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**THE IMPACT ON STANDING DOCTRINE IN ENVIRONMENTAL
LITIGATION OF THE INJURY IN FACT REQUIREMENT IN
*LUJAN V. NATIONAL WILDLIFE FEDERATION***

TIMOTHY BELEVETZ*

I. INTRODUCTION

In the last twenty years, the burden of enforcing public law has fallen increasingly upon the shoulders of private individuals. It might be more accurate to say that private individuals have the opportunity, rather than burden, to enforce public law, for many individuals and organizations have used statutory rights to sue as a means of attaining their public objectives. Private enforcers have sought to enforce the law in areas ranging from consumer protection to civil rights to antitrust and securities exchange.¹ The largest area of development of private enforcement, however, has been environmental law.

While the primary purpose of environmental citizen suits, and public interest litigation in general, is to vindicate important public rights, courts nevertheless require private plaintiffs to demonstrate sufficient standing to sue. While standing doctrine has been developing for decades, only since the early 1970s have courts faced the difficult task of defining the limits of standing in environmental litigation. Although many of the statutory provisions enabling a private citizen to sue contain language such as "any citizen" or "any person," courts still must answer such questions as whether the plaintiff sustained an actual injury, whether the law invoked actually protects the alleged injury, and whether an adequate nexus between the injury sustained and the conduct challenged exists.

In *Lujan v. National Wildlife Federation*, the United States Supreme Court heard a case in which a private plaintiff challenged land management practices in vast portions of federally owned land.² The Court held that by claiming use and enjoyment of land "in the vicinity" of the affected areas, the plaintiff did not allege an actual injury sufficient to

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1. See, e.g., Consumer Product Safety Act § 24, 15 U.S.C. § 2073 (1988); Civil Rights Act of 1964 §§ 706(f), 2004(a), 42 U.S.C. §§ 2000a-3(a), 2000e-5(f) (1988); Clayton Act of 1964 § 4, 15 U.S.C. § 15 (1988); Securities Act of 1933 §11, 15 U.S.C. § 77k(a) (1988).

2. 497 U.S. 871 (1990).

withstand the defendants' motion for summary judgment.³ Does the decision contribute to standing jurisprudence, or simply provide procedural instruction as to the best method of drafting a complaint and supporting affidavits?

This Article will trace the development of private enforcement of public law with an emphasis on environmental citizen suit provisions. It will then provide a foundation for understanding the constitutional and prudential requirements for standing, specifically examining standing doctrine in pre-*National Wildlife Federation* environmental private enforcement actions. After describing the holding in *National Wildlife Federation*, the Article will analyze the decision's impact on environmental citizen suit litigation and argue that the case's contribution to standing is insubstantial. The main lessons to be drawn from *National Wildlife Federation* are (1) plaintiffs must be more careful and artful in drafting their complaints and supporting affidavits in cases involving use and enjoyment of land areas, and (2) in challenging standing in such cases, defendants would be wise to employ a motion for summary judgment rather than a motion to dismiss.

II. HISTORICAL PERSPECTIVE

Although the popularity of statutory citizen suit litigation is a relatively recent phenomenon, private enforcement of public law is not a new idea. The modern citizen suit has an assortment of historical and modern predecessors. *Marbury v. Madison* involved citizen-initiated judicial review of an agency action.⁴ In the Anglo-American tradition, the notion of joint public and private responsibility of enforcement reaches back at least 600 years to when Richard II and the English Parliament enacted a water pollution statute.⁵ Public officials or anyone else who "fe[lt] [themselves] grieved" or who "w[ould] complain" could bring enforcement actions under this statute.⁶

The English common law system had two different legal devices that enabled private citizens to take part in enforcement. A citizen could

3. *Id.* at 899.

4. 5 U.S. (Cranch) 137 (1803).

5. 12 Rich. II, ch. 12 (1388).

6. Barry Boyer and Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 947 (1985), quoting 12 Rich. II, ch. 13 (1388).

institute either a *qui tam* action⁷ or a public nuisance tort action. Because no rigid conceptual distinction between public and private functions existed, citizen suits were not uncommon in England.⁸ Such a distinction did not develop until the advent of the industrial revolution toward the end of the nineteenth century. As industries and urban centers began to grow, so did the need for new regulations which increased in number and in scope. Because of limited resources, however, the Parliament enacted common informer statutes which sought to enlist the help of private citizens with the arduous task of enforcement.⁹ These statutes permitted actions for a broad range of offenses including violation of health and safety standards in the workplace, licensing requirements for professional occupations, and "Offenses leading to the Corruption of Morals."¹⁰

As industrialization progressed, society became more complex and government more centralized. The notion of governmental responsibility for the welfare of citizens became firmly entrenched. Although private parties sued to protect their property and economic interests from other private parties and from the government, judicial review was not seen as a device for citizen-initiated challenge of actions affecting common public resources.¹¹

The first half of the twentieth century saw the enactment of several statutes providing for judicial review of administrative agency action in the United States. In 1946 Congress codified the citizen's right to such review in the Administrative Procedure Act ("APA").¹² The APA provides that, "A person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of [the] relevant statute, is entitled to judicial review thereof."¹³ Other regulatory legislation identified in specific provisions the parties entitled to petition for review. The statutory language included such terms as "party in

7. "Qui tam" is an abbreviation for the Latin phrase "qui tam pro domino rege quam pro si ipso in hac parte sequitur" which means "who sues on behalf of the King as well as himself." BLACK'S LAW DICTIONARY 1251 (6th ed. 1990).

8. Boyer and Meidinger, *supra* note 6, at 952.

9. Under the common informer statutes, parties assisting in the arrest and conviction of violators would receive a share of the fines collected as a result of their efforts. 2 LEON RADINOZWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 at 138 (1956).

10. *Id.* at 142.

11. MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS § 1-2 (1991).

12. 5 U.S.C. §§ 551-559, 701-706 (1988).

13. 5 U.S.C. § 702.

interest"¹⁴ or any person¹⁵ or party "aggrieved"¹⁶ or "adversely affected."¹⁷

In 1943, the Second Circuit Court of Appeals in *Associated Industries of New York, Inc., v. Ickes* held that "[C]ongress can constitutionally enact a statute conferring on any non-official person . . . authority to bring a suit to prevent action by an officer in violation of his statutory powers"¹⁸ The court concluded that in such cases the constitutional requirement of a "case or controversy" is satisfied, even if the plaintiff's sole purpose is to vindicate the public interest.¹⁹ The controversy arises from the private citizen's right to live in a society in which public officers do not act in violation of their statutory powers.²⁰ The court invented the term "private attorneys general" to describe such plaintiffs who sue to enforce public legislation.²¹ In *Associated Industries*, however, the private attorney generals, industrial coal consumers who claimed a common economic interest in the implementation of the Bituminous Coal Act of 1937, sought judicial protection of only their economic interest in rights or resources, rather than their public interest in preserving those rights and resources.²²

Before 1970, the year Congress amended the Clean Air Act²³ to include a citizen suit provision, citizens' attempts to seek judicial protection of public non-economic rights were sporadic.²⁴ The growth of

14. See, e.g., Interstate Commerce Act § 205, 49 U.S.C. § 305(g) (1976), *repealed by* 92 Stat. 1466 (1978), granting a "party in interest" standing to maintain an action to set aside an Interstate Commerce Commission order.

15. See, e.g., Emergency Price Control Act § 2, 50 U.S.C. § 902(m) (1946), *repealed by* 70A Stat. 641 (1956), authorizing "any person who is aggrieved by the denial . . . of his protest" against an order of the Price Administrator prohibiting a landlord from evicting a tenant, upon complaint to the Emergency Court of Appeals, to secure judicial review of the Administrator's denial of such protest.

16. See, e.g., Hatch Political Activity Act § 906(a)(6), 5 U.S.C. § 1508 (1988) entitling "any party aggrieved by a determination or order of the Merit Systems Protection Board to file a petition for review.

17. See, e.g., Federal Food, Drug, and Cosmetic Act § 701(e)(2), 21 U.S.C. § 371(e)(2) (1988), permitting any person "adversely affected" by a regulation of the Federal Security Administrator, to seek a public hearing.

18. 134 F.2d 694, 704 (2d. Cir. 1943), *rev'd on other grounds*, 320 U.S. 707 (1943).

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 697-98.

23. 42 U.S.C. §§ 7401-7642 (1988).

24. AXLINE, *supra* note 11, § 1-3.

the civil rights movement, activism concerning the Vietnam War, and an increasing awareness of the deterioration of the environment led private individuals and organizations to the courtroom to seek an end to unlawful conduct, including conduct which resulted in public and non-economic harm.²⁵ The Supreme Court recognized the legitimacy of citizen suits to protect non-economic public rights in *NAACP v. Button*.²⁶ The Court found that litigation in the context of the objectives of organizations like the National Association for the Advancement of Colored People constitutes a form of political expression.²⁷ Such litigation is "not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state, and local, for the members of the Negro community in this country."²⁸ The incorporation in 1966 of Rule 23 of the Federal Rules of Civil Procedure governing class actions caused an upsurge in the filing of actions seeking environmental protection and enforcement of corporate democracy and consumers' rights.²⁹ Although availability of the class action was strictly limited to those who actually had a cause of action, federal statutes like the Civil Rights Act of 1964³⁰ and the Voting Rights Act³¹ provided causes of action for large numbers of victims of discrimination.³² The class action enabled plaintiffs who did not have the financial resources to sue as individuals to aggregate their claims in a class-wide suit. In so doing, the efforts of individual plaintiffs benefitted a greater number of people.

III. DEVELOPMENT OF ENVIRONMENTAL CITIZEN SUIT CLAUSES

In the late 1960s private citizens attempted to protect shared environmental resources through cumbersome and often unsuccessful means. Qui tam and public nuisance actions against dischargers who polluted common air and waters either met with disfavor in the courts or faced enormous obstacles.³³ With few incentives for prosecution, most

25. *Id.*

26. 371 U.S. 415 (1963).

27. *Id.* at 429.

28. *Id.*

29. AXLINE, *supra* note 11, § 1-3 to 1-4.

30. 28 U.S.C. § 1447 (1988); 42 U.S.C §§ 1971, 1975a-1975d, 2000a-2000h-6 (1988).

31. 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1988).

32. AXLINE, *supra* note 11, § 1-4.

33. *Id.*

people found that the costs of litigating outweighed the benefits.

In response to these obstacles and to a growing interest in environmental protection, Congress significantly enhanced enforcement devices in the federal environmental statutes.³⁴ Citizen suit clauses developed in an effort to stimulate government enforcement. Senator Edmund Muskie stated during the Senate debate on the amendments to the Clean Air Act of 1970³⁵ that the proposed citizen suit provision would "extend[] the concept of public participation to the enforcement process."³⁶ If the government failed to act, citizen suit sections would provide an alternate means of enforcement.

In 1970, Congress amended the Clean Air Act to include section 304, a citizen suit provision.³⁷ This first private enforcement clause was enacted just a few months after organization of the first Earth Day and publication of Ralph Nader's landmark report, *Vanishing Air*.³⁸ The combative and aggressive tone of the report reveals the intense atmosphere in which the private citizen suit developed.³⁹ A belief that neither the federal government nor the states were enforcing antipollution laws adequately was widespread.

The legislative histories of the amendments to the Clean Air Act and the Federal Water Pollution Control Act⁴⁰ indicate substantial doubt about effective governmental enforcement of environmental statutes. The Senate Report on the Clean Air Act of 1970 recognized the limited effectiveness of existing statutory devices and expressed the hope that actions under section 304 would "motivate governmental agencies charged with the responsibility to bring enforcement and abatement proceedings."⁴¹ The Senate Report on the Federal Water Pollution Control Act disclosed an even greater degree of desperation, as it stated, "[t]he record shows an almost total lack of enforcement."⁴² The version

34. *Id.*

35. 42 U.S.C. §§ 7401-7642 (1988).

36. 116 Cong. Rec. 32, 903 (1970).

37. 42 U.S.C. § 7604 (1988 & Supp. II 1990).

38. J. ESPOSITO, *VANISHING AIR* (1970).

39. In his introduction to the book, Nader charged that "air pollution (and its fallout on soil and water) is a form of domestic chemical and biological warfare. . . . Violators are openly flouting the laws, and an Administration allegedly dedicated to law and order sits on its duties." Nader, *Introduction to J. Esposito, supra* note 38, at viii.

40. 33 U.S.C. §§ 1251-1345, 1361-1376 (1988) ("Clean Water Act").

41. S. REP. NO. 1196, 91st Cong., 2d Sess. 36-37 (1970).

42. S. REP. NO. 414, 92d Cong., 2d Sess. 5 (1972).

of the law existing at the time of the 1972 amendments required a number of conferences and hearings before the initiation of any enforcement action. The report noted that the process was so slow and cumbersome that only one case had made it to the courts in over twenty years.⁴³

Debate on the proposal divided those who believed that the citizen suit provision was the only answer to the enforcement agencies' unavoidable shortage of sufficient resources to confront all statutory violations, and those who felt that such legislation would increase the strain on the already over-burdened court system. Although it was politically difficult to oppose what was viewed as a pro-environmental proposal, there was considerable congressional concern over giving private parties the power to enforce regulatory statutes. In the end, Congress provided citizens with a right to sue that could be exercised only after notifying the appropriate regulatory agencies and giving them the opportunity to sue first.⁴⁴ Citizens were entitled to sue to redress statutory violations but could not sue for resulting damages.⁴⁵ In an effort to encourage private enforcement, Congress permitted citizens to collect attorneys fees.⁴⁶ At the same time, Congress included a device to discourage frivolous and harassing suits by giving courts the power to make fee awards against any party "where appropriate."⁴⁷

All new federal environmental legislation or major amendments thereto except for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)⁴⁸ have incorporated the citizen suit clause, firmly established and tested in section 304 of the Clean Air Act. The language in each provision is substantially the same. Generally, the citizen suit provisions authorize "any person" to initiate an action to enforce the statutory requirements against "any person" alleged to be in violation or against the government to compel performance of nondiscretionary duties.⁴⁹ Federal

43. *Id.*

44. Clean Air Act § 304(b), 42 U.S.C. § 7604(b) (1988 & Supp. II 1990).

45. Clean Air Act § 304, 42 U.S.C. § 7604 (1988 & Supp. II 1990).

46. Clean Air Act § 304(d), 42 U.S.C. § 7604(d) (1988).

47. The United States Supreme Court held in *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 694 (1983), that for an award to be considered "appropriate" under this language, a party must have attained "some degree of success on the merits."

48. 7 U.S.C. §§ 136-136y (1988).

49. See, e.g., Clean Water Act, § 505, 33 U.S.C. § 1365(a) (1988); Resource Conservation and Recovery Act ("RCRA") § 7002(a), 42 U.S.C. § 6972(a) (1988); Toxic Substances Control Act § 20(a), 15 U.S.C. § 2619(a) (1988); Comprehensive Environmental Response, Compensation and Liability Act of 1980 § 310(a), 42 U.S.C.

district courts have jurisdiction to decide citizen suits regardless of diversity of citizenship or amount in controversy. Venue is typically in the district where the violation occurred. In suits against the government, venue is sometimes in the District of Columbia.⁵⁰ The laws bar a citizen from commencing the action until a period of time has elapsed, usually sixty days, following the giving of notice to the alleged violator, the EPA, and sometimes the state. Exceptions to the time delay requirement apply where plaintiffs claim violations of new source or hazardous pollutant standards.⁵¹ A citizen enforcement action may not be initiated if EPA, or in some cases the state, has commenced and is diligently prosecuting an action to require compliance.⁵² Finally, the typical citizen suit section has a savings clause which eliminates any suggestion that it precludes other common law or statutory remedies.⁵³

