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Who Can Stand Up for the Environment?: Standing to Challenge Administrative Agency Actions

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WHO CAN STAND UP FOR THE ENVIRONMENT?: STANDING TO CHALLENGE ADMINISTRATIVE AGENCY ACTIONS

Public concern for the environment has resulted in substantial legislation aimed at maintaining and improving environmental quality.[1] Administrative agencies, pursuant to authority granted

[1] *See* Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 135-136 (1991) (regulating use, labeling and sale of pesticides); Surface Mining and Reclamation Act of 1977, 30 U.S.C. § 1201 (1992) (regulating surface strip mining); Clean Water Act (Water Pollution, Prevention and Control Act), 33 U.S.C. §§ 1251-1376 (1991) (amended 1972) (regulating water pollution standards); Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. §§ 1401-1445 (1991); National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4361 (1991) (establishing comprehensive policies and procedures for protection of environment); Hazardous and Solid Waste Amendments of 1984 to Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901-6987 (1991) (regulating disposal sites); National Noise Pollution and Abatement Act of 1970, 42 U.S.C. §§ 7401-7642 (1991) (regulating noise pollution levels); Clean Air Act Amendments of 1990, 42 U.S.C. §§ 7401-7671 (1991) (regulating air pollution standards); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, 42 U.S.C. §§ 9601-9657 (1991) (creating superfund for environmental clean up); Nuclear Waste Policy Act of 1982, 42 U.S.C. §§ 10101-10226 (1991) (establishing procedures for storage and disposal of radioactive waste components); State Environmental Quality Review Act (SEQRA), N.Y. ENVTL. CONSERV. LAW §§ 8-0101-0117 (McKinney 1984). *See generally* Stephen M. Reck, Note, *The Expanding Environmental Consciousness of Local Government: Municipalities That Have Banned Styrofoam and the Legal Consequences,* 11 U. BRIDGEPORT L. REV. 127 (1990) (comparing various local ordinances banning styrofoam).

Prior to the enactment of statutes regulating use of the environment, only common law tort actions in nuisance were available to redress plaintiff injury resulting from environmental damage. *See* RESTATEMENT (SECOND) OF TORTS § 821A (1979) [hereinafter RESTATEMENT]. The first recorded case permitting private action in tort was decided in 1536: Anonymous, Y.B. 27, Hen. 8, fo. 26, pl.10 (1536) (tort action maintainable by party who could show he suffered harm, beyond that suffered by public at large or to other members of public exercising the same right).

The tort theory of nuisance is divided into public nuisance and private nuisance. *See* RESTATEMENT, *supra,* § 821A (1979). Public nuisance is an unreasonable interference with a right common to the general public. *See id.* § 821B; *see also* STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 20.5 n.74 cmt. h. (1990) [hereinafter AMERICAN LAW OF TORTS]. A cause of action in public nuisance is usually brought by the government. *See, e.g.,* Tull v. United States, 481 U.S. 412, 421-22 (1987) (public nuisance actionable in equity by sovereign); Keystone Bituminous Coal Ass'n v. DeBenedicitis, 480 U.S. 470, 471 (1987) (public nuisance actionable by government acting on behalf of public). Case law is clear that a private plaintiff cannot recover on a public nuisance theory unless he suffered harm different from that suffered by the general public (special injury). *See, e.g.,* Armory Park Neighborhood Ass'n v. Episcopal Community Servs., 712 P.2d 914, 918 (Ariz. 1985) (injury to plaintiff's interest in land sufficient to distinguish his injuries from those experienced by general public and support standing); Copart Indus., Inc. v. Consolidated Edison Co., 41 N.Y.2d 564, 568, 362 N.E.2d 968, 971, 394 N.Y.S.2d 169, 172 (1977) (normal remedy for public nuisance is action by government; individual must show peculiar injury to have

by Congress and state legislatures,[2] have sought to enforce as well as comply with new environmental laws.[3] As the arena for a multi-

standing); Gibbons v. Hoffman, 203 Misc. 26, 28, 115 N.Y.S.2d 632, 634 (Sup. Ct. Bronx County 1952) (more frequent use of public waters for boating, fishing and bathing not difference in kind); McClellan v. Thompson, 333 A.2d 424, 429 (R.I. 1975) (more frequent use of public highway only relates to difference in degree, not kind, and is therefore insufficient to support standing in nuisance action).

Private nuisance is the non-trespassory invasion of another's interest in the private use and enjoyment of his land. *See* RESTATEMENT *supra*, § 821D. In order for a plaintiff to have standing in a private nuisance action, he must show injury to a right enjoyed by reason of his possessory or ownership interest in land. *Id.* § 821E.

Generally, courts will not adjudge conduct, which normally would constitute nuisance, to be such when it is authorized by statute, ordinance or administrative regulation. *See, e.g.*, Committee for Consideration of Jones Falls Sewage Sys. v. Train, 539 F.2d 1006, 1009 (4th Cir. 1976) (federal court will not impose standards stricter than those provided for in statute); Elliott v. United States Fish & Wildlife Serv., 769 F. Supp. 588, 590 (D. Vt. 1991) (judiciary will not "substitute its own view of the public good"). *See generally* THE AMERICAN LAW OF TORTS, *supra*, § 20:25 (discussing judicial deference to decisions of legislature and its administrative adjuncts). Additionally, the pervasive scheme of government regulation in the environmental area which has developed since the New Deal has provided for statutory remedies, thereby reducing common law review. *See, e.g., Elliott*, 769 F. Supp. at 590 (plaintiffs had no standing to sue under common law theory because Lake Champlain Special Designation Act of 1990 preempted common law). Therefore, as a practical matter, common law challenges to administrative regulatory actions are rare, but still exist both at the federal and state levels. *See, e.g.*, New York v. Shore Realty Corp., 763 F.2d 49, 50 (2d Cir. 1985) (common law public nuisance action not barred by CERCLA); Leo v. General Elec. Co. 145 A.D.2d 291, 293-94, 538 N.Y.S.2d 844, 846 (2d Dep't 1989) (pollution of navigable public waters which causes death to or contamination of fish constitutes public nuisance). For a modern example of common law nuisance actions, see Miles Tolbert, *The Public as Plaintiff: Public Nuisance and Federal Citizens Suits in the Exxon Valdez Litigation*, 14 HARV. ENVTL. L. REV. 511 (1990).

[2] *See, e.g.*, Migratory Bird Conservation Act, 16 U.S.C. § 715 (1992) (creation of Migratory Bird Conservation Commission); Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1731 (1992) (creation of Bureau of Land Management); National Environmental Policy Act of 1969, 43 U.S.C. §§ 4321-4347 (1991) (directing all federal agencies to give major consideration to environmental consequences of their actions and establishing Environmental Protection Agency); California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21000-21094 (West 1991) (declaring legislative intent that all state agencies regulate their activities to prevent environmental damage); CONN. GEN. STAT. ANN. §§ 22a-1 to 22a-27 (West 1985) (creating and empowering Environmental Protection Department); N.J. STAT. ANN. § 13:1D-1 (West 1991) (reorganizing Department of Environmental Conservation and Economic Development as Department of Environmental Protection); N.Y. ENVTL. CONSERV. LAW § 8-0107 (West 1991) (charging all state agencies with responsibility for ensuring compliance with environmental policy); WIS. STAT. ANN. § 1.11 (West 1991) (charging all state agencies with responsibility for compliance with NEPA guidelines).

[3] *See, e.g.*, National Wildlife Fed'n v. Hodel, 839 F.2d 694, 712 (D.C. Cir. 1988) (agency's failure to comply with procedural requirements sufficient to support cause of action); Township of Lower Alloways Creek v. Public Serv. Elec. & Gas Co., 687 F.2d 732, 741 (3d Cir. 1982) (finding of significant environmental impact under NEPA requires agency to prepare environmental impact statement (EIS)); Davis v. Coleman, 521 F.2d 661, 670-72 (9th Cir. 1975) (city alleging procedural injury had standing to challenge failure to issue EIS under NEPA and California Environmental Quality Act); Brew v. Hess, 124

tude of lawsuits challenging compliance with these laws, courts have developed and applied rules of standing to preclude nonmeritorious claims.[4]

Article III of the United States Constitution,[5] as interpreted by federal courts, requires that a party who requests judicial resolution of a case or controversy[6] be injured in fact in order to have standing to bring the lawsuit.[7] As judicially interpreted, the Ad-

A.D.2d 962, 964, 508 N.Y.S.2d 712, 714 (3d Dep't 1986) (State Environmental Quality Review Act incorporates environmental consideration into government decision making); Henrietta v. Department of Envtl. Conservation, 76 A.D.2d 215, 219-22, 430 N.Y.S.2d 440, 445-47 (4th Dep't 1980) (state agencies must consider environmental protection).

[4] *See* Animal Lovers Volunteer Ass'n v. Weinberger, 765 F.2d 937, 938-39 (9th Cir. 1985) (association lacked standing to challenge shooting of goats on Navy property where group had no access to said property); South East Lake View Neighbors v. Department of Hous. & Urban Dev., 685 F.2d 1027, 1034-38 (7th Cir. 1982) (association of community organizations lacked standing to challenge apartment building project when construction almost complete); Donham v. United States Dep't of Agric., 725 F. Supp. 985, 986-88 (S.D. Ill. 1989) (individual lacked standing to challenge timber harvesting in national forest he visited only once); Cane Creek Conservation Auth. v. Orange Water & Sewer Auth., 590 F. Supp. 1123, 1127-28 (M.D.N.C. 1984) (generalized fear of loss insufficient to support plaintiff standing). *See generally* Philip Weinberg, *A Powerful Mandate: NEPA and State Environmental Review Acts in the Courts*, 5 PACE ENVTL. L. REV. 1, 19 (1987) (New York courts have limited standing to challenge agency actions under SEQRA to those who assert environmental injury).

[5] U.S. CONST. art. III, § 2, cl. 1. This clause provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; [and] between Citizens of different States . . . .

Id.

[6] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 11 (1975) (determination of whether case before court presents "case or controversy" within Article III of Constitution must be made at outset); Preiser v. Newkirk, 422 U.S. 395, 401 (1975) (judicial power under Article III requires existence of case or controversy); Benton v. Maryland, 395 U.S. 784, 788 (1969) ("[W]ell settled that federal courts may act only in the context of justiciable case or controversy"); Flast v. Cohen, 392 U.S. 83, 94 (1968) ("judicial power of federal courts is constitutionally limited to 'cases' and 'controversies' "); Baker v. Carr, 369 U.S. 186, 204 (1962) (federal court may not declare statute void "except as it is called upon to adjudge the legal rights of litigants in actual controversies" (quoting Liverpool Steamship Co. v. Commissioners of Emigration, 113 U.S. 33, 39 (1885))); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937) (case before court must be "real and substantial controversy admitting of specific relief through a decree of a conclusive character as distinguished from an opinion advising what the law would be on a hypothetical state of facts"). *See generally* Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 265-70 (1990) (propounding that justiciability analysis has been result of independent doctrines).

[7] *See, e.g.*, Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471-74 (1982) (Article III requires plaintiff show injury in fact); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979) (plaintiff must demonstrate he personally suffered actual or threatened injury); United States v. Students

ministrative Procedure Act[8] additionally requires that a party seeking to challenge an administrative agency action must bring the claim within the zone of interests sought to be protected by the statute, or within the constitutional guarantee at issue.[9]

Part One of this Note will examine the doctrine of standing,

Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 690 n.14 (1973) (injury in fact serves to distinguish person with direct stake in outcome from person with mere interest in problem); Association of Data Processing Serv. Orgs. v. Camp, 379 U.S. 150, 152 (1970) (plaintiff must show he suffered or will suffer actual economic or other injury); People for Ethical Treatment of Animals v. Department of Health & Human Servs., 917 F.2d 15, 17 (9th Cir. 1990) (failing to allege specific facts showing injury fatal to standing); Capital Legal Found. v. Commodity Credit Corp., 711 F.2d 253, 258 (D.C. Cir. 1983) (party alleging constitutional, statutory or regulatory violation must suffer distinct but not necessarily substantial injury in fact); Public Citizen v. Lockheed Aircraft Corp., 565 F.2d 708, 714 (D.C. Cir. 1977) (plaintiff must demonstrate harm or that he would receive tangible benefit from judicial review of matter); Appeal of Richards, 590 A.2d 586, 591 (N.H. 1991) (association has standing to represent members if they have been injured but not based on mere interest in problem); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 221 (1988) (palpable injury required for standing); *see also* Barlow v. Collins, 397 U.S. 159, 159 (1970) (holding farmers had standing to challenge regulations that caused economic injury by forcing them to obtain financing for farming needs); Stark v. Wickard, 136 F.2d 786, 789 (D.C. Cir. 1943) (milk producers do not have standing to sue for injunction on claim Secretary of Agriculture's formula for determining prices to which producers were statutorily entitled was improper); Massachusetts Auto Body v. Commissioner of Ins., 570 N.E.2d 147, 153-54 (Mass. 1991) (possibility of competitive injury by Automobile Insurance Reform Act too indirect and speculative to make auto repair trade association "person aggrieved"). *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 3-14 to 3-17 (2d ed. 1988) (discussing injury in fact requirement for standing).

[8] 5 U.S.C. § 702 (1976). This section was enacted in 1946 in response to the growth of the number of administrative agencies. *See* FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952). The Administrative Procedure Act (APA) provides a right of judicial review to any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a statute." 5 U.S.C. § 702. It permits a plaintiff to bring suit even in the absence of an implied right of action. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 317-18 (1979) (APA creates right of review when party adversely affected); Sierra Club v. Hodel, 848 F.2d 1068, 1076 (10th Cir. 1988) (APA creates right of action in absence of other statutorily created right). This has been judicially interpreted as requiring that plaintiff's complaint fall within the zone of interests protected by the statute. *See* Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093, 1097 n.16 (D.C. Cir. 1970) (standing under APA equivalent to requirement that injury be within statute's zone of interests); *see also infra* note 9 (discussing zone of interest test).

[9] *See Data Processing*, 397 U.S. at 153. In *Data Processing*, the Court found that the Bank Service Corporations Act of 1962 provided that banks could only engage in banking services, and that an allegation claiming that a bank was conducting data processing services fell within the zone of interests which the Act sought to protect. *Id.* at 157. *See generally* Gene R. Nichol, Jr., *Rethinking Standing*, 72 CALIF. L. REV. 68, 96 (1984) (zone of interests test provides several useful functions: it helps establish amount of protection that should be afforded, allows Congress to determine what class of people can bring actions, and provides nexus between injury and substantive claim).

specifically the federal constitutional and prudential requirements, in addition to congressionally created standing. Part Two will examine how federal courts apply the doctrine of standing in challenges to environmental administrative actions brought under the National Environmental Policy Act. Part Three will discuss New York's application of the standing doctrine to challenges arising under the State Environmental Quality Review Act, emphasizing the recent New York Court of Appeals decision, *Society of the Plastics Industry, Inc. v. County of Suffolk.*[10] It will also examine how other state courts apply the rules of standing in environmental cases. Finally, this Note will conclude that the New York Legislature must rethink SEQRA standing and provide for such within the statute.

I. Doctrine of Standing

Article III of the United States Constitution defines the scope of federal judicial power[11] and limits that power by requiring that federal courts resolve only cases and controversies.[12] Whether a matter is justiciable,[13] that is, within the scope of federal judicial power, is a determination that must be made before there can be

[10] 77 N.Y.2d 761, 573 N.E.2d 1034, 570 N.Y.S.2d 778 (1991).

[11] *See* Hoffman-LaRoche, Inc. v. Sperling, 493 U.S. 165, 175 (1989) (judicial power limited by Article III); Mistretta v. United States, 488 U.S. 361, 389 (1989) (Article III limits judicial power to cases and controversies); *Valley Forge*, 454 U.S. at 471 (same); United States v. Louisiana, 123 U.S. 32, 35-36 (1887) (judicial power declared by Constitution as modified by Eleventh Amendment); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803) ("the judicial power of the United States is extended to all cases arising under the constitution.").

[12] *See supra* note 6 and accompanying text (discussing case and controversy requirement of Article III).

[13] *See* Flast v. Cohen, 392 U.S. 83, 94-95 (1968) (justiciability is term of art used to describe limitations imposed by case or controversy doctrine: federal courts limited to cases in adversarial context and prohibited from intrusion into areas committed to other branches of government); Poe v. Ullman, 367 U.S. 497, 509 (1961) (justiciability is not fixed objective concept but results from many subtle pressures including appropriateness of issues and hardship to litigants if relief is denied). *See generally* Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 Conn. L. Rev. 677 (1990) (advocating evaluation of underlying policies of justiciability); Richard H. Fallon, *Of Justiciability, Remedies and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. Rev. 1, 5-8 (1984) (Supreme Court misused standing and equitable restraint to restrict volume of public law cases in federal courts); Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 Yale L.J. 71, 75 (1984) (judicial adherence to valid legislative substantive and jurisdictional enactments would produce little loss and much gain).

an examination on the merits.[14] Traditionally, it is not within the courts' power to render advisory opinions[15] or to review cases that are moot,[16] involve political questions[17] or are not yet ripe for

[14] *See* Competitive Enter. Inst. v. National Highway Traffic Safety Admin., 901 F.2d 107, 113 (D.C. Cir. 1990) (standing determination must not be confused with plaintiff's likelihood of success on merits); Eric B. Schaurer, Note, *"More Than an Intuition, Less Than a Theory": Toward a Coherent Doctrine of Standing*, 86 COLUM. L. REV. 564, 580 (1986) (discussing conceptual bifurcation of cause of action into examinations of standing and merits). *But see* City of Evanston v. Regional Transp. Auth., 825 F.2d 1121, 1125-26 (7th Cir. 1987) (court decided city lacked standing after looking at pleadings, which went to merits), *cert. denied*, 484 U.S. 1005 (1988); Fletcher, *supra* note 7, at 221-24 (advocating standing be an examination on merits).

[15] *See* Buckley v. Valeo, 424 U.S. 1, 11 (1976) (Congress may not require Article III courts to render opinions); Preiser v. Newkirk, 422 U.S. 395, 401 (1975) (same); Local No. 8-6, Oil, Chemical & Atomic Workers Int'l Union v. Missouri, 361 U.S. 363, 367 (1960) (same); Muskrat v. United States, 219 U.S. 346, 362 (1911) (same).

The refusal to issue advisory opinions dates back to Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 n.(a) (1792). The Court stated that "neither the Legislative nor the Executive branches can constitutionally assign to the Judicial any duties, but such as are properly judicial, and to be performed in a judicial manner." *Id.* In fact, in 1791, the Supreme Court, under Chief Justice John Jay, refused to issue an informal advisory opinion to President Washington on questions of United States neutrality during the European War of 1793. 3 H. JOHNSTON, CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486-89 (1891).

[16] *See* SEC v. Medical Comm. for Human Rights, 404 U.S. 403, 407 (1972) ("Our lack of jurisdiction to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." (quoting Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3 (1964))); North Carolina v. Rice, 404 U.S. 244, 246 (1971) ("federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them"); Powell v. McCormack, 395 U.S. 486, 496 (1969) ("Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."); *Local No. 8-6*, 361 U.S. at 367 (court will not decide moot questions); Missouri, Kansas & Texas Ry. Co. v. Ferris, 179 U.S. 602, 606 (1900) ("Moot questions require no answer."); *see also* DeFunis v. Odegaard, 416 U.S. 312, 316-17 (1974) (holding that law student already admitted into law school under court order lacked standing to challenge admissions procedures, since school already stipulated student allowed to complete final term regardless of outcome of litigation); Doremus v. Board of Educ., 342 U.S. 429, 432-33 (1952) (challenge to Bible reading in public schools moot after child graduated); Sierra Club v. Penfold, 857 F.2d 1307, 1317 (9th Cir. 1988) (certain environmental group claims moot as challenging operations that already happened). For a modern perspective, see Gene R. Nichol, Jr., *Moot Cases, Chief Justice Rehnquist, and the Supreme Court*, 22 CONN. L. REV. 703, 705-06 (1990) (examining constitutional-prudential arbitrariness of mootness doctrine).

[17] *See* INS v. Chadha, 462 U.S. 919, 941 (1983). In *Chadha*, the Court noted that an issue is nonjusticiable under the political question doctrine when one of the following elements is present:

> [A] textually demonstrable constitutional commitment of the issue to a coordinate political department . . . a lack of judicially discoverable and manageable standards for resolving it . . . the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion . . . the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government . . . an unusual need for unquestioning adherence to a political decision already made . . . the potentiality of embarrassment from multifa-

consideration.[18] Furthermