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Standing for Environmental Groups: Procedural Injury as Injury-in-Fact

Miriam S. Wolok

NOTE

STANDING FOR ENVIRONMENTAL GROUPS: PROCEDURAL INJURY AS INJURY-IN-FACT

INTRODUCTION

Standing to sue the federal government historically has oscillated between leniency and stringency. Until 1970, plaintiffs could not bring their grievances to federal court unless they demonstrated injury to a legally protected interest.[1] In 1970, the Supreme Court liberalized standing by changing the rules governing standing requirements.[2] Instead of alleging violation of a formulaic legal right, a complainant needed to show only sufficient actual or threatened injury and a legislative intent to protect the class of people including the complainant.[3] This reformulation allowed a new class of plaintiffs to bring suit against, for one, the federal government on behalf of public interests.[4] In the last decade, some federal courts nevertheless have narrowed judicial access for environmental groups challenging alleged administrative violations of federal statutes while purporting to remain within the framework previously developed to liberalize standing.[5] In recent years, the federal judiciary has required environmental plaintiffs to plead with such specificity that many federal agency actions that affect the environment are immune from judicial review.[6] These courts are following the policy lead of the United States Supreme Court, which has revived the doctrine of separation of powers to limit judicial activism in broad and politically-charged decisions.[7]

Ironically, a counter-trend is emerging in several federal courts that may reopen the standing door for some environmental plaintiffs. Pro-

1. Frothingham v. Mellon, 262 U.S. 447 (1923).

2. Association of Data Processing Services, Inc. v. Camp, Comptroller of the Currency, 397 U.S. 150 (1970). This case originated the modern standing test.

3. *Id.*

4. *E.g.*, Committee for Full Employment v. Blumenthal, 606 F.2d 1062 (1979) (plaintiffs with institutional concerns of racial discrimination had standing to sue Secretary of Treasury over alleged failure to implement regulations). *See* C. Wright, 13 Fed. Prac. & Proc. § 3531.4 (1984) (for case summaries under liberalized standing).

5. The District of Columbia Circuit and United States Supreme Court have been especially strict. See *infra* notes 90–104 and accompanying text for discussion of recent judicial developments on this subject.

6. *E.g.*, Lujan v. National Wildlife Federation, 110 S. Ct. 3177, 111 L.Ed.2d 695 (1990). See *infra* notes 99–104 and accompanying text for discussion of this case.

7. *See* Allen v. Wright, 468 U.S. 737, 750 (1984); Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881 (1983).

cedural injury is a tool for asserting sufficient injury that works within the confines of the current constitutional standing standards,[8] yet bears a remarkable resemblance to the older, stricter legal interest standard. Procedural injury occurs when two conditions coexist: when an administrative agency allegedly violates a law; and when Congress expressly or impliedly creates an interest in persons to affect administrative decisions through that law.[9] Most often in environmental litigation, procedural injury has been invoked to challenge administrative violations of purely procedural statutes. Recently, however, procedural injury has been asserted successfully in a case challenging an agency action as a violation of the Endangered Species Act.[10] Procedural injury can be used as a wedge to reopen some standing barriers as the federal judiciary increasingly recognizes that the urgency of environmental relief requires judicial access.

This Comment explores 1) the changing standing requirements generally under the United States Constitution[11] and specifically for environmental organizations, 2) the evolution and use of procedural injury to satisfy standing under Article III through its adoption by the Eighth Circuit in *Defenders of Wildlife v. Lujan*,[12] and 3) possible future applications of procedural injury. It also examines the pitfalls that attend the use of procedural injury.

BACKGROUND

Under Article III of the United States Constitution, standing determines who can bring a grievance to court.[13] Article III limits aggrieved parties' access to courts to "cases" or "controversies."[14] The

8. *See* Sierra Club v. Morton, 405 U.S. 727, 735 n. 8 (1972) (for statement of contemporary standing test for environmental plaintiffs); Lujan v. National Wildlife Federation, 110 S. Ct. 3177 (1990) (for recent modification of standing law).

9. See notes 106–107, 111–113, 124–175 and accompanying text for examples of procedural injury.

10. Defenders of Wildlife v. Lujan, 911 F.2d 117 (1990), *cert. granted*, 111 S. Ct. 2008 (1991).

11. United States Const. art. III, § 2, cl. 1.

12. 911 F.2d 117 (8th Cir. 1990).

13. Davis, *The Liberalized Law of Standing*, 37 U. Chi. L. Rev. 450 (1969–70). Much confusion, both orchestrated and accidental, surrounds the motive behind standing. The United States Supreme Court has expressed varying goals of the standing inquiry as the need has arisen to obscure or obviate the substantive issues of a given case to reach the desired decision. *E.g.*, Warth v. Seldin, 422 U.S. 490, 520 (1975) (Brennan, J., dissenting) (Justice Brennan accused the majority of denying standing to plaintiffs challenging a zoning ordinance because it did not want to hear the merits); Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 473 (1982) (one purpose of standing is to limit federal judicial power over the legislature and other courts of law); Scalia, *supra* note 7, at 881 (the impetus behind rigorous application of Article III standing requirements is separation of powers concerns). *But see* Flast v. Cohen, 392 U.S. 83, 100 (1968) ("[t]he question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems.").

14. United States Const. art. III, § 2, cl. 1.

framers of the Constitution left the interpretation of these words to the courts. It is settled that the party bringing suit in federal court must have sustained a minimum level of injury to enable the dispute to rise to a case or controversy.[15] The test that determines whether the injury threshold has been reached has changed over the years. The modern rule requires the plaintiff to allege an actual or threatened injury (injury-in-fact) that is fairly traceable to the defendant's conduct and is likely to be redressed in court.[16] Congress has no power to change the constitutional standing criteria.[17] The common law of standing developed from the language of Article III as just one of several threshold determinations involving access to federal courts.[18]

In addition to the constitutional requirements of standing (which cannot be waived), the Supreme Court has created a prudential standing threshold. Prudential standing requirements limit federal jurisdiction even though no specific statutory or constitutional provisions require it.[19] Modern prudential standing jurisprudence requires among other things that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[20] To satisfy this prudential standing requirement, the complainant must allege that the purpose of the law is to protect it.[21] The complainant's interest satisfies prudential standing if it is "related to or consistent with the purposes implicitly in the statute" so that it can "reasonably be assumed that Congress intended to permit the suit."[22]

Congress can negate prudential standing barriers by explicitly authorizing "aggrieved" or "adversely affected" parties to seek judicial

15. Flast v. Cohen, 392 U.S. 83, 101 (1968).

16. *Valley Forge Christian College*, 454 U.S. 464, 475–76 (1982). *See* Alpert, *Citizen Suits Under the Clean Air Act: Universal Standing for the Uninjured Private Attorney General?* 16 B.C. Envtl. Affairs L. Rev. 283 (1988) (criticism has been leveled against the causation and redressability criteria as having been borrowed arbitrarily from both constitutional and prudential principles). *See also* Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 221 (1988) (the three-pronged standing test is unclear and has been applied inconsistently); R. Brown, Congressional Interpretation of Article III—An Opportunity Missed in *Defenders of Wildlife v. Hodel* (unpublished manuscript 1991) (the causation and redressability standards actually evolved from the prudential "zone of interests" test and have no place in the constitutional standing inquiry).

17. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979).

18. The other areas of law that developed from Article III include mootness, ripeness, justiciability, reviewability, scope of review, exhaustion, waiver, political question, and advisory opinion. Davis, *supra* note 13, at 469; Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 Harv. L. Rev. 645, 683 (1973); Coyle, *Standing of Third Parties to Challenge Administrative Agency Actions*, 76 Cal. L. Rev. 1061, 1062 n. 10 (1988).

19. Alpert, *supra* note 16, at 288.

20. *Data Processing*, 397 U.S. 150, 153 (1970). The purpose of this test is to avoid separation of powers problems. Comment, *Organizational Standing in Environmental Litigation*, 6 Touro L. Rev. 295, 298 (1990); Beauchamp, *Standing Without Principles*, 55 Geo. Wash. L. Rev. 1092, 1092 n. 3 (1987). *But see* Davis, *supra* note 13, at 458, 465 (for criticisms of the zone of interests test).

21. Jaffe, *Standing Again*, 84 Harv. L. Rev. 633, 636 (1971).

22. Clarke, Comptroller of the Currency v. Securities Industry Association, 479 U.S. 388, 399 (1987).

redress.[23] This statutory standing cannot create standing if article III is not satisfied, but it can define who is sufficiently injured under Article III.[24] For example, an "aggrieved" complainant need not show economic harm to overcome the constitutional standing barrier.[25] These laws permit judicial review for parties that would not otherwise possess an interest protected by the laws. The Administrative Procedures Act (APA) confers standing specifically to sue the federal agencies upon parties "adversely affected or aggrieved by agency action within the meaning of a relevant statute."[26] In addition, citizen suit provisions in federal statutes have been held to allow plaintiffs to bypass prudential standing requirements.[27]

Out with the Old

In the early twentieth century, standing doctrine under Article III acted as the "gatekeeper" to federal courts,[28] the "wardens and nurturers of our higher values and principles."[29] A complainant had to show some direct, tangible injury to itself[30] that was protected by a legal interest.[31] Moreover, the legal interest had to be cognizable:[32] it had to originate in tort, contract, property, statutory, or constitutional law.[33] In setting down these threshold requirements that were to stand for four decades, the

23. Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608, 615 (2d Cir. 1965), *cert. den.*, 384 U.S. 941 (1966).

24. *Id. But cf.* Rite-Research Improves the Environment, Inc. v. Costle, 650 F.2d 1312, 1320 (5th Cir. 1981) ("[i]n effect, someone is 'injured in fact' by an action for purposes of Article III if the person has a statutory right to complain of the action in a federal court." (quoting L. Tribe, American Constitutional Law 80 (1978))).

25. National Wildlife Federation v. Hodel, 839 F.2d 694, 707 (D.C. Cir. 1988) (alleged physical injury to community residents from possible water quality impacts of nearby mining operations was sufficient injury-in-fact; standing denied on other grounds).

26. 5 U.S. C. § 702 (1988 & Supp. I 1990).

27. *Accord* Warth v. Seldin, 422 U.S. 490, 501 (1975); National Wildlife Federation v. Hodel, 839 F.2d at 704 n. 7. *See also* Alpert, *supra* note 16, at 285; Dumont, *Beyond Standing: Proposals for Congressional Response to Supreme Court "Standing" Decisions*, 13 Vt. L. Rev. 675, 679–80 (1989).

28. Coyle, *supra* note 18, at 1067.

29. Brown, *Quis Custodiat Ipsos Custodes?—The School-prayer Cases*, 1963 Sup. Ct. Rev. 1, 16.

30. *Compare* Frothingham v. Mellon, 262 U.S. 447, 452, 479 (1923) (taxpayer had no standing to challenge a government spending program to decrease the infant mortality rate because plaintiff's liability as a taxpayer would not increase appreciably as a result) *with* Flast v. Cohen, 392 U.S. 83, 105–06 (1968) (the fact that a taxpayer sustained an injury in common with the public was not a *per se* bar to judicial access).

31. Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U.S. 118, 137 (1939).

32. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 152 (1951) (Frankfurter, J., concurring). *See Data Processing*, 397 U.S. 150 (1970); Scott, *supra* note 18, at 649–50 (documenting the changes in the law of standing).

33. *Tennessee Electric*, 306 U.S. at 137 (1939). Plaintiff electric power companies challenged Tennessee Valley Authority's (TVA) statutory power to regulate federal property and operations regarding the generation and sale of electric power purportedly to be used for navigation purposes. *Id.* at 134–35. The companies alleged direct and threatened harm from increased competition. *Id.* at 137. The court concluded that the plaintiffs did not have standing because they had no right to be free from competition under theories of property or contract law. *Id.* at 138–39.

Supreme Court greatly restricted standing to sue the federal government functionally; not only were aggrieved parties that were injured or threatened with injury in common with the public denied standing,[34] to gain access to courts they bore a heavy burden of satisfying the merits of their claim.[35] This hard-line stance necessitated each federal court to determine substantively whether a given governmental activity may have been illegal before it could determine whether the plaintiff's legal interest was injured. In determining whether a legally protected duty in an agency was sufficient to confer standing upon a given plaintiff, the court looked to the language and legislative history of the allegedly violated statute.[36] If the statute created a legal duty in the federal government to protect the plaintiff in some tangible way, the plaintiff could allege a violation of that duty in federal court.[37] This legal interest standing test remained intact for over 40 years.

In with the New

In light of increasing congressional intervention in the regulation of social, natural resource, and financial realms, the federal courts foresaw a barrage of lawsuits against the federal agencies administering these new regulations.[38] Heightened participation by public interest organizations in federal decision making and the judiciary's own willingness to review agency actions also contributed to the increased judicial review of administrative actions.[39] Dissatisfied with the rigidity and constriction of the formulaic legal interest test, the Supreme Court shifted its stance on the scope of standing. At first, the Court announced a broad policy to govern standing, but which lacked solid parameters. Justice Brennan stated that plaintiffs must have "such a stake in the outcome of the controversy as to assure

34. Frothingham v. Mellon, 262 U.S. 447 (1923).

35. *Tennessee Electric*, 306 U.S. at 149. In dissent, Justice Butler focused on the merits. He suggested that TVA's regulatory scheme violated its enabling statute because the control of navigation was not the main objective of the statute, and therefore TVA's illegal action directly injured the plaintiffs' property rights. *Id.* at 152. *See also* Duke Power Co. v. Greenwood County, 91 F.2d 665, 676 (4th Cir. 1937), *aff'd*, 302 U.S. 485 (1938) ("competition by the county [in obtaining a loan and grant from the federal government to construct its own electric power plant] violates no rights of the plaintiff.").

36. *Tennessee Electric*, 306 U.S. at 149 (Dissenting, Justice Butler stated that the majority had mistakenly omitted discussion of the statute's purpose); Hardin v. Kentucky Utilities Co., 390 U.S. 1, 7 (1968) (plaintiff had standing because one purpose of the 1959 amendments to the Tennessee Valley Authority Act of 1933 (Pub. L. Nos. 86–137, 86–157, 73 Stat. 260, 338 (1959)) was to protect electric utility companies from competition by the federal government within a specified geographical area); Scott, *supra* note 18, at 651, 663 (the courts used statutory purpose and legislative history to their own ends; under the legal interest test, plaintiffs had to show with "clarity" that a legislative purpose existed to protect them). See *infra* notes 190–193 and accompanying text for a comparison of the legal interest and procedural injury standing standards.

37. *Tennessee Electric*, 306 U.S. at 137.

38. Coyle, *supra* note 18, at 1069. Scott, *supra* note 18, at 685–86, attributed the change in judicial attitude to the government initiation of national education-aid programs that potentially could affect much of the public.

39. G. Coggins & C. Wilkinson, Federal Public Land and Resources Law 279 (1987).

that concrete adverseness which sharpens the presentation of issues."[40] Later, the Supreme Court attempted to clarify the criteria to sue federal agencies,[41] but this effort failed to provide adequate guidance for the newly enlarged standing policy.[42]

In 1970, the Court in *Association of Data Processing Services v. Camp*[43] produced the standing test used by federal courts ever since in suits against the federal government.[44] *Data Processing* required that the complainant show actual injury to an interest. It also required the complainant to show that its interest was arguably within the zone of interests that the authorizing statute sought to protect.[45] This new test demanded less concrete allegations in pleadings than did the preceding legal interest test,[46] and the standing criteria shifted away from a preliminary decision on the merits.

In subsequent years, the two parts of the *Data Processing* inquiry diverged. Actual injury, or injury-in-fact, became part of the now well-established three-pronged Article III standing test, and the zone of interests test has remained a prudential standing requirement. This comment focuses on the development of injury-in-fact under constitutional law, for it is this area of law that engendered procedural injury and has undergone an evolution that has important ramifications for environmental litigants.

40. Baker v. Carr, 369 U.S. 186, 204 (1962) (the majority found standing to challenge the apportionment of voting districts in Tennessee). *But see* Davis, *supra* note 13, at 470 (standing should be used to determine whether "the plaintiff [is] entitled to judicial assistance in order that justice may be done," not to sharpen the issues). Justice Brennan's passage is one of the most often quoted in modern standing cases. *E.g.*, Havens Realty Corp. v. Coleman, 455 U.S. 363, 378–79 (1982).

41. Flast v. Cohen, 392 U.S. 83, 101 (1968) (standing inquiry under Article III was twofold: The aggrieved party must have had a "personal stake in the outcome of the controversy," and the controversy must have involved "adverse legal interests.").

42. For criticisms of the *Flast* decision, see Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 78–79 (1978) (requirement in *Flast* that complainant show a causal link between alleged injury and constitutional claims was limited to taxpayer suits); Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 225 n.15 (1974) (*Flast* is not applicable to cases other than federal taxing and spending power); Coyle, *supra* note 18, at 1072–73 (attempt in *Flast* to clarify injury requirement for standing failed); Scott, *supra* note 18, at 660 (*Flast* decision was not helpful in defining useful standing criteria).

43. 397 U.S. 150, 151 (1970) (plaintiffs, data processing servicers, challenged a decision by the Comptroller of the Currency to allow national banks to provide the same services as plaintiffs, thereby subjecting plaintiffs to increased competition).

44. Alpert, *supra* note 16, at 290; Coyle, *supra* note 18, at 1071, 1074. *See e.g.*, City of Davis v. Coleman, 521 F.2d 661, 678 (9th Cir. 1975).

45. *Data Processing*, 397 U.S. at 153.

46. Scott, *supra* note 18, at 663.

INJURY-IN-FACT

In *Data Processing*,[47] injury-in-fact functioned to ensure that the plaintiff had a sufficient personal stake to promote concrete adverseness in the courtroom.[48] Injury-in-fact establishes that the plaintiff has suffered greater harm than the public at large and is evidence that the plaintiff has alleged a "distinct and palpable injury to [itself]."[49] Because it manifests a "case" or "controversy," it has been described as the "cornerstone of the Court's constitutional standing requirement."[50]

Numerous federal cases delineated the scope of injury-in-fact. Injury to noneconomic and intangible values have been recognized.[51] Injury also can be actual or threatened,[52] or even contingent.[53] Although conclusive proof of injury-in-fact is not required,[54] the burden of alleging sufficient injury varies depending on the particular procedural motion under which the standing issue arises.[55] At a minimum, however, the plaintiff itself must be injured or threatened with injury,[56] and it has to

47. *Data Processing*, 397 U.S. 150 (1970).

48. Baker v. Carr, 369 U.S. 186 (1962).

49. Warth v. Seldin, 422 U.S. 490, 501 (1975).

50. Coyle, *supra* note 18, at 1075.

51. *Scenic Hudson Preservation Conference*, 354 F.2d 608, 616 (2d Cir. 1965) ("the public interest in the aesthetic, conservational, and recreational aspects of power development... must be held to be included in the class of 'aggrieved' parties"); Sierra Club v. Morton, 405 U.S. 727, 734 (1972) (plaintiffs' aesthetic and recreational interests are sufficient for standing); *Gladstone*, 441 U.S. 91, 112 (1979) ("deprivation of the social and professional advantage of living in an integrated community" constituted sufficient injury); Natural Resources Defense Council v. Securities Exchange Commission, 389 F. Supp. 689, 697 (D.D.C. 1974) (plaintiff's successfully alleged interest was "in protecting the environment, in investing their funds, and in voting their shares in a socially responsible manner.").

52. *E.g.*, Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973); National Audubon Society v. Hester, 801 F.2d 405 (D.C. Cir. 1986) (agency actions may adversely affect condor sightings by the plaintiff's members); Wilderness Society v. Griles, 824 F.2d 4, 11 (D.C. Cir. 1987) (threatened injury is sufficient for constitutional standing purposes if the governmental action directly affects the plaintiff or the government directly affects a third party whose response will injure the plaintiff).

53. Oregon Environmental Council v. Kunzman, 817 F.2d 484, 491–92 (9th Cir. 1987) (injury contingent upon state's use of insecticides was sufficient to confer standing); Rockford League of Women Voters v. United States Nuclear Regulatory Commission, 679 F.2d 1218, 1221–22 (7th Cir. 1982) (threat of physical harm to plaintiff's members from future construction and operation of nuclear facility satisfied injury for standing purposes).

54. City of Davis v. Coleman, 521 F.2d 661, 673 (9th Cir. 1975) (proof of environmental harm to the plaintiff was not necessary to show injury).

55. To defeat a summary judgment motion, Fed. R. Civ. P. 56, the non-movant bears the burden of presenting specific facts that show that a genuine issue of material fact exists and that the movant is not entitled to the summary judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Conversely, under a motion to dismiss, Fed. R. Civ. P. 12(b), all factual disputes are resolved in favor of the non-moving party and the burden is on the movant to sustain the motion. The court dismisses the suit only when no reasonable doubt exists that the plaintiff cannot prevail on the facts presented. Comment, *Standing for Environmental Groups: An Overview and Recent Developments in the D.C. Circuit*, 19 Envtl. L. Rep. 10289, 10290 (1989).

56. Warth v. Seldin, 422 U.S. 490, 511 (1975).

assert more than a general injury or interest shared with the general public.[57]

ORGANIZATIONAL STANDING

Organizations can assert two types of interests to gain standing. They may represent the interests of their members,[58] or they may assert their own interests in participating in governmental decisions.[59] Organized groups, especially national public interest groups, have had difficulty alleging injury to their own interests because their group objectives often are broad and their interests usually are not confined geographically.[60] Thus, organizational complainants not easily overcome the constitutional standing barrier. To gain standing, they have instead alleged injury to their members' interests. In *Hunt v. Washington Apple Advertising Commission*,[61] the United States Supreme Court allowed an organizational plaintiff standing to represent itself and the State of Washington. The Court established the following three-part test for organizational plaintiffs to gain standing:

(a) [the] members would otherwise have standing to sue in their own right;

(b) the interests [the organization] seeks to protect are germane to the organization's purpose;[62] and

(c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.[63]

Organizations can satisfy the first prong of this test by documenting that at least one member can overcome the constitutional standing barrier. The last two criteria are prudential standing requirements, and organizations must satisfy them independently of Article III. For the most part, organizations have easily satisfied the *Hunt* test when members' health or employment was directly affected, or when members either

57. Sierra Club v. Morton, 405 U.S. 727, 739 (1972).

58. *Id.* at 735 n.8.

59. Warth v. Seldin, 422 U.S. at 511.

60. Comment, *supra* note 55, at 10295.

61. 432 U.S. 333, 343 (1977). Plaintiff, on its own behalf and on behalf of Commission members, challenged a North Carolina statute regulating the labeling of apples imported from other states as a violation of the Commerce Clause, U.S. Const. art. 1, § 8. The court denied standing to the plaintiff in its own right because it was not in the advertising business and therefore did not have a sufficient interest in the outcome of the litigation. *Hunt*, 432 U.S. at 338, 341.

62. The germaneness requirement has been postulated as preventing "litigious organizations from bringing suit on issues outside their realm of expertise and about which few of their members care." Comment, *supra* note 55, at 10296. However, this test has been criticized as superfluous. *Id. But see* Scott, *supra* note 18, at 674 ("[t]he idle and whimsical plaintiff, a dilettante who litigates for a lark, is a specter which haunts the legal literature, not the courtroom.") *See generally* Comment, *supra* note 20, at 319 (the entire standing test required of environmental groups lacks sufficient justification in light of the grave environmental concerns of our time).

63. *Hunt*, 432 U.S. at 343.

owned property in or used land within the disputed area of agency action.[64]

If an environmental group is to establish constitutional standing in its own right, it must allege an injury to its own interest that corresponds to a purportedly illegal agency action. An organization's interest in the challenged administrative action must demarcate the group from the general public as well.[65] Most organizational plaintiffs that have successfully asserted Article III standing on their own behalf in federal court were established for only limited and site-specific purposes. By contrast, national public interest groups are not likely to litigate successfully on behalf of organizational interests because they are unable to allege a particularized or specific injury that sets them apart from the crowd.[66] The judiciary seems reluctant to grant standing to sue the federal government to organizations that have sweeping goals, like the large membership environmental groups, unless they can show injury to their members.[67] Separation of powers concerns are most often cited as the reason for this restrictive judicial policy; with the expansion of the standing doctrine to accommodate public interest groups in the 1970s and early 1980s came doubts that federal courts could effectively confine their role to adjudicating cases or controversies.[68]

STANDING FOR ENVIRONMENTAL ORGANIZATIONS

The Trends

After *Data Processing*, the law of standing that evolved under Article III allowed public interest groups to gain access to the judiciary on a

64. International Union, United Automobile, Aerospace, and Agricultural Implementation Workers of America v. Brock, 477 U.S. 274, 282 (1986) (UAW represented its members to challenge Secretary of Labor's actions); National Association of Rehabilitation Facilities, Inc. v. Schweiker, 550 F. Supp. 357, 365 (D.D.C. 1982) (professional associations of providers of medical rehabilitation services had standing under *Hunt*); American Motorcyclist Association v. Watt, 534 F. Supp. 923, 930 (N.D. Cal. 1981), *aff'd*, 714 F.2d 962 (9th Cir. 1983) (recreational organizations challenged a federal desert conservation plan).

65. *See e.g.*, Center for Auto Safety v. National Highway Traffic Safety Administration, 793 F.2d 1322 (D.C. Cir. 1986) (plaintiff had standing to sue the federal agency because harm to its general goal of facilitating the use of fuel-efficient vehicles was too loosely connected to the administration's fuel economy standards); Warth v. Seldin, 422 U.S. 490, 511 (1975) (plaintiff associations representing low- and moderate-income house shoppers had standing to sue a city on their own behalf only if the defendants' action "perceptibly impaired the plaintiff's ability to provide counseling and referral services," thereby resulting in injury-in-fact).

66. *Compare* Center for Auto Safety, 793 F.2d 1322 (D.C. Cir. 1986) *and* Warth v. Seldin, 422 U.S. at 516–17 ("the complaint does not suggest that any of these groups has focused its efforts... or has any specific plan to do so") *with* Oregon Environmental Council v. Kunzman, 817 F.2d 484 (9th Cir. 1987) (groups had standing to challenge gypsy moth pesticide elimination procedures implemented by state and federal agencies).

67. *E.g.*, Warth v. Seldin, 422 U.S. at 516–17; Sierra Club v. Morton, 405 U.S. 727, 735 n.8 (1972).

68. Scalia, *supra* note 7 (for criticism of decisions that may have overstepped Article III boundaries).

large scale to challenge administration actions. By expanding the definition of injury-in-fact, the Supreme Court allowed large environmental groups standing to sue the federal government over lackadaisical enforcement of newly-enacted environmental protection laws. Recently, however, the federal judiciary has reversed this trend. The requirement for showing injury-in-fact for national environmental organizations with large memberships has become more onerous.

The Initial Expansion

At first, the Supreme Court expansively read the injury requirement of *Data Processing* for environmental groups. In *Sierra Club v. Morton*,[69] the majority opinion both acknowledged that organizational plaintiffs could gain judicial review of federal agency actions by alleging a sufficient noneconomic injury such as harm to aesthetic or recreational uses of federal lands,[70] and conceded that had the Sierra Club pleaded injury to members who actively used the disputed area recreationally and whose uses allegedly were affected by an agency action, it might have overcome the injury-in-fact hurdle.[71] *Sierra Club* had the practical effect of broadening the possible avenues for asserting actual injury because thereafter, most public interest groups brought suit on behalf of their members.[72]

United States v. Students Challenging Regulatory Agency Procedures (SCRAP)[73] further broadened injury-in-fact for environmental groups.[74] SCRAP, a group of law students dedicated to "enhanc[ing] the quality of the human environment,"[75] alleged injury to their members' economic,

69. 405 U.S. at 729 (1972) (plaintiff environmental organizations brought suit to enjoin the Department of Interior from issuing permits associated with recreational development adjacent to and affecting the Sequoia National Park).

70. *Id.* at 734. The Court held, however, that the plaintiffs lacked standing for failure to allege a sufficiently direct injury under Article III. *Id.* at 735. Plaintiffs alleged a "special interest" in conserving natural areas held by the federal government. *Id.* at 730. The Supreme Court in *Sierra Club* specifically rejected a Second Circuit Court of Appeals holding that an environmental group's own interest as distinguished from interests of its members was sufficient to confer standing. *Scenic Hudson Preservation Conference*, 354 F.2d 608, 616 (2nd Cir. 1965).

71. Sierra Club v. Morton, 405 U.S. at 735–36 n. 8.

72. *E.g.*, United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 682 (1973); Defenders of Wildlife v. Lujan, 911 F.2d 117 (8th Cir. 1990). Scott, *supra* note 18, at 667.

73. 412 U.S. 669 (1973).

74. Simultaneously, federal courts were extending the second and third prongs of the Article III standing test. *SCRAP*, 412 U.S. at 688–90 (lack of causation was not in itself a barrier to standing); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 261 (1977) (likelihood that injury could be redressed was sufficient for standing purposes). In the same period, the Supreme Court clarified and broadened the prudential standing requirements for membership organizations. *E.g.*, Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 80 (1978) (plaintiff cannot assert legal rights of third parties).

75. *SCRAP*, 412 U.S. at 678.

recreational and aesthetic well-being because a surcharge on freight, authorized by the Interstate Commerce Commission, would affect railroad shipments of scrap locally and nationally, thus encouraging producers to use raw instead of recycled materials.[76] The majority rejected the defendant's contention that SCRAP's interest was vague and had merely alleged a general interest in common with the public.[77] The majority was swayed in part by the fact that the plaintiff's members used the natural areas and breathed the air in the Washington, D.C., metropolitan area that might be affected by the agency action.[78] Thus, *SCRAP* permitted environmental plaintiffs access to the federal court system simply by showing that federal agency action might affect their members who used the resource.[79]

As a result of these cases, environmental litigants did not experience much difficulty in satisfying constitutional standing. Until the last decade, federal courts followed the liberal standards established in *Sierra Club* and *SCRAP* and allowed diverse public interest groups, including environmental organizations, to sue federal agencies. Groups with specific interests came to the forefront of public interest litigation, groups like local environmentalists,[80] consumer groups,[81] senior citizens,[82] and public information groups.[83]

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76. *Id.* at 678.

77. *Id.* at 689 n.14 (an "identifiable trifle" will satisfy injury-in-fact).

78. *Id.* at 688.

79. *Id.* at 689. Some jurists and commentators wanted to dispense altogether with restrictions that even cases broadly construing the constitutional standing standards adhered to. Among the more moderate, Justices Brennan and White in their concurrence in *Data Processing*, 397 U.S. 150, 167–68, 178 (1970), and Justice Brennan in his dissent in Warth v. Seldin, 422 U.S. 490, 520 (1975), would abandon all standing requirements except injury-in-fact. *See generally* Dumont, *supra* note 27, at 680 (the focus of standing should be on the complaining party, not on the substantive issues). Those more extreme would confer standing upon environmental groups on behalf of the environment itself. Sierra Club v. Morton, 405 U.S. 727, 741 (1972) (Douglas, J., dissenting) (expressing the desire to grant standing to environmental groups on behalf of "inanimate object[s]" in the environment); Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 Cal. L. Rev. 450, 458 (1972); Stone, *Should Trees Have Standing Revisited*, 59 Cal. L. Rev. 1, 6 (1985) (the author argued persuasively that natural areas, flora and fauna should have standing); Comment, *supra* note 20, at 296, 297, 323 (injury-in-fact should be abandoned as the means for environmental groups to access courts because it merely encourages "artfully drawn pleadings," and because it epitomizes the long-held but faulty premise that natural resources exist for our use. The author would rather see these groups gain standing through their dedication for and expertise in certain environmental fields. In support of her contention, the author stated that the Endangered Species Act, for one, recognizes that some resources should be protected on their own behalf).

80. Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978); Metropolitan Washington Coalition for Clean Air v. District of Columbia, 511 F.2d 809 (D.C. Cir. 1975).

81. *Center for Auto Safety*, 793 F.2d 1322 (D.C. Cir. 1986); National Organization for the Reform of Marijuana Laws v. United States Department of State, 452 F. Supp. 1226 (D.D.C. 1978); Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982).

82. Action Alliance of Senior Citizens of Greater Philadelphia v. Heckler, 789 F.2d 931 (D.C. Cir. 1986), *judgment vac., rem. for further consideration in light of* Dole v. United Steelworkers of America, 110 S. Ct. 1329 (1990).

83. Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission, 481 F.2d 1079 (D.C. Cir. 1973).

COUNTER-DEVELOPMENTS

During the last decade, however, the federal courts have again limited the ability of large, multifaceted environmental groups to sue federal agencies. Criticism of the liberal injury-in-fact standard originated with legal scholars. While on the District of Columbia Circuit, Justice Scalia wrote of separation of powers concerns:

> [T]he judicial doctrine of standing is a crucial and inseparable element of the separation of powers] principle, whose disregard will inevitably produce . . . an overjudicialization of the processes of self-governance . . . [C]ourts need to accord greater weight than they have in recent times to the traditional requirement that the plaintiff's alleged injury be a particularized one, which sets him apart from the citizenry at large.[84]

Scalia went on to predict a contemporary return to the legal interest standard.[85]

Criticism also has focused on perceived inconsistencies in the standing doctrine. The Supreme Court cases that contributed most to expanding the old rigid standing rule, namely *Data Processing, Flast, Sierra Club,* and *SCRAP,* have been criticized for not having defined a "coherent and unified doctrine."[86] Commentators also have criticized the Supreme Court for allowing plaintiffs with abstract or intangible injuries into court[87] and for its inconsistency in restricting its injury-in-fact inquiry primarily when it perceives a threat to separation of powers.[88] In response to the Supreme Court's liberal stance on standing for environmental plaintiffs in cases like *SCRAP,* one author hypothesized that allowing parties with a mere interest in environmental regulation to sue the federal government creates inefficiency in the federal government because it restricts "the transfer of resources from less valuable to more valuable uses."[89] In

84. Scalia, *supra* note 7, at 881, 897 (denouncing judicial enforcement of agency compliance with federal environmental legislation as a violation of the separation of powers principle).

85. *Id.* at 897.

86. Scott, *supra* note 18, at 660. Specifically left open to doubt may be the following questions: How much injury ensures concrete adverseness; and how much power should the federal judiciary hold over enforcement of federal legislation? Beauchamp, *supra* note 20, at 1093.

87. Nichol, *Rethinking Standing,* 72 Cal. L. Rev. 68, 75 (1984) (citing *SCRAP* as an example of plaintiffs with an intangible injury, and Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978), where the plaintiff's interest was abstract).

88. *Id.* at 79.

89. Jensen, Meckling, & Holderness, *Analysis of Alternative Standing Doctrines,* 6 Intl. Rev. L. & Econ. 205, 212 (1986).

other words, bureaucratic spending shifts from administering regulatory programs to litigation costs.

Soon after legal scholars began complaining that standing had become too liberal, some federal courts began sporadically to restrict large-membership environmental and general public interest litigants from suing the federal agencies by moving away from the standards identified in *Sierra Club* and *SCRAP*.[90] They narrowed the scope of review to localized disputes.[91] This shift required large-membership plaintiffs to plead a particularized grievance on the merits in order to establish injury-in-fact through harm to their members' use of federal land.[92] A string of District of Columbia Circuit decisions in the late 1980s consistently restricted standing to sue federal resource agencies. In *National Wildlife Federation v. Hodel*,[93] for example, the plaintiffs (NWF) brought suit in response to numerous regulations issued by the Department of Interior that allegedly violated the Surface Mining Control and Reclamation Act.[94] In defense, industry alleged that NWF lacked standing to challenge 18 of the 21 regulations in dispute. Plaintiffs responded with approximately 1600 pages of affidavits from members testifying to their ongoing use of the areas affected by implementation of the regulations.[95] Although the court upheld the plaintiffs' standing under the three-pronged constitutional test,[96] it did so on a regulation-by-regulation basis.[97] The court permitted the plaintiff environmental organizations to complain about agency wrongdoing only after an enormously expensive effort to access

90. Comment, *supra* note 55, at 10289. *E.g.*, Los Angeles v. Lyons, 461 U.S. 95, 101–02 (1983) (citing pre-*Data Processing* cases, the Court held that injury to the plaintiff must be immediate and not conjectural. As a result of alleged police brutality against him, the plaintiff sought an injunction to stop the use of control holds by the Los Angeles police. *Id.* at 98).

91. *Compare* Animal Lovers Volunteer Association, Inc. v. Weinberger, 765 F.2d 937 (9th Cir. 1985) (organization attempting to prevent the United States Navy from treating feral goats on its property cruelly lacked standing because the court found no cognizable injury to itself or its members), Mountain States Legal Foundation v. Costle, 630 F.2d 754 (10th Cir. 1980) (group formed for legal purposes had no standing to challenge federal actions pursuant to the Clean Air Act) *and* Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency, 507 F.2d 905 (9th Cir. 1974) (group formed for general environmental protection lacked standing to protest federal approval of state plans under the Clean Air Act) *with* Save Our Community v. United States Environmental Protection Agency, 741 F. Supp. 605 (N.D. Tex. 1990) (plaintiffs had standing to sue over EPA's authority under the Clean Water Act to drain a wetland).

92. *E.g.*, Comment, *supra* note 20, at 305.

93. 839 F.2d 694 (D.C. Cir. 1988).

94. 30 U.S.C. §§ 1201–1211, 1231–1328 (1988). National Wildlife Federation v. Hodel, 839 F.2d at 702.

95. *Hodel*, 839 F.2d at 703.

96. *Id.* at 707.

97. *Id.* at 704, 706.

the courtroom.[98]

This recent predilection to narrow standing culminated in *Lujan v. National Wildlife Federation*.[99] Justice Scalia's majority opinion held that to defeat a summary judgment motion, the plaintiff must *prove*[100] specifically that its members were injured by the Bureau of Land Management's withdrawals of land from the public domain.[101] The Court denied *prudential* standing to the plaintiff under the APA in part because it had not alleged sufficiently that any of its members had visited the specific sites scheduled for withdrawal from the public domain, only that they had used forested areas "in the vicinity;" therefore, it was not "aggrieved within the meaning" of the substantive statutes in dispute.[102] Already this decision has affected the requisite scope of injury for both prudential *and* constitutional standing in federal adjudications between environmental groups and land management agencies.[103] This and other recent federal

98. Another recent District of Columbia decision that took a narrow view of standing included Wilderness Society v. Griles, 824 F.2d 4 (D.C. Cir. 1987), in which the Bureau of Land Management issued regulations pursuant to the Alaska Native Claims Settlement Act and the Alaska Statehood Act that transferred submerged land base from federal to native corporation and state ownership. *Id.* at 9. Under the Bureau's motion for summary judgment, the plaintiff was denied constitutional standing because it did not sufficiently specify the affected lands that were the basis of the plaintiff's claim and which the plaintiff's members used. *Id.* at 16. Similarly, the court in Natural Resources Defense Council, Inc. v. Burford, 716 F. Supp. 632 (D.D.C. 1988), denied Article III standing to environmental and citizen groups to challenge the Department of Interior's regulations promulgated under substantive statutes governing coal leasing and mining because their allegations of injury were too remote and speculative to sustain their burden of proof. *Id.* at 633, 638. Comment, *supra* note 55, at 10289.

99. 110 S. Ct. 3177, 3179 (1990) (plaintiff challenged temporary withdrawals of public domain lands to be reclassified for, in part, sale to mining companies).

100. "The question, it should be emphasized, is not whether the National Wildlife Federation has *proved* that it has standing to bring this action, but simply whether the materials before the District Court established 'that there is a genuine issue for trial.'" *Id.* at 3196 (Blackmun, J., dissenting) (emphasis in original).

101. *Id.* at 3185. Relying on affidavits from two members stating that each had used and will continue to use recreationally areas "in the vicinity" of land potentially affected by the agency action, the majority denied standing to the plaintiff because the lands possibly affected by the withdrawals encompassed about two million acres and thousands of nondiscrete actions. *Id.* at 3187, 3190.

102. *Id.* at 3187. The Court did not reach the Article III standing analysis because it dismissed the plaintiff under the prudential standing inquiry.

103. Defenders of Wildlife v. Lujan, 911 F.2d 117 (1990) (plaintiffs had standing under *Lujan* because they alleged specific injury in affidavits from members); City of Los Angeles v. National Highway Traffic Safety Administration, 912 F.2d 478, 483 (D.C. Cir. 1990) (agency's failure to prepare an environmental impact statement was not causally related to global warming and did not sufficiently allege harm to geographically specific members of the plaintiff organization); Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 84 (3rd Cir. 1990) (affidavits from members of plaintiff were factually and geographically sufficient to confer standing under Article III); People for Ethical Treatment of Animals v. Department of Health and Human Services, 917 F.2d 15, 17 (9th Cir. 1990) (court distinguished *SCRAP* on the grounds that case involved a motion to dismiss, not a summary judgment motion, and factual allegations must be specific under the latter); Conservation Law Foundation of New England, Inc. v. Reilly, 743 F. Supp. 933 (federal agency's failure to implement hazardous waste site assessment required by statute allegedly caused members of plaintiff organization specific injury); Greenpeace U.S.A. v. Stone, 748 F. Supp. 749, 756 (D. Haw. 1990) (since motion for preliminary injunction and not for summary judgment is involved, *Lujan* is instructive but not dispositive).

cases have narrowed the injury standard to a level that allows environmental groups standing to sue federal agencies only upon the showing of a "direct connection between [their] members' use of public land and the location where the action of the third party will occur."[104]

REVERSING THE RECENT TREND

Procedural Injury

Even before constitutional and prudential standing was constricted in the Supreme Court and some circuits, large organizational plaintiffs experimented with demonstrating standing on their own behalf on the basis of procedural injury.[105] Because of the difficulty in asseting an injury different from the public at large, national environmental groups generally were unsuccessful in alleging injury to themselves to satisfy the Article III requirements. However, when they linked harm to their interests with a statutory remedy designed to permit them to participate in the administrative process itself, federal courts began to recognize injury to organizational interests. This procedural injury has afforded groups an alternative route to gain judicial access to sue federal agencies.

Several circuits recognize procedural injury injury-in-fact[106] if a "statute that imposes statutory duties creates correlative procedural rights in a given plaintiff, the invasion of which is sufficient to satisfy the requirements of injury-in-fact under Article III."[107] As with injury-in-fact generally, the plaintiff complaining about an agency's procedural error must present specific facts to distinguish its harm from that of the general public.[108] Procedural injury has been distinguished from injury to a mere interest in the enforcement of federal laws[109] in that the former is an "inhi-

104. Comment, *supra* note 55, at 10293.

105. *E.g.*, Valley Forge Christian College, 454 U.S. 464, 473–74 (1982) (plaintiffs unsuccessfully asserted a special interest in the enforcement and administration of federal environmental laws); Sierra Club v. Morton, 405 U.S. 727, 735–36 n.8 (1972) (plaintiff failed to allege injury to itself merely by having a special interest in conservation of federal natural resources).

106. Through 1990, the following federal circuits have recognized procedural injury: The First (Munoz-Mendoza v. Pierce, 711 F.2d 421 (1st Cir. 1983)), Seventh (South East Lake View Neighbors v. Dept. of Health and Urban Development, 685 F.2d 1027 (7th Cir. 1982)), Eighth (Defenders of Wildlife v. Lujan, 911 F.2d 117 (8th Cir. 1990)), Ninth (*e.g.*, Dellums v. Smith, 797 F.2d 817 (9th Cir. 1986)), Eleventh (Georgia Ass'n of Retarded Citizens v. McDaniel, 716 F.2d 1565 (11th Cir. 1983)), and District of Columbia (*e.g.*, Action Alliance of Senior Citizens of Greater Philadelphia v. Heckler, 789 F.2d 931 (D.C. Cir. 1986)) Circuits. Also recognizing procedural injury were the following federal district courts: Hawaii (Greenpeace U.S.A. v. Stone, 748 F. Supp. 749 (D. Haw. 1990)), District of Columbia (*e.g.*, National Organization for the Reform of Marijuana Laws v. Morton, 452 F. Supp. 1226 (D.D.C. 1978)), Wyoming (Mountain States Legal Foundation v. Andrus, 499 F. Supp. 383 (D. Wyo. 1980)), Florida (Arteaga v. Lyng, 660 F. Supp. 1142 (M.D. Fla. 1987)), and California (*e.g.*, City and County of San Francisco v. United States, 443 F. Supp. 1116 (N.D. Cal. 1977)).

107. Fernandez v. Brock, 840 F.2d 622, 630 (9th Cir. 1988). *See* Beauchamp, *supra* note 20, at 1097 n.35.

108. *See* Sierra Club v. Morton, 405 U.S. 727, 739 (1972).

109. *See Id.* at 735, 739.

bition of [the organizations'] daily operations"[110] that affects or may affect the organization's interests in furthering its own goals as opposed to a general grievance the outcome of which would not affect the organization itself. The plaintiff need only *allege* that the federal agency's substantive action was affected by its procedural violation; otherwise, the court may be forced to decide the substantive issues of a given case.[111] Courts focus on the consistency between the plaintiff organization's primary purposes and the allegedly violated statute to determine whether the plaintiff's procedural injury satisfies injury-in-fact.[112] To determine whether a particular statute has the requisite connection to the plaintiff's goals, the court looks at the statute's purpose, plain language, and legislative history. If the court finds that Congress intended to create "a correlative procedural right" in that particular plaintiff, injury-in-fact under Article III is established.[113]

The Ninth Circuit used to require additionally that the plaintiff group's injury have a "sufficient geographical nexus to the site of the challenged project."[114] This requirement purportedly ensured that injury to the plaintiff or its members was sufficiently affected by agency action.[115] The origin of this additional requirement is unclear and cannot be traced to specific constitutional or prudential standing criteria; The Ninth Circuit seemed to be confusing or melding injury to organizational plaintiffs and harm to their members. For organizational plaintiffs alleging specific procedural harm to their operations as the result of some administrative action, this additional requirement would render procedural injury nonsensical.[116] The geographical nexus test has been rejected by most other

110. Action Alliance of Senior Citizens of Greater Philadelphia v. Heckler, 789 F.2d 931, 938 (D.C. Cir. 1986). *See generally* Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 40–41 (1976) (an ideological injury to plaintiff members' medical care access was insufficient to satisfy injury-in-fact).

111. Munoz-Mendoza v. Pierce, 711 F.2d 421, 428 (1st Cir. 1983) (minority plaintiffs alleged the Dept. of Housing and Urban Development's statutory failure to conduct a comprehensive study before issuing a grant for commercial development may have caused the agency to overlook negative impacts to the neighborhood).

112. Dellums v. Smith, 797 F.2d at 821–22 (9th Cir. 1986) (purpose of Ethics in Government Act (28 U.S.C. §§ 591–598 (1988)), to create a neutral setting for Attorney General to resolve disputes involving the executive branch, did not include allowing members of the public to compel investigation of administrative wrongdoing); Alvarez v. Longboy, 697 F.2d 1333, 1336 (9th Cir. 1983) (statute regulating relationship between farm workers and contractors was designed to protect migrant and union workers from abuse).

113. Fernandez v. Brock, 840 F.2d at 625, 630 (Employee Retirement Income Security Act, 29 U.S.C. §§ 1001–1461 (1988 & Supp. I 1990), contemplated creating procedural rights in seasonal farmworkers).

114. City of Davis v. Coleman, 521 F.2d 661, 671 (9th Cir. 1975); *Oregon Environmental Council*, 817 F.2d 484, 491 (9th Cir. 1987).

115. *See Oregon Environmental Council*, 817 F.2d at 491.

116. Such an analysis would place procedural injury squarely and indistinctly within the realm of substantive, organizational injury-in-fact. Environmental plaintiffs, for instance, would have to find members affected substantively in their use or enjoyment of the site of agency action. *See* Sierra Club v. Morton, 405 U.S. 727, 735–36 n.8 (1972).

circuits as superfluous.[117] In fact, the Ninth Circuit has retreated from this approach in subsequent cases.[118] The geographical nexus test is not determinative in procedural injury analysis.

Invariably, the government has opposed public interest groups' attempts to demonstrate standing through procedural injury. Most often, the defending agency has argued that allowing such groups access to federal courts through procedural injury would open the floodgates for any party to sue without sufficient interest in the litigation to satisfy Article III[119] and would convert federal courts into general supervisors of executive branch activities. Apparently, this argument prompted the Ninth Circuit to adopt its geographical nexus test.[120] However, the concern that procedural injury would unacceptably broaden injury-in-fact for public interest organizations has been rejected soundly by the circuits that have adopted procedural injury, even the Ninth Circuit itself.[121] These courts are satisfied that the connection between the allegedly violated statute and the particularized procedural harm to plaintiff is sufficiently narrow to avoid separation of powers problems.

The government also mounts an Article III defense against allegations of procedural injury by challenging the sufficiency of plaintiffs' factual allegations. Often, a summary judgment motion on the standing issue raises this defense, where the burden of proving that a genuine issue of material fact remains is shifted to the party seeking review.[122] However, use of this defense may not be limited to summary judgment motions; Justice Scalia has intimated that regardless of the motion that introduces the standing issue, organizational plaintiffs carry the initial burden of pleading specific facts to back up allegations of injury-in-fact.[123] Despite the government's assertion of these defenses, procedural injury has emerged

117. *E.g.*, Defenders of Wildlife v. Lujan, 911 F.2d 117, 121 (8th Cir. 1990) (the 8th Circuit expressly rejected the Ninth Circuit's geographical nexus approach). *Contra* Greenpeace U.S.A. v. Stone, 748 F. Supp. 749, 756 (D. Haw. 1990) (9th Circuit's geographical nexus test applies).

118. *E.g.*, Fernandez v. Brock, 840 F.2d 622, 630 (9th Cir. 1988).

119. *E.g.*, *Oregon Environmental Council*, 817 F.2d 484, 491 (9th Cir. 1987).

120. City of Davis v. Coleman, 521 F.2d 661 (9th Cir. 1975).

121. See *supra* note 117 and accompanying text.

122. Celotex Corporation v. Catrett, 477 U.S. 317, 324 (1986) *See* Lujan v. National Wildlife Federation, 110 S. Ct. 3177, 3194 (1990) (letter by NWF Vice-president Lynn T. Greenwalt stating that the government's procedures harmed the plaintiff's ability to carry out its public information and educational programs was found by the majority to be conclusory and lacking in specific facts); Defenders of Wildlife v. Lujan, 911 F.2d at 118–19; Wilderness Society v. Griles, 824 F.2d 4, 11 (D.C. Cir. 1987); Munoz-Mendoza v. Pierce, 711 F.2d 421, 425 (1st Cir. 1983).

123. *Center for Auto Safety*, 793 F.2d 1322, 1343 (D.C. Cir. 1986) (Scalia, J., dissenting). *See* Maine Association of Interdependent Neighborhoods v. Commissioner, Maine Department of Human Services, 747 F. Supp. 88, 92 (D. Me. 1990) (Under *Lujan*, plaintiff must allege specific facts of injury under both summary judgment motion and motion to dismiss).

as a viable alternative method to establish standing for environmental complainants.

DEVELOPMENT OF PROCEDURAL INJURY

The first trace of procedural injury in the context of constitutional standing appeared in a footnote in a 1973 District of Columbia Circuit Court of Appeals decision. In *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission*,[124] the plaintiff sought to enjoin the Atomic Energy Commission from implementing a nuclear reactor program until it completed an environmental impact statement under NEPA.[125] Judge Skelly Wright stated that the plaintiff had satisfied injury-in-fact on its own behalf because one of its main objectives, to provide scientific and policy information to the public, would be hampered if the agency was not compelled to comply with the procedural requirements of the National Environmental Policy Act of 1969 (NEPA).[126] Judge Wright reasoned that to deny this plaintiff access to the court would be inconsistent with the congressional intent behind NEPA[127] and with the reasoning of *Sierra Club v. Morton*.[128] Throughout the 1970s and 1980s, the District of Columbia Circuit Court of Appeals allowed several procedurally injured complainants standing to sue the federal administration.[129]

In 1975, the Ninth Circuit also recognized procedural injury for public interest groups. *City of Davis v. Coleman*[130] was the first federal appellate decision that explicitly demarcated procedural injury as a discrete method for organizations to satisfy injury-in-fact. In the context of NEPA, the plaintiff established procedural injury by alleging that the United States Department of Transportation created a risk that it would overlook the environmental impacts of constructing a highway interchange and failed to inform the plaintiff that it took a final action that significantly impacted the environment, so long as the plaintiff's injury had a

124. 481 F.2d 1079, 1087 n.29 (D.C. Cir. 1973).

125. *Id.* at 1082. The plaintiff contended and the court agreed that the program would significantly affect the quality of the human environment. 42 U.S.C. § 4332(c) (1988).

126. *Id.* at 1087 n.29 (the court did not label procedural injury expressly). NEPA, 42 U.S.C. §§ 4321–4370(b) (1988). See *infra* note 144 and accompanying text for the purpose of NEPA and its role in procedural injury.

127. See *infra* note 144.

128. Sierra Club v. Morton, 405 U.S. 727, 735 (1972) (plaintiff was alleging more than a mere interest in the outcome of the lawsuit). See *supra* notes 69–72 and accompanying text for discussion of the *Sierra Club* decision.

129. Natural Resources Defense Council, Inc. v. Securities Commission, 389 F. Supp. 689 (D.D.C. 1974); California Association of Physically Handicapped v. Federal Communications Commission, 778 F.2d 823 (D.C. Cir. 1985); National Wildlife Federation v. Hodel, 839 F.2d 694 (D.C. Cir. 1988).

130. 521 F.2d 661 (9th Cir. 1975).

"sufficient geographical nexus to the site of the challenged project."[131] NEPA created an obligation in the Department to study and report on the environmental consequences of constructing the interchange; *City of Davis* adopted procedural injury so that environmental groups could allege specific environmental harm without having to do their own investigating.[132] The Ninth Circuit has become one of the most prolific advocates of procedural injury for public interest groups.[133]

Subsequent federal decisions in other circuits followed the *City of Davis* lead. The Seventh Circuit ruled that procedural harm (no opportunity to comment under NEPA) to a neighborhood association from an agency's decision to subsidize a housing project satisfied injury-in-fact, although the Court denied standing on other Article III grounds.[134] The First Circuit also allowed standing to an individual on the basis of procedural injury. In *Munoz-Mendoza v. Pierce*,[135] black and Asian minority residents of Boston, Massachusetts, filed suit against the Department of Housing and Urban Development (HUD).[136] To assert standing, one plaintiff alleged a procedural injury to herself because HUD's alleged procedural failure under the Civil Rights Acts and related HUD regulations to conduct a proper study of the impact on racial and ethnic integration in the area[137] deprived her of "the social and professional advantages of living in an integrated community."[138] This harm satisfied injury-in-fact and allowed the minority plaintiffs the opportunity to challenge the legality of HUD's actions that caused the injury.[139] The Eleventh Circuit also adopted procedural injury in *Georgia Association of Retarded Citizens v. McDaniel*.[140] In that case, Georgia's "policy precluding consideration *on the merits* of the need for" a minimum number of educational days for handicapped children allegedly was inconsistent with a federal statute.[141]

131. City of Davis v. Coleman, 521 F.2d at 671 . See *supra* notes 114–118 and accompanying text for a criticism of the geographical nexus approach.

132. *Id.* *See* McKinnon, *Water to Waste: Irrational Decisionmaking in the American West*, 10 Harv. Envtl. L. Rev. 503, 531 (1986).

133. Fernandez v. Brock, 840 F.2d 622 (9th Cir. 1988); Oregon Environmental Council v. Kunzman, 817 F.2d 484 (9th Cir. 1987); Trustees for Alaska v. Hodel, 806 F.2d 1378 (9th Cir. 1986); Dellums v. Smith, 797 F.2d 817, 821 (9th Cir. 1986); Alvarez v. Longboy, 697 F.2d 1333, 1335 n.1 (9th Cir. 1983); Western Oil and Gas Association v. United States Environmental Protection Agency, 633 F.2d 803, 808 n.4 (9th Cir. 1980).

134. South East Lake View Neighbors v. Department of Housing and Urban Development, 685 F.2d 1027, 1039 (7th Cir. 1982) (under NEPA, the chance of environmental harm would have to go unnoticed during the decisionmaking process for the plaintiff to incur procedural injury).

135. 711 F.2d 421 (1st Cir. 1983).

136. *Id.* at 422.

137. *Id.* at 422–23.

138. *Id.* at 426 (quoting *Gladstone*, 441 U.S. 91, 112 (1979)).

139. *Id.* at 427.

140. 716 F.2d 1565 (11th Cir. 1983).

141. *Id.* at 1569, 1572 (emphasis in the original). The statute involved was the Education for All Handicapped Children Act, 20 U.S.C. § 821 (1988).

The plaintiff was harmed procedurally for standing purposes because the alleged violation was incongruent with the federal statute's and the organization's goal, both being the facilitation of the education of handicapped children. The Eighth Circuit was the latest federal circuit to adopt procedural injury.[142]

PROCEDURAL INJURY IN ENVIRONMENTAL DISPUTES

Most environmental groups asserting a procedural injury plead under a wholly procedural statute. NEPA,[143] which compels all federal agencies to consider environmental concerns in their actions,[144] has provided one means by which several environmental groups have accessed the federal courts. Generally, the procedural injuries that plaintiffs allege under NEPA are an increased risk that an agency overlooked environmental consequences in its decision-making process[145] and the lost opportunity to participate in that process.[146] Successful environmental plaintiffs have linked violations of these procedural safeguards with harm to their information-gathering and dissemination or other functions.[147] NEPA is

142. See *infra* notes 163–175 and accompanying text.

143. 42 U.S.C. §§ 4321–4370(b) (1989).

144. NEPA requires all federal agencies to consider environmental consequences of final actions that significantly affect the human environment. 42 U.S.C. § 4332 (1988). By so requiring, Congress intended agencies ultimately to internalize environmental considerations at each level of decisionmaking and to open this process to public participation. Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission, 449 F.2d 1109, 1122 (D.C. Cir. 1971).

145. South East Lake View Neighbors, 685 F.2d 1027, 1039 (7th Cir. 1982).

146. National Wildlife Federation v. Burford, 699 F. Supp. 327, 330 (D.D.C. 1988), *aff'd*, 110 S. Ct. 3177 (1990); City and County of San Francisco v. United States, 443 F. Supp. 1116, 1126 n.11 (N.D. Cal. 1977).

147. Oregon Environmental Council v. Kunzman, 817 F.2d 484, 491 (9th Cir. 1987) (plaintiff successfully alleged a violation of NEPA when insecticidal air spraying of gypsy moths in the absence of an adequate environmental impact statement created a "risk that environmental impacts will be overlooked."); Trustees for Alaska v. Hodel, 806 F.2d 1378, 1380 (9th Cir. 1986) (plaintiffs successfully alleged in part that the lack of opportunity to comment on a legislative environmental impact statement prepared by the Department of Interior on the effects of oil and gas production on wildlife in the Arctic National Wildlife Refuge would potentially harm plaintiff members' use of the refuge); *South East Lake View Neighbors*, 685 F.2d 1027, 1039 (7th Cir. 1982) (plaintiffs showed injury-in-fact by the Department's failure to prepare an environmental impact statement on federally-funded construction of low-income or elderly housing, though plaintiffs were denied standing because their grievance was not redressable); National Organization of the Reform of Marijuana Laws v. Morton, 452 F. Supp. 1226, 1230 (D.D.C. 1978) (plaintiffs had standing because of harm to their ability to make information available to the public on marijuana herbicidal spraying in Mexico); City and County of San Francisco v. United States, 443 F. Supp. 1116, 1126 n.11 (N.D. Cal. 1977) (procedural injury was found because plaintiff alleged that the Navy overlooked local land-use policies when it leased a port site without preparing an environmental impact statement); United States v. 18.2 Acres of Land, More or Less, in County of Butte, State of California, 442 F. Supp. 800, 805 (N.D. Cal. 1977) (defendant, owner of property over which the Bureau of Land Management sought condemnation for an easement, established procedural injury because he "asserted

an obvious vehicle to allege procedural injury because Congress intended to carry out its statutory mandate through procedural means.[148]

The Administrative Procedure Act (APA)[149] also provides organizational plaintiffs a basis for alleging procedural injury. Two cases brought by western land development constituencies illustrate the use of procedural objections to administrative handling of environmental issues. In both cases, the organizational plaintiffs successfully gained standing under the APA by alleging a procedural injury.[150] The crux of procedural injury under the APA is the infringement on an organizational plaintiff's right to have an administrative hearing or to receive notice of an action or even to get judicial review. For instance, an agency's determination that a given action constitutes rule-making as opposed to an adjudication may deprive an organization of the opportunity to present evidence at an administrative hearing. In *Western Oil and Gas Ass'n v. United States Environmental Protection Agency,*[151] the plaintiff successfully alleged procedural injury because the agency's alleged failure to provide a public comment period as mandated by the APA deprived it of the right to influence federal administrative decisions. Although environmental groups

that the Department of Interior has failed to examine the environmental impact of its action in an area which includes defendant's own land."); Cady v. Morton, 527 F.2d 786, 790 (9th Cir. 1975) (failure to prepare an environmental impact statement under NEPA satisfied injury-in-fact); City of Davis v. Coleman, 521 F.2d 661, 671 (9th Cir. 1975) (Secretary of Transportation's failure to prepare an environmental impact statement for a proposed highway interchange that was funded in part with federal dollars harmed plaintiff procedurally through an increased risk that the agency would overlook environmental consequences of its action); Scientists' Institute of Public Information, Inc. v. Atomic Energy Commission, 481 F.2d 1079, 1087 n. 29 (D.C. Cir. 1973) (organization had standing because its public information services were limited without the requisite environmental impact statement on a breeder reactor program).

148. Only one case denied standing to an environmental group based on procedural injury under NEPA, though the Court's holding was far from clear. In Greenpeace U.S.A. v. Stone, 748 F. Supp. 749, 757 (D. Haw. 1990), the Court denied a preliminary injunction against the Department of Defense to stop it from transporting and disposing of nerve gas before it prepared a comprehensive environmental impact statement, apparently because the plaintiff failed the geographical nexus test applicable in that jurisdiction. However, the court merely concluded that there is a "serious question" whether the plaintiff had standing. *Id.*
The broad procedural scope of NEPA, which applies to major agency actions significantly affecting the quality of the human environment, allows environmental groups to satisfy the causation and redressability requirements of standing under Article IIIArticle III by alleging that administrative failure to comply with NEPA is contributing to environmental degradation and can be remedied through compliance.

149. 5 U.S.C. §§ 551–706 (1988).

150. Western Oil and Gas Association v. United States Environmental Protection Agency, 633 F.2d 803, 808 n.4 (9th Cir. 1980) (deprivation of the plaintiff's opportunity to comment on Clean Air Act regulations promulgated pursuant to the APA constituted sufficient injury-in-fact); Mountain States Legal Foundation v. Andrus, 499 F. Supp. 383, 396–97 (D. Wyo. 1980) (alleged inaction by the Departments of Interior and Agriculture on pending oil and gas lease applications amounted to procedural injury to the plaintiff, an applicant, under the APA's requirement that each agency "conclude any matter presented to it within a reasonable time.").

151. *Western Oil and Gas Ass'n*, 633 F.2d at 808 n.4.

have not yet used the APA to show procedural injury, these cases suggest that they can do so.

Environmental organizations have successfully asserted procedural injury under substantive statutes as well.[152] Substantive laws differ from procedural laws in that the former have environmental protection as their primary purpose and offer substantive remedies to prevailing complainants such as money damages for or injunctions against environmental damage. Procedural laws such as NEPA and the APA merely grant procedural relief in the form of directives to follow proscribed procedures.[153] The first environmental plaintiff to use a substantive law to allege procedural injury was Natural Resources Defense Council (NRDC), which sued the federal government under corporate disclosure regulations.[154] NRDC and others sued the Securities Exchange Commission to compel it to broaden its regulatory policy on disclosure of information on corporate activities.[155] The district court found that the Commission's narrow regulatory scope impaired plaintiff NRDC's interest "in protecting the environment, in investing their funds, and in voting their shares in a socially responsible manner." [156] It is unclear, however, whether the court was concerned about constitutional or prudential requirements of standing. Furthermore, the court analyzed the interests of the organization and its members as one entity. While this case epitomized the lack of cohesion at that time in standing doctrines and represented a rather amateur attempt to expand standing for public interest groups beyond tangible injuries, it showed an early willingness to embrace standing on grounds of procedural harm.

152. Non-environmental organizations have alleged procedural injury through the following statutes: Staggers Railroad Act of 1980 (49 U.S.C. § 10101 (1988)), United Transportation Union v. Interstate Commerce Commission, 891 F.2d 908 (D.C. Cir. 1989); Employee Retirement Income Security Act (29 U.S.C. § 1381 (1988)), Fernandez v. Brock, 840 F.2d 622 (9th Cir. 1988); Ethics in Government Act (2 U.S.C. § 1 (1988)), Dellums v. Smith, 797 F.2d 817 (9th Cir. 1986); Farm Labor Contractor Registration Act (7 U.S.C. § 2041 (1988)), Alvarez v. Longboy, 697 F.2d 1333 (9th Cir. 1983); Age Discrimination Act (42 U.S.C. § 6101 (1988)), Action Alliance of Senior Citizens of Greater Philadelphia v. Heckler, 789 F.2d 931 (D.C. Cir. 1986); Education for All Handicapped Children Act (20 U.S.C. § 821 (1988)), Georgia Association of Retarded Citizens v. McDaniel, 716 F.2d 1565 (11th Cir. 1983); Federal Election Campaign Act (2 U.S.C. § 431 (1988 & Supp. I 1990)), National Conservative Political Action Committee v. Federal Election Commission, 626 F.2d 953 (D.C. Cir. 1980); and Housing Act of

153. Compare NEPA, a procedural statute, with the Endangered Species Act, a substantive law. The purpose of NEPA is to ensure that administrative decision-makers make informed decisions that may impact the environment; its remedy is to compel the agency to allow further public input or to more thoroughly study the environmental consequences of its actions. By contrast, the purpose of the Endangered Species Act is to reverse the decline and extirpation of wild animals and plants in their native habitats; the typical remedies for violation of this statute are criminal sanctions or an injunction against disturbing the species' habitat.

154. Natural Resources Defense Council, Inc. v. Securities Exchange Commission, 389 F. Supp. 689 (D.D.C. 1974).

155. *Id.* at 692.

156. *Id.* at 697.

Over a decade later, the NWF challenged 21 regulations issued by the Secretary of Interior pursuant to the Surface Mining Control and Reclamation Act of 1976 (SMCRA).[157] The court ruled that affiants, residents of Colorado affected by the regulations, were injured when the Secretary delegated the authority to approve mining plans on federal lands in contravention of SMCRA, thereby denying the affiants their right to participate in the federal decision-making process under that statute.[158]

Friends of the Earth also successfully alleged procedural injury in the third procedural injury case under a substantive statute.[159] The plaintiffs sought a permanent injunction against the Navy to cease the dredging of a home port on Puget Sound, and alleged violations of the National Defense Authorization Act for Fiscal Year 1987.[160] The court concluded that the plaintiffs suffered procedural injury. In so holding, the Court analyzed the statutory purpose[161] and found it consistent with harm to the plaintiffs' members who used Puget Sound, in that the Navy did not fully address environmental concerns before construction began.[162]

Most recently, environmental groups successfully invoked the Endangered Species Act (ESA)[163] to establish procedural injury.[164] Defenders of Wildlife challenged a 1986 regulation issued by the Secretary of Interior pursuant to section 7 of the ESA,[165] limiting section 7 consultation to agency actions "in the United States or upon the high seas."[166] The environmental organizations sought to force the Secretary to rescind the 1986 regulations and to reinstate a previous regulation that extended the scope of section 7 consultation to foreign nations.[167] To gain standing, the plaintiffs alleged a procedural injury; the Secretary's failure to consult

157. 30 U.S.C. §§1201–1211, 1231–1328 (1988). National Wildlife Federation v. Hodel, 839 F.2d 694 (D.C. Cir. 1988).

158. National Wildlife Federation v. Hodel, 839 F.2d at 711–12.

159. Friends of the Earth v. United States Navy, 841 F.2d 927, 930, 931 (9th Cir. 1988).

160. *Id.* at 929.

161. That purpose is to "ensure that the environmental consequences of dredging are fully considered before funds for construction of the homeport are obligated." *Id.* at 931.

162. *Id.* at 931–32. Note that this was a Ninth Circuit Court of Appeals decision; the geographical nexus requirement necessitated linking the harm to use of the area of agency action.

163. 16 U.S.C. §§ 1531–1544 (1988 & Supp. 1 1989).

164. Defenders of Wildlife v. Lujan, 911 F.2d 117 (8th Cir. 1990). Also represented were Friends of Animals and Their Environment and The Humane Society of the United States.

165. 16 U.S.C. § 1536 (1988). Section 7 requires each federal agency to consult and assist the Secretary to "insure that any action authorized, funded, or carried out" by that agency "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [the critical] habitat of such species." 16 U.S.C. § 1536(a)(2) (1988).

166. 50 C.F.R. §§ 402.01, 402.02 (1986). These regulations replaced previous regulations that required consultation whenever any agency action impacted federally listed species in the United States or in foreign countries. 50 C.F.R. § 402.04 (1978).

167. Brief for Defenders of Wildlife at 2, Defenders of Wildlife v. Lujan, 911 F.2d 117 (8th Cir. 1990) (No. 89-5192MN) [hereinafter Brief for Defenders].

under section 7 illegally restricted the scope of the ESA and potentially would adversely impact endangered species, thus thwarting their goal of decreasing the rate of extinctions and extirpations worldwide.[168]

The Eighth Circuit[169] accepted Defenders' allegations of injury to itself *and* its members.[170] Defenders established injury-in-fact[171] on its own behalf by alleging specific procedural injury to their interests in preventing the decline of wildlife species at the allegedly affected project sites.[172] Defenders demonstrated specific facts that the purposes of the Endangered Species Act,[173] the plain language, and legislative history all indicated that the Secretary's failure to carry out his duty to consult under section 7 with federal agencies on projects in foreign countries created in

168. Brief for Defenders at 47. The plaintiffs' interest in protecting wildlife and disseminating information to the public to further that interest distinguished their injury from the public at large. The plaintiffs also claimed that their members used sites located specifically at several federally funded or authorized project sites in foreign countries and would be injured by the lack of Section 7 consultation on endangered species found at or near these sites. Specifically, affiants described their visits to project sites in Sri Lanka, Egypt, and others, their observations of endangered wildlife in those areas, and their plans to return in the future. *Id.*

169. The federal District Court for the District of Minnesota granted the Secretary's motion to dismiss for lack of subject matter jurisdiction because the Plaintiffs lacked standing. Misunderstanding the injury-in-fact test for organizational plaintiffs and the nature of the plaintiffs' injuries, the district court dismissed in part because "there is no indication that the projects summarized. . . will affect endangered or threatened species of wildlife or plants," and "it is entirely possible that Section 7 consultation has occurred." *Defenders of Wildlife*, 658 F. Supp. 43, 47 (D. Minn. 1987), *rev'd*, 851 F.2d 1035 (8th Cir. 1988). On appeal, the court reversed and remanded for a determination on the merits. The appellate court found threatened procedural injury to their interest in the "enforcement and administration of the ESA." *Defenders of Wildlife*, 851 F.2d 1035, 1041 (8th Cir. 1988). On remand, 707 F. Supp. 1082 (D. Minn. 1989), cross-motions for summary judgment were filed. The plaintiffs prevailed, both as to standing and on the merits. *Id.* at 1084, 1086. The plaintiffs sustained the burden of showing injury-in-fact under the summary judgment motion and under new evidence presented by the Secretary. *Id.* at 1083–84. The Secretary appealed to the Eighth Circuit but lost again.

170. *Defenders of Wildlife*, 911 F.2d at 122. Although the ease with which the court seemed to apply and overcome the recent severe obstruction to standing since *Lujan* would indicate that the latter case did not create the obstacle to standing for environmental litigants that was apparent on its face, it would be foolhardy to rely on this illusion when environmental plaintiffs attempt to challenge agency actions affecting inaccessible areas like Alaska, Antarctica, tropical forests, and oceans or submerged lands. *See* Comment, *supra* note 20.

171. The court bypassed prudential standing and required a showing of standing only under Article III. The Endangered Species Act's citizen suit provision allows "any person [to] commence a civil suit on his own behalf" against the federal government. 16 U.S.C. § 1540(g) (1988).

172. Brief for Defenders at 47.

173. The purposes of the ESA are to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions." 16 U.S.C. § 1531(b) (1988).

the plaintiffs a "correlative procedural right"[174] to seek judicial redress.[175] By linking procedural injury with the ESA, plaintiff Defenders of Wildlife succeeded in accessing the federal courts through the most extensive environmental protection statute in the history of the United States.

ANALYSIS

Injury-in-fact is increasingly difficult for environmental organizations to allege with sufficient specificity. Because the federal agencies are using the summary judgment motion as a devise to shift the burden to the environmental groups to *prove* standing,[176] environmental groups may be forced to shift their focus away from showing standing on behalf of their members. To satisfy current standing rules, organizations without direct economic or other tangible interest in the affairs of government must plunge into an obscure hunt for members who have traveled not merely to Sri Lanka,[177] or to a forest surrounding a purportedly affected site of agency action,[178] but upon the soil at the precise site of agency action.[179] When organizational complainants have grievances against specific agency action that potentially affects large tracts of land, current standing hurdles create enormous financial and logistic headaches.

The message of the recent litigation is clear; broad public interest disputes should be taken up with the legislative or executive branches, not in the courts. Justice Scalia's separation of power concerns[180] have come to fruition as the majority opinion in *Lujan v. National Wildlife Federation*.[181] However, his viewpoint raises two issues. First, the standing inquiry may not be the proper point in a lawsuit to air separation of powers concerns, as the allegations necessarily shift from the litigant to the substantive con-

174. Fernandez v. Brock, 840 F.2d 622, 630 (9th Cir. 1988).

175. *Defenders of Wildlife*, 911 F.2d at 121. The court relied on the strongly worded opinion in Tennessee Valley Authority v. Hill, 437 U.S. 153, 184 (1978), to iterate that Congress intended federal agencies to protect endangered and threatened species "at whatever the cost;" if an agency falters, Congress envisioned judicial review to be warranted.

176. See Justice Blackmun's dissenting opinion in Lujan v. National Wildlife Federation, 110 S. Ct. 3177, 3196 (1990) (Blackmun, J., dissenting) ("The question, it should be emphasized, is not whether the National Wildlife Federation has *proved* that it has standing to bring this action, but simply whether the materials before the District Court established 'that there is a genuine issue for trial.'") (emphasis in the original).

177. *Defenders of Wildlife*, 911 F.2d 117 (8th Cir. 1990).

178. Lujan v. National Wildlife Federation, 110 S. Ct. 3177 (1990).

179. *Id.*

180. Scalia, *supra* note 7.

181. 110 S. Ct. at 3191 (underlying the decision was the majority's reluctance to intervene in broad-sweeping administrative programs on behalf of "across-the-board" environmental organizations).

stitutional and statutory issues.[182] Second, environmental considerations simply are not being addressed adequately or expeditiously in Congress,[183] nor have they for the most part been sufficiently integrated into the executive decision-making processes to be effectively enforced.[184] The judiciary has made the most substantial inroad in reforming agency actions to more adequately reflect a balancing of conservation and economic concerns; the courts are necessary partners in achieving environmental protection.[185] It must be conceded that many large membership environmental organizations do not fit the archetypal plaintiff, but adherence to an archaic standing test that does not conform to modern reality will only shut the jurisprudential doors altogether on critical environmental issues that need contemporary resolution.

If courts are to play their proper role in the partnership, environmental groups must find innovative ways to gain access to the courts. Asserting procedural injury may provide one avenue for environmental litigants to demonstrate constitutional standing on their own behalf. Several environmental plaintiffs have used procedural injury successfully in the circuits that have adopted it, and more will try as the executive budget

182. Coyle, *supra* note 18, at 1067 ("standing law has become detached from its original purpose, so detached that it now creates barriers to adjudication that have no sound doctrinal or normative basis."); Scott, *supra* note 18, at 688 (the judicial branch of government avoids policy-forming decisions by denying standing on separation of powers grounds). *See* Nichol, *supra* note 87, at 70, 78, 79. *But see* Scalia, *supra* note 7; Alpert, *supra* note 16, at 289 (the basic premise of the Article III standing doctrine is separation of powers).

183. President Bush, through Secretary of Interior Lujan, has addressed publicly the need to introduce legislation that amends the Endangered Species Act. Albuquerque J., Mar. 14, 1991, at A5, col. 1. Congress spent 13 years amending the Clean Air Act (42 U.S.C. §§ 7401–7642 (1988 & Supp. 1991)). When the smoke cleared, automobile emission standards once again were a disappointment to clean air advocates. Bills to conserve the nation's and the world's natural biological diversity have been stalled since 1988, and those that survived the subcommittee level made up in broad national policy statements what they lacked in strategic and management provisions. *E.g.*, H.R. 1268, 101st Cong., 1st Sess. (1989). Clean Water Act effluent limitation deadlines have been extended for various industries several times, with no clear end in sight.

184. In Sierra Club v. Department of Interior, 398 F. Supp. 284, 293 (N.D. Cal. 1975), the court censured the Bureau of Land Management for intentionally omitting from a report recommendations for the Secretary of Interior to take action and for failing to ask Congress to appropriate funds authorized by it to implement the recommendations. In Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985), the U.S. Forest Service unsuccessfully attempted to dilute the negative impacts of building a road that later would be used to transport timber by preparing separate environmental impact statements for the road construction and timber sales. In Sierra Club v. Lyng, 694 F. Supp. 1260 (E.D. Tex. 1988), the court found that U.S. Forest Service timber harvesting practices violated the Endangered Species Act by fragmenting endangered red-cockaded woodpeckers' habitat, although the Court upheld the denial of a stay. These are only sample disputes that illustrate just how far federal agencies are from institutionally internalizing conservation and sustained yield management. *See* Sierra Club v. Morton, 405 U.S. 727, 748 n. 7 (1972) (Douglas, J., dissenting) ("The Forest Service, influenced by powerful logging interests, has. . . paid only lip service to its multiple-use mandate and has auctioned away millions of timberland acres without considering environmental or conservational interests.").

185. *E.g.*, Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978); Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971).

tightens. Decisions like *Defenders of Wildlife v. Lujan* represent the growing recognition by the federal judiciary that the current rules of constitutional standing that require allegations that members use specific geographical areas as a predicate for challenging any agency action are becoming increasingly burdensome for environmental groups to assert.[186]

Those cases that adopted procedural injury under substantive statutes have expanded the means by which environmental groups can enlist the courts to protect the environment. The use of procedural injury as a wedge to get federal courts to enforce substantive environmental requirements is a powerful means of accomplishing direct and concrete environmental protection that goes well beyond using alleged violations of essentially procedural statutes to get into court.[187]

In addition, the range of injuries to environmental organizations that stem from administrative failure to comply with environmental protection measures broadens when asserted under substantive environmental statutes, as they often lead to more far-reaching and tangible consequences than inadequate enforcement of purely procedural statutes. To illustrate, procedural injury under NEPA would include the lost opportunity to comment on administrative decisions; the remedy would entail preparation or expansion of an environmental impact statement or an extended public comment period. Failure to comply with the procedural requirements of the ESA, on the other hand, may interfere with an environmental group's ability to reverse the decline of endangered species. To correct this type of administrative inadequacy, the agency would be required to comply with procedural measures designed to protect listed species, like consultation with other agencies to halt extirpation of such species. When an agency makes a procedural error in regulating timber harvesting or sales under the Alaska National Interest Lands Conservation Act,[188] for example, conservation organizations that protect forests in Alaska may assert a procedural injury to compel the agency to adequately enforce its own regulations or properly regulate the timber industry. Similarly, the Wilderness Society can challenge regulations issued pursuant to the Wilderness Act[189] without deposing particular members who have

186. *See* Sierra Club v. Morton, 405 U.S. 727, 735–36 n.8 (1972); Lujan v. National Wildlife Federation, 110 S. Ct. 3177 (1990); Burnham, *Injury for Standing Purposes When Constitutional Rights are Violated: Common Law Public Value Adjudication at Work*, 13 Hastings Const. L.Q. 57, 69 n.64 (1985) ("perhaps due to an abundance of caution, some courts feel the need to state a procedural injury partly in terms of a risk of impairment to the more tangible public value-sanctioned interests.").

187. The Endangered Species Act, 16 U.S.C. §§ 1531–1544 (1988), Clean Water Act, 33 U.S.C. §§ 1251–1387 (1988 & Supp. 1990), Clean Air Act, 42 U.S.C. §§ 7401–7642 (1988 & Supp. 1991), and Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–6992(k) (1988), are examples of federal environmental statutes that allow citizen enforcement of environmental protection through administrative and judicial proceedings.

188. 16 U.S.C. §§ 3101–3233 (1988 & Supp. 1990).

189. National Wilderness Preservation System Act, 16 U.S.C. §§ 1131–1136 (1988 & Supp. 1990).

used the area. By alleging specific procedural violations of substantive environmental statutes, organizations can assert standing on their own behalf.

Procedural injury defies precise definition because to identify it involves interpretation of specific laws that guide individual agency actions; therefore, a functional analysis of procedural injury is necessary to ascertain its future vitality. A close inspection of the evolution of standing reveals a historical parallel between procedural injury and the old legal interest standing test. Both require the same inquiry into statutory interpretation and legislative intent to determine which plaintiffs deserve a hearing; and both involve legal rights in plaintiffs that originate from the allegedly violated statute.[190]

They serve different ends, however. The legal interest test restricted access to courts, whereas the procedural injury inquiry has been an alternative tool to gain standing for public interest groups when other methods failed. This difference may simply reflect the cyclical nature of the Supreme Court constitutional standing decisions. The legal interest test restricted standing. When that test denied judicial access to parties with legitimate and specific grievances against the federal government outside of the traditional legal actions of tort, contract, or property, the Supreme Court invented a new, liberalized rule for standing[191] to accommodate new classes of plaintiffs that represented the public interests. Currently, the judicial response to a deluge of lawsuits by public interest groups in the last decade has been once again to limit standing under the separation of powers rationale.[192] The entire constitutional standing inquiry is a tool by which federal courts can limit or expand judicial access for classes of plaintiffs. Standing analysis has been characterized as "often convenient if largely fictional cloaks for the court's own decision as to whether the plaintiff in the case before it shall be entitled to judicial review."[193]

A functional comparison between the legal interest and procedural injury inquiries is more important than an historical comparison. Because of its similarity to the legal interest test, procedural injury can range from a mechanism for expanding judicial access for environmental plaintiffs to requiring complainants to plead on the merits to get judicial review of agency actions. This would leave environmental organizations in the same standing predicament they have faced since *Lujan v. National Wildlife Federation* heightened the burden of establishing standing through

190. *Compare* Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U.S. 118 (1939) *with* Defenders of Wildlife v. Lujan, 911 F.2d 117 (8th Cir. 1990). Burnham, *supra* note 186, at 69 n.64 (describing procedural injury as "injury to the plaintiff's congressionally secured *legal interest* in an [EIS]." (emphasis added)).

191. *Data Processing*, 397 U.S. 150 (1970); Sierra Club v. Morton, 405 U.S. 727 (1972).

192. *See* Lujan v. National Wildlife Federation, 110 S. Ct. 3177 (1990).

193. Scott, *supra* note 18, at 651.

their members. Like the legal interest test, procedural injury can be used to stifle judicial access by requiring plaintiffs to allege a direct connection between the statutory violation and the procedural harm or between the primary goals of the organization and the protection that the statute was intended to afford those plaintiffs. Specifically, courts can find narrowly that the particular statutory language or legislative intent does not encompass the harm complained of by the plaintiff, the only constraint being binding precedent to the contrary. Fortunately, procedural injury thus far has been accepted by federal courts as a measure that liberalizes injury-in-fact for public interest groups.

Environmental litigants can participate actively in the evolution of standing to sue the federal government through procedural injury. Foremost, they always should plead a procedural injury under the allegedly violated statute, independently and in the alternative. In so doing, these organizations more likely will prevail on the threshold standing issue than if they rely solely on affiants' use of the disputed site of agency action. Procedural injury can be especially effective in instances of administrative failures in inaccessible areas such as Alaska or Antarctica or when members are hard to locate or expensive to depose.

Briefs should separate clearly each standing claim from the others and from meritorious arguments to ensure that the judge will not confuse procedural injury with prudential standing requirements, other Article III tests, or procedural claims on the merits. Moreover, in circuits that have not yet adopted procedural injury, complainants need to present lucidly the difference between procedural injury and these other issues, and to describe the method of analyzing it that will make sense to the uninitiated.

For instance, in *Natural Resources Defense Council, Inc. v. Burford*,[194] the plaintiffs might have prevailed on the standing issue if it had presented its injuries more clearly and if it had asserted a procedural injury additionally and independently. The court granted the defendants' motion for summary judgment because the plaintiffs did not present evidence of injuries that could be linked to the Department of Interior's coal leasing programs.[195] In describing injuries to themselves and to their members, the plaintiffs confusingly merged prudential with constitutional standing inquiries.[196] The plaintiffs should have analyzed their alle-

194. 716 F. Supp. 632 (D.D.C. 1988)

195. *Id.* at 638.

196. The plaintiffs' complaint stated in pertinent part:

[E]ach of the plaintiff organizations has an organizational interest in providing its members and/or others with the information which NEPA requires thedefendants to compile, analyze and disclose in environmental documents. Each also has an organizational interest in availing itself and its members or others of the opportunities which NEPA affords for public participation in connection with the preparation of such documents. The interests have been adversely affected by the failure of the defendants to prepare, circulate and consider an adequate environmental assessment or environmental impact statement prior to the decision to adopt a new coal leasing program. *Id.* at 637.

gations of injury separately for constitutional and prudential tests, and they should have supported each standing issue with evidence of specific injury or grievance. Instead, the complaint borrowed general language from both constitutional and prudential standing criteria. Additionally, the plaintiffs probably could have asserted procedural injury on their own behalf through NEPA as a separate sub-issue under the discussion of injury-in-fact for constitutional standing. The unsuccessful plaintiffs in this case apparently made errors in the organization and thoroughness of their complaint that may have precluded the court from conferring standing.

In addition, litigants should take special precautions to circumvent the outcome in *Lujan v. National Wildlife Federation*. Under *either* a summary judgment motion or motion to dismiss, briefs should show evidence of legislative intent to protect environmental litigants from harm. Such evidence must be labeled clearly under a constitutional standing heading to avoid confusion with prudential standing allegations and with meritorious claims on procedure. Allegations of procedural harm also should be fact-specific and connected as directly as possible to a discrete administrative failure to carry out a statutory obligation. In addition, environmental organizations should rewrite their stated purposes, both long- and short-term, to address specific objectives and reflect flexibility in anticipation of litigation problems with standing to sue federal agencies. In the alternative, large-membership organizations could initiate lawsuits in the name of local affiliates that may incur more tangible procedural injuries from unauthorized agency activities.[197] In addition, they should form legal coalitions and allocate litigation to those groups that have objectives most consistent with and specific to particular administrative disputes. For instance, Defenders of Wildlife would not fare well litigating over water pollution regulations, while the Natural Resources Defense Council should remain loyal to disputes over the "elementals," i.e. water, air, and earth resources. Finally, procedural injury must be used with caution because just as it can be asserted persuasively, it can just as easily be used to narrow organizational standing.

CONCLUSION

Some federal circuits have carved out an exception within the current standing rules for environmental organizations in liberalizing stand-

197. Environmental groups like the Environmental Defense Fund, Sierra Club Legal Defense Fund, and Natural Resources Defense Council are especially susceptible of overly-broad policy goals because their members are a wide cross-section of the public.

ing through procedural injury.[198] In recognizing procedural injury as a basis for alleging injury-in-fact, these courts have abided by the framework provided them by the Supreme Court since *Data Processing*. At a time when natural resources are dwindling at an unsustainable rate despite some efforts by Congress to retard this process, procedural injury may provide some relief for environmental groups attempting to force insouciant federal agencies to carry out their statutory obligations.[199]

If environmental values were given as much weight by the federal government as economic values now are, maybe environmental groups would not be struggling to gain judicial access, or maybe there would be little need to have their grievances heard in court. If these organizations could get standing on behalf of the environment itself or the diverse natural resources it contains, there would be no need to dream up creative pleadings to manipulate the rules of standing. But reality dictates that environmental organizations today must find new ways to meet the current constitutional standing requirements. Perhaps the rigid rules of standing should be changed when they do not adequately protect the "deteriorating environment."

Procedural injury is not very difficult to allege successfully under substantive as well as procedural statutes. Procedural injury may give environmental organizations a standing chance to sue federal agencies.

MIRIAM S. WOLOK

198. This contention is supported by evidence that citizen suit provisions are being given liberal interpretations as well. *E.g.*, Clarke, Comptroller of the Currency v. Securities Industry Association, 479 U.S. 388, 395 (1987). *See* Comment, *supra* note 55, at 10294.

199. Sierra Club v. Morton, 405 U.S. 727, 755 (1972) (Blackmun, J., dissenting).