IV. STANDING TO SUE

A citizen suit defendant may challenge the plaintiff's standing to prosecute the action. At issue in a challenge to standing is whether the court has jurisdiction to entertain a particular action; the court does not address the merits of the claim. As the Supreme Court has stated, the focus is "on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated."⁵⁴

Standing requirements derive from two sources, constitutional and prudential.⁵⁵ If a party lacks constitutional standing, the court does not have the authority to decide the case. Article III, clause 2 of the United States Constitution gives federal courts jurisdiction to resolve "cases" or "controversies." Courts do not have the resources to rule on theoretical questions or even concrete questions in which the parties have only an abstract interest. The plaintiff must have a sufficient interest in the resolution of the case to meet the constitutional requirements for standing. Specifically, the plaintiff must satisfy the three-part test established in

§ 9659(a) (1988).

50. *E.g.*, RCRA § 7002(a), 42 U.S.C. § 6972(a) (1988).

51. *E.g.*, Clean Water Act § 505(b), 33 U.S.C. § 1365(b) (1988).

52. *E.g.*, Clean Water Act § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B) (1988).

53. *See, e.g.*, RCRA § 7002(f), 42 U.S.C. § 6972(f) (1988); Clean Water Act § 505(f), 33 U.S.C. § 1365(f) (1988); Clean Air Act § 304(e), 42 U.S.C. § 7604(e) (1988).

54. *Valley Forge Christian College v. Americans United for Separation for Church and State*, 454 U.S. 464, 484 (1982), *citing* *Flast v. Cohen*, 392 U.S. 83, 99 (1968).

55. *See* 13 CHARLES ALAN WRIGHT ET. AL., *FEDERAL PRACTICE AND PROCEDURE*: 2d § 3531 (1984).

Valley Forge Christian College v. Americans United for Separation for Church and State.⁵⁶ The plaintiff must "'show that [1] he . . . has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant'⁵⁷ and [2] that the injury 'can be [fairly] traced to the challenged action' and [3] 'is likely to be redressed by a favorable decision.'"⁵⁸

The most important and most complex prong is the injury requirement. Courts will deny standing unless the plaintiff can show injury to an identifiable interest which the courts will recognize. The injury must be concrete, whether actual or threatened, in order to give it the structure required for judicial resolution. The Supreme Court has held that an interest which is held in common by all members of the public may not form the basis for standing, because an injury shared by all is necessarily too abstract.⁵⁹ Injury to such a widespread interest must represent more than a generalized grievance pervasively shared, and best addressed in the elected branches. "[T]he requirement of concrete injury further serves the function of insuring that such adjudication does not take place unnecessarily."⁶⁰

When the statute allegedly violated does not contain a citizen suit provision, the APA imposes an additional requirement that the plaintiff's injury be arguably within the "zone of interests" intended to be protected by the statutory or constitutional provision he invokes.⁶¹ This test first appeared in *Data Processing Service Organizations v. Camp* in which the Court granted standing to firms engaged in data processing services to challenge the Comptroller of the Currency's ruling that permitted national banks to provide such services to other banks and to bank customers.⁶² The increased competition satisfied the injury in fact requirement.⁶³ The Court found the competitors' activities to be "arguably within the zone of interests to be protected or regulated by the statute or constitutional

56. 454 U.S. 464 (1982).

57. *Id.* at 472 (citing *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)).

58. *Id.* at 472 (citing *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976)).

59. *E.g.*, *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972).

60. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1973).

61. The APA grants standing to person "aggrieved by agency action within the meaning of the relevant statute." 5 U.S.C. § 702 (1988). *See*, *Data Processing Service Org. v. Camp*, 397 U.S. 150, 153 (1970).

62. 397 U.S. at 151.

63. *Id.* at 152.

guarantee in question,"⁶⁴ because the restrictions on bank service corporation activities specified in section 4 of the Bank Service Corporation Act protected the competitors' interests.⁶⁵

Courts also refuse to find standing when a plaintiff fails to prove a causal connection between the injury and the challenged action. In *Warth v. Seldin*, residents challenged a town zoning ordinance as violating their constitutional rights and 42 U.S.C. §§ 1981, 1982, and 1983.⁶⁶ The residents claimed that the ordinance effectively excluded low income persons from living in the town.⁶⁷ In denying standing, the Court established a "but for" standard requiring a fairly high level of specificity for showing a causal link between the alleged injury and the challenged act. The court determined that the plaintiffs had failed to allege facts from which the court could reasonably infer that, absent the town's restrictive zoning practices, there was a substantial probability that the plaintiffs would be able to purchase or lease housing in the community.⁶⁸

Finally, a court will deny standing where a plaintiff asserts an injury held in common by all members of the public.⁶⁹ Courts find an injury shared by all citizens too abstract to be capable of judicial resolution. Instead, courts hold that the elected branches can best address questions of such widespread impact.⁷⁰ Judicial intervention is reserved for protection of individual rights. The Supreme Court has stated, "Concrete injury, whether actual or threatened, . . . adds the essential dimension of specificity to the dispute by requiring that the complaining party have suffered a particular injury caused by the action challenged as unlawful."⁷¹ Absent such a specific injury, courts believe it unwise to accord standing.

This requirement does not mean, however, that a group can never

64. *Id.* at 153.

65. *Id.* at 155-56.

66. 422 U.S. 490, 493 (1975).

67. *Id.*

68. *Id.* at 504.

69. See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974), in which plaintiffs, a group of present and past Air Force reservists opposing U.S. involvement in Vietnam brought a class action on behalf, inter alia, of all U.S. citizens and taxpayers against the Secretary of Defense challenging the Reserve membership of members of Congress as violating the Incompatibility Clause of Art. I, § 6, cl. 2 of the Constitution.

70. See *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471-474 (1982).

71. *Schlesinger*, 418 U.S. 208, 220-221.

establish proper standing to challenge an action. Citizen organizations often file citizen suits, sometimes on behalf of themselves, sometimes on behalf of their members. An organization itself may have standing to request judicial relief from injury to itself and to seek protection of whatever rights it may enjoy.⁷² The organization itself need not have suffered injury as a result of the challenged activity to have standing to assert the claims of its members.⁷³ The question of organizational standing frequently involves a consideration of the concept of third party standing, that is, standing of one party to sue on behalf of another.⁷⁴ An association has representational standing to bring suit on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."⁷⁵

V. THE INJURY IN FACT REQUIREMENT IN PRE-NATIONAL WILDLIFE FEDERATION CASES

Courts traditionally require plaintiffs in environmental citizen suits to make a lesser showing to obtain standing than the showing they require in cases not involving environmental issues. In a decision reflecting deference to a congressional mandate favoring environmental interests, the Supreme Court has held that statutory grants of standing in environmental cases supplant the Court's own prudential restrictions on such elements as the widespread nature of the injury.⁷⁶

Courts have not demanded proof of injury to economic interests in order to establish standing in environmental citizen suits. In the landmark case of *Sierra Club v. Morton*, the Supreme Court found that plaintiffs who assert and are able to show harm to aesthetic or environmental interests meet the requirement of actual or threatened injury.⁷⁷ The

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

73. *Id.*

74. See generally Marc Rohr, *Fighting for the Rights of Others: The Troubled Law of Third-Party Standing and Mootness in the Federal Courts*, 35 U. MIAMI L. REV. 393, 430-33 (1981).

75. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

76. Michael A. Perino, Comment, *Justice Scalia: Standing, Environmental Law, and the Supreme Court*, 15 B.C. ENVTL. AFF. L. REV. 135, 144 (1987).

77. 405 U.S. 727, 738 (1972).

Court, however, restricted its grant of standing in such cases to those plaintiffs who can demonstrate that they *themselves* have suffered or will suffer the injury claimed.⁷⁸

The plaintiff in *Morton* was an environmental interest organization suing under section 10 of the APA to obtain a declaratory judgment and an injunction to restrain federal officials from approving a vast skiing development in the Sequoia National Forest's Mineral King Valley.⁷⁹ The Court recognized injury to a cognizable interest, destruction of or other adverse effects to the park's "scenery, natural and historical objects, and wildlife and impairment of the enjoyment of the park for future generations."⁸⁰ Because the organization never asserted that its members actually used Mineral King and Sequoia National Park, however, the Court held that the Sierra Club failed to allege that it or its members would be affected in any of their activities by the proposed development.⁸¹ In order to establish standing, a party must show more than a "mere interest in a problem."⁸² The alleged injury in fact was not sufficiently personalized to meet the injury in fact requirement. The Court suggested a simple remedy for this basically procedural flaw, submission of the affidavits of the organizational plaintiff's members stating that they use the resource at issue and that the proposed agency action would adversely affect their enjoyment thereof.⁸³

Relaxing the prerequisites for standing in environmental litigation, the Court gave the injury in fact requirement a broad interpretation in *United States v. Students Challenging Regulatory Agency Procedures* (SCRAP) by refusing to deny standing simply because the injury asserted would have an impact on a large number of people.⁸⁴ In *SCRAP*, the plaintiffs, an unincorporated association of five law students, filed an APA section 10(a) complaint seeking to enjoin enforcement of Interstate Commerce Commission orders approving a railroad rate increase that placed a surcharge on the transportation of scrap materials.⁸⁵ The plaintiffs claimed that this rate modification encouraged the use of raw materials over recycled materials, thereby causing an increase in pollution

78. *Id.* at 735-36.

79. *Id.* at 730.

80. *Id.* at 735.

81. *Id.* at 736.

82. *Id.* at 739.

83. *Id.* at 735-36 n.8.

84. 412 U.S. 669, 687-88 (1973).

85. *Id.* at 678.

and injuring the students as users of natural resources and breathers of air.⁸⁶ Although the Court recognized that the injury at issue was far less direct and perceptible than that asserted in *Morton*, it found that "standing is not to be denied simply because many people suffer the same injury."⁸⁷ The Court found that SCRAP had sufficiently alleged in their pleadings that its members were "adversely affected" or "aggrieved" under section 10(a) of the APA by submitting affidavits stating that its "members used the forests, streams, mountains, and other resources in the Washington metropolitan area for camping, hiking, fishing, and sightseeing, and that this use was disturbed by the adverse environmental impact caused by the nonuse of recyclable goods brought about by a rate increase on those commodities."⁸⁸ These allegations of "a specific and perceptible harm" sufficiently distinguished SCRAP members from other citizens who had not used the natural resources at issue.⁸⁹

VI. LUJAN V. NATIONAL WILDLIFE FEDERATION

In July 1985, the National Wildlife Federation ("NWF"), a 4.5 million member environmental public interest organization, brought an action against the United States Department of the Interior ("Department"), the Secretary of the Interior ("Secretary"), and the Bureau of Land Management ("BLM").⁹⁰ NWF contested a Department decision to

86. In describing SCRAP's injury in fact, the Court stated,

Specifically, SCRAP alleged that each of its members was caused to pay more for finished products, that each of its members [u]ses the forests, rivers, streams, mountains, and other natural resources surrounding the Washington Metropolitan area and at his legal residence, for camping, hiking, fishing, sightseeing, and other recreational [and] aesthetic purposes, and . . . that each of its members breathes the air within the Washington metropolitan area and the area of his legal residence and that this air has suffered increased pollution caused by the modified rate structure, and that each member has been forced to pay increased taxes because of the sums which must be expended to dispose of otherwise reusable waste materials.

Id. at 678.

87. *Id.* at 687.

88. *Id.* at 685.

89. *Id.* at 689.

90. *National Wildlife Fed'n v. Burford*, 878 F.2d 422 (D.C. Cir. 1989); *See National Wildlife Fed'n v. Burford*, 676 F. Supp. 271 (D.D.C. 1985).

reclassify the status of 180 million acres of public land located in seventeen states.⁹¹ As part of its ongoing "Land Withdrawal Review Program ("Program")," the Department decided to lift protective restrictions on the use of the land at issue.⁹² The Department instituted this program pursuant to the Federal Land Policy and Management Act ("FLPMA").⁹³ FLPMA directs the Secretary to prepare and maintain an "inventory of all public lands and their resource and other values,"⁹⁴ and to develop and maintain land use plans for public lands.⁹⁵ In addition, FLPMA allows the Secretary to review and "modify or terminate" land use classifications.⁹⁶

As an Interior subagency, the BLM is responsible for implementing the Program.⁹⁷ Pursuant to the Program, BLM terminated land use "withdrawals" and "classifications," devices through which the Department "implement[ed] land use planning for millions of acres of federal public lands."⁹⁸ The Department utilized "classifications" to categorize lands for specific usage, often designating public lands for retention, thereby removing them from the reach of various land disposal laws.⁹⁹ "Withdrawals" enabled the BLM to remove directly designated public lands from disposal under the general laws.¹⁰⁰

By terminating the classifications and withdrawals, the BLM effectively lifted protective restrictions, thereby opening over 13 million acres of federal land to mining by private parties.¹⁰¹ When NWF filed suit, hundreds of leases and sales, executed and pending, had resulted in land uses such as mining and mineral leasing as well as agricultural, commercial and other proposed developmental uses.¹⁰²

In its amended complaint, NWF claimed the defendants had violated the FLPMA, the National Environmental Policy Act of 1969

91. 878 F.2d at 425.

92. *Id.*

93. 43 U.S.C. §§ 1701-1784 (1982). In enacting the FLPMA in 1976, Congress established a policy favoring retention of public lands for multiple use management. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 877 (1990).

94. 43 U.S.C. § 1711(a) (1982).

95. § 1712(a).

96. § 1712(d).

97. *National Wildlife Fed'n v. Burford*, 878 F.2d 422, 425 (D.C. Cir. 1989).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

("NEPA"),¹⁰³ and section 10 of the APA in the course of administering the Program.¹⁰⁴ NWF alleged that the reclassification of some of the withdrawn lands and the return of others to public domain would destroy their natural beauty through mining activities.¹⁰⁵ Specifically, NWF claimed that the defendants had neglected their duties under the FLMPA by failing to "develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of public lands."¹⁰⁶ NWF further alleged that the defendants had violated NEPA by failing to prepare an environmental impact statement.¹⁰⁷ Finally, NWF asserted that all of defendants' violations were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and that the court should set aside these actions pursuant to section 10 of the APA.¹⁰⁸

At trial, NWF offered affidavits of two of its members in support of its standing to sue.¹⁰⁹ The individuals alleged that they used federal land "in the vicinity of" the areas affected by the Program and that the defendants' actions adversely affected their recreational and aesthetic enjoyment of the federal land at issue.¹¹⁰ The district court granted NWF's motion for a preliminary injunction, prohibiting the defendants from reclassifying or modifying the revocation status of the lands at issue, and denied the defendants' Rule 12(b) motion to dismiss for lack of standing.¹¹¹

The District of Columbia Circuit Court of Appeals vacated the issuance of a preliminary injunction but sustained the denial of the defendants' motion to dismiss.¹¹² On remand, the defendants again contested NWF's standing by moving for summary judgment, which motion the district court granted.¹¹³ The Court of Appeals reversed, holding that one of the affidavits was ambiguous with respect to whether

103. 42 U.S.C. §§ 4321-4374 (1982).

104. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 875 (1990).

105. *Id.* at 879.

106. *Id.* (referring to 43 U.S.C. § 1712(a) (1982)).

107. *Id.* (referring to 42 U.S.C. § 4332(2)(C) (1982)).

108. *Id.* (referring to 5 U.S.C. § 706 (1982)).

109. *Id.* at 880.

110. *Id.*

111. *Id.* at 879-80. See *National Wildlife Fed'n v. Burford*, 676 F. Supp. 271, 277, 279 (D.D.C. 1985).

112. 497 U.S. at 880; See *National Wildlife Fed'n v. Burford*, 835 F.2d 305 (D.C. Cir. 1987).

113. 497 U.S. at 881; See *National Wildlife Fed'n v. Burford*, 699 F. Supp. 327, 332 (D.D.C. 1988).

the adversely affected lands were actually the ones the affiant used.¹¹⁴ The appellate court determined that the district court should have resolved the factual ambiguity of the affidavit in the NWF's favor by assuming that the affiant had in fact used all of the land at issue.¹¹⁵

The defendants petitioned the United States Supreme Court for certiorari which the Court granted.¹¹⁶ By a five to four vote, the Court, in an opinion by Justice Scalia, reversed the Court of Appeals by refusing to find standing.¹¹⁷ The Court found that the affidavits alleged "adverse affect" or "aggrievement" which was "within the meaning of the relevant statute," that is, which satisfied the "zone of interests" test.¹¹⁸ The Court held that recreational use and aesthetic enjoyment were among the sorts of interests that the statutes which formed the basis of the complaint, the FLMPA and NEPA, attempted to protect.¹¹⁹ The Court found that the affidavits failed to show that the interests of the affiants were "actually affected" by the specific agency actions challenged, however.¹²⁰ Summary judgment was proper because the individuals failed to demonstrate that their use and enjoyment of federal land extended to the particular land at issue.¹²¹ NWF merely made general averments, but did not the assert "specific facts" required to withstand a motion for summary judgment.¹²²

VII. IMPACT OF *NATIONAL WILDLIFE FEDERATION'S* INJURY IN FACT REQUIREMENT

After *National Wildlife Federation*, courts will require facts alleging use and enjoyment of an area more specific than land "in the vicinity" of the challenged conduct. The courts will not infer this factual prerequisite for standing. Practically speaking, however, the decision has limited implications for plaintiffs seeking standing in environmental citizen suits.

Essentially, the decision stands for the proposition that a challenge to a plaintiff's standing in an environmental citizen suit will likely be more

114. 497 U.S. at 881; *See National Wildlife Fed'n v. Burford*, 878 F.2d 422, 431 (D.C. Cir. 1989).

115. 878 F.2d at 431.

116. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990).

117. *Id.* at 899-900.

118. *Id.* at 886.

119. *Id.*

120. *Id.* at 889.

121. *Id.*

122. *Id.*

effective if the defendant uses a motion for summary judgment rather than a motion to dismiss. The stricter requirement articulated in the decision is not new to standing doctrine in environmental litigation. In *SCRAP*, the Court seemed to relax the requirement in its grant of standing to the plaintiffs based on their attenuated "but for" allegations "that a railroad rate increase would cause use of nonrecyclable commodities, which would in turn divert natural resources out of the area and into the manufacturing process, which would in turn cause more litter in the parks used by plaintiffs."¹²³ In *National Wildlife Federation*, however, the Court distinguished the expansive holding in *SCRAP* by noting that the latter case involved a Rule 12(b) motion to dismiss, not a Rule 56 motion for summary judgment.¹²⁴ Unlike a motion for summary judgment, a Rule 12(b) motion "presumes that general allegations embrace those specific facts that are necessary to support the claim."¹²⁵ No such inference exists with respect to a motion for summary judgment. In other words, in contesting a Rule 12(b) motion, the nonmoving party need only allege facts sufficiently specific to meet the requirements for standing, while the party responding to a summary judgment motion must submit substantive evidence, usually affidavits, to support the specific allegations set forth in the complaint.

In the context of environmental citizen suits, plaintiffs will have to be more careful and thorough in drafting their allegations and presenting their evidence in support of standing. In suits regarding land areas, the Court's emphasis on geographical specificity will require plaintiffs to be more specific about the areas of land they use and enjoy, and about the ways in which the challenged conduct adversely affects such use and enjoyment.

If any lasting standing implications for environmental citizen suit plaintiffs exist, they are (1) the Court's reaffirmation of the actual injury prerequisite and its application of the requirement to suits involving land areas, and (2) the Court's recognition that recreational use and enjoyment of federal land are among the sorts of interests that NEPA was specifically

123. Daniel J. Capra, *Discretion Must Be Controlled, Judicial Authority Circumscribed, Federalism Preserved, Plain Meaning Enforced, and Everything Must Be Simplified: Recent Supreme Court Contributions to Federal Civil Practice*, 50 MD. L. REV. 632, 677 (1991).

124. 497 U.S. at 889.

125. *Id.*, (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

intended to protect.¹²⁶

The requirement of geographical specificity is another way of articulating the requirement of actual injury. In *Lujan* the Court found the affidavits defective because the individuals merely claimed use and enjoyment of land "in the vicinity" of the area of the proposed development. The Court then held that the plaintiffs did not demonstrate that their use and enjoyment of the "particular" lands at issue were "actually" affected by the agency action.

Post-*National Wildlife Federation* organizational plaintiffs will find themselves confronted by stricter standing requirements imposed by these new standards. In *Save Ourselves v. United States Army Corps of Engineers*,¹²⁷ the Fifth Circuit Court of Appeals applied *National Wildlife Federation* to deny standing to a non-profit association suing the Corps for failure to comply with the APA and exercise its Clean Water Act jurisdiction in determining whether a tract of land to be developed by airport authorities was a wetland. The plaintiff, an organization dedicated to protecting and preserving the waters of Ascension Parish, Louisiana, claimed that it was "adversely affected or aggrieved by the Corps' abrogation of its duty to declare the airport site a wetland under the Clean Water Act."¹²⁸ The court held that because the plaintiff failed to submit affidavits or other evidence demonstrating that the Corps' actions affected its members, it did not "allege specific facts showing a direct injury to any of its members sufficient to confer standing" under section 702 of the APA.¹²⁹

The Supreme Court also denied standing to environmental conservation organizations who failed to allege sufficient injury in fact in *Lujan v. Defenders of Wildlife*.¹³⁰ The plaintiffs challenged a regulation promulgated by the Secretary of the Interior which made section 7 of the Endangered Species Act of 1973 inapplicable to actions in foreign countries.¹³¹ Section 7 requires federal agencies to consult with the Secretary of the Interior or Commerce to ensure that any action funded by

126. See, *Natural Resources Defense Council v. Lujan*, 768 F. Supp. 870 (D.D.C. 1991) (in which the court, citing *National Wildlife Federation*, found that recreational use and aesthetic enjoyment were among the sorts of interests that NEPA purports to protect).

127. 958 F.2d 659 (5th Cir. 1992).

128. *Id.* at 661.

129. *Id.* at 662.

130. 112 S. Ct. 2130 (1992).

131. *Id.* at 2135.

the government is not likely to jeopardize endangered species.¹³² Although members of the organization claimed to have travelled to foreign countries in the past to observe endangered species and asserted that they intended to return to those places, the Court concluded that such averments were not sufficient to satisfy the injury in fact requirement.¹³³ The plaintiffs had to demonstrate concrete plans or specific dates for travel.¹³⁴

The plaintiffs in *Defenders of Wildlife* also asserted that they had standing based on an "ecosystem nexus."¹³⁵ This theory proposed that any person who uses any part of a "contiguous ecosystem" adversely affected by a funded activity has standing even if the activity is located a great distance away.¹³⁶ The Court rejected this theory as inconsistent with *National Wildlife Federation* because the plaintiffs did not use the particular area affected by the challenged action.¹³⁷

Other plaintiffs have successfully met the standing requirements. In *Sierra Club v. Robertson*,¹³⁸ the court applied *National Wildlife Federation* in a suit brought by an organizational plaintiff challenging the United States Forest Service's adoption of a land and resource management plan for the Ouachita National Forest in Arkansas. The court held that the allegations of injury in affidavits submitted by the plaintiff's members were sufficiently specific to enable the court to find standing.¹³⁹ "Plaintiffs' affidavits here . . . describe in detail specific parts of the forest that the affiants enjoy, activities that they engage in there, and the types of harm that they allege ensue from the use of herbicides and even aged management techniques. . . ."¹⁴⁰ These are the sorts of area-specific allegations contemplated by the Court in *National Wildlife Federation* that permit standing. The district court found that the problem of specificity at issue in *National Wildlife Federation* did not present an obstacle in this case and that the plaintiff's affidavits were sufficient to meet the APA's requirement of "aggrievement."¹⁴¹

The federal district court for the District of Columbia used the

132. *Id.*

133. *Id.* at 2138.

134. *Id.*

135. *Id.* at 2139.

136. *Id.*

137. *Id.*

138. 764 F. Supp. 546 (W.D.Ark. 1991).

139. *Id.* at 552-53.

140. *Id.* at 552.

141. *Id.* at 553.

holding in *National Wildlife Federation* to find that a corporate shipholding group had standing to sue under NEPA on behalf of its employees to contest the Maritime Administration's promulgation of a rule allowing very large crude tankers to operate in domestic trade without completing a full environmental impact statement ("EIS").¹⁴² The plaintiff asserted that the enactment of the rule without performing a full EIS created a risk of air and water pollution in the areas in which the company and its employees conducted business.¹⁴³ The court found that evidence showing that the plaintiff "uses the affected sea lanes, and would be aggrieved should there be an oil spill, collision or increased air pollution" was adequately specific to meet *National Wildlife Federation's* geographical nexus requirement.¹⁴⁴

VIII. CONCLUSION

National Wildlife Federation's injury in fact requirement represents a limited contribution to standing jurisprudence in the area of environmental litigation. The opinion does little more than reaffirm the standing doctrine established by the Court in prior decisions. If the case further defines standing, it does so only to the extent that it applies the actual injury prerequisite to cases involving land areas and recognizes that recreational use and enjoyment of federal land are among the sorts of interests NEPA was specifically designed to protect.

The Court's procedural requirements and implicit suggestions contain the real implications of the decision for parties to environmental citizen suits. Plaintiffs, both individual and organizational, seeking to invoke the right to sue statutorily, but not unconditionally, granted to them, must be more careful and artful in articulating their claims and drafting their supporting affidavits. Specifically, plaintiffs must aver use and enjoyment of the affected land itself. Claimed use and enjoyment of land "in the vicinity" of the affected area will not suffice. Finally, defendants contesting a citizen suit are well-advised to move for summary judgment rather than dismissal under Rule 12(b). Courts will take a closer look at a plaintiff's allegations when considering a motion for summary judgment and will demand a higher degree of specificity with respect to the injury alleged and the challenged action.

142. *Overseas Shipholding Group, Inc. v. Skinner*, 767 F. Supp. 287, 293 (D.D.C. 1991).

143. *Id.*

144. *Id.*