COMMENT

NEPA and Standing: Halting the Spread of "Slash-and-Burn" Jurisprudence

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INTRODUCTION

Congress passed several landmark environmental statutes in the late 1960s and early 1970s in response to widespread national concern regarding degradation of the environment.[1] Many of these federal statutes address the physical aspects of the environment, such as the air, land, and water.[2] In contrast, the National Environmental Policy Act ("NEPA"),[3] passed in 1969, addresses the federal decision-making process.[4] NEPA's stated purpose seeks to ensure thoughtful decision-making by federal agencies to advance NEPA's goal of coexistence between humans and the environment.[5]

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[1] *See, e.g.*, Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. §§ 1401-1445 (1994) (regulating ocean use and environment); National Environmental Policy Act of 1969 §§ 2-209, 42 U.S.C. §§ 4321-4370d (1994) (establishing comprehensive policies and procedures for protection of environment); Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6987 (1994) (regulating disposal sites).

[2] *See, e.g.*, Surface Mining and Reclamation Act of 1977, 30 U.S.C. § 1201 (1994) (regulating strip mining); Water Pollution Prevention and Control Act, 33 U.S.C. §§ 1251-1376 (1994) (regulating water pollution standards); Clean Air Act Amendments of 1990, 42 U.S.C. §§ 7401-7671 (1994) (regulating air pollution standards).

[3] National Environmental Policy Act §§ 2-209. NEPA has two titles. *See id.* Title I has five sections. *See id.* §§ 101-105. The first section contains the congressional declaration of national environmental policy. *See id.* § 101. The second section deals with cooperation of agencies, reports, availability of information, recommendations, and international and national coordination of efforts. *See id.* § 102. The third section establishes conformity of administrative procedures to national environmental policy. *See id.* § 103. The fourth section addresses additional statutory obligations of agencies. *See id.* § 104. The fifth section states that the policy and goals of NEPA are supplemental to those set forth in existing authorizations of federal agencies. *See id.* § 105.

Title II has nine sections. *See id.* §§ 201-209. The first section directs the President to transmit an annual environmental quality report to Congress. *See id.* §201. The second section creates the Council of Environmental Quality ("CEQ"), an executive agency, and directs it to formulate and recommend national environmental policies. *See id.* § 202. The final seven sections address the CEQ's structure and functions. *See id.* §§ 203-209; *see also* WILLIAM H. RODGERS, ENVIRONMENTAL LAW §§ 9.1-9.9 (2d ed. 1994) (providing detailed history and development of NEPA).

[4] *See* 40 C.F.R. § 1500.1 (1996). Section 1500.1 reads: "The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." *Id.*

[5] *See* National Environmental Policy Act § 2. NEPA has been called the "Sherman Act of environmental law" and "the most famous statute of its kind in the world." *See* RODGERS, *supra* note 3, § 9.1, at 801. For the first time, the federal courts addressed environmental issues with regard to the federal decision-making process. *See id.* NEPA also effectively expanded the scope of judicial review of agency actions, added new values to administrative decision-making, and enhanced Congress's ability to oversee agency actions that impact the environment. *See id.* NEPA has also produced thousands of lawsuits, altered agency practic-

NEPA requires each federal agency to prepare a detailed report for all legislative proposals and other major actions that significantly affect the environment.[6] These environmental impact statements ("EIS") primarily serve two functions. First, the EIS draws an agency's attention to the impact that proposed legislation or projects may have on the environment.[7] Second,

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es, and generated similar assessment statutes at both the state and international levels. *See id.* Depending on the viewpoint, NEPA is either considered the monolith of environmental law or an insignificant paper tiger. *See id.* All of this has been created by one of the shortest environmental statutes ever drafted. *See* Ritchenya Shephard, *The United States' Actions in Antarctica: The Legality, Practicality, and Morality of Applying the National Environmental Policy Act*, 14 GEO. MASON L. REV. 373, 383-84 (1991) (commenting on length and impact of NEPA).

[6] *See* National Environmental Policy Act § 102(2)(C). Section 102(2)(C) requires that "all agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement . . . ." *Id.* The CEQ is the sole overseer of agency compliance with NEPA. *See* RODGERS, *supra* note 3, § 9.1; at 819. Agencies and the Supreme Court give great deference to CEQ regulations and interpretation of NEPA. *See id.* at 819-20. The CEQ promulgated a set of guidelines in 1978 that agencies still follow today. *See id.* at 820. The guidelines cover the entire NEPA process of which the EIS is only one step. *See* 40 C.F.R. §§ 1500.1-1508.28 (defining and expanding NEPA process and language).

The first step of the NEPA process is the environmental assessment. *See id.* § 1508.9. The environmental assessment is a concise document that provides evidence and analysis of "whether to prepare an EIS or a finding of no significant impact." *See id.* The EIS is the "detailed statement" required by section 102(2)(C). *See id.* § 1508.11. The finding of no significant impact is an agency document that explains why an action will not have a significant effect on the environment and why the agency will not prepare an EIS. *See id.* § 1503.13.

Aside from the environmental assessment and the EIS, there are also categorical exclusions, which are categories of actions that do not individually or cumulatively have a significant effect on the environment or on federal agency procedures. *See id.* § 1508.4. Therefore, neither an environmental assessment nor an EIS will be required for a categorical exclusion. *See id.* Categorical exclusions have been applied to activities that are inconsequential and routine or related to matters of law enforcement, litigation, and budget activities. *See* RODGERS, *supra* note 3, § 9.5, at 871 (presenting accepted definitions of categorical exclusions). The agency must justify all categorical exclusions in the record. Additionally, all exclusions are judicially reviewable. *See id.*

A supplement to a draft or final EIS may be prepared for several reasons. *See* 40 C.F.R. § 1502.9(c)(1)-(4). These reasons include making substantial changes in the proposed action that affect the environment or identifying significant new circumstances relevant to environmental consequences that bear on the proposed action. *See id.* § 1502.9(c)(1)(i)-(ii). For a more comprehensive view of the entire NEPA procedural process, see RODGERS, *supra* note 3, §§ 9.1-9.9.

[7] *See* National Environmental Policy Act § 102(2)(C) (requiring EIS for any project that has significant impact on environment); *see also* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989) (holding that primary function of EIS is to inform action

the EIS discloses information that enables the public to play a more active role in the decision-making process.[8]

Although many environmental statutes provide for judicial review, NEPA does not provide a private right of action to contest agency decisions.[9] Instead, environmental groups may challenge the agency's proposed action under the Administrative Procedure Act.[10] However, only the procedural requirements of NEPA are judicially reviewable.[11] Courts will not second-guess the agency's balancing of environmental factors in an EIS.[12]

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agency); Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 97 (1983) (finding that one purpose of NEPA is to place obligation on federal agency to consider environmental impacts); City of Davis v. Coleman, 521 F.2d 661, 670-72 (9th Cir. 1975) (holding that compliance with NEPA is primary duty of every federal agency); 40 C.F.R. § 1502.1 (stating that EIS shall inform decision-makers of environmental impacts and reasonable alternatives that would minimize these impacts).

[8] *See* RODGERS, *supra* note 3, § 9.1, at 814. "Public participation has long been a conspicuous landmark of the NEPA landscape." *See id.* "CEQ procedures strongly endorse a process of public involvement, including notice and public hearings." *See id.* The CEQ also mandates detailed commenting procedures that give the public a role in decision-making by requiring the agency to record and respond to comments. *See id.* Two rationales behind public involvement with NEPA are: agencies function better if exposed consistently to public views, and the public is more accepting of the outcome if they are able to express their views. *See id.*; *see also Methow Valley*, 490 U.S. at 349 (holding that another primary function of EIS is to inform public).

[9] *See* Sierra Club v. Penfold, 857 F.2d 1307, 1315 (9th Cir. 1988) (stating that NEPA does not provide private right of action); Noe v. Metropolitan Atlanta Rapid Transit Auth., 644 F.2d 434, 439 (5th Cir. 1981) (ruling that NEPA has no provision for private right of action).

[10] 5 U.S.C. §§ 701-706 (1994); *see* JOHN H. REESE, ADMINISTRATIVE LAW: PRINCIPLE AND PRACTICE 80 (1995). The Administrative Procedure Act ("APA") has four basic purposes: (1) to keep the public currently informed of the organization, procedures, and rules; (2) to encourage public participation in the rule making process; (3) to prescribe uniform standards for the conduct of formal rule making and adjudicatory procedures; and (4) to restate the law of judicial review. *See id.* Section 702 of APA provides this fourth purpose: it states that "[a] person suffering legal wrong because of an agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statue, is entitled to judicial review thereof." Administrative Procedure Act § 702. The Supreme Court has held that affected environmental concerns are the type of interests protected by a relevant statute, such as NEPA. *See* Lujan v. National Wildlife Fed'n, 497 U.S. 871, 886 (1990). Therefore, an environmental group has standing to bring a NEPA challenge under APA. *See* REESE, *supra*, at 618.

[11] *See* Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989) (stating that judicial enforcement limited to NEPA procedures); *Methow Valley*, 490 U.S. at 350 (holding that only procedural requirements of NEPA can be judicially enforced).

[12] *See* Harold Leventhal, *Environmental Decisonmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 529 (1974) (questioning institutional capacity of courts to rebalance substantive agency decisions).

Therefore, while environmental groups can challenge the procedural adequacy of an EIS, they cannot use the courts to impose or require any particular results.[13]

Before a court can address the merits of a NEPA claim, it must first consider whether it has the power to adjudicate the case.[14] In particular, the standing doctrine determines whether the particular litigant has a sufficient stake to bring suit in an otherwise justiciable controversy.[15] Standing analysis in NEPA cases requires courts to balance two competing policies: excessive interference with agency decisions is balanced against the importance of allowing injured parties to receive their "day in court."[16] Achieving this balance in NEPA lawsuits has proven difficult, resulting in inconsistent standing requirements among the federal circuit courts of appeals.[17] The Court of Appeals for the Ninth Circuit, which liberally allows NEPA litigation,[18] and the Court of Appeals for the District of Columbia Circuit, which carefully circumscribes NEPA litigation due to its concern with excessive interference with agency decisions, illustrate this split.[19]

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[13] *See* RODGERS, *supra* note 3, § 9.4, at 862. Rodgers notes that the limitation on challenging a substantive decision under NEPA never happened. *See id.* At the end of the majority opinion in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), Justice Rehnquist made an observation in dictum: "NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural." *Id.* at 558. This dictum reappeared in *Methow Valley*, with the Court noting that it was "well settled" that NEPA itself does not impose substantive duties mandating particular results. *See* RODGERS, *supra* note 3, § 9.4, at 862. Therefore, the Supreme Court turned a single dictum observation into a well-settled principle of NEPA jurisprudence. *See id.*

[14] *See infra* notes 23-41 and accompanying text (discussing background of justiciability and standing doctrine).

[15] *See* Lawrence Gerschwer, *Informational Standing Under NEPA: Justiciability and the Environmental Decisionmaking Process*, 93 COLUM. L. REV. 996, 1006-07 (1993) (illustrating judicial purpose for standing); *see also* DANIEL R. MANDELKER, NEPA LAW AND LITIGATION § 4.06[1][a], at 4-14 (2d ed. 1997) (noting that purpose of standing is to ensure plaintiff has interest protected by Constitution, statute, or common law).

[16] *See* Bruce B. Varney & George J. Ward, Jr., *Who Can Stand Up for the Environment?: Standing to Challenge Administrative Agency Actions*, 7 ST. JOHN'S J. LEGAL COMMENT. 443, 473 (1991) (presenting conflicting policies of standing analysis in NEPA cases).

[17] *See infra* notes 110-70 and accompanying text (developing circuit split).

[18] *See* Idaho Conservation League v. Mumma, 956 F.2d 1508, 1516 (9th Cir. 1992) (allowing more suits at agency planning stage because agency's plans will eventually injure plaintiff and plaintiff must have standing to challenge at some point).

[19] *See* Florida Audubon Soc'y v. Bensten, 94 F.3d 658, 672 (D.C. Cir. 1996) (restricting

This Comment discusses the confusion regarding standing analysis in NEPA cases and proposes a model solution. Part I examines the history of standing and how courts have applied the standing doctrine to environmental groups. Part II presents the state of the law regarding the differing requirements for NEPA and standing. Finally, Part III proposes a model solution that provides definitive guidelines for standing in NEPA suits.

I. BACKGROUND

With the passage of NEPA, a flood of litigation ensued regarding its interpretation, implementation, and scope.[20] Parties frequently defended against NEPA lawsuits by asserting that the plaintiffs lacked standing.[21] These lawsuits have resulted in an inconsistent development of the standing doctrine for environmental groups.[22]

A. The Constitutional Background and History of Standing

Article III, Section 2 of the United States Constitution confines federal court jurisdiction to "cases and controversies."[23] Federal courts also limit their jurisdiction by invoking the doctrine of justiciability.[24] One justiciability concern is whether plaintiffs have standing to sue.[25] The federal courts have

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standing out of fear that courts will become superagencies and will usurp agency actions).

[20] *See* RODGERS, *supra* note 3, § 9.2, at 817-19. NEPA has an administrative and litigation history unlike that of any other environmental statute. *See id.* There have been hundreds of injunctions, thousands of cases, tens of thousands of EISs, and hundreds of thousands of environmental assessments. *See id.* By 1975, 332 NEPA cases involving 54 injunctions had been completed, and another 332 cases with 65 injunctions were pending. *See id.*

[21] *See, e.g.*, Lujan v. National Wildlife Fed'n, 497 U.S. 871, 881 (1990) (standing used as defense to NEPA lawsuit involving federal land withdrawals); Seattle Audubon Soc'y v. Espy, 998 F.2d 699, 701 (9th Cir. 1993) (standing used as defense to NEPA lawsuit involving logging); City of Davis v. Coleman, 521 F.2d 661, 666 (9th Cir. 1975) (standing used as defense to NEPA lawsuit involving proposed interstate highway overpass).

[22] *See infra* notes 42-109 and accompanying text (elaborating on Supreme Court development of standing for environmental groups).

[23] *See* U.S. CONST. art. III, § 2.

[24] *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 2.12, at 54 (5th ed. 1995) (presenting history of justiciability doctrine).

[25] *See id.* at 71. The other justiciability doctrines are advisory opinions, mootness, collusiveness, ripeness, and finality. *See id.* § 2.12. Current standing law is a relatively recent judicial creation and has an uncertain historic origin. *See, e.g.*, JOSEPH VINING, LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW 55-56 (1978) (noting that standing first appeared

developed three requirements necessary to find that a party has standing: causation, redressability, and injury-in-fact.[26]

Causation requires the plaintiff to demonstrate that the defendant caused the injury.[27] Thus, the injury has to be "fairly traceable" to the defendant's action and not the result of a

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in 1903 case and came into common usage in second half of twentieth century); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 224-28 (1988) (placing origin of modern standing law in 1930s); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 169 (1992) (tracing first reference to standing as Article III limitation to 1944).

Before a comprehensive doctrine of standing emerged, determinations were based on a combination of statutory interpretation and common law assumptions. *See* Fletcher, *supra*, at 226. To present a case in court, the litigant was required to establish a legal interest at issue. *See* Susnstein, *supra*, at 170. The legal interest was derived from constitutional, statutory, or common law. *See id.* at 170-71 (finding sources of standing in Congress, common law, or Article III).

Prior to 1968, the standing doctrine involved courts focusing on the issue to be reviewed. *See* Massachusetts v. Mellon, 262 U.S. 447, 487 (1923). The focus of the standing doctrine then shifted to the party seeking redress. *See* Flast v. Cohen, 392 U.S. 83, 99-101 (1968).

The Supreme Court clarified the test for standing in *Association of Data Processing Service Orgs. v. Camp*, 397 U.S. 150, 151-52 (1970). The Court invalidated the legal interest test, holding that whether a legal interest can be adjudicated is actually an examination of the merits of the case rather than an element of whether the plaintiff can sue. *See id.* at 153. In place of the legal interest test, the Court established the injury-in-fact test. *See* Fletcher, *supra*, at 229-34 (presenting evolution of injury requirement). Later cases expanded the Article III standing analysis with causation and redressability requirements. *See* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976) (establishing redressability requirement); Warth v. Seldin, 422 U.S. 490, 499 (1975) (establishing causation requirement).

[26] *See* NOWAK & ROTUNDA, *supra* note 24, § 2.12, at 71-90 (presenting history and development of standing). There is a fourth standing test created by the Supreme Court: the zone of interests requirement. *See Association of Data Processing Serv. Orgs.*, 397 U.S. at 151-54 (stating that interest sought to be protected must be within zone of interests that statute or constitution aims to protect). A plaintiff must show whether the interest she seeks to protect is arguably within the zone of interest protected or regulated by the statute or constitutional guarantee in question. *See id.* at 154. Commentators criticize this requirement as forcing the courts to judge what Congress's exact motives are. *See, e.g.*, RODGERS, *supra* note 3, § 1.9, at 110. However, the zone of interests requirement has not posed a problem for environmental groups bringing suit under NEPA. *See* Committee to Save the Rio Hondo v. Lucero, 102 F.3d 445, 448 (10th Cir. 1996) (holding that environmental group was within zone of interest of NEPA).

[27] *See* Fletcher, *supra* note 25, at 239 (articulating progression from injury-in-fact requirement to causation requirement); *see also* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976) (presenting traditional causation requirements); National Resources Defense Council, Inc. v. Watkins, 954 F.2d 974, 980 (4th Cir. 1992) (citing Public Interest Research Group, Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 72 (3d Cir. 1990)).

third-party's independent action.[28] Generally, environmental groups easily meet this requirement.[29]

Once causation is established, the plaintiff must also show that the injury is redressable.[30] An injury is redressable if the plaintiff would benefit in a tangible way from the court's intervention.[31] If a favorable court decision would not adequately remedy the injury, then the plaintiff does not satisfy the redressability requirement.[32] Environmental plaintiffs also generally meet the redressability requirement.[33]

To show an injury-in-fact, the plaintiff must have suffered an "actual or imminent" invasion of a legally protected interest.[34] Traditionally, courts defined injury-in-fact as tangible economic, physical, or mental injuries.[35] The new environmental laws, however, have given rise to causes of action where the injuries at issue are not economic but less tangible, such as harm to aesthetic and recreational interests.[36]

One way federal courts have attempted to adapt the traditional notions of standing to NEPA cases is by developing the "geo-

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[28] *See Eastern Ky. Welfare Rights Org.*, 426 U.S. at 41-42. The term "fairly traceable" is a term of art developed by the Supreme Court for causation purposes. *See id; see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-18, at 129-30 (2d ed. 1988) (describing lack of precision with causation requirement and analysis). Commentators have criticized the fairly traceable requirement of causation for severely hindering environmental litigants. *See, e.g.*, RODGERS, *supra* note 3, § 1.9, at 106-07.

[29] *See* Brandon D. Smith, Note, Lujan v. Defenders of Wildlife*: A Slash-and-Burn Expedition Through the Law of Environmental Standing,* 28 U.S.F. L. REV. 859, 869 (1994) (arguing that causation for environmental groups has not proven troublesome).

[30] *See* RODGERS, *supra* note 3, § 1.9, at 107 (stating traditional redressability doctrine).

[31] *See id.*

[32] *See id.* at 109.

[33] *See* MANDELKER, *supra* note 15, § 4.06[3][b], at 4-26. Commentators have criticized the redressability requirement for allowing courts to speculate freely about whether the requested relief would help. *See, e.g.*, RODGERS, *supra* note 3, § 1.9, at 108-09. The redressability requirement gives courts the opportunity to strike down any challenge by environmental groups. *See id.*

[34] *See* Whitmore v. Arkansas, 495 U.S. 149, 155 (1990) (citing Los Angeles v. Lyons, 461 U.S. 95, 102 (1983)).

[35] *See* NOWAK & ROTUNDA, *supra* note 24, § 2.12, at 79 (presenting traditional scope of injury-in-fact).

[36] *See* Sierra Club v. Morton, 405 U.S. 727, 734 (1972) (holding that aesthetic injury is comparable to economic injury for standing analysis); Scenic Hudson Preservation Conference v. Federal Power Comm'n, 354 F.2d 608, 615-16 (2d Cir. 1965) (finding that citizens no longer need to show either economic injury or violation of constitutional right to satisfy injury-in-fact).

graphic nexus test."[37] The courts created this test specifically to analyze alleged injuries resulting from a federal agency's failure to prepare or redraft an EIS.[38] The geographic nexus test requires courts to determine whether there is any connection between the individual asserting the claim and the location suffering an environmental impact.[39] The courts have not clearly defined what constitutes such a connection.[40] If the plaintiff establishes this connection, however, the plaintiff satisfies the injury-in-fact requirement.[41]

B. Supreme Court Development of Environmental Group Standing

The traditional requirement that injuries need to be physical, mental, or economic has had the effect of denying plaintiffs in environmental suits a satisfactory remedy.[42] This traditional

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[37] *See infra* notes 37-41 and accompanying text (introducing origin and rationale of geographic nexus test); *see also* RODGERS, *supra* note 3, § 1.9, at 99-111 (illustrating courts' attempts to mold traditional standing requirements to fit other types of environmental lawsuits).

[38] *See* City of Davis v. Coleman, 521 F.2d 661, 671 (9th Cir. 1975) (creating geographic nexus test for injury-in-fact analysis in NEPA lawsuits).

[39] *See* Daniel A. Farber, *Stretching the Margins: The Geographic Nexus in Environmental Law*, 48 STAN. L. REV. 1247, 1248 n.4 (1996) (defining essence of geographic nexus test). Specifically, a plaintiff needs an interest that is near the proposed project to suffer any environmental consequences of the project. *See City of Davis*, 521 F.2d at 671. Courts originally applied the geographic nexus test to a city challenging an EIS. *See id.* Courts have since expanded the test to environmental groups that used a particular area impacted by an action. *See* Oregon Envtl. Council v. Kunzman, 817 F.2d 484, 491 (9th Cir. 1987) (expanding geographic nexus test to group alleging impact to wildlife area).

[40] *See* Dubois v. United States Dep't of Agric., 102 F.3d 1273, 1280-83 (1st Cir. 1996) (finding geographic nexus between environmental group and area proposed for ski resort expansion); Portland Audubon Soc'y v. Babbitt, 998 F.2d 705, 708 (9th Cir. 1992) (finding geographic nexus between environmental groups and Bureau of Land Management lands on which Bureau proposed timber cutting); *City of Davis*, 512 F.2d at 671 (finding geographic nexus between city and proposed interstate highway overpass outside city limits). However, the First Circuit did not find that an environmental group established a geographic nexus with a particular waterfront area. *See* United States v. AVX Corp., 962 F.2d 108 (1st Cir. 1992).

Success in establishing a geographic nexus depends on a plaintiff's demonstrating, generally through pleadings, that it will be perceptibly harmed. *See* Peter Bucklin, *The Importance of Standing: The Need to Prioritize Standing Review Under the National Environmental Policy Act of 1969*, 3 J. L. & POL'Y 289, 295 (1994) (focusing on what plaintiff needs to show to satisfy geographic nexus test).

[41] *See supra* note 40 (presenting cases where plaintiffs have established geographic nexus).

[42] *See* Smith, *supra* note 29, at 875 (noting lack of adequate remedies for

analysis failed to account for many of the harms resulting from the destruction of nature.[43] Recognizing this failure, the Supreme Court expanded the definition of injury-in-fact in *Sierra Club v. Morton*[44] to allow for injuries to aesthetic and recreational interests, such as "scenery and wildlife."[45]

In *Sierra Club*, the Disney Corporation developed a plan for a ski resort in Mineral King Valley, an area adjacent to Sequoia National Park in California.[46] The Sierra Club brought suit seeking a declaratory judgment that the plan contravened several federal laws.[47] The district court granted a preliminary injunction but the Court of Appeals for the Ninth Circuit reversed, stating that the Sierra Club lacked standing.[48] The Sierra Club appealed and the Supreme Court granted certiorari.[49]

In affirming the Ninth Circuit's decision, the Supreme Court first looked at whether the Sierra Club had suffered an injury-in-fact.[50] The Court held that to suffer an injury-in-fact, the party seeking review must be among the injured.[51] The Court noted that the Sierra Club had failed to allege that the ski resort development would affect any of its members' activities.[52] However, the Court did indicate that if the Sierra Club could show that its members were individually injured, it would have standing.[53] Although the Sierra Club argued it had an interest

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environmental groups).

[43] *See id.*

[44] 405 U.S. 727 (1972).

[45] *See id.* at 734.

[46] *See id.* at 729. At that time Mineral King was in a national forest, so the resort plan was subject to the Forest Service's jurisdiction. *See id.*

[47] *See id.* at 730 n.2. The Sierra Club alleged four violations. First, it claimed that the special use permit for the resort's construction exceeded the maximum-acreage limitation placed on such permits by 16 U.S.C. § 497. *See id.* Second, it contended that the permit for a road through Sequoia National Park violated 16 U.S.C. § 1 and would destroy timber and other natural resources in violation of 16 U.S.C. §§ 41, 43. *See id.* Third, the Sierra Club claimed that the Forest Service and Interior Department had violated their own regulations on public hearings. *See id.* Finally, it alleged that 16 U.S.C. § 45 required congressional authorization for the construction of power transmission lines through a national park. *See id.*

[48] *See id.* at 731.

[49] *See* Sierra Club v. Morton, 401 U.S. 907 (1971).

[50] *See Sierra Club*, 405 U.S. at 731-33.

[51] *See id.* at 734-35.

[52] *See id.* at 735.

[53] *See id.* at 739.

in preventing overdevelopment of Mineral King Valley, this interest was not enough to meet the requirement of an individualized injury.[54] The Court was concerned that if it allowed the Sierra Club standing solely because of a "special interest," then no objective basis would exist to dismiss suits by other bona fide special interest groups or individuals.[55]

Sierra Club discusses two aspects of a relationship that seems to blur at times. First, the decision expands the category of "cognizable interests" by permitting injury-in-fact as applied to aesthetics and environmental well-being.[56] Second, the decision reiterates the requirement that individuals seeking a cause of action must be themselves among the injured.[57] So while the Court was willing to recognize interests such as aesthetics, recreational intests, and environmental well-being, the traditional requirement of individual injury is still intact.

Following *Sierra Club*'s expanded standard for injury-in-fact, courts were content to accept broad individualized allegations of injury from parties that were obviously interested in the outcome.[58] The Supreme Court affirmed the *Sierra Club*'s expanded injury-in-fact requirement in NEPA lawsuits in *United States v. Students Challenging Regulatory Agency Procedure ("SCRAP").*[59] *SCRAP* is the Supreme Court's most liberal holding to date regarding the standing doctrine.[60]

In *SCRAP,* the vast majority of the United States's railroads petitioned the Interstate Commerce Commission ("ICC") for a 2.5% surcharge on most freight rates as an emergency measure to garner increased revenues.[61] The ICC, recognizing a

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[54] *See id.*

[55] *See id.*

[56] *See id.* at 734.

[57] *See id.* at 734-35.

[58] *See* RODGERS, *supra* note 3, § 1.9, at 103. (commenting that environmental groups could easily meet standing requirements).

[59] 412 U.S. 669 (1973).

[60] *See* JACKSON B. BATTLE ET AL., ENVIRONMENTAL DECISIONMAKING: NEPA AND THE ENDANGERED SPECIES ACT 91 (2d ed. 1994) (arguing that *SCRAP* was apex of standing flexibility); RODGERS, *supra* note 3, §1.9, at 104 (contending that *SCRAP* was most liberal grant of standing).

[61] *See SCRAP,* 412 U.S. at 674. The railroads intended the surcharge to produce $246 million annually to cover increasing costs and to bolster inadequate revenues. *See id.* The railroads also pointed to economic indicators, particularly decreasing working capital and increased debt obligations, to highlight an ever-worsening financial condition. *See id.* at 674-

potential financial disaster, approved the surcharge.[62] SCRAP, an unincorporated group of law students, filed suit arguing that the surcharge was illegal.[63] Specifically, SCRAP alleged that the ICC's decision was unlawful due to its failure to prepare an EIS for the rate surcharge.[64] Citing *Sierra Club*, the ICC argued that SCRAP lacked standing.[65]

The district court rejected ICC's argument and granted the injunction.[66] The district court distinguished *Sierra Club* by noting that SCRAP had alleged specific injuries to its members.[67] The District of Columbia Circuit reversed, and the Supreme Court granted certiorari.[68]

The Supreme Court held that SCRAP did have standing.[69] The Court acknowledged that the alleged injury-in-fact was attenuated because it was applicable to all the nation's railroads and was not limited to a specific site.[70] However, the Court reasoned that SCRAP would clearly sustain an injury-in-fact if the allegations in the pleadings were true.[71]

The immediate consequence of the *Sierra Club* and *SCRAP* decisions was to liberalize standing requirements for environ-

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[62] *See id.* at 676. If the ICC had not acted on the issue, the surcharge would have become effective automatically. *See id.*

[63] *See id.* at 678. SCRAP brought suit in the District Court for the District of Columbia, seeking a preliminary injunction to restrain enforcement of the surcharge. *See id.*

[64] *See id.* at 679.

[65] *See id.* at 683-84.

[66] *See id.* at 681.

[67] *See id.* at 681-82.

[68] *See id.* at 682-83.

[69] *See id.* at 690.

[70] *See id.* at 687-88.

[71] *See id.* at 689-90. SCRAP alleged that the surcharge would cause its members economic, recreational, and aesthetic harm. *See id.* at 675-76. Specifically, it alleged that the new rate structure would discourage the use of recyclable materials and would promote use of new raw materials. *See id.* at 676. This would force the group to pay more for finished products, impair their use of forests and streams by the increased destruction of timber and extraction of raw materials, and cause otherwise recyclable materials to accumulate. *See id.*

In his dissent, Justice White contended that the showing of standing was insufficient. *See id.* at 722 (White, J., dissenting). White reasoned that the alleged injuries were too remote and speculative. *See id.* at 723. In fact, White considered the allegations by SCRAP no different from those in *Sierra Club*. *See id.* Moreover, if the allegations were sufficient, the "floodgates" would open and citizens would be allowed to litigate any governmental decisions with which they disagreed. *See id.*

mental groups.[72] Environmental groups easily met the technical requirements of proving that their members used the affected resources and that a defendant's conduct would impact that use.[73] No serious obstacles remained for environmental litigants as long as they were able to show that a defendant caused an injury to an individual member.[74]

C. *Recent Supreme Court Restriction of the Standing Doctrine*

In the aftermath of *Sierra Club* and *SCRAP,* environmental plaintiffs enjoyed a broad grant of standing to challenge agency decisions.[75] Recently, however, the Supreme Court has shown a renewed interest in adopting a more restrictive approach in environmental standing issues.[76] This restrictive approach

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[72] *See* RODGERS, *supra* note 3, § 1.9, at 102 (describing immediate consequences of *Sierra Club* and *SCRAP*).

[73] *See id.* The Sierra Club responded to the technical requirements by alleging that the resort development threatened wilderness areas that certain members used, hiked in, and enjoyed. *See id.* at 209 n.12. In addition, the Sierra Club alleged that its members' pleasures would be compromised by the proposed development. *See id.* The Sierra Club also attached a NEPA claim to its lawsuit. *See id.*

When the Forest Service relased the final EIS in 1976, the EIS effectively terminated the Mineral King project. *See id.* The EIS found several environmental impacts from the development and also recommended that the project be scaled down significantly. *See id.* Disney never built the ski resort. *See id.* As a result, the district court dismissed the Sierra Club's lawsuit without prejudice in 1977. *See id.* The Sierra Club realized its ultimate goal of protecting Mineral King when Congress made the valley part of the Sequoia National park in 1978. *See id.*

[74] *See id.* at 103 (noting most courts accepted general allegations of injury from parties interested in outcome).

[75] *See id.* at 104.

[76] *See* Smith, *supra* note 29, at 877 (noting recent Supreme Court restriction of environmental standing). In 1990, the Supreme Court addressed environmental standing in *Lujan v. National Wildlife Federation,* 497 U.S. 871 (1990). The National Wildlife Federation ("NWF") alleged that the Bureau of Land Management had violated the Federal Land Policy and Management Act of 1976 and the National Environmental Policy Act of 1969 while administering the land withdrawal program. *See id.* at 875. Members of the NWF alleged that the agency's action affected their recreational use and aesthetic enjoyment of land near the withdrawals. *See id.* at 885. The Supreme Court held that since the members could not prove that they actually used the federal lands subject to the withdrawal, they lacked standing. *See id.* The Court held that the members' allegations were insufficient to demonstrate that the withdrawal actually affected their interests. *See id.* The Court determined that since the members failed to establish that they specifically used the lands in question, they could not claim that the withdrawal adversely affected them. *See id.* at 886-89; *see also* Smith, *supra* note 29, at 878 (expanding on impact of *National Wildlife Federation*). The lower courts also began to apply stricter requirements on environmental plaintiffs. *See,*

reached its apex in *Lujan v. Defenders of Wildlife.*[77] *Lujan* places difficult new burdens on environmental groups asserting claims under environmental statutes.[78]

In *Lujan*, the Secretary of the Interior promulgated a rule interpreting section 7 of the Endangered Species Act ("ESA").[79] The new rule rendered section 7 applicable only to agency actions within the United States or on the high seas.[80] One implication of this rule was that federal agencies involved with foreign projects were not required to consult with the Fish and Wildlife Service to determine if the project would affect endangered species.[81] The Defenders of Wildlife and other environ-

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e.g., United States v. AVX Corp., 962 F.2d 108, 119 (1st Cir. 1992) (requiring group members to show distinct and palpable injury to challenge procedural harm under Comprehensive Environmental Response, Compensation, and Liability Act).

Before 1990, the Supreme Court granted review to only two environmental standing cases. *See* Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221 (1986); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978). In *Japan Whaling*, the International Whaling Commission established a zero quota for whale harvesting, but Japan filed a timely objection and was not bound by the quota. *See Japan Whaling Ass'n*, 478 U.S. at 227. Japan then entered an agreement with the United States that allowed Japan to continue harvesting. *See id.* at 227-28. Soon thereafter, environmental groups filed suit to compel the Secretary of Commerce to invalidate the agreement, claiming that Japan had continued to harvest whales despite international conventions that called for a moratorium. *See id.* at 228. The groups contended that continued harvesting would adversely affect their members' opportunities to watch and study whales. *See id.* at 231 n.4. The Court recognized that this was a legitimate interest that satisfied injury-in-fact and granted standing. *See id.*

In *Duke Power*, a power company planned to construct nuclear power plants in both North and South Carolina. *See Duke Power*, 438 U.S. at 67. Environmental groups and a union alleged that the Price-Anderson Act, which limits liability after a nuclear disaster, was unconstitutional. *See id.* The groups asserted that the Act violated the Due Process Clause of the Fifth Amendment, which protects citizens from arbitrary government actions that adversely affect property rights. *See id.* at 69. The groups also argued that in the event of a nuclear disaster, the government would take their property in violation of the Fifth Amendment. *See id.* They claimed that they used the surrounding water for recreation and would suffer apprehension from the fear of radiation. *See id.* at 73. Additionally, the groups alleged that the value of land would decrease. *See id.* The Court found that because construction of a nuclear power plant would have immediate adverse affects, the plaintiffs had standing to assert their claims. *See id.* at 73-74; *see also* Smith, *supra* note 29, at 868-69, 876-77 (elaborating on details and impacts of *Duke Power* and *Japan Whaling*).

[77] 504 U.S. 555 (1992).

[78] *See* Randall S. Abate & Michael J. Myers, *Broadening the Scope of Environmental Standing: Procedural and Informational Injury-in-Fact After* Lujan v. Defenders of Wildlife, 12 UCLA J. ENVTL. L. & POL'Y 345, 347 (1994) (contending that *Defenders of Wildlife* will make environmental lawsuits extremely difficult).

[79] *See Lujan*, 504 U.S. at 557-58; *see also* 16 U.S.C. § 1536 (1994).

[80] *See Lujan*, 504 U.S. at 557-58.

[81] *See id.* at 558-59.

mental groups brought suit arguing that the rule constituted an ESA violation.[82] The Defenders of Wildlife alleged that the federal agencies' lack of consultation would injure members of its group.[83] Specifically, two members of the Defenders of Wildlife alleged that the lack of consultation in foreign projects would lead to the potential demise of endangered species in those areas.[84] This potential demise would injure the members by denying them the chance to directly observe the species in the future.[85] The district court granted the Defenders of Wildlife's motion and ordered the Secretary to publish a revised regulation.[86] The Eighth Circuit affirmed,[87] and the Supreme Court granted certiorari.[88]

The Supreme Court observed that while the desire to observe the animals was a "cognizable interest" that could be injured-in-fact,[89] the Defenders of Wildlife needed to show that its members were among the injured.[90] To do this, the Court maintained that the Defenders of Wildlife had to submit evidence, including specific facts such as its members' travel plans to the areas.[91] The Supreme Court reversed the Eight Circuit,[92]

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[82] *See id.* at 559.

[83] *See* Defenders of Wildlife v. Hodel, 851 F.2d 1035, 1040 (8th Cir. 1988). Specifically, the Defenders of Wildlife alleged that its members would be harmed by the Mahaweli Water Project in Sri Lanka, funded by the Agency for International Development, and the Aswan High Dam project in Egypt, funded by the Bureau of Reclamation. *See id.* at 1041-42. One member, Amy Skilbred, had traveled to Sri Lanka to observe the Asian elephant and the leopard at the present site of the dam and had plans in the future to return. *See Lujan*, 504 U.S. at 563. Another member, Joyce Kelly, had traveled to Egypt to observe the habitat of the Nile crocodile and intended to do so again, hoping to observe the crocodile directly. *See id.*

[84] *See Lujan*, 504 U.S. at 563.

[85] *See id.*

[86] *See id.* at 559. Initially, the district court granted the Secretary's motion to dismiss for lack of standing. *See* Defenders of Wildlife v. Hodel, 658 F. Supp. 43, 48 (D. Minn. 1987). The Secretary appealed and the Eighth Circuit reversed and remanded. *See Hodel*, 851 F.2d at 1044. On remand, the Secretary moved for summary judgment on standing and the Defenders of Wildlife moved for summary judgment on the merits. *See* Defenders of Wildlife v. Hodel, 707 F. Supp. 1082, 1083 (D. Minn. 1989), *rev'd*, 911 F.2d 117 (8th Cir. 1990), *rev'd sub nom.* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

[87] *See Hodel*, 911 F.2d at 125.

[88] *See* Lujan v. Defenders of Wildlife, 500 U.S. 915 (1991).

[89] *See Lujan*, 504 U.S. at 562-63.

[90] *See id.* at 563 (citing Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972)).

[91] *See id.* at 563-64. The Court also found that no facts showed how damage to the species would produce imminent injury to the members. *See id* at 564. "Someday"

holding that the Defenders of Wildlife failed to show an actual or imminent injury; thus, the group lacked standing.[93]

In addition to finding an inadequate injury-in-fact, the Court also ruled that there was a lack of redressability.[94] The Court noted that the Defenders of Wildlife was challenging the Secretary's regulation not to require consultation as opposed to the decisions to fund the foreign projects.[95] Even had the Court ordered the Secretary to rewrite the regulation to require consultation, it was unclear whether the regulation would bind the agencies in question.[96] Because those agencies were not parties to the litigation, the Court concluded that it could not adequately redress the members' injuries.[97]

The Eighth Circuit had also asserted an alternative ground for standing — procedural injury.[98] Specifically, the court held that

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intentions, without a description of concrete plans, were not enough to support a finding of the required actual or imminent injury. *See id.* The Court rejected the Defenders of Wildlife's three novel nexus arguments for injury-in-fact. *See id.* at 565-67. The first argument was the "ecosystem nexus," which allowed a person using any part of an ecosystem threatened by a federally funded agency's activity to assert injury-in-fact. *See id* at 565-66. The Court held that this was inconsistent with *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), which required a plaintiff claiming injury to use the area affected by the challenged activity. *See id.* The second argument was the "animal nexus," which gave standing to any person studying the threatened animal. *See id.* at 566. The third and final argument was the "vocational nexus," which gave standing to any person with a professional interest in the particular endangered species. *See id.* These two arguments were rejected as being too attenuated and uncertain. *See id.* at 566-67. Justice Scalia found all three of these theories to be "beyond all reason" and going "beyond the limit . . . into pure speculation and fantasy." *See id.*

[92] *See id.* at 578. The decision was seven to two, with Justice Scalia writing the majority opinion. *See id.* at 556-57.

[93] *See id.* at 563-71.

[94] *See id.* at 568.

[95] *See id.* Even if the Defenders of Wildlife had been successful in its claim, the district court could only require the Secretary to revise his regulations. *See id.*

[96] *See id.* Federal agencies are not obliged to consult with the Secretary about endangered species. *See id.* at 568-69. Ordering the Secretary to revise the regulations requiring consultation would not necessarily lead to suspension of those projects. *See id.*

[97] *See id.* at 569.

[98] *See* Defenders of Wildlife v. Hodel, 911 F.2d 117, 121-22 (8th Cir. 1990), *rev'd sub nom. Lujan*, 504 U.S. 555. The court interpreted the citizen-suit provision of ESA to allow standing on a procedural injury. *See id.* The citizen-suit provision allows any person to commence a civil suit to enjoin any person or agency that is in alleged violation of the statute. *See id.* at 555-56. The court held that anyone can file suit in federal court to challenge the Secretary's failure to follow the correct consultive procedure even though no discrete injury flows from this failure. *See id.*

the Defenders of Wildlife satisfied the injury-in-fact requirement because Congress conferred upon it a right to have the executive branch follow legally required procedures.[99] However, the Supreme Court rejected this view, finding no congressional conferral of this abstract right.[100] In addition, the Court also held that plaintiffs never have standing to challenge purely procedural injuries.[101] The Court did note, however, that when Congress does accord procedural rights to people to protect their interests, they can assert those rights without meeting the traditional standards for redressability.[102]

The Court's discussion of procedural injuries only contributed to the existing confusion and uncertainty surrounding standing requirements for NEPA claims.[103] The Court held that plaintiffs do not have standing to challenge a purely procedural decision.[104] However, in dicta, the Court distinguished procedural injuries resulting from a NEPA violation from other purely procedural injuries.[105] Procedural injuries under NEPA involve the failure to follow procedures designed to evaluate environmental consequences of governmental action.[106]

II. STATE OF THE LAW

In *Sierra Club* and *SCRAP*, the Court applied liberal standing requirements to all environmental suits, including those brought under NEPA.[107] Yet *Lujan* restricted the requirements, indicating that standing was not as broad as the Court previously

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[99] *See Lujan*, 504 U.S. at 573.

[100] *See id.*

[101] *See id.* at 573-74.

[102] *See id.* at 572-73. The opinion presented a hypothetical to elaborate this point. *See id.* at 572 n.7. One living adjacent to a proposed dam has standing to challenge the failure to prepare an EIS even though it is uncertain whether the statement will affect the outcome of the dam. *See id.* By comparison, the Defenders of Wildlife wanted procedural rights for those who have no affected concrete interests — the equivalent of those people who live or anticipate living at the other end of the country from the dam. *See id.*

[103] *See id.* at 572.

[104] *See id.* at 573-74.

[105] *See id.* at 572.

[106] *See* Friends of the Earth v. United States Navy, 841 F.2d 927, 931 (9th Cir. 1988) (clarifying procedural injury under NEPA), *modified*, 850 F.2d 599 (9th Cir. 1988); *see also* City of Davis v. Coleman, 521 F.2d 661, 671 (9th Cir. 1975) (elaborating on procedural injury resulting from NEPA).

[107] *See supra* notes 44-74 and accompanying text (discussing *Sierra Club* and *SCRAP*).

held.[108] Thus, the Supreme Court's handling of standing in NEPA lawsuits has provided limited guidance for lower courts.[109]

The uncertainty regarding NEPA standing jurisprudence resulted in a circuit split between the Court of Appeals for the District of Columbia Circuit and the Court of Appeals for the Ninth Circuit.[110] In *Florida Audubon Society v. Bensten,*[111] the District of Columbia Circuit used a strict interpretation of injury-in-fact and causation to deny a NEPA challenge.[112] Conversely, in *Idaho Conservation League v. Mumma,*[113] the Ninth Circuit used a broad interpretation of injury-in-fact and causation to allow a NEPA challenge.[114]

A. Florida Audubon Society v. Bensten

In *Florida Audubon Society,* the United States Secretary of the Treasury expanded a tax credit for alternative fuels to include gasoline and corn alcohol blends.[115] The Florida Audubon Society ("the Society") sued to permanently enjoin enforcement of the rule and to require the Secretary to prepare an EIS.[116] Upon review of cross-motions for summary judgment, the district court concluded that the plaintiffs lacked standing.[117] The district court dismissed as speculative the Society's argument that the credit would stimulate crop production.[118] The court also questioned the Society's contention that expanded production

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[108] *See supra* notes 77-106 and accompanying text (discussing *Lujan*). *Lujan* involved ESA, not NEPA. *See Lujan,* 504 U.S. at 557-58. In dicta, the Court seemed to imply its restriction of injury-in-fact did not apply to NEPA lawsuits. *See id.* at 572 n.7.

[109] *See supra* notes 44-106 and accompanying text (presenting Court's development of environmental standing).

[110] *See infra* notes 111-70 and accompanying text (developing circuit split).

[111] 94 F.3d 658 (D.C. Cir. 1996).

[112] *See infra* notes 115-46 and accompanying text (highlighting *Florida Audubon Society*).

[113] 956 F.2d 1508 (9th Cir. 1992).

[114] *See infra* notes 147-61 and accompanying text (highlighting *Idaho Conservation League*).

[115] *See Florida Audubon Soc'y,* 94 F.3d at 662. Specifically, the corn alcohol for this tax credit was ethyl tertiary butyl ether ("ETBE"). *See id.* ETBE is used as a fuel additive to create a cleaner burning fuel. *See id.*

[116] *See id.*

[117] *See id.*

[118] *See id.* at 683. Corn production is essential to make ethanol from which ETBE is derived. *See id.* at 676.

would result in increased environmental dangers to regions that border wildlife areas that its members used.[119] Accordingly, the district court granted summary judgment for the Secretary.[120]

On appeal, a divided District of Columbia Circuit panel reversed.[121] The majority held that the Society's claims that increased corn production might affect specific wildlife areas were sufficient to satisfy the geographic nexus test.[122] The court also found that the Society demonstrated causation because an EIS might prompt the Secretary to rescind or modify the credit.[123]

After a petition of rehearing en banc, the District of Columbia Circuit agreed to review the issue of standing.[124] The District of Columbia Circuit reversed and established standing requirements that assures courts will only hear EIS suits where a plaintiff has a cognizable interest and where the court can grant relief.[125] The court held that plaintiffs must show that their particularized environmental interest will suffer "demonstrably increased risk from the challenged action."[126] The court also held that the demonstrated particularized injury has to be "fairly traceable" to the agency's act allegedly implicating the EIS.[127] Finally, the challenged act has to be "substantially probable" to cause the particularized injury.[128]

To meet these standards, the Society sought to demonstrate that the tax credit posed a demonstrably increased risk of injury

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[119] *See id.* at 662.

[120] *See id.* at 662-63.

[121] *See id.* at 663.

[122] *See* Florida Audubon Soc'y v. Bensten, 54 F.3d 873, 880-83 (D.C. Cir. 1995). As discussed in Part I, this test requires the court to look at the physical connection between an individual and an affected location. *See supra* notes 37-41 and accompanying text (outlining geographic nexus test).

[123] *See Florida Audubon Soc'y*, 54 F.3d at 882.

[124] *See* Florida Audubon Soc'y v. Bensten, 64 F.3d 712 (D.C. Cir. 1995). The en banc procedure is intended, in the unusual case to which it is suited, to avoid conflicts within a circuit and to promote finality of decisions in the courts of appeal. *See* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 3, at 11 (5th ed. 1994). A majority of active judges in a circuit may grant a rehearing en banc. *See id.* An en banc court consists of all active judges in that circuit or, in the case of the Ninth Circuit, a number prescribed by law. *See* 28 U.S.C. § 46(c) (1994).

[125] *See Florida Audubon Soc'y*, 94 F.3d at 666-68.

[126] *See id.* at 665.

[127] *See id.* at 666.

[128] *See id.*

to the particular wildlife areas it enjoyed.[129] Specifically, the Society alleged that the tax credit would encourage farmers throughout the United States to increase production.[130] By implication, farmers near the wildlife areas at issue would also increase production.[131] The Society argued that this increase in production would increase agricultural pollution, resulting in environmental harm to the wildlife areas.[132]

The District of Columbia Circuit, however, found this argument too speculative to permit standing.[133] The court held that the Society's evidence that farmers near the particular wildlife areas would react to the tax credit was not persuasive.[134] Moreover, the Society did not adequately demonstrate a geographic nexus to any asserted environmental injury; therefore, it lacked standing.[135]

The District of Columbia Circuit then addressed the causation requirement.[136] For EIS suits, the court held that an adequate causal chain must satisfy two elements.[137] First, the omitted EIS must be related to potentially inadequate government decisionmaking.[138] Second, the decision at issue must be traceable to the plaintiff's particularized injury.[139]

Applying this standard to the facts of *Florida Audubon Society*, the District of Columbia Circuit found that the failure to prepare an EIS was sufficiently related to the decision to approve the tax credit.[140] However, the court could not trace the alleged injury to the passage of the tax credit.[141] It found that the chain of causation from the tax credit to the agricultural pollution of wildlife areas was too protracted.[142] Accordingly,

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[129] *See id.* at 667.
[130] *See id.* at 667-68.
[131] *See id.*
[132] *See id.*
[133] *See id.* at 668.
[134] *See id.*
[135] *See id.*
[136] *See id.*
[137] *See id.*
[138] *See id.*
[139] *See id.* at 668-69.
[140] *See id.*
[141] *See id.* at 669-70.
[142] *See id.* at 670. The court determined that several of the links were either uncertain or too speculative. *See id.* Most of the links depended on imprecise allegations, and the

the court affirmed the district court's ruling of summary judgment based on lack of standing.[143]

The major impact of the District of Columbia Circuit ruling is that it places strict standing requirements on NEPA suits.[144] The court now requires plaintiffs to establish the nature and likelihood of the alleged injury.[145] Essentially, the court shifts the burden by demanding that plaintiffs conduct the same environmental inquiry that they argue the federal agency should undertake.[146]

B. Idaho Conservation League v. Mumma

In sharp contrast to the District of Columbia Circuit's strict interpretation of standing in NEPA cases is the Ninth Circuit's liberal application of standing.[147] In *Idaho Conservation League*,[148] the Idaho Conservation League ("ICL") and five

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court refused to allow predictive assumptions to establish standing. *See id.* The court determined that a greater number of uncertain links decreases the likelihood that the entire chain will remain intact. *See id.*

[143] *See id.* The court concluded by reminding the Society that the federal judiciary is neither a back seat Congress nor a superagency that rules on all other agency decisions. *See id.* at 672. The court added that the Society cannot use the courthouse to pursue their goal of environmental protection. *See id.* Finally, the court held that the Society failed to establish an injury to a particularized interest and failed to show that the tax credit would cause an injury. *See id.*

[144] *See id.* at 675 (Rogers, J., dissenting) (contending that majority opinion created such heavy evidentiary burden to establish standing that bringing NEPA challenge was virtually impossible).

[145] *See id.* at 679.

[146] *See* City of Davis v. Coleman, 521 F.2d 661, 671 (9th Cir. 1975) (holding excessive factual requirements force plaintiffs to do federal agency's work).

[147] *See* Susan L. Gordon, *The Ninth Circuit Standing Requirements for Environmental Organizations*, 13 J. ENERGY NAT. RESOURCES & ENVTL. L. 264, 270 (1993) (noting that Ninth Circuit standing requirements are liberal compared to other circuits).

[148] The final *Idaho Conservation League* decision came out on May 6, 1992, more than a month before *Lujan*. The Eighth Circuit has questioned the viability of the *Idaho Conservation League* decision as a result of its timing. *See* Sierra Club v. Robertson, 28 F.3d 753, 760 (8th Cir. 1994). However, two subsequent Ninth Circuit cases dealing with standing and NEPA have answered the viability question. *See* Portland Audubon Soc'y v. Babbitt, 998 F.2d 705 (9th Cir. 1992); Seattle Audubon Soc'y v. Espy, 998 F.2d 699 (9th Cir. 1993). These companion cases involved challenges to the Forest Service's decision to log near spotted owl habitats. *See Portland Audubon Soc'y*, 998 F.2d at 707; *Seattle Audubon Soc'y*, 998 F.2d at 701. The Forest Service contended that *Lujan* materially altered previous standing principles and required dismissal of the suits. *See Portland Audubon Soc'y*, 998 F.2d at 707; *Seattle Audubon Soc'y*, 998 F.2d at 702. The Ninth Circuit rejected this contention and held that the *Idaho Conservation League* definitions of standing for NEPA cases were

other environmental organizations challenged a Forest Service decision not to designate forty-three roadless areas as wilderness.[149] Specifically, the ICL claimed that the Forest Service failed to fully examine the environmental impact of its decision and to explore reasonable alternatives.[150] The district court granted summary judgment for the defendants based in part on its determination that the ICL lacked standing.[151] On appeal, the Ninth Circuit held that the ICL did have standing, but affirmed the district court's ruling on the merits.[152]

The Ninth Circuit first looked to NEPA itself to determine whether an injury occurred.[153] NEPA requires that agencies consider all reasonable alternatives before making a decision affecting the environment.[154] The ICL alleged that an inadequate EIS created a risk that environmental impacts might be overlooked.[155] The Ninth Circuit agreed and held that the ICL alleged a harm that Congress had acknowledged, thereby satisfying the injury-in-fact requirement.[156]

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compatible with the dicta in *Lujan*. *See Portland Audubon Soc'y*, 998 F.2d at 708; *Seattle Audubon Soc'y*, 998 F.2d at 703; *see also* Resources Ltd. v. Robertson, 35 F.3d 1300, 1302-03 (9th Cir. 1994) (noting continued validity of *Idaho Conservation League*); Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1351-55 (9th Cir. 1994) (following reaffirmance of *Idaho Conservation League*).

[149] *See* Idaho Conservation League v. Mumma, 956 F.2d 1508, 1510 (9th Cir. 1992).

[150] *See id.* at 1512.

[151] *See id.* at 1513. The district court had two alternative rulings. First, the court ruled that the plaintiffs were barred from litigating claims they failed to raise at the administrative level. *See id.* Second, on the merits, the court ruled that the Forest Service had adequately complied with all relevant regulations. *See id.* at 1519-23.

[152] *See id.* at 1523. The ICL's suit consisted of two objections to the Forest Service's EIS and record of decision. *See id.* at 1519. First, it argued that the impact statement failed to reveal or consider the ICL's recommended alternative. *See id.* That alternative involved logging the agency's preferred amount of timber from previously developed lands and designating currently roadless areas as wilderness. *See id.* Second, the ICL argued that regulations required the Forest Service to reveal the value of the timber it proposed to harvest on the roadless areas. *See id.* The Ninth Circuit noted that the Forest Service did consider the ICL's alternative, although not with the extensive detail required in an EIS. *See id.* at 1522. Therefore, the Forest Service did meet NEPA's procedural requirements. *See id.* The court also held that there was no precedent or statute that required the Forest Service to reveal the value of the roadless area timber. *See id.* at 1522-23. The court concluded that the district court's holding on standing was in error but the decision on the merits was correct. *See id.* at 1523.

[153] *See id.* at 1514.

[154] *See id.*

[155] *See id.*

[156] *See id.* at 1516.

The Ninth Circuit focused next on causation.[157] The court held that the ICL would have standing only if it could show that the agency's alleged misconduct caused its injury.[158] The ICL's asserted injury was that the Secretary of Agriculture might overlook the environmental consequences of his decision without an acceptable EIS.[159] The court ruled that this injury would not have occurred but for the Secretary of Agriculture's decision not to redraft the EIS.[160] Therefore, the court ruled that causation existed between the Secretary's decision and the potential injury.[161]

C. *The Circuit Differences*

In NEPA challenges, the District of Columbia Circuit and the Ninth Circuit differ on the evidentiary burden required to show injury-in-fact and causation.[162] The District of Columbia Circuit requires plaintiffs to show that a demonstrably increased risk of serious environmental harm actually threatens a particular interest.[163] Plaintiffs must provide evidence that the defendants will act in a fashion that leads to further environmental degradation.[164] Without this evidence, plaintiffs fail to demonstrate a geographic nexus to any environmental injury.[165]

On the other hand, the Ninth Circuit requires plaintiffs to show that the federal agency might overlook environmental consequences as a result of deficiencies in the analysis.[166] To establish a geographic nexus, plaintiffs must show that the agency's action will threaten their members' use and enjoyment of the lands within the particular action area.[167] Both circuits

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[157] *See id.* at 1517.

[158] *See id.*

[159] *See id.* at 1518.

[160] *See id.*

[161] *See id.*

[162] *See infra* notes 163-70 and accompanying text (examining circuits' differing standing analyses).

[163] *See* Florida Audubon Soc'y v. Bensten, 94 F.3d 658, 667 (D.C. Cir. 1996).

[164] *See id.* The environmental degradation must present a demonstrably increased risk to a particular area of enjoyment. *See id.* A marginal increase in degradation will not be sufficent to show a harm to enjoyment. *See id.*

[165] *See id.*

[166] *See Idaho Conservation League*, 956 F.2d at 1514.

[167] *See id.* at 1517. Plaintiffs do not have to show how third parties would act. *See id.* at

have similar causation standards — in each circuit plaintiffs must show that the injury is fairly traceable to the agency action at issue.[168] The circuits diverge on the injury itself and on which specific agency decision causes it. The District of Columbia Circuit requires plaintiffs to show that the agency's proposed action will cause environmental impacts.[169] In contrast, the Ninth Circuit requires plaintiffs to show that the agency's refusal to draft or redraft an EIS will cause the agency to overlook environmental impacts.[170] This split in methodology demonstrates the uncertainty of standing within the scope of NEPA.

III. PROPOSED SOLUTION

The circuit split demonstrates the Supreme Court's failure to adequately guide the lower courts on how to evaluate standing in NEPA lawsuits.[171] Congress enacted NEPA specifically to ensure that the federal decision-making process considered environmental impacts.[172] Violation of NEPA is more than a purely procedural injury — it is a procedural injury with the potential for substantive consequences.[173] Accordingly, consistent realization of NEPA's goals requires consistent standing requirements.[174]

This Comment addresses this need for consistency with a proposed solution that recommends statutory definitions for injury-in-fact, causation, and redressability.[175] The federal

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1514. It is enough that the faulty EIS would not consider possible environmental impacts that might have been recognized or prevented. *See id.*

[168] *See Florida Audubon Soc'y*, 94 F.3d at 669; *Idaho Conservation League*, 956 F.2d at 1517.

[169] *See Florida Audubon Soc'y*, 94 F.3d at 668. The District of Columbia Circuit found that several links were too uncertain and speculative to adequately show that the tax credit would cause the environmental harm. *See id.* at 670.

[170] *See Idaho Conservation League*, 956 F.2d at 1517.

[171] *See supra* notes 110-70 and accompanying text (developing circuit split).

[172] *See* National Environmental Policy Act of 1969 § 101, 42 U.S.C. § 4331 (1994) (declaring national environmental policy).

[173] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 572 (1992).

[174] *See id.* at 572 n.7.

[175] *See infra* notes 184-208 and accompanying text (presenting proposed statutory solution). Justice Kennedy, in his concurrence in *Lujan*, contended that Congress has the power to define injuries and to articulate causation to give rise to a case or controversy. *See Lujan*, 504 U.S. at 580 (Kennedy, J., concurring). When Congress speaks, either explicitly

common law has failed to provide a consistent set of requirements for the federal courts to follow in NEPA cases.[176] Only with statutory definitions will federal courts have the necessary guidelines to consistently decide NEPA standing issues.[177]

A. *Injury-in-Fact*

As discussed in Part I, the federal courts' response in NEPA cases to the injury-in-fact requirement was the geographic nexus test.[178] Both the Ninth Circuit and the District of Columbia Circuit employed this test in their injury-in-fact analyses.[179] However, the geographic nexus test has two major shortcomings. First, rigid geographic tests unnecessarily burden environmental plaintiffs and defendants.[180] Having a physical connection with an affected area does not necessarily correlate with being genuinely harmed.[181] Strict geographic formalism creates the situation where a genuinely harmed plaintiff, who does not have a physical connection with an affected area, cannot bring suit.[182] Second, the use of the geographic nexus test, along with the inherent uncertainties in causation and redressability, could potentially render significant agency actions unreviewable.[183]

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or implicitly, the Supreme Court has generally accepted Congress's decision to confer standing to litigate statutory claims. *See* NOWAK & ROTUNDA, *supra* note 24, § 2.12, at 77. Although the Supreme Court has shown concern with Article III standing requirements, the doctrine of standing remains largely prudential. *See* Gerschwer, *supra* note 15, at 1033. The constitutionality of defining "constitutional" standing in a statute is a concern. *See, e.g.*, Robert B. June, *The Structure of Standing Requirements for Citizens Suits and the Scope of Congressional Power*, 24 ENVTL. L. 761, 793-99 (1994) (discussing appropriateness of Congress defining and creating standing for plaintiffs in statutes). However, that concern is beyond the scope of this Comment.

[176] *See supra* notes 44-170 and accompanying text (presenting circuit split and inadequate common law for NEPA standing).

[177] *See* JAMES WILLARD HURST, DEALING WITH STATUTES 1-29 (1982) (discussing purpose and relationships of statutes and law). Statutes directly embody governing standards and rules for major sectors of life in society. *See id.* at 1. Statutes provide the legitimizing base and structure for the sweep of executive and administrative rules and orders. *See id.* Statutes have preempted the common law in the governance of several important areas of policy, including the conservation of natural resources. *See id.* at 5.

[178] *See supra* notes 37-41 and accompanying text (illustrating geographic nexus test).

[179] *See* Florida Audubon Soc'y v. Bensten, 94 F.3d 658, 668 (D.C. Cir. 1996); Idaho Conservation League v. Mumma, 956 F.2d 1508, 1516-17 (9th Cir. 1992).

[180] *See Lujan*, 504 U.S. at 595 (1992) (Blackmun, J., dissenting).

[181] *See id.*

[182] *See id.*

[183] *See* Gerschwer, *supra* note 15, at 1018-19 (challenging usefulness of geographic nexus

This Comment's proposed statutory definition for injury-in-fact attempts to relieve some of the rigidity by expanding the possible connecting factors beyond pure geography.[184] The proposed definition essentially elaborates on the factors that the Supreme Court noted in *Sierra Club*.[185] Accordingly, the definition for injury-in-fact for NEPA should read:

> The plaintiff satisfies the injury-in-fact requirement if the plaintiff can show a reasonable relationship (economic, recreational, aesthetic, or otherwise) to the area that the proposed action will potentially affect.

Although the District of Columbia Circuit viewed *Lujan* as altering injury-in-fact analysis for NEPA cases, the dicta in *Lujan* suggests the Supreme Court did not intend to change standing requirements in NEPA cases.[186] Therefore, because the *Lujan* Court did not materially change the requirement, this definition restates the injury-in-fact requirement as it was prior to *Lujan*.[187]

One possible criticism of this definition is that it is too permissive and will allow plaintiffs to bring generalized grievances into the courts.[188] By allowing these generalized grievances, the courts may threaten the separation of powers by unduly interfer-

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for NEPA claims). In fact, most environmental groups have attempted to avoid the rigidity of the geographic nexus test by alleging an "informational injury." *See* Competitive Enter. Inst. v. National Highway Traffic Safety Admin., 901 F.2d 107 (D.C. Cir. 1990). In *Competitive Enterprise*, environmental groups challenged the National Highway Transportation Safety Administration's decision not to lower the minimum corporate average fuel economy. *See id.* at 110-11. The court noted that injury to an organization's ability to disseminate information can support standing if the information is essential to the organization's activities and lack of information would render those activities infeasible. *See id.* at 122. As a result, the plaintiff must assert a plausible link between the agency's action, the informational injury, and the organization's activities. *See id.* The court also recognized that informational injury claims have particular force when asserted under NEPA and do not require further inquiry into causation and redressability. *See id.* The court determined that any infringement on the right to information created by NEPA constitutes a cognizable injury. *See id.* After *Lujan*, the usefulness and viability of standing based on an informational injury appears to be suspect. *See Lujan*, 504 U.S. at 572.

[184] *See supra* at 180-83 and accompanying text (presenting rigidity of geographic nexus).

[185] *See* Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972).

[186] *See supra* note 108 and accompanying text (suggesting that *Lujan* did not alter standing requirements for NEPA lawsuits).

[187] *See supra* note 185 and accompanying text (noting that proposed definition returns to *Sierra Club* standard).

[188] *See Lujan*, 504 U.S. at 573-74.

ing with the other two branches of government.[189] This is a valid concern when litigants attempt to transform constitutional provisions into judicially enforceable proscriptions on government action.[190] However, the judiciary's role differs dramatically when administrative adherence to the law is at stake.[191] In these cases, judicial review actually reinforces the separation of powers by ensuring that agencies comply with NEPA's legislative mandate.[192]

Use of judicial review is particularly relevant in the NEPA context where Congress sought to advance substantive goals by imposing procedural requirements.[193] In NEPA cases, plaintiffs cannot challenge the ultimate wisdom of a decision.[194] Rather,

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[189] *See id.* at 573-78 (discussing standing as limitation to protect separation of powers); Florida Audubon Soc'y v. Bensten, 94 F.3d 658, 672 (D.C. Cir. 1996) (holding that excessive judicial interference with agencies threatens separation of powers); *see also* Gerschwer, *supra* note 15, at 1029 (developing separation of powers concerns). Originally, the Supreme Court held that standing does not raise separation of powers problems. *See id.* However, the Court departed from this view and noted that standing involves a single basic idea: the separation of powers. *See id.* Two very different understandings of separation of powers underlie the Supreme Court's analysis. *See id.* One theory of separation of powers seeks to preclude courts from entertaining challenges to legislation in order to preserve the outcomes of the democratic process. *See id.* The second theory attempts to insulate the executive branch from judicial challenges based on alleged noncompliance with statutory mandates. *See id.*

[190] *See* Gerschwer, *supra* note 15, at 1033 (arguing that some judicial restraint is necessary).

[191] *See id.* By insulating the executive branch from judicial review, the courts may actually be restricting the democratic process. *See id.* at 1029. Judicial review of agency action is one of several means of ensuring democracy in an increasingly bureaucratic state. *See id.* Judicial review recognizes a competing aspect of the constitutional framework — checks and balances. *See id.* Restricting access to the courts increases the dangers of inadequate checks and balances on agency actions by permitting uncontrolled bureaucracy, regulatory capture, uneven bargaining power on the part of objects and beneficiaries, and general lack of public accountability. *See id.* at 1036; *see also* Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1239-41, 1254 (1989) (noting judicial review serves to reduce problems of bureaucratic noncompliance with legislative will); Jonathan Poisner, *Environmental Values and Judicial Review After* Lujan*: Two Critiques of the Separation of Powers Theory of Standing*, 18 ECOLOGY L.Q. 335, 392-93 (1991) (suggesting separation of powers theory as applied to judicial review appears arbitrary).

[192] *See* Gerschwer, *supra* note 15, at 1036-37 (arguing that judicial review of agency decisions in NEPA context is especially compelling because of substantive goals that Congress sought to advance by imposing procedural requirements).

[193] *See id.* at 1037.

[194] *See* Leventhal, *supra* note 12, at 529 (questioning institutional capacity of courts to rebalance substantive agency decisions).

plaintiffs can only seek to ensure that courts consider all the relevant environmental impacts.[195] Although there is a fear that courts may become a type of superagency,[196] the denial of standing negates Congress's intent when it passed NEPA.[197]

B. Causation and Redressability

Once the plaintiff has established an injury-in-fact, the plaintiff must then demonstrate causation.[198] The *Florida Audubon Society* court found that there was no causation because the causal chain was too attenuated and third-party actions were uncertain.[199] However, the court confused the likelihood of the harm with the cause of the harm.[200]

In NEPA cases, often the alleged harm is that the agency failed to prepare or adequately prepare an EIS. Generally, this results in a decision where the federal agency does not adequately address environmental impacts.[201] The *Florida Audubon Society* court's concern about third-party action was unnecessary because the plaintiff was not challenging the tax credit but rather the decision not to draft an EIS.[202] The court's additional concern about the likelihood of harm is the intended purpose of an EIS evaluation.[203] Accordingly, the causation definition for NEPA should read:

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[195] *See id.*

[196] *See* Florida Audubon Soc'y v. Bensten, 94 F.3d 658, 672 (D.C. Cir. 1996) (expressing concern that courts will become superagencies by constantly reviewing federal agency decisions).

[197] *See id.*

[198] *See* Fletcher, *supra* note 25, at 239 (defining standing process). *See also Florida Audubon Soc'y*, 94 F.3d at 669 (examining causal connection between substantive government action and asserted injury to plaintiff's interest).

[199] *See Florida Audubon Soc'y*, 94 F.3d at 669-70.

[200] *See* Committee to Save the Rio Hondo v. Lucero, 102 F.3d 445, 451 (10th Cir. 1996) (suggesting that *Florida Audubon Society* court confused likelihood of harm with cause of harm).

[201] *See* Idaho Conservation League v. Mumma, 956 F.2d 1508, 1514 (9th Cir. 1992) (defining injury for NEPA suits).

[202] *See Florida Audubon Soc'y*, 94 F.3d at 662.

[203] *See* City of Davis v. Coleman, 521 F.2d 661, 671 (9th Cir. 1975) (holding that strict requirements of likelihood of injury forces plaintiff to do work of agency).

> Causation will be satisfied if the plaintiff can show that potential environmental harm may result from the agency's action and that this potential environmental harm will be addressed in the EIS.

This definition is similar to the general understanding of causation for NEPA before the *Florida Audubon Society* decision.[204] This definition returns the focus of causation analysis to the potential environmental impacts that an EIS would address instead of requiring the plaintiff to prove that the defendant's project is likely to cause those environmental impacts.[205]

The proposed causation definition also covers the redressability requirement. Redressability usually poses no issue in NEPA cases.[206] A court decision requiring an EIS will remedy the plaintiff's injury by ensuring that the agency will consider potential environmental impacts in its decision-making process.[207] Additionally, the court can also enjoin the specific project until the agency meets NEPA's requirements, insuring that the agency's action will not cause any unrealized environmental impacts before the agency prepares the EIS.[208]

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[204] *See* MANDELKER, *supra* note 15, § 4.06[3][a], at 4-24. The defendant need not show causation with exquisite precision as the *Florida Audubon Society* court demanded. *See id.* It is sufficient that an agency could rescind or modify a decision where the environmental consequences are presented in detail by the EIS. *See id.* § 3.03.

[205] *See Committee to Save the Rio Hondo*, 102 F.3d at 451-52 (holding that proper causation analysis in NEPA cases is connection between EIS and environmental impact, not analysis of likelihood of harm).

[206] *See* MANDELKER, *supra* note 15, § 4.06 [3][b], at 4-26; *see also Florida Audubon Soc'y*, 94 F.3d at 674 (Rogers, J., dissenting) (arguing that redressability has never been issue in NEPA lawsuits).

[207] *See* MANDELKER, *supra* note 15, § 4.06[3][b], at 4-26 (demonstrating satisfaction of redressability requirement in NEPA case).

[208] *See id.* The alleged injury in an EIS claim is the risk that a federal agency will overlook an environmental impact. *See* Idaho Conservation League v. Mumma, 956 F.2d 1508, 1514 (9th Cir. 1992). NEPA is not a substantive statute but a procedural one that requires analysis of possible environmental consequences of proposed actions. *See* FREDERICK R. ANDERSON, NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT vii (1973) (defining evolution of NEPA). Therefore, a plaintiff is not required to show that an EIS will modify or cause the agency to retract the original decision. *See Idaho Conservation League*, 956 F.2d at 1518 (holding that plaintiff need not show that EIS will cause retraction of decision); Munoz-Mendoza v. Pierce, 711 F.2d 421, 428 (1st Cir. 1983) (ruling that plaintiff is not required to show EIS will alter decision). The right claimed is to have the agency consider all reasonable alternatives before a decision affecting the environment is made. *See Idaho Conservation League*, 956 F.2d at 1514. If the court requires the drafting or modification of an EIS, the alleged injury of an overlooked envi-

CONCLUSION

With the passage of NEPA, Congress expressed the federal government's intention to behave in an environmentally responsible manner.[209] As a result, the American public is assured that the federal decision-making process will include consideration of the environment.[210] However, when the government does not consider an environmental impact, potentially affected individuals need an avenue of redress. This avenue previously went through the courts.

Recent decisions, however, have given the appearance that courts have closed this avenue to environmental groups.[211] The current status of NEPA standing is confused and uncertain, highlighted by the split between the Ninth Circuit and the District of Columbia Circuit. Federal courts have virtually no guidance on how to determine whether a plaintiff has standing to bring a NEPA claim. The proposed statutory definitions for NEPA's standing requirements will provide that guidance for federal courts.

Matthew William Nelson

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ronmental impact will be redressed. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 572 n.7 (1992) (suggesting relaxed redressability and immediacy requirements for NEPA suits); *Idaho Conservation League*, 956 F.2d at 1518 (defining redressability for NEPA suits).

[209] *See* National Environmental Policy Act of 1969 § 101, 42 U.S.C. § 4331 (1994) (declaring national environmental policy).

[210] *See id.* § 102(C) (establishing what federal government should consider in decision-making process).

[211] *See supra* notes 115-146 and accompanying text (presenting *Florida Audubon Society* as restrictive case for NEPA plaintiffs).