of litigation under the ESA.195 The Eighth Circuit and the D.C. Circuit had not applied the test to restrict actions under the ESA.196 While the Ninth Circuit applied the test to

193. See Sunstein, supra note 15, at 223-24. See also Feld, supra note 32, at 164 (proffering a similar solution).


195. The Ninth Circuit's decision in Bennett v. Plenert, 63 F.3d 915 (9th Cir. 1995), has been described as "representative of the widespread confusion over the concept of standing, the role of 'prudential' concerns in the standing analysis, and more specifically, the meaning and use of the zone of interests test." Kathleen C. Becker, Bennett v. Plenert: Environmental Citizen Suits and the Zone of Interests Test, 26 ENVTL. L. 1071, 1072 (1996) (citations omitted). See also Sheldon K. Rennie, Note, Bennett v. Plenert: Using the Zone-of-Interests Test to Limit Standing Under the Endangered Species Act, 7 VILL. ENVTL. L.J. 375 (1996).

196. See Defenders of Wildlife v. Hodel, 851 F.2d 1035 (8th Cir. 1988), rev'd on other grounds sub nom. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Mausolf v. Babbitt, 913 F. Supp. 1334 (D. Minn. 1996), rev'd, 85 F.3d 1295 (8th Cir. 1996). In Mausolf, the court held that intervenors must satisfy Article III standing to litigate in federal court. See Mausolf, 85 F.3d at 1301-02. In doing so, the court implicitly accepted the district court decision on the standing of snowmobilers to bring a lawsuit under the ESA, albeit quoting from the part of the decision that suggested that the snowmobilers also alleged an environmental harm in not being able to observe wolves in their natural habitat. See id. In Mountain States Legal Found. v. Glickman, 92 F.3d 1228 (D.C. Cir. 1996), the D.C. Circuit disagreed with the Ninth Circuit's decision in Plenert, concluding that economic interests play an important and constraining role in the implementation of the ESA. See id. at 1237; see also Robert I. Levy, Note, Mountain States Legal Foundation v. Glickman: Environmental Standing Continues Its Trek As a Moving Target, 10 TUL. ENVTL. L.J. 123 (1996). In Idaho v. ICC, 35 F.3d 585 (D.C. Cir. 1994), where the plaintiff's
conclude that parties with solely economic interests could not sue to enforce the ESA, the court did so blindly. Even the chief lawyer for the Department of the Interior, Solicitor John D. Leshy, indicated before the Court decided Bennett that the Clinton Administration "believe(s) that under current law plaintiffs with economic interests can obtain review of the Secretary's actions under the Endangered Species Act equivalent to the review available to environmental plaintiffs." He added that "plaintiffs who allege injury to economic interests should be able to obtain judicial review of governmental action concerning protected species if they structure their lawsuits appropriately." Consequently, the Supreme Court's decision in Bennett, reversing the Ninth Circuit decision, seemed almost pre-ordained.

objective was to avoid the economic impact from an abandoned railroad line, the court's application of the zone of interests test was so expansive that the inquiry seemed almost meaningless. See id. at 590-92. As the petitioners argued in Bennett, Brief for Petitioners, Bennett v. Spear, 117 S. Ct. 1154 (1997) (No. 95-813) [hereinafter Petitioners' Brief], economic interests brought the lawsuit in Babbitt v. Sweet Home Chapter of Communities, 515 U.S. 687 (1995), and the Court never questioned standing in that case. See Petitioner's Brief at 25. 197. In Pacific Northwest Generating Co-op. v. Brown, 38 F.3d 1058 (9th Cir. 1994), the Ninth Circuit observed that it was uncertain whether the zone of interests test applied to suits involving the ESA. See id. at 1065. However, assuming that the test did apply, the court proceeded to find standing in groups with an economic interest. See id. Prior to the Court's opinion in Bennett, Judge Reinhardt issued an opinion involving a challenge under the ESA brought by interests he described as "not Good Samaritans," without ever questioning standing in his written opinion. See Ramsey v. Kantor, 96 F.3d 434, 440 (9th Cir. 1996); see also Aluminum Co. of Am. v. Bonneville Power Admin., 56 F.3d 1075 (9th Cir. 1995) (disregarding the question of whether the petitioners' economic interests established standing for their challenge, in part, under NEPA and the ESA, and dismissing the case as moot instead). The Ninth Circuit's application of the zone of interests test ignored other provisions of the ESA. For instance, under the ESA, any 'interested person' may petition the USFWS to list, delist, or reclassify the status of a species. See 16 U.S.C. § 1533(b)(3)(A). Standing has not been an issue when environmental groups have sued the USFWS/NMFS for failure to list a particular species or designate a critical habitat. See Environmental Def. Ctr. v. Babbitt, 73 F.3d 867 (9th Cir. 1995); Defenders of Wildlife v. Babbitt, No. 96-160 (D.C.D.C. March 27, 1997); Carlton v. Babbitt, 900 F. Supp. 526 (D.D.C. 1995) (reclassification of grizzly bear). Standing also has not been a significant problem when parties have tried to challenge a proposed listing by those not interested in protecting the species. See Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392 (9th Cir. 1995); Alabama-Tombigbee Rivers Coalition v. Department of Interior, 26 F.3d 1103 (11th Cir. 1994) (violation of Federal Advisory Committee Act); City of Las Vegas v. Lujan, 891 F.2d 927 (D.C. Cir. 1989) (challenge to emergency listing of desert tortoise); Endangered Species Comm'n v. Babbitt, 852 F. Supp. 32 (D.D.C. 1994). But cf. Coalition of Ariz./N.M. Counties for Stable Econ. Growth v. Babbitt, No. CIV 94-1058-M, 1997 U.S. Dist. LEXIS 4212 (D.N.M. Mar. 11, 1997) (denying standing to parties with an asserted economic interest in emergency listing of desert tortoise for failure to establish a sufficient interest in the listing). Cf. Coalition of Ariz./N.M. Counties for a Stable Econ. Growth v. Babbitt, 100 F.3d 837 (10th Cir. 1996) (discussing ongoing challenge to the listing of the Mexican Spotted Owl).

197. Letter from John D. Leshy, Solicitor, Department of the Interior, to Hon. Don Young, Chairman, Committee on Resources, House of Representatives (Mar. 11, 1997).

199. Id.
In Bennett, ranchers and irrigators sought to use the ESA to challenge the USFWS’s administration of the Act. In 1988, the USFWS listed the Lost River sucker (Deltistes luxatus) and the short-nose sucker (Chasmistes brevirostris) as endangered species pursuant to the ESA. These species can be found in various reservoirs in Oregon, including reservoirs that form part of the Bureau of Reclamation’s (Bureau) Klamath Project, one of the earliest federal reclamation projects. After the species were listed, the Bureau entered into formal consultation with the USFWS under section 7 of the ESA on the effect of the proposed long-term operation of the project. At the conclusion of the consultation, the USFWS issued a biological opinion that the proposed operation of the project was likely to jeopardize the continued existence of the two species unless the Bureau adopted the reasonable and prudent alternative suggested by the USFWS. The alternative required maintaining a certain amount of water in the reservoirs, thereby reducing the amount of water that the reservoirs could deliver to the various water users. Two irrigation districts and two individuals initiated the lawsuit to challenge the restrictions on the withdrawal of irrigation water from the reservoirs. They claimed that the restrictions violated sections 7 and 4 of the ESA as well as provisions of the APA.

Both the district court and the Ninth Circuit held that the irrigation districts and ranchers lacked standing to prosecute the case. The Ninth Circuit concluded that the plaintiffs’ interests were not within the zone of interests protected by the ESA. In its decision, the court indicated that the zone of interests test applied to cases litigated under the ESA, including cases premised upon a

200. See Bennett, 117 S. Ct. at 1158-59.
203. See Bennett, 117 S. Ct. at 1159.
204. See id.
205. See id. at 1165. The biological opinion also included an incidental take statement, authorizing a certain level of otherwise prohibited “taking” of the species. See id.
206. See id. at 1159.
207. See id. at 1160.
208. The districts and members argued that the USFWS violated section 7 of the ESA by not using the “best scientific and commercial data available,” and that the use of restrictions on the withdrawal of water implicitly operated as a designation of critical habitat, and as such violated the requirements for designating critical habitat under section 4. See id. at 1159-60, 1165-66, 1168.
209. See id. at 1160.
210. See Bennett v. Plenert, 63 F.3d 915, 917-19 (9th Cir. 1995).
procedural injury.\textsuperscript{211} The court further rejected the citizen suit provision of the ESA as evidence of Congress' intent to allow any person to sue if they otherwise satisfy the requirements for Article III standing.\textsuperscript{212} The court applied the zone of interests test and concluded that "only plaintiffs who allege an interest in the preservation of endangered species fall within the zone of interests protected by the ESA."\textsuperscript{213}

Before the Supreme Court, the United States challenged the petitioners' standing by trying to shift the argument away from the zone of interests test.\textsuperscript{214} The United States argued that the petitioners had failed to satisfy the requirements for Article III standing and that even if the petitioners had Article III standing, their claims were not cognizable under either the APA or the ESA.\textsuperscript{215} The United States did not argue that the petitioners lacked standing because they failed to satisfy the zone of interests test.\textsuperscript{216} Initially, the government sought to persuade the Court that the petitioners failed to satisfy any of the three requirements for Article III standing.\textsuperscript{217} The United States asserted that the petitioners could not show an injury in fact, because, while the aggregate amount of water from the Klamath Project might be reduced, the petitioners neither alleged "that they

\textsuperscript{211} See id. at 917-18.

\textsuperscript{212} See id. at 919.

\textsuperscript{213} Id. at 919 (emphasis added). Following the same analysis that it applied in NEPA cases, the court looked to the overall purpose of the ESA. See id. at 920.

\textsuperscript{214} Petitioners generally argued that the zone of interests test could be satisfied either by persons whose interests are protected by the Act or by those whose interests are regulated by the Act. See Petitioners' Brief at 29-41, Bennett (No. 95-813). Petitioners further argued that even if one looked only at those to be protected by the Act, the ESA includes within its ambit economic-based considerations. See id.


\textsuperscript{216} In a curious footnote, the United States left unresolved how it would treat the zone of interests test:

In our view, the difficult "zone of interests" questions under the ESA citizen suit provision involve situations very far removed from the present one. Suppose, for example, that the owner of land adjacent to government property complained that logging on the federal land caused dust and noise and thereby hindered his enjoyment of his own land. He might contend in addition that the logging jeopardized the continued existence of an endangered bird species. The property owner might expressly disavow any personal interest in the fate of the bird but argue that he was nonetheless entitled to invoke the ESA citizen suit provision, on the ground that he had suffered injury in fact from the same government conduct that was alleged to violate the ESA. That allegation would surely satisfy Article III; the question is whether the fortuitous relationship between the landowner's injury and the values protected by the ESA would trigger the application of prudential standing requirements.

\textsuperscript{217} See id. at 17-29.
have received, or can be expected to receive, less water than would otherwise have been allocated to them."218 Furthermore, the United States argued that the injury was not "fairly traceable" to the USFWS's issuance of the biological opinion, because the biological opinion is not a final agency action and thus, is not binding.219 Rather, the United States alleged that the agency's ultimate decision accepting or deviating from the biological opinion would be the cause of any possible injury: "[I]f petitioners have suffered injury, the proximate cause of their harm is an (as yet unidentified) decision by the Bureau regarding the volume of water allocated to petitioners, not the biological opinion itself."220 Next, the government argued that petitioners failed to satisfy the redressibility requirement of Article III.221 With an argument reminiscent of that raised in Defenders of Wildlife, the United States claimed that "in the absence of any challenge to a final decision by the [Bureau of Reclamation], it is purely speculative whether a judicial order running against the Service would enable petitioners to obtain additional water."222 Interestingly, a majority of the Defenders of Wildlife Court did not endorse a similarly constructed redressibility analysis.223

In its second argument, the United States presented various reasons why petitioners could not pursue their claims under the ESA or APA, even if they satisfied Article III standing.224 The government's primary argument tried to establish that review under the

218. Id. at 19 (emphasis added).
219. See id. at 22 n.10 ("The Services have consistently recognized that the action agency retains legal authority to accept or reject the recommendations contained in a biological opinion."); see also infra note 249 and accompanying text.
220. Respondent's Brief at 22, Bennett (No. 95-813). Review of a biological opinion is available, argued the United States, "only after the Bureau has acted, and only within the context of a challenge to specific actions taken by the Bureau in reliance on that opinion." Id. at 25.
221. See id. at 26.
222. Id. at 27. The Justice Department distinguished petitioners' claims from those of a party alleging a procedural injury by explaining that here the injury, if any, would be caused by a third party (the Bureau) not before the Court. See id. at 27-28. The Department added that in the Defenders of Wildlife footnote seven hypothetical, the plaintiff could show injury caused by the construction of the dam, which could be remedied (at least temporarily) by a court order requiring the preparation of an environmental impact statement (EIS). See id. at 29 n.15. This explanation, however, avoids defining the "harm" in a case involving a procedural injury. Petitioners had stated that "each of the claims asserted by [them] is in the nature of a procedural right." Reply Brief for Petitioners at 8, Bennett v. Spear, 117 S. Ct. 1154 (1997) (No. 95-813). They argued that the Secretary failed in several respects to provide sufficient consideration to various issues and that reduced standards for redressibility exist when raising a procedural right. See id.
223. One of the Justices joining in that part of the opinion, Justice White, is no longer on the Court. More importantly, the present Administration's Justice Department presumably believes in a more liberal law of standing.
224. See Respondent's Brief at 30-35, Bennett (No. 95-813).
APA was unavailable because there was no final agency action.\textsuperscript{225} Beginning with the premise that the APA only authorizes review of final agency actions and then reasserting its view that a biological opinion is not such an action, the United States essentially argued that the case was not ripe for review.\textsuperscript{226} The United States argued that the petitioners should have waited and brought their lawsuit after the Bureau of Reclamation acted on the biological opinion.\textsuperscript{227} Lastly, the United States argued that the petitioners' claims could not be brought under the ESA citizen suit provision either.\textsuperscript{228} The citizen suit provision only applies to the failure of the Secretary to perform a nondiscretionary duty, and the United States contended that none of the three claims brought by petitioners fell within that category.\textsuperscript{229}

The Court began its analysis by inquiring whether the plaintiffs lacked standing under both the ESA and the APA, initially focusing on the ESA. After describing the history of the zone of interests test, the Court added that:

[T]he breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the “generous review provisions” of the APA may not do so for other purposes . . . .\textsuperscript{230}

In the context of a suit brought under the ESA, the Court concluded that the ESA's citizen suit provision, with its broad language

\textsuperscript{225} See id.
\textsuperscript{226} See id. at 34 (noting that in some cases final agency action and ripeness are not necessarily the same).
\textsuperscript{227} The government observed that “plaintiffs may obtain vacatur of an action agency’s decision by showing that it was based on a biological opinion that failed to satisfy the arbitrary-and-capricious standard of review.” Id. at 47 n.31. The United States added that a lawsuit against the Bureau challenging the Bureau’s allocation decision would fall within the zone of interests test. See id. at 49 n.34.
\textsuperscript{228} See id. at 35-38.
\textsuperscript{229} Petitioners argued that their claims fell within sections 11(g)(1)(A) and 11(g)(1)(C) of the ESA, 16 U.S.C. § 1540, the former section authorizing citizen suits for a “violation” of the Act, and the latter authorizing citizen suits for the failure to perform a nondiscretionary duty. See Petitioners' Brief at 19, Bennett (No. 95-813). The United States countered that section 11(g)(1)(A) does not apply to agency actions unless there is an alleged violation of one of the proscriptions of the Act and that 11(g)(1)(C) applies to agency actions, but only when the agency is under a nondiscretionary duty to act and fails to do so. See Respondents' Brief at 34-46, Bennett (No. 95-813). Absent an alleged violation of the Act, such as an agency’s decision to allow an activity that is likely to jeopardize an endangered species, or the failure of an agency to undertake a nondiscretionary duty required by the ESA, the only avenue for relief is through the APA. See id.
\textsuperscript{230} Bennett v. Spear, 117 S. Ct. at 1154, 1161 (1997) (citations omitted).
allowing "any person" to sue, negates the zone of interests test. 231 The Court indicated that:

Such a broad reading of "any person" . . . is greatly augmented by two interrelated considerations: that the overall subject matter of this legislation is the environment (a matter in which it is common to think all persons have an interest) and that the obvious purpose of the particular provision in question is to encourage enforcement by so-called "private attorneys general"—evidenced by its elimination of the usual amount-in-controversy and diversity-of-citizenship requirements, its provision for recovery of the costs of litigation (including even expert witness fees), and its reservation to the Government of a right of first refusal to pursue the action initially and a right to intervene later. 232

The Court held that the any person language of section 11(g) of the ESA encompasses all lawsuits authorized by the terms of section 11(g). 233

After rejecting the Ninth Circuit's application of the zone of interests test for claims under the citizen suit provision of the ESA, the Court responded to the government's other arguments. First, the Court dismissed the United States' claim that, in order to satisfy the Article III injury in fact requirement, the petitioners must show that they will receive less water. 234 The Court reasoned that at the pleading stage sufficient facts were alleged to show that petitioners might be adversely affected by the reduction of available water. 235 Next, the Court rejected the argument that the petitioners had not satisfied the second or third requirements for Article III standing. 236 The petitioners' injury, even though it might ultimately occur as a result of the actions of the Bureau of Reclamation, is nevertheless "fairly traceable" to the issuance of the biological opinion because the causation requirement "does not exclude injury produced by determinative or coercive effect upon the action of someone else." 237

231. See id. at 1162. The Court's analysis tracked the petitioners' argument. See Petitioner's Brief at 19-20, Bennett (No. 95-813). Perhaps to avoid essentially abrogating the zone of interests test for other citizen suit provisions, the Court noted that the language of section 11(g) of the ESA appears broader than the language Congress used in other citizen suit provisions, such as in the CWA. See Bennett at 1162.

232. Id. at 1162. These considerations seem remarkably similar to the arguments presented by environmental advocates and rejected by the Court 25 years ago.

233. See id. at 1163.

234. See id. at 1163-64.

235. See id.

236. See id. at 1164-65.

237. Id. at 1164 (quoting from the Respondents' Brief about the practical significance of biological opinions and stating that while they may not be binding on the federal agency action, they appear to have a "determinative effect."). Cf. Swan View Coalition, Inc. v. Turner, 824 F. Supp. 923, 932 (D. Mont. 1992) (examining the same issue in a different manner).
The Court concluded that the biological opinion would have such a determinative or coercive effect on the Bureau of Reclamation. According to the Court, the redressibility element is satisfied because the Bureau of Reclamation would not impose the water level restrictions if the biological opinion is set aside.

However, because only one of petitioners' claims fell within the type of suit that could be brought under the ESA's citizen suit provision, the Court then addressed whether petitioners could bring those other claims under the APA. The Court concluded that petitioners had standing to assert their APA claim. Relying heavily on Data Processing, the Court chastised the Ninth Circuit for not recognizing that the zone of interests test requires looking to the "particular provision of law upon which the plaintiff relies" and not to the "overall purpose of the Act in question (here, species preservation)."

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238. See id. at 1164-65. Since Bennett, environmental plaintiffs have successfully argued that they could seek review of a biological opinion that would allow an incidental taking of listed species. See Southwest Center for Biological Diversity v. Babbitt, CIV 97-0786-PHX, at 12 (D. Ariz. filed Aug. 25, 1997).

239. See id. at 1165. This judgment is perhaps conclusive because the Bureau of Reclamation could still choose to adopt water level restrictions, even in the absence of any "determinative or coercive" threat. See generally Reed D. Benson, Whose Water Is It? Private Rights and Public Authority over Reclamation Project Water, 16 VA. ENVTL. L.J. 363 (1997); Michael R. Moore et al., Water Allocation in the American West: Endangered Fish Versus Irrigated Agriculture, 36 NAT. RESOURCES J. 319 (1996); Richard W. Wahl, Rediscovering the Waters: The Reclamation Act of 1902, 10 NAT. RESOURCES & ENV'T 31 (1995). The Bureau could do so simply as part of a general conservation measure or pursuant to a conservation program under section 7(a)(1) of the ESA. See 16 U.S.C. § 1536(a). See generally J.B. Ruhi, Section 7(a)(1) of the "New Endangered Species Act: Rediscovering and Redefining the Untapped Power of Federal Agencies' Duty to Conserve Species, 25 ENVTL. L. 1107 (1995). Indeed, the Department of the Interior has suggested that the Department can manage and operate the Klamath Project in a manner designed to protect tribal rights. See Letter from David Nawi et al., Regional Solicitor of Pacific Southwest Region, to Regional Director of Region 1, U.S. Fish and Wildlife Service, et al. (Jan. 9, 1997) (on file with author). Since the decision in Bennett, irrigators have sued the Department of the Interior over its management of the project, aside from the ESA and the biological opinion. Thus, the Court's slight of hand in dealing with redressibility illustrates a fundamental problem with applying the requirement to cases involving a procedural violation. See infra notes 386-99 and accompanying text.

240. Petitioners' claim that the USFWS' biological opinion implicitly designated critical habitat without following the procedures for such a designation fell within the ambit of section 11(g)(C), but the petitioners' other claims involved what the Court termed "maladministration" and could not be brought under any clause of section 11(g). See Bennett, 117 S. Ct. at 1166-67. This part of the Court's holding effectively overrules the same aspect of Swan View Coalition where the district court had allowed a citizen suit challenging the adequacy of a biological opinion, or maladministration. See Swan View Coalition, 824 F. Supp. at 929. Cf. Battaglia v. Browner, 963 F. Supp. 689 (E.D. Ill. 1997) (applying similar reasoning to citizen suit provision of the Comprehensive Environmental Response, Compensation, and Liability Act).

241. See Bennett, 117 S. Ct. at 1167-69.

242. See id.

243. Id. at 1167. The Court emphasized that in Data Processing it "did not require that the plaintiffs' suit vindicate the overall purpose of the Bank Service Corporation Act of 1962, but found it sufficient that their commercial interest was sought to be protected by the anti-
“best scientific and commercial data available” reflects a broad scope of interests and considerations, which necessarily include the type of economic concerns animating the petitioners’ lawsuit:

The obvious purpose of the requirement . . . is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise. While this no doubt serves to advance the ESA’s overall goal of species preservation, we think it readily apparent that another objective (if not indeed the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives.244

Lastly, and in what can only be described as an unfortunate hindrance to the USFWS’ administration of the Act, the Court held that the APA suit can proceed.245 The Court reasoned that the biological opinion has “direct and appreciable legal consequences” and, therefore, is a final agency action under the APA.246 It would appear from Solicitor Leshy’s letter,247 as well as from the brief of the

competition limitation contained in section 4 of the Act—the specific provision which they alleged had been violated.” Id. Not only did Justice Scalia’s comment ignore that Data Processing was not a model of clarity, but he also overlooked the contrary suggestion expressed by the Court in Clarke v. Securities Indus. Ass’n, 479 U.S. 388, 401 (1987). Citing to Clarke, for instance, the Tenth Circuit observed that “[a] court must look at both the specific purpose of the statute and the more general purposes of the act in which the statute is contained.” Mount Evans Co. v. Madigan, 14 F.3d 1444, 1452 (10th Cir. 1994). Opinions involving NEPA claims also have invariably looked to the objectives of NEPA, not to the specific statutory requirement for the preparation of an EIS under 42 U.S.C. § 4332(c). E.g., City of Los Angeles v. Glickman, 950 F. Supp. 1005, 1012-14 (C.D. Cal. 1996). See also JACOB A. STEIN ET AL., ADMINISTRATIVE LAW § 50.03, at 50-64 (1997) (stating that courts have looked to the statute as a whole to discern the zone of interests to be protected).

244. Bennett, 117 S. Ct. at 1168. The Court added that the ESA contemplates consideration of economic consequences in the section 7 consultation process. See id. The reasoning here may be somewhat superficial, because in TVA v. Hill, 437 U.S. 153 (1978), the Court clearly indicated that economic consequences were irrelevant in the consideration of whether a particular action is likely to jeopardize the continued existence of a threatened or endangered species or result in adverse modification or destruction of critical habitat. See id. The Court’s citation to section 7(h) as evidence that the ESA is concerned with economic consequences demonstrates a less than thorough analysis. Section 7(h) of 16 U.S.C. § 1536(h) is what has been called the “God Committee” provision of the Act, and is neither reflective of the purposes of the Act nor has it proved all that useful. See generally Oliver A. Houck, The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce, 64 U. COLO. L. REV. 277, 329-44 (1993); Jared Des Rosiers, Note, The Exemption Process Under the ESA: How the “God Squad” Works and Why, 66 NOTRE DAME L. REV. 825 (1991).

245. See Bennett, 117 S. Ct. at 1168.

246. According to the Court, “the Biological Opinion and accompanying Incidental Take Statement alter the legal regime to which the action agency is subject, authorizing it to take the endangered species if (but only if) it complies with the prescribed conditions.” Id. Oddly enough, this description comes from the Petitioner’s Brief and is otherwise wholly un-supported.

247. See supra note 198 and accompanying text.
United States,248 that this aspect of the Court's decision was unexpected, because most scholars and attorneys familiar with the ESA had always thought otherwise.249

B. The Trail Behind Bennett

Bennett v. Spear is only the start of an escalating problem in applying the present requirements for standing. To begin with, the zone of interests test has been lost in a terminal sea of inconsistency. How or whether it applies to challenges under the ESA is only the first manifestation of the problem. Over the horizon lurks the haphazard manner in which the test has been applied in NEPA lawsuits. In addition, the effort to interpret footnote 7 of Defenders of Wildlife and allow standing for procedural violations has generated considerable confusion, especially in suits filed under NEPA. Richard J. Pierce appropriately noted that "[i]f the majority opinion in Defenders has rejected standing based on such procedural injuries [that if the agency had followed the appropriate procedure, the outcome might have been different], the field of administrative law will have lost most of its content."250 Further, he observed that the majority opinion recognized standing for procedural violations, but only "so long as the procedures in question are designed to protect some threatened concrete interest of [a party] that is the ultimate basis of [the party's] standing."251 For most environmental disputes involving an agency's alleged procedural violation, this qualifier, coupled with the zone of interests test, seems to mandate a re-examination of the requirements for standing.

One initial and unfortunate problem with focusing on procedural injuries as the basis for standing is the difficulty of distinguishing

248. See Respondents' Brief at 15-16, Bennett (No. 95-813).
250. Pierce, supra note 171, at 1185.
251. See id. (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 573 n.8 (1992)). Pierce suggested that this part of the majority opinion appears "well-reasoned" and means that "a person cannot obtain judicial review of an agency action based only on injury to a 'procedural right.'" Pierce, supra note 171, at 1185.
between "informational" and "procedural" standing. 252  "Informational" standing was initially premised on an organization's inability to disseminate information to its members as a result of an agency's failure to follow certain procedures to gather information, principally under NEPA. 253  This approach, however, is intellectually unsatisfying, because neither the APA nor NEPA mentions a third party's opportunity to disseminate information. 254  These statutes instead

252. See, e.g., Sive, supra note 15.

253. See Foundation on Econ. Trends v. Lyng, 943 F.2d 79, 83 (D.C. Cir. 1991). In Lyng, the court observed that this type of standing was first raised by a footnote in Scientists' Inst. for Pub. Info., Inc. ("SIPI") v. Atomic Energy Comm'n, 481 F.2d 1079, 1086-87 n.29 (D.C. Cir. 1973), where the D.C. Circuit noted "that the plaintiff organization might have standing because it distributed scientific information to the public, an activity adversely affected by the agency's failure to provide an impact statement." Lyng, 943 F.2d at 83. The Lyng court then traced some of the post-SIPI cases and concluded that it has "never sustained an organization's standing in a NEPA case solely on the basis of 'informational injury,' that is, damage to the organization's interest in disseminating the environmental data an impact statement could be expected to contain." Id. at 84. The court warned that allowing such informational standing would eliminate any standing requirement in NEPA cases and concluded that the plaintiffs in Lyng lacked standing. See id. The Lyng court's reasoning is reminiscent of the National Wildlife Federation decision where the Court held that there was no identifiable federal agency action, an issue different from that of standing. See National Wildlife Fed'n, 497 U.S. at 890. In a separate opinion, Judge Buckley wrote that the majority in Lyng inappropriately confused the issue of standing with the substantive claim under NEPA. See Lyng, 943 F.2d at 87 (Buckley, J., dissenting in part and concurring in part). Relying on Competitive Enter. Inst. v. NHTSA, 901 F.2d 107 (D.C. Cir. 1990), Judge Buckley would have held that the plaintiffs had standing to assert informational injury. See id. See also Oregon Natural Desert Ass'n v. Green, 953 F. Supp. 1133, 1141 (D. Or. 1997) (discussing right to be apprised of environmental effects); Colorado Envtl. Coalition v. Lujan, 803 F. Supp. 364, 367 (D. Colo. 1992) (accepting informational injury as valid interest supporting standing). See generally Randall S. Abate & Michael J. Myers, Broadening the Scope of Environmental Standing: Procedural and Informational Injury-in-Fact After Lujan v. Defenders of Wildlife, 12 J. ENVTL. L. 345 (1994) (arguing for a recognition of informational injury); Christopher T. Burt, Comment, Procedural Injury Standing After Lujan v. Defenders of Wildlife, 62 U. CHI. L. REV. 275, 290-93 (1994) (questioning informational injury); Brian J. Gatchel, Informational and Procedural Standing After Lujan v. Defenders of Wildlife, 11 J. LAND USE & ENVTL. L. 75 (1995) (favoring informational injury); Lawrence Gerschwer, Note, Informational Standing Under NEPA: Justiciability and the Environmental Decisionmaking Process, 93 COLUM. L. REV. 996 (1993).

254. Distinguishing between procedural and informational injury is not necessarily productive. For example, Randall S. Abate and Michael J. Myers posit that "the main difference between the two harms exists in who is prevented from protecting the rights of the public: in procedural injury, the government; in informational injury, the public itself." Abate & Myers, supra note 253, at 385. The problem with this approach is that talking about the "public itself" is unrealistic. The "public" via Congress has entrusted to administrative agencies the authority to act in accordance with certain procedures and in the public interest. To say, then, that the public itself is injured when it does not receive information is most certainly accurate, but to presume that the existence of such harm translates into a cognizable interest that may be asserted by any person or organization asserting an interest in facilitating that dissemination is to draw lines without ends. This is quite different than where a restraint is placed on an organization's ability to disseminate information. See Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975). One author suggests that the parameters of informational standing can be bounded by the requirements for a geographical nexus to or actual use of an affected area. See Gatchel, supra note 253, at 85 n.73. However, the application of this requirement would eviscerate the need to invoke informational standing in the first place. If the focus shifts from an interest in disseminating information toward an interest in receiving information, then it seems more precise
address a third party's right to receive information and supply information to the federal agency. An organization may truly be "interested" in disseminating information and actions that diminish that organization's ability to disseminate information most assuredly injure the organization. However, that interest or injury is not one that Congress likely contemplated, at least not under the APA, NEPA, or most environmental statutes. So how, then, should courts treat standing to raise a NEPA claim?

1. NEPA and Its Zone of Interests

Some courts begin by suggesting that litigants must first satisfy the zone of interests test for prudential standing. The Ninth Circuit, for example, has indicated that a plaintiff who asserts purely economic interests does not have standing to challenge a violation of NEPA. In City of Klamath Falls, Oregon v. Babbitt, a district court observed that the Ninth Circuit's decision in Plenert supported to talk about the agency's failure to provide the public with information that is required to be supplied under statutes such as NEPA, the APA, or the Freedom of Information Act; in other words, a procedural violation.

In National Wildlife Federation, although Justice Scalia declined to address the deprivation of information as an asserted injury, his passing remarks are instructive. See National Wildlife Federation, 497 U.S. at 899. He characterized the injury as one involving the failure to provide information to organizations such as NWF, and suggested that such an injury would require showing that Congress contemplated that "providing information to organizations such as respondent was one of the objectives of the statutes allegedly violated." Id. For a discussion of informational standing under other federal statutes, see Abate & Myers, supra note 253, at 351-58. See also Animal Legal Defense Fund v. Yeutter, 760 F. Supp. 923 (D.D.C. 1991) (informational standing under the Animal Welfare Act), vacated sub nom. Animal Defense Fund, Inc. v. Espy, 23 F.3d 496 (D.C. Cir. 1994) (rejecting informational standing). Cf. Fund for Animals v. Babbitt, 89 F.3d 128, 134 (2nd Cir. 1996) (suggesting an implied informational injury). For a discussion of Yeutter, see GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 79-84 (1995). The Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11001-11050 (1994), is perhaps the best example of an environmental program premised on the dissemination of information. See generally Abate & Myers, supra note 253, at 374-76. Informational injury also might exist for violations of the Federal Election Campaign Act. Compare Akins v. FEC, 101 F.3d 731 (D.C. Cir. 1996) (en banc) (granting standing), with Common Cause v. FEC, 108 F.3d 413 (D.C. Cir. 1997) (denying standing).

255. In Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989), the Court stated that one of the purposes of NEPA's action forcing procedures is to guarantee "that the relevant information will be made available to the larger audience that may also play a role both in the decisionmaking process and the implementation of that decision." Id. at 349. See also Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989) (stating that NEPA goals are primarily accomplished by allowing governmental and public attention to be focused on the environmental effects of the proposed agency action). Two of the primary purposes of the APA are to ensure that the public is kept informed of federal agency activities and to provide for public participation in the administrative process. See UNITED STATES DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 9 (1947).

256. See Douglas County v. Babbitt, 48 F.3d 1495, 1499 (9th Cir. 1995) (quoting Nevada Land Ass'n v. U.S. Forest Serv., 8 F.3d 713, 716 (9th Cir. 1993)).

applying the zone of interests test to exclude a party whose interests are solely economic.258 The district court ultimately avoided the issue by concluding that the plaintiff, a municipality, necessarily represented a variety of interests and also had provided some environmental justification for its litigation.259 Another district court superimposed the language and requirements of the zone of interests test set forth in Clarke v. Securities Industry Ass'n260 and concluded that a NEPA plaintiff must:

(a) allege a non-pretextual environmental injury; (b) show that its claim is more than "marginally related" to, and not "inconsistent with," the purposes that underlie NEPA; and (c) be a "reliable private attorney general to litigate the issues of the public interest in the present case" in that [the plaintiff's] interests in the litigation must not be "more likely to frustrate than to further statutory objectives."261

This court then rejected the plaintiff's injury as too marginally related to the purposes of NEPA, and concluded that the plaintiff's economic interests were in extreme conflict with litigation in the "public interest" to warrant the plaintiff becoming a "reliable private attorney general."262 The D.C. Circuit, on the other hand, has indicated that economic interests will not "blight" an assertion of qualifying environmental and aesthetic interests.263 Usually, the issue is not so thoroughly explored. In Catron County v. U.S. Fish & Wildlife Service,264 the County alleged that the USFWS was required to prepare an EIS before it could designate critical habitat for listed species under the ESA.265 The County's motive was undoubtedly economic, but it alleged with an attenuated fact pattern that the designation of the habitat would "prevent the diversion and

258. See id. at 5.
259. See id.
262. See id. at 1013.
263. Mountain States Legal Found. v. Glickman, 92 F.3d 1228, 1236 (D.C. Cir. 1996). Early on, the Eighth Circuit similarly stated that "[i]ndividuals motivated in part by protection of their own pecuniary interests can challenge administrative action under NEPA provided that their environmental concerns are not so insignificant that they ought to be disregarded altogether." Robinson v. Knebel, 550 F.2d 422, 425 (8th Cir. 1977) (citations omitted).
264. 75 F.3d 1429 (10th Cir. 1996).
265. See id. at 1433.
impoundment of water by the County, thereby causing flood damage to county-owned property.”

The Tenth Circuit held that the County’s concern with protecting its property fell within the zone of interests protected by NEPA, although the court never articulated the “interests” that it believed were protected.

In Douglas County v. Babbitt, which also involved a challenge to a critical habitat designation, the Ninth Circuit similarly held that a county had standing to allege a procedural injury. The court began by stating that, before excluding the County’s interests from the zone of interests to be protected by NEPA, it would have to find that those interests were so inconsistent with the purposes of NEPA that it would be unreasonable to assume that Congress intended to allow the challenge. After the court listed the County’s injuries (the interests for purposes of the zone of interests test), the court suggested that the primary issue was whether the County had standing based upon a procedural injury that resulted from the failure of the USFWS to prepare an environmental document pursuant to NEPA. The court concluded that the County did have standing.

In both Douglas County and Catron County, the NEPA claim survived a challenge to the plaintiff’s standing, but the difference in how the two courts treated the NEPA claim illustrates the ambiguity surrounding the application of the zone of interests test to such disputes. The Douglas County court applied the test, but did so as part of its discussion of finding a procedural injury. Almost in passing, the court concluded that the County’s lands might be affected by the management of the adjacent federal lands, with such an interest falling “within NEPA’s zone of concern for the environment.”

The court in Catron County also applied the zone of interests test, but never addressed a procedural injury. The court

266. Id.
267. See id. at 1439. On the merits, the court held that the USFWS was required to comply with NEPA before designating a critical habitat under ESA. See id. In Coalition of Ariz./N.M. Counties for Stable Econ. Growth v. Babbitt, No. 95-1285-M, slip op. at 8 (D.N.M. March 4, 1997), the court held that parties challenging the critical habitat designation for the Mexican Spotted Owl had standing to raise a NEPA claim. See id. at 8. The court noted that it was “disinclined” to explore the plaintiffs’ motives and that the issues raised were not merely economic. See id. The court added that the parties had standing to raise procedural interests as well. See id. at 9.
268. 48 F.3d 1495 (9th Cir. 1995).
269. See id. at 1501. However, on the merits of the claim the court reached a contrary result from that in Catron County. See id. at 1507.
270. See id. at 1502.
271. See id. at 1500.
272. See id. at 1500-01.
273. See id. at 1500.
274. Id. at 1501.
275. See Catron County, 75 F.3d at 1433.
merely described the plaintiff’s injuries as perceptible and environmental and said that these injuries “fall well within the zone of interests protected by NEPA.”276 Although the difference in how the two courts treated the zone of interests test may be explained by the difference between each plaintiff’s facts and arguments, if precedent for the law of standing is to develop with such thin threads it should soon fray.

2. Article III Standing Requirements and Procedural Interests Under NEPA

If the zone of interests test is satisfied, the critical issue becomes how to apply the Article III standing requirements to typical environmental claims under NEPA involving a federal agency’s alleged failure to follow prescribed procedures. In Douglas County, the court described the requirements for standing based upon a procedural injury, but its analysis seems to ignore the fundamental concept of a procedural injury under NEPA.277 The court did not discuss how such an injury falls within the zone of interests protected by NEPA while also satisfying Article III. The court initially expressed doubt whether, under Defenders of Wildlife, the “procedural right” must be conferred by statute or whether it arises because of a threat to a concrete interest.278 The court decided that the right must be conferred by statute.279 This did not pose a problem because under NEPA the County had a right to comment on proposed major federal actions that significantly affect the quality of the human environment.280 However, the Court stated that the procedural injury still had to affect a “concrete” interest within the zone of interests of NEPA.281 The court concluded that the County’s interest in protecting its lands from the consequences of designating adjacent land as critical habitat under the ESA was sufficient to “describe concrete, plausible interests, within NEPA’s zone of concern for the environment, which underlie the County’s asserted procedural interests.”282

276. Id.
277. See Douglas County, 48 F.3d at 1500.
278. See id. at 1500 n.4.
279. See id.
280. See id. at 1501. See also City of Davis v. Coleman, 521 F.2d 661, 672 (9th Cir. 1975) (employing similar reasoning).
281. See Douglas County, 48 F.3d at 1501.
282. Id. The court further indicated that the “causation” component of standing was satisfied because it is “reasonably probable” that the County would be affected by the critical habitat designation, see id. at n.6, and that redressibility is not important when alleging a procedural injury. See id. at 1501. However, this analysis seems flawed. Causation applies to
In *Florida Audubon Society v. Treasury Department*, the D.C. Circuit offered another approach to cases involving an alleged procedural violation. The case involved a challenge by various conservation groups to a tax credit for the use of an alternative fuel additive, ethyl tertiary butyl ether (EBTE). The groups claimed that the Secretary of the Treasury was required to comply with NEPA before promulgating a rule providing the tax credit. The court began its analysis by treating the case as one involving procedural rights of the type addressed in footnotes 7 and 8 in *Defenders of Wildlife*. According to the court, "a procedural-rights plaintiff must show not only that the defendant's acts omitted some procedural requirement, but also that it is substantially probable that the procedural breach will cause the essential injury to the plaintiff's own interest." The plaintiffs, therefore, had to show "a particularized environmental interest of theirs that will suffer demonstrably increased risk, and whether the tax credit promulgated by the defendant is substantially likely to cause that demonstrable increase in risk to their particularized interest." The court recognized that this might be a difficult standard to meet where the plaintiff cannot show a geographical nexus to or actual use of an area, but believed that this standard was required by such opinions as *Defenders of Wildlife* and even *Sierra Club*.

In *Florida Audubon Society*, the court determined that the plaintiffs could not satisfy this requirement. The court focused on whether the plaintiffs had shown a particularized interest or specific environmental risk to themselves, stating that the "plaintiff must show that

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283. 94 F.3d 658 (D.C. Cir. 1996) (en banc).
284. See id. at 662.
285. See id.
286. See id. at 663. A panel of the D.C. Circuit would have found standing. See Florida Audubon Soc'y v. Bentsen, 54 F.3d 873 (D.C. Cir. 1995), reh'g en banc granted, Florida Audubon Soc'y v. Bentsen, 64 F.3d 712 (D.C. Cir. 1995). In *Florida Audubon Society v. Treasury Department*, the Treasury Department asserted that such rules are categorically excluded from NEPA compliance. See *Florida Audubon Soc'y*, 94 F.3d at 662.
288. Id. at 665.
289. See id. at 665-66.
290. See id. at 666.
he is not simply injured as is everyone else, lest the injury be too general for court action, and suited instead for political redress." 291 Stated another way, the court appears to require some showing of serious environmental harm to an identifiable area as well as a geographical nexus to or actual use of the affected area by the plaintiffs. The plaintiffs sought to satisfy this standard by arguing that the tax credit would cause more ETBE production, which would lead to increased ethanol production, thus prompting more production of corn and sugar. 292 The plaintiffs further argued that the increased agricultural production of corn and sugar would result in additional agricultural pollution, which would affect various wildlife areas in Minnesota, Michigan, and Florida that the plaintiffs or its members used and enjoyed. 293 The court refused to accept this argument, reasoning that the plaintiffs had failed to show that any particular farmers near the wildlife areas would actually respond to the tax credit, even though plaintiffs had demonstrated a general risk of environmental harm that would occur from increased agricultural production. 294 Consequently, a majority of the court concluded that the plaintiffs "have not demonstrated such a geographical nexus to any asserted environmental injury," and thus had no standing to sue. 295

After holding that plaintiffs failed to satisfy the injury in fact requirement, the court issued, in effect, an alternative holding on causation. 296 Apparently uncomfortable with the articulation of this requirement in the past, 297 the court explained that in a NEPA case causation must relate to the alleged environmental injury itself:

As in all cases, standing in an EIS suit requires adequate proof of causation. The conceptual difficulty with this requirement, in this type of case, is that an adequate causal chain must contain at least two links: one connecting the omitted EIS to some substantive government decision that may have been wrongly decided because

291. Id. at 667 n.4.
292. See id. at 667.
293. See id.
294. See id. at 667-68.
295. Id. at 668. Cf. People for the Ethical Treatment of Animals v. HHS, 917 F.2d 15, 17 (9th Cir. 1990) (holding that there had been no showing of harm to the area where a geographical nexus arguably existed).
296. See Florida Audubon Soc'y, 94 F.3d at 668.
297. The inquiry into causation was unnecessary in light of the court's holding that the plaintiffs already lacked standing to sue. The discussion, therefore, appears contrived to overrule Los Angeles v. NHTSA, 912 F.2d 478 (D.C. Cir. 1990). See infra notes 300, 303-04 and accompanying text.
of the lack of an EIS and one connecting that substantive decision to the plaintiff’s particularized injury.\footnote{298}

The court noted that this causal link between the asserted injury to a particularized interest and the substantive governmental action is required by \textit{Defenders of Wildlife}.\footnote{299} Any past decisions inconsistent with this view were then overruled.\footnote{300} Here, the court found insufficient evidence to support the various links in the plaintiff’s asserted chain of causation,\footnote{301} including even a congressional prophesy.\footnote{302}

The dissenters, Judges Rogers, Edwards, Wald, and Tatel, argued that the majority had misapplied the doctrine of standing to such a degree that it threatened to deny standing to anyone challenging actions with diffuse impacts.\footnote{303} These judges would have followed the circuit court’s decision in \textit{Los Angeles v. NHTSA},\footnote{304} where the court articulated two requirements for standing in cases involving claims under NEPA.\footnote{305} First, the procedural error, such as the failure to prepare an EIS, must create a risk that serious environmental

\footnote{298.} Florida Audubon Soc’y, 94 F.3d at 668.
\footnote{299.} See \textit{id.} at 669. The court added, “Not to require that a plaintiff show that its particularized injury resulted from the government action at issue would effectively void the particularized injury requirement.” \textit{id.} But, as argued later, the answer is not to impose such an illogical standard that essentially requires an inquiry into the merits of the case. Rather the recourse is to abandon the ill-conceived causation requirement in the first place.
\footnote{300.} See \textit{id.}.
\footnote{301.} See \textit{id.} at 671.
\footnote{302.} The court stated that it does “not defer to the views of . . . Congress or its individual members in determining whether a particular rule will cause injury to a particular plaintiff or as proof of any causal chain necessary for standing.” \textit{id.} at 670. The majority added that, after \textit{Defenders of Wildlife}, the decision in SCRAP must be considered an “outlier.” \textit{See id.} at 672. \textit{See also} Louisiana Envtl. Action Network v. Browner, 87 F.3d 1379, 1383 (D.C. Cir 1996) (making the same observation). Nevertheless, other courts still invoke SCRAP as support that an “identifiable trifle” is enough of an injury. \textit{See, e.g.}, Pilgrim Pub. Interest Lobby v. Dow Chem. Co., No. 95-CV-73286-DT, 1996 WL 930839, at *2 (E.D. Mich. Sept. 25, 1996); \textit{see also} Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546, 557 (5th Cir. 1996) (holding that in a CWA case, an “identifiable trifle” is sufficient for Article III standing). In cases brought under the citizen suit provision of the CWA, establishing causation may only require a showing that the defendant discharged pollutants of a type that would cause or contribute toward the alleged injury. \textit{See, e.g.}, Natural Resources Def. Council, Inc. v. Watkins, 954 F.2d 974, 980 (4th Cir. 1992). In \textit{Friends of the Earth v. Crown Cent. Petroleum Corp.}, 95 F.3d 358 (5th Cir. 1996), however, the court distinguished \textit{Cedar Point} and denied standing to an organization whose members did not use the directly affected waters, but instead used a water body “located three tributaries and 18 miles ‘downstream’ from” the emitting facility. \textit{See id.} at 361. The Fifth Circuit held that the plaintiffs had to prove at least some credible evidence that the members’ injuries were fairly traceable to the facility’s discharges, other than relying on a truism that water flows downstream. \textit{See id.} at 361-62.
\footnote{303.} \textit{See Florida Audubon Soc’y}, 94 F.3d at 673, 675. In a concurring opinion, Judge Buckley also agreed that the majority had inappropriately adopted new criteria for standing, which “will erode the effectiveness of one of the most important environmental measures of the past generation.” \textit{id.} at 672 (Buckley, J., concurring).
\footnote{304.} 912 F.2d 478 (D.C. Cir. 1990).
\footnote{305.} \textit{See id.} at 492.
harm will be overlooked, and second, the plaintiff must have a "sufficient geographical nexus to the site of the challenged project that he may be expected to suffer whatever environmental consequences the project may have." The dissenting judges in *Florida Audubon Society* considered the second requirement as the equivalent of the concrete interest test in *Defenders of Wildlife*. They believed that the plaintiffs "demonstrated concrete and particularized injury by establishing that they have a 'geographical nexus' to the threatened environmental injury." These judges argued that the plaintiffs had established a heightened risk of environmental injury that would affect their particularized interests and, therefore, it would require too much of plaintiffs to pinpoint precisely how they would be affected.

In *Committee to Save the Rio Hondo v. Department of Agriculture*, the Tenth Circuit disagreed with aspects of the D.C. Circuit's analysis in *Florida Audubon Society*. In *Rio Hondo*, the Forest Service approved an amendment to its master plan for the Carson National Forest in New Mexico. The amendment would have authorized changing Taos Ski Valley's special use permit for ski activities during the winter, located within the national forest, to include summertime operations. The Committee to Save the Rio Hondo (the Committee) believed that summertime activities would adversely affect the surrounding land and nearby water. Consequently, the Committee contended that the Forest Service's decision violated NEPA and asserted that the plan amendment and authorization for summertime activities required the preparation of an EIS. The Committee

306. *Florida Audubon Soc'y*, 94 F.3d at 674 (quoting *City of Los Angeles*, 912 F.2d at 492 (further quoting *City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975))).

307. See *Florida Audubon Soc'y*, 94 F.3d at 674; see also supra note 150 and accompanying text.

308. See *Florida Audubon Soc'y*, 94 F.3d at 677 (Rogers, J., dissenting).

309. See id. at 679. The dissenters also responded to the causation argument by reviewing the considerable evidence suggesting that the ETBE tax credit would stimulate ethanol production and its accompanying effects. See id. at 680-84. Of course, anyone who has followed the political debate over ethanol would realize that the plaintiffs' claims were not without some significance. Needless to say, the entire discussion appears mired in the merits of whether an EIS should have been prepared and the question of the likely environmental consequences of the tax credit. See id. Finally, the dissenters indicated that redressibility would be easily solved because the court could order the preparation of an EIS. See id. at 684.

310. 102 F.3d 445 (10th Cir. 1996).

311. See id. at 451-52.

312. See id. at 446.

313. See id.

314. See id. at 446-47.

315. See id. The Forest Service adopted the master plan for the Carson National Forest in 1981 and at that time prepared an EIS. See id. at 446. For the amendment to the plan, however, the Forest Service only prepared an environmental assessment (EA), which the Committee
submitted two affidavits from individuals with a demonstrated geographical nexus to the area: both used the nearby water and one used the land in and around the ski area. 316 Both affidavits stated that summertime use would not only affect the quality of the nearby waters by increasing the amount of sewage discharge and non-point source pollution, but would also disturb the recreational and aesthetic value of the surrounding land as a consequence of increased development and mechanization. 317 After concluding that the Committee had satisfied the zone of interests test for prudential standing, the court examined whether the Committee had satisfied constitutional standing under Article III. 318 The court separated its analysis into the three inquiries identified in Defenders of Wildlife: (1) Injury in Fact, 319 which was broken into (a) Increased Risk of Environmental Harm 320 and (b) Concrete Interests; 321 (2) Causation; 322 and (3) Redressibility. 323

The court’s discussion of whether the Committee’s members suffered an injury in fact was the most elaborate. The court began by describing the injury resulting from a violation of NEPA in the following summary:

An agency’s failure to follow the National Environmental Policy Act’s prescribed procedures creates a risk that serious environmental consequences of the agency action will not be brought to the agency decisionmaker’s attention. The injury of an increased risk of harm due to an agency’s uninformed decision is precisely the type of injury the National Environmental Policy Act was designed to prevent. Thus, under the National Environmental Policy Act, an injury of alleged increased environmental risks due to an agency’s uninformed decisionmaking may be the foundation for injury in fact under Article III. 324

Next, the court explained that Defenders of Wildlife requires a showing that the increased risk of environmental harm affects the litigant’s concrete and particularized interest: “To fully establish injury in fact, a plaintiff must be able to show that a separate injury to its concrete,

316. See id. at 450.
317. See id.
318. See id. at 448.
319. Id.
320. Id. at 450.
321. Id.
322. Id. at 451.
323. Id. at 452.
324. Id. at 448-49.
particularized interests flows from the agency’s procedural failure.”325 The plaintiff can show this type of injury by establishing a “geographical nexus” to or actual use of a site that might suffer environmental harm as a consequence of the agency’s action.326 The court noted that *Defenders of Wildlife* required that the environmental harm be perceptible and that it must be actual, threatened or imminent.327 The court concluded that these requirements were met in *Rio Hondo*.328 In examining the increased risk of environmental harm, the court summarized the harm that would follow from the Forest Service’s decision to allow summertime use of the ski area.329 The court implicitly suggested that this harm would be a product of an allegedly uninformed decision occasioned by failure to comply with NEPA.330 The Committee members established their concrete interest because they had a clearly identified geographical nexus to the area and actually used the area.331

Lastly, the *Rio Hondo* court addressed the causation and redressibility requirements.332 The court observed that in order to establish causation for a NEPA claim, a litigant must establish that the increased risk of environmental harm to its concrete interests is fairly traceable to the alleged NEPA violation.333 Here, the court departed from the D.C. Circuit’s decision in *Florida Audubon Society*.334 The *Rio Hondo* court stated that the D.C. Circuit’s requirement that “there is a substantial probability that the substantive agency action created a demonstrable risk, or caused a demonstrable increase in an existing risk, of injury to the particularized interests of the plaintiff . . . appears to confuse the issue of the likelihood of the harm, which is better addressed in the injury in fact prong of the analysis, with its cause.”335 Instead, the increased risk of environmental harm

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325. *Id.* at 449.
326. See *id.* (citing *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), and *Catron County v. U.S. Fish & Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996) as support).
327. Recast, the court summarized the injury in fact requirement:
the litigant must show that in making its decision without following the National Environmental Policy Act’s procedures, the agency created an increased risk of actual, threatened, or imminent environmental harm; and the litigant must show that the increased risk of environmental harm injures its concrete interests by demonstrating either its geographical nexus to, or actual use of the site of the agency action.
329. See *id.* at 450-51.
330. See *id.* at 450.
331. See *id.* at 450-51.
332. See *id.* at 451-52.
333. See *id.* at 451.
334. See *id.*
335. *Id.*
determines whether the plaintiff has suffered an injury in fact.\textsuperscript{336} The court acknowledged that the increased risk of harm from the agency's decision is not a result of the decision itself but rather from "uninformed decisionmaking."\textsuperscript{337} Therefore, the goal of NEPA would be subverted if plaintiffs were required to establish with a "substantial probability" that the environmental injury will actually occur: "[T]hose examinations are left to an environmental impact statement."\textsuperscript{338} The court then noted that plaintiffs can satisfy the redressibility requirement of standing if the injury would be redressed by a favorable decision requiring the Forest Service to comply with NEPA.\textsuperscript{339} This is why the court added that it is immaterial whether (and thus not required to be shown that) the Forest Service's decision would be any different if the plaintiff prevailed.\textsuperscript{340}

In a similar case, the First Circuit in \textit{Dubois v. United States Department of Agriculture}\textsuperscript{341} held that a party had standing to challenge a Forest Service decision involving a ski resort.\textsuperscript{342} Dubois argued that the Forest Service had not complied with NEPA, the CWA, and an Executive order before the Service decided to authorize the expansion of a skiing facility.\textsuperscript{343} The court described Dubois as:

located squarely within the geographical area allegedly directly affected by the proposed project, who visits the area regularly, who drinks the water which will allegedly be tainted by pollutants, and who will allegedly be deprived of his environmental, aesthetic and scientific interests in ways directly tied to the project he challenges.\textsuperscript{344}

Although the court noted, citing \textit{SCRAP}, that the injury may be shared by many, it followed by citing \textit{Warth v. Seldin} with the caveat

\begin{itemize}
\item[336.] See \textit{id}. (citations omitted).
\item[337.] Id. at 452.
\item[338.] Id. Logically, the court's statement belies its own analysis because the showing of any environmental harm should be equally irrelevant if the injury arises from the failure to ensure an informed decision. Whether or not significant environmental impacts will exist goes to the merits of the claim, not to whether a party can bring the claim.
\item[339.] See \textit{id}.
\item[340.] See \textit{id}. "Compliance with the National Environmental Policy Act would avert the possibility that the Forest Service may have overlooked significant environmental consequences of its action." \textit{Id}.
\item[341.] 102 F.3d 1273 (1st Cir. 1996), \textit{cert. denied sub nom., Loon Mountain Recreation Corp. v. Dubois}, 117 S. Ct. 2510 (1997).
\item[342.] \textit{See id.} at 1280-83.
\item[343.] \textit{See id.} at 1277. Although deprived of jurisdiction over the CWA issue, the court nevertheless determined that it could decide the CWA issue in the context of reviewing whether the Forest Service had considered all relevant factors in accordance with its obligation under NEPA. \textit{See id.} at 1295. Therefore, the only significant injury allegedly occurred as a consequence of the asserted NEPA violation. \textit{See id}.
\item[344.] \textit{Id.} at 1283.
\end{itemize}
that the injury "may not be common to everyone." The court also recited the now typical litany that (1) the injury must be personal to the plaintiff (concrete and particularized); (2) it must be actual or imminent, not conjectural or hypothetical; (3) it must be distinct and palpable; (4) it may be "small" as long as it is "direct"; and (5) it must be fairly traceable to the allegedly unlawful conduct and likely to be redressed. The court concluded that Dubois had standing because he had a geographical nexus to the area and used the water and lands that would be affected by the Forest Service's action. In a fairly conclusory statement, the court added that his injuries were "likely to be redressed" by the relief he has requested in the complaint: *inter alia*, an injunction against the project's proceeding. The First Circuit's analysis, therefore, avoided, or arguably overlooked, focusing on whether Dubois had standing due to a procedural violation as outlined in footnote 7 of *Defenders of Wildlife*.  

V. CEMENTING THE FAULTS: A SIMPLE RECOGNITION OF THE MODERN PARADIGM

The law of standing appears ready to come full circle, back to the fundamental issue that confronted the Court in the early 1970s. In

345. See id. at 1281. The references to SCRAP and Warth are curious. The notion that injuries can be shared by many was, as noted earlier, also one of the elements of *Sierra Club*, and the continued efficacy of SCRAP has been questioned. See supra notes 120-21 and accompanying text; see also supra note 302. In *Warth*, the Court did not say that an injury could not be common to everyone. See Warth v. Seldin, 422 U.S. 490 (1975). Rather, the Court observed that "when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction." Id. at 499 (citations omitted). Taken at face value, the statement in *Dubois* may suggest that federal air quality standards that impact us all might be immune from suit, although that clearly was not the court's intent.

346. See Dubois, 102 F.3d at 1281.

347. See id. at 1282-83.

348. Id. at 1283. The court further noted that Dubois' standing was being decided on a motion to dismiss (as in SCRAP) and might not be subject to the same exacting level of scrutiny during a review of a motion for summary judgment. See id. at 1283 n.13. This statement, however, seems somewhat disingenuous. Ostensibly, Article III standing is constitutional and thus jurisdictional, but the court decided the merits of the case because three of the parties had filed motions for summary judgment as well. See id. at 1283-85 (discussing the appropriate standard of review). In addition, the court explained that Dubois' standing was explored beyond the pleading stage during a hearing. See id. at 1282-83.

349. See id. at 1281. The court merely recites part of *Defenders* note 7 without ever explaining its relevance to the case. See id. at 1281 n.10 (citing Lujan v. *Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992)); see also supra note 341 (explaining that the asserted NEPA violation was the only significant violation because the court lacked jurisdiction over the CWA violation). In *Associated Fisheries, Inc. v. Daley*, 954 F. Supp. 383 (D. Maine 1997), aff'd, No. 97-1327, 1997 U.S. App. LEXIS 24436 (1st Cir. Sept. 16, 1997), the district court relied upon *Dubois* to conclude that fishery interests had standing to challenge an action of the Department of Commerce. See id. at 386.
Data Processing, the Court cast aside the notion of requiring a "legal interest," a relic of the old private or common law model, and acknowledged that a party with a noneconomic injury could have standing to pursue a claim.\textsuperscript{350} In doing so, the Court indicated that the party must have an injury in fact and fall within the zone of interests of the relevant statute.\textsuperscript{351} The Court did not separate its constitutional inquiry from any prudential inquiry, nor did it articulate the nature and breadth of the APA's language that the party must be "adversely affected or aggrieved within the meaning of the relevant statute,"\textsuperscript{352} as Kenneth Culp Davis would have liked.\textsuperscript{353} Two years later, in Sierra Club, the Court confirmed that aesthetic and ecological injuries were injuries in fact for purposes of obtaining standing to sue, but added that to establish an injury in fact the party must show that she is herself personally injured.\textsuperscript{354} The Court rejected the argument of the Sierra Club and others that they could, in effect, sue as private attorneys general.\textsuperscript{355} In various cases over the next eighteen years,\textsuperscript{356} the Court refined its Article III injury in fact requirement by adding what Cass Sunstein notes might be viewed as "natural and entirely unobjectionable corollaries" of the injury in fact requirement if applied correctly.\textsuperscript{357} Why Justice Scalia's opinion in National Wildlife Federation and, more particularly, in Defenders of Wildlife, marked a critical juncture in the law has less to do with a formulation of "new" requirements than with their application, or misapplication, to disputes under environmental statutes such as the ESA or NEPA. Since Defenders of Wildlife, the lower courts have struggled with applying the various constitutional and prudential standing doctrines in the frequent cases involving a violation of a procedural requirement under the ESA or NEPA.

This struggle demonstrates that the zone of interests test and the Court's articulated requirements for satisfying Article III standing do not apply in the modern era of environmental law. The zone of

\textsuperscript{350} Data Processing, 397 U.S. at 154.
\textsuperscript{351} See id. at 154-57.
\textsuperscript{352} See id.
\textsuperscript{353} See Davis, supra note 41, at 450.
\textsuperscript{354} See Sierra Club, 405 U.S. at 740.
\textsuperscript{355} See id.
\textsuperscript{357} See Sunstein, supra note 16, at 1452.
interests test is ill-equipped to serve as a useful guide for limiting access to the courts in environmental cases where Congress has sanctioned citizen participation, whether in the form of the APA or NEPA, through specific provisions providing procedural rights, as in the FPA, or by providing a citizen suit provision, as in Bennett. The differences among the opinions can be attributed to the lack of any common understanding that claims under NEPA necessarily engulf a zone of interests test. Bennett luckily signals such a recognition.

If we accept the Bennett Court’s admonition that the zone of interests test applies to the particular provision of the law being violated, and not to Congress’ overall objectives in the legislation, then courts will no longer have to struggle with deciding when economic interests do not justify granting standing because they are in too much conflict with environmental interests. This is the dilemma presented by the district court’s opinion in City of Los Angeles v. Glickman. While it has become commonplace for courts to assert that NEPA was designed to protect the environment, those same courts fail to rely upon the Court’s interpretation of NEPA as simply a procedural statute designed to ensure an informed agency decision. Therefore, the goal of NEPA cannot be divorced from the process. This process is not to ensure a correct or particular substantive agency decision, but rather to make sure that the federal agency has before it all the necessary facts to render an informed decision. This means that those who believe that certain environmental impacts will flow from the decision should be treated in a similar fashion as those who might disagree with the agency’s decision or want to provide the agency with their side of the story. Whether they are concerned with the environment in the same manner as an environmental organization is irrelevant; each has an equal right to participate in the NEPA process. Often, the juxtaposition of two opposing perspectives can result in a more informed agency decision. Courts, therefore, should be cautious about invoking the hortatory language of NEPA, unless they are willing to afford

360. See, e.g., Western Radio Services Co. v. Espy, 79 F. 3d 896, 902-03 (9th Cir. 1996); Glickman, 950 F. Supp. at 1012 n.5.
361. See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989); see also Inland Empire Pub. Lands Council v. United States Forest Serv., 88 F.3d 754, 758 (9th Cir. 1996) (holding that NEPA ensures a process, not a result). Although the Glickman court stated that “NEPA standing is procedural standing,” it failed to address how NEPA’s procedural focus relates to the zone of interests test. Glickman, 950 F. Supp. at 1015 n.10. The decision in Glickman is not likely to survive (if it has not already been reversed as of the date of this publication).
that language significance and alter the current understanding of NEPA as a procedural statute. Courts should recognize that all claims under NEPA are procedural and that the zone of interests test does not apply in NEPA cases, or its application, for the most part, will be pro forma.

After prudential standing, the next inquiry is how to address Article III standing. The need to show an injury in fact by establishing some direct or personal stake in the outcome of the litigation must be viewed at best as an attempt to ensure that mere interlopers do not abuse the judicial process, or at worst, as an ill-conceived creation to avoid a perceived assault on the courthouse. When the Court expressed this requirement in Sierra Club, it did so without much analysis, simply stating that it was so. What the Court failed to realize, and what has since become abundantly clear, is that any inquiry into the existence of an injury in fact entails a normative judgment. Such an inquiry involves a court’s subjective determination of whether it will recognize an interest as worthy of protection. No doubt the plaintiffs and their members in Sierra Club, National Wildlife Federation, and Defenders of Wildlife all feared some “harm” would follow from the alleged governmental violation, so much so that they devoted considerable time and effort in pursuing their cases for many years. However, the harm or injury in each instance apparently was too elusive for the Court to accept; it is not that the injury did not exist.

The problem with defining an injury in fact and determining whether it is of a type that a court will recognize as sufficient to confer standing is evident in how courts treat disputes under NEPA. All such cases are predicated upon a concern that the federal agency may have overlooked certain environmental consequences when the agency decided to act. The plaintiff typically alleges some procedural error, such as the failure to prepare an EIS or to take the

362. Some commentators suggest that the policy goals animating the passage of NEPA should be construed as having a substantive effect. See Coleman, supra note 35; Hanks & Hanks, supra note 35; see also James McElfish, Back to the Future, 12 ENVTL. FORUM 14 (Sept./Oct. 1995) (arguing that NEPA should be interpreted as having a substantive component); Ronald B. Robie, Recognition of Substantive Rights Under NEPA, 7 NAT. RESOURCES LAW 387 (1974); Yost, supra note 35.

363. In Plenert, the Ninth Circuit even relied on an earlier NEPA case for its analysis. See Plenert, 63 F.3d at 919-20 (citing Nevada Land Action Ass'n v. U.S. Forest Serv., 8 F.3d 713, 716 (9th Cir. 1993)).

364. See Sierra Club, 405 U.S. at 734-35; see also supra notes 64-74 and accompanying text.

365. See Fletcher, supra note 15, at 231-33 (commenting that the injury in fact requirement “is a singularly unhelpful, even incoherent, addition to the law of standing”); Sunstein, supra note 15, at 188-92; Sax, supra note 2.
requisite "hard look" at the environmental consequences of its action. There is no uniformity in how courts treat such claims. In *Babbitt*, the court purported to treat the case as involving a procedural right, while under similar circumstances in *Catron County*, the court did not address any procedural right because the County had established that the agency's decision posed a threat to its legally protected property interest. In both *Florida Audubon Society* and *Rio Hondo*, the courts treated the NEPA claim as one involving a procedural injury. The Ninth Circuit has also typically treated NEPA claims the same way, reasoning that the injury is the risk that environmental consequences might be overlooked. In some instances, whether the case becomes one of procedural rights or not appears to depend on whether the alleged injury is characterized as resulting from the agency's substantive decision or from the agency's failure to observe NEPA. In most of these cases, the injury the courts look to is the injury which may result from the agency's substantive decision. At first glance, this seems to make sense

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367. See *Babbitt*, 48 F.3d at 1501.

368. See *Catron County*, 75 F.3d at 1433.

369. See *Florida Audubon Society*, 54 F.3d at 875; *Rio Hondo*, 102 F.3d at 452; see also supra notes 286-95 and 323-30 and accompanying text.

370. See, e.g., *Seattle Audubon Soc'y v. Espy*, 998 F.2d 699, 703 (9th Cir. 1993); *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1514 (9th Cir. 1992).

371. In *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346 (9th Cir. 1994), for example, the plaintiffs challenged the adequacy of an EIS prepared by the Forest Service to accompany the Service's decision to use herbicides as part of its reforestation program. See *id.* at 1348. The court emphasized that the plaintiffs had not alleged a mere procedural injury, but had demonstrated a concrete interest, namely, the substantive harm that might occur from the use of the herbicides. See *id.* at 1354-55. The court, therefore, concluded that the plaintiffs "have a concrete interest apart from their interest in having procedure observed." *Id.* at 1355 n.14. The concrete interest was a geographical nexus or actual use of the area affected by the herbicides. See *id.* at 1355. The court's analysis focused on the harm that might occur from the agency's substantive decision, not from the harm that may occur as a result of the alleged procedural violation, but the analysis shifted focus when the court added that "[s]peculation that the application of herbicides might not occur is irrelevant. The asserted injury is that environmental consequences might be overlooked," as a result of deficiencies in the government's analysis under environmental statutes." *Id.* (citations omitted); see also *Sierra Club v. USACE*, 935 F. Supp. 1556, 1571 (S.D. Ala. 1996) (disagreeing with the characterization of the plaintiff's injury as procedural, stating that "the plaintiffs allege environmental and aesthetic losses which, they claim, would not have been sustained had the proper procedures been followed. Thus, it is not the procedures themselves, but the effect of the Corps' alleged divergence from such procedures" that is being challenged).

372. See, e.g., *Rio Hondo*, 102 F.3d at 450-51; *Catron County*, 75 F.3d at 1433; *Douglas County*, 48 F.3d at 1501; *Sierra Club v. Marita*, 46 F.3d 606, 612-13 (7th Cir. 1995); *Salmon River*, 32 F.3d at 1355; *Seattle Audubon Soc'y*, 998 F.2d at 703; see also *Sierra Club v. Pena*, 962 F. Supp. 1037 (N.D. Ill. 1997).
because a procedural violation does not *per se* have identifiable impacts on the physical environment.

This means that a plaintiff alleging a procedural violation must in most, if not all, instances show some likelihood that the agency’s substantive decision will have an identifiable impact on the physical environment, as well as establish some geographical nexus to or actual use of the affected area. Upon further reflection, any such inquiry into the risk of adverse environmental effects appears inconsistent with the notion of distinguishing between procedural and other violations of the law for purposes of standing. This becomes evident in *Florida Audubon Society*, where the court reviewed in considerable detail whether the alleged environmental harm was likely to occur as a result of the ETBE tax credit. The environmental effects were precisely those the litigants thought sufficient to

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373. See, e.g., *Dubois*, 102 F.3d at 1283; *Rio Hondo*, 102 F.3d at 448-51; National Wildlife Fed’n v. Espy, 45 F.3d 1337, 1341 (9th Cir. 1995); Portland Audubon Soc’y v. Babbitt, 998 F.2d 705, 708 (9th Cir. 1993); *Seattle Audubon Soc’y*, 998 F.2d 699, 703 (9th Cir. 1993); Friends of the Earth v. United States Navy, 841 F.3d 927, 931-32 (9th Cir. 1988); Oregon Envtl. Council v. Kunzman, 817 F.2d 484, 491 (9th Cir. 1987); Southwest Ctr. for Biological Diversity v. FERC, 967 F. Supp. 1166, 1171 (D. Ariz. 1997); Swan View Coalition, Inc. v. Turner, 824 F. Supp. 923, 929-30 (D. Mont. 1992). The same is generally true for other types of environmental cases. See, e.g., *Alaska Wildlife Alliance* v. Jensen, 108 F.3d 1065 (9th Cir. 1997) (challenging the legality of commercial fishing in Glacier Bay, with the organizational members’ recreational and aesthetic experience affected by the fishing); *Sierra Club* v. *Cedar Point Oil Co.*, 73 F.3d 546, 555-58 (5th Cir. 1996) (bringing a citizen suit under the CWA, where plaintiff’s members used the allegedly affected waters, and two of the members also lived near the waters); Mt. Graham Red Squirrel v. Espy, 986 F.2d 1568, 1581-82 (9th Cir. 1993) (finding standing where the project threatened the red squirrel and the plaintiff’s members enjoyed observing the red squirrel in its natural habitat); Didrickson v. Department of the Interior, 982 F.2d 1332 (9th Cir. 1992) (bringing a challenge to a regulation under the Marine Mammal Protection Act of 1972, where the challenging party had an interest in the observation and study of sea otters in Alaska); *Sierra Club v. Tri-State Generation & Transmission Ass’n*, 173 F.R.D. 275 (D. Colo. 1997) (suing plaintiff challenged the defendant under the citizen suit provision of the CAA, where plaintiff alleged that its members lived, worked, and recreated in the area and their ability to breathe clean air and view the surroundings would be adversely affected); *Ross v. Federal Highway Admin.*, No. 97-2132-GTV, 1997 U.S. Dist. LEXIS 11917 (D. Kan. July 17, 1997) (claiming plaintiffs adjacent land would be affected); Pilgrim Pub. Interest Lobby v. *Dow Chem. Co.*, No. 95-CV-73286-DT, 1996 WL 90389, at *2, *3 (E.D. Mich. Sept. 25, 1996). Conservation groups have been able to maintain a CWA citizen suit even in the absence of any serious environmental harm. See, e.g., *Friends of the Earth v. Laydlaw Envtl. Serv.*, 956 F. Supp. 588 (D.S.C. 1997). In *Cedar Point*, for instance, the Fifth Circuit expressed little interest in examining whether any harm actually existed, observing that the plaintiff’s members were sufficiently “concerned” and that there was a sufficient threat of future injury. See *Cedar Point*, 73 F.3d at 556-57; see also *supra* note 302. However, in *Public Interest Research Group, Inc. v. Magnesium Elektron*, 123 F.3d 111 (3d Cir. 1997), the Third Circuit reconsidered the issue of standing after the lower court concluded that the defendant’s CWA violation did not pose a threat to the body of water that plaintiffs’ members used. See id. at 117-23. The court accepted that the members used the water body and that the defendant violated the Act, but it required the members, through the organization, to show that the defendant’s conduct caused injury to the waterway. See id. at 119-23.

374. See *Florida Audubon Soc’y*, 94 F.3d at 667-69.
warrant the NEPA claim. 375 Similarly, following the lead of its court of appeals, the district court in California Forestry Ass’n v. Thomas 376 examined whether the Forest Service’s adoption of Interim Guidelines to protect the spotted owl’s habitat in certain national forests in California actually would have the type of adverse environmental impact asserted by the timber industry. 377 Although the court concluded that the guidelines would not have the asserted effect, the court denied standing because the plaintiff’s injuries were not redressible. 378 However, in another case, the D.C. Circuit concluded that a showing of a relatively modest increase in risk is sufficient to establish injury in fact for standing purposes where the alleged environmental harm would be serious. 379 These decisions, Florida Audubon Society in particular, reflect the inherent result of trying to marry a procedural violation with a requirement for a concrete injury, that is, a geographical nexus or actual use test. To the extent that an injury in fact requires showing a personal stake in the outcome of the case, which essentially has come to mean some geographical nexus to or actual use of an area affected by the agency’s substantive decision, 380 the tension between decisions like Florida Audubon Society and Rio Hondo and between procedural injury and the substantive decision seems inevitable.

One facet of focusing on an increased risk of environmental harm in a procedural injury case is the timing of that risk, or whether the injury must be immediate or imminent. The Court in Defenders of Wildlife generated such an inquiry when it held that the harm to plaintiff’s members was not an actual or imminent injury. 381 The Court did not consider the environmental injury itself but found that the environmental injury was not personalized to the plaintiff’s members because the affidavits were insufficient to show that the members actually used or had a geographical nexus to the sites in the Middle East. 382 Nevertheless, some courts now infer from Defenders of Wildlife a requirement for some sort of immediacy to the environmental injury. For example, this requirement has become particularly troubling in challenges to land use plans adopted by the

375. See id.
377. See id. at 16-18.
378. See id. at 18.
380. In Babbitt, for instance, the court specifically commented that “[t]he district court was correct to equate the ‘geographic nexus’ test of past Ninth Circuit cases with the ‘concrete interest’ test of Lujan.” Babbitt, 48 F.3d at 1501 n.5.
381. See Defenders of Wildlife, 504 U.S. at 564; see also supra note 154 and accompanying text.
382. See supra note 154 and accompanying text.
Forest Service. In general, these plans establish the standards and guidelines for making site specific decisions in national forests, not unlike a comprehensive zoning map. Because these plans do not have immediately identifiable discernable effects on the environment, standing to challenge them has become a controversial issue. While most courts follow the better reasoned view that standing is available, the Eighth Circuit denied standing to the Sierra Club's challenge to such a plan because of a failure to establish a threat of imminent environmental harm. The court believed that *Defenders of Wildlife* justified this conclusion. The Eleventh Circuit, on the other hand, observed that such an analysis confuses ripeness and standing doctrines, finding "the framework of the ripeness doctrine more useful when evaluating injuries that have not yet occurred."


385. See, e.g., Sierra Club v. Marita, 46 F.3d 606 (7th Cir. 1995); Resources, Ltd., Inc. v. Robertson, 8 F.3d 1394 (9th Cir. 1993); Portland Audubon Soc'y v. Babbitt, 998 F.2d 705 (9th Cir. 1993); Seattle Audubon Soc'y v. Espy, 998 F.2d 699 (9th Cir. 1993); Idaho Conservation League v. Mumma, 956 F.2d 1508 (9th Cir. 1992). The Seventh Circuit correctly responded that "[o]nce the plan has passed administrative review, the procedural injury has been inflicted. Unless a plaintiff's purported interest in the matter is wholly speculative, waiting any longer to address that injury makes little sense." *Marita*, 46 F.3d at 612. This issue will likely get resolved by the Supreme Court in *Sierra Club v. Thomas*, 105 F.3d 248 (6th Cir. 1997), cert. granted sub nom., Ohio Forestry Ass'n, Inc. v. Sierra Club, 66 U.S.L.W. 3296 (U.S. Oct. 20, 1997) (No. 97-16), where standing and ripeness were considered almost in the same breath, with the court concluding that the challenge to the plan was justiciable. See id. at 250. Also, in *Citizens for a Better Environment v. Steel Co.*, 90 F.3d 1237 (7th Cir. 1996), cert. granted, Steel Co. v. *Citizens for a Better Environment*, 117 S. Ct. 1079 (1997), the Court may address whether Congress can confer standing on citizens to sue for wholly past violations of the Emergency Planning and Community Right-to-Know Act of 1986, in circumstances where the plaintiff has not alleged any current or future injury in fact.

386. See *Sierra Club v. Robertson*, 28 F.3d 753, 759 (8th Cir. 1994).

387. See *id*.

388. *Wilderness Soc'y v. Alcock*, 83 F.3d 386, 389-90 (11th Cir. 1996). The court added that the confusion between the two doctrines is not surprising because "[b]oth doctrines focus initially on the injury to the person bringing the action." *id* at 390. A requirement for imminence in the likelihood of the environmental effects is more appropriately addressed where the plaintiff has sought injunctive relief or where a particular statute requires an imminent and
Considering all this, what is the purpose of treating a claim as alleging a procedural violation for purposes of Article III standing? In *Defenders of Wildlife*, the Court attempted to answer this question by suggesting relaxed standards for the causation and redressibility requirements.\(^{389}\) Logically, neither of these requirements should apply. If, as we have seen, the cause of a plaintiff’s harm is from the agency’s substantive decision, then it is not clear how the requirements for causation and redressibility would apply when a plaintiff is alleging a procedural violation, as under NEPA. It is entirely guesswork whether the alleged injury from the substantive agency decision would have been avoided had the agency followed the correct procedures. Thus, in order to avoid stating that the requirements cannot be applied, commonly courts will refer to the increased risk of environmental harm as a result of a procedurally flawed decision, although it is uncertain that the risk of the injury will decrease if the agency is forced to follow the correct procedures.\(^{390}\) In *Rio Hondo*, for instance, the court concluded that the plaintiffs had demonstrated an increased risk of environmental harm to the Ski Area as a result of the agency’s substantive, albeit uninformed, decision.\(^{391}\) The court then addressed causation and redressibility by concluding that causation is satisfied if the increased risk is traceable to the alleged procedural error.\(^{392}\) Specifically, the procedural error must relate in some way to the agency’s substantive decision.\(^{393}\) Otherwise, the alleged violation would not risk affecting the plaintiff’s interests that are adversely impacted by the agency decision.\(^{394}\) Thus would typically not be a problem in the context of NEPA because the entire NEPA process is designed to inform and influence the ultimate decision, thus affecting the plaintiff’s substantive

\(^{389}\) See *Defenders of Wildlife*, 504 U.S. at 572-73; see also supra notes 167-69 and accompanying text.

\(^{390}\) The *Robertson* Court observed that compliance with procedures is “almost certain to affect the agency’s substantive decision.” *Robertson*, 490 U.S. at 350.

\(^{391}\) Committee to Save the Rio Hondo v. Department of Agric., 102 F.3d 445, 450-51 (10th Cir. 1996).

\(^{392}\) *See Rio Hondo*, 102 F.3d at 451-52.

\(^{393}\) *See id.*

\(^{394}\) *See Marita*, 46 F.3d at 613 (“To the extent that the Sierra Club suffered a procedural injury, it is directly tied to an underlying, particularized interest.”).
interests automatically. When a plaintiff is not alleging injury from an increased risk of environmental harm, causation and redressibility become even more problematic. See Baca v. King, 92 F.3d 1031, 1037 (10th Cir. 1996); Mount Evans Co. v. Madigan, 14 F.3d 1444, 1451 (10th Cir. 1994) (economic interest challenging Forest Service decision not to rebuild a structure on Forest System lands); Wyoming v. Lujan, 969 F.2d 877, 881-82 (10th Cir. 1992) (challenge to an exchange transaction when injury was economic); Desert Citizens Against Pollution v. Bisson, 954 F. Supp. 1430 (S.D. Cal. 1997) (challenge to land exchange); Lodge Tower Condominium Ass’n v. Lodge Properties, Inc., 880 F. Supp. 1370, 1381 (D. Colo. 1995), aff’d, 85 F.3d 476 (10th Cir. 1996); see also Earth Island Inst. v. Christopher, 913 F. Supp. 559, 564-65 (Ct. Int’l Trade 1995) (Georgia Fishermen’s Association’s economic interests not sufficient to press ESA issue).

395. For example, in Sierra Club v. Marita, the court indicated that redressibility was not an issue. See Marita, 46 F.3d at 613 n.4; see also supra notes 270-272 (discussing Douglas County v. Babbitt, 48 F.3d 1495 (9th Cir. 1995)). See generally Gatchel, supra note 253, at 100-05.


397. In Mountain States, for instance, the court responded in the following manner to the argument that the plaintiffs’ economic injury would not be redressed if the agency, in this case, were forced to follow the law because plaintiffs had no legal interest in any specific outcome because the agency decisionmaking process:

We need not resolve this conflict here. So far as appears no court in the modern era has treated a garden-variety substantive defect in plaintiffs’ claim as defeating redressibility. Unlike [other situations], the alleged impediment to redress stems not from a defect in the court’s institutional power to order a specific remedy but merely from the interplay of various statutes bearing on the substantive validity of the Forest Service decision. Assuming that purely legal remedial gaps can establish a lack of redressibility, the substantive impact of the ESA is not a remedial gap at all; to treat it as an impairment of redressibility would seemingly allow any merits defect in plaintiffs’ claim to defeat their standing. Accordingly the ESA’s substantive provisions are irrelevant on this point.


398. Perhaps the most accurate response was delivered by Judge Norma Holloway Johnson, who observed that the “chance” that the plaintiff’s asserted injury might be averted is sufficient.

the present standing requirements. Courts must recognize that the private law model for litigation cannot function in the modern era of public interest in environmental disputes. The various environmental law programs, whether through the APA alone or through citizen suit provisions, were premised on public participation in environmental and natural resource protection, a national goal for the citizenry. That meant that citizens each have a “right” to participate and to challenge violations of the law, either substantively or procedurally. Environmental laws are a product of the recognition that the Silent Spring may fall upon all citizens as a result of actions not immediately or perceptibly harmful and that citizens can no longer look at environmental issues through a myopic lens. Americans must look at our environment as an ecosystem that affects us all. To say that all Americans are not personally injured when the opportunity to observe the nearly extinct Amur (or Siberian) tiger (Panthera tigris altaica) is lost or the opportunity to save a species that may contribute toward finding a cure for a disease that affects all persons is risked denies the fundamental tenet of modern environmental law. As one court observed, “[b]oth altruism and self interest lead people to protect endangered species. The decline of one of our fellow travelers on this planet is tragic in itself. It may also be a tocsin which tells us that we are doing something very wrong.” Further, not all harms occur in any particular place to satisfy a “geographical nexus” test, and not all harms are immediately perceptible. When the present debate over standing first began, Joseph Sax noted that:

400. In NEPA, Congress declared that it was this nation’s policy, in part, to “encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation.” National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4321 (1994). Elsewhere, Congress declared it a national goal to eliminate the discharge of pollution into the nation’s waters by 1985. See 33 U.S.C. § 1251(a)(1) (1994). The 1970 Clean Air Amendments were equally ambitious in establishing timetables, e.g., Clean Air Amendments of 1970 § 304, Pub. L. No. 91-604, § 6, 84 Stat. 1676, 1690 (1970) (mobile emissions), with the goal of protecting and enhancing the quality of the nation’s air resources. See 42 U.S.C. § 7401(b)(1) (1994). In the ESA, Congress declared that the species being protected “are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.” Endangered Species Act, 16 U.S.C. § 1531(a)(3) (1994) (emphasis added).

401. See RACHAEL CARSON, SILENT SPRING (1962).


403. For instance, how does one establish harm from the EPA’s decision on the appropriate level for particulate matter under the Clean Air Act, when the debate is over the science surrounding the level of harm? See Robert Yuhnke, Particles of Concern, 14 ENVTL. FORUM 24 (Mar./Apr. 1997). Perhaps because air quality is perceived to affect us all, standing to challenge federal air quality decisions is not typically an issue. See, e.g., Environmental Defense Fund v. EPA, 82 F.3d 451 (D.C. Cir. 1996) (challenge to EPA’s Transportation Conformity Rule).
The Mineral King decision suggests that environmental controversies are really nothing more than struggles between developers and birdwatchers. The Court majority seems oblivious to the central message of the current environmental literature—that the issues to engage our serious attention are risks of long-term, large scale, practically irreversible disruptions of ecosystems. By denying to persons who wish to assert those issues the right to come into court, and granting standing only to one who has a stake in his own present use and enjoyment, the Court reveals how little it appreciated the real meaning of the test case it had before it.404

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404. Sax, supra note 2, at 88.
Perhaps now, almost a quarter of a century later, when the standing requirements, at least under NEPA and the ESA, are precarious, the time is right to accept Sax’s cue. Courts, therefore, should follow what the Supreme Court said in Bennett v. Spear: The environment is a matter in which we all have an interest, a point essentially made by Justice Stewart in SCRAP.405 Courts should accept the holding in Sierra Club v. Morton that standing is not defeated simply because an interest may be widely shared.406 Also, to say that citizens are not all personally injured when federal public lands and natural resources are impacted by federal agency decisions ignores that public lands and resources are not just for citizens of the surrounding communities or users of those lands and resources. Public lands are held for the public at large,407 for the benefit of us all. In some cases, public lands generate public revenues for programs that we depend upon, and in other cases the revenue is generated so that citizens and future generations might have the opportunity to visit them.408 Parties who pursue their claims under modern environmental laws are not asserting “generalized grievances,” the concern underlying the standing doctrine.409 Instead, these parties are asserting concrete and particularized claims involving specifically alleged violations of the law that are of the type a court is well suited to decide. Moreover, fiction would be elevated over substance to suggest that there is no “case or controversy” under Article III when the party to the litigation is not seeking an advisory opinion but rather some form of particularized “relief.”410

405. See supra note 103 and accompanying text.
406. See supra note 75 and accompanying text.
407. See Light v. United States, 220 U.S. 523, 537 (1911) ("All the public lands of the nation are held in trust for the people of the whole country.") (quoting United States v. Trinidad Coal & Coking Co., 137 U.S. 160 (1890)).
408. People, for instance, may “feel the need for pristine places, places substantially unaltered by man. Even if we do not visit them, they matter to us. We need to know that though we are surrounded by buildings there are places where the world goes on as it always has.” BILL MCKIBBN, THE END OF NATURE 55 (1989). Congress and the American public endorsed this notion in the Wilderness Act, 16 U.S.C. §§ 1131-1136 (1994). For a further discussion of the concept of standing to preserve interests for future generations, see Raymond A. Just, Note, Intergenerational Standing Under the Endangered Species Act: Giving Back the Right to Biodiversity After Lujan v. Defenders of Wildlife, 71 TUL. L. REV. 597 (1996).
409. In these situations, “the legal questions presented to the court will be resolved, not in the rarefied atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.” Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 472 (1982).
410. See, e.g., Flast v. Cohen, 392 U.S. 83, 96-97 (1968) (discussing advisory opinions). The Court has been less than careful in transplanting standing analysis from cases involving constitutional disputes to those involving alleged violations of statutory programs. In non-environmental cases, the Court typically articulated its concern with deciding cases involving "abstract" injuries and "generalized grievances," sometimes denying standing on the grounds that the claim of injury was not judicially cognizable. See, e.g., Allen v. Wright, 468 U.S. 737, 754-
To be sure, when litigants seek to vindicate "individual rights" or "constitutional guarantees," the need for some individualized showing of injury is wholly appropriate. It is fair to say that under the Constitution no general constitutional or individual right exists to ensure that all governmental activities are constitutionally permissible.\textsuperscript{411} Otherwise, there would be no present barrier limiting lawsuits alleging a host of constitutional violations. Cass Sunstein explains that the Supreme Court initially developed the doctrine of standing precisely to deal with this problem.\textsuperscript{412} However, to say that no implied constitutional right exists to ensure observance with the Constitution fails to suggest that Congress cannot statutorily confer upon private citizens such rights to ensure that the laws it passes are followed. When Justice Scalia wrote that "there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right,"\textsuperscript{413} he missed the point. The basis for the asserted right is indeed critical. That basis arises in constitutional cases and under a private litigation model when the litigant can demonstrate a sufficient stake in the outcome. In the public litigation model, the basis for the asserted right arises because Congress has adopted modern environmental law programs and conferred upon the citizenry the right to participate in many of those programs. As William Fletcher wrote almost ten years ago, "Congress should have essentially unlimited power to define the class of persons entitled to enforce that [statutory] duty, for congressional power to create the duty should include the power to define those who have standing to enforce it."\textsuperscript{414} When and if the courts become overburdened by those claiming to be adversely affected or aggrieved, Congress should bear the duty to curb any abuses that might occur rather than for the courts to craft doctrines with a speculative eye toward what might follow.

\textbf{VI. CONCLUSION}

The past quarter of a century has illustrated that the law of standing cannot last in its current form. The prudential and constitutional requirements for standing were developed during an era

\footnotesize{55 (1984). In environmental cases, however, the Court usually has accepted that the injury is \textit{judicially cognizable}, and thus, the need for any further requirement should have been unnecessary.

411. It may well be that some showing of individualized injury is necessary to justify implying a cause of action under a constitutional provision. See Fletcher, \textit{supra} note 15, at 265-72, 280.


414. Fletcher, \textit{supra} note 15, at 223-24.}
in which the field of administrative law underwent a transformation from the old to a new paradigm. This new paradigm recognized the need for increased citizen involvement and access to the courts. The Court in *Sierra Club v. Morton* was reluctant to fully endorse the new model of citizen and judicial involvement. That model would have recognized that decisions affecting the environment and natural resources impact all citizens and that the courthouse doors should swing wide to ensure that agencies observe the environmental laws when taking action. Now that the fruit of that reluctance has been witnessed, including an inability to construct a coherent approach to applying the standing requirements to cases under statutes such as NEPA and the ESA, it is only fitting to suggest that the current law of standing is on its last legs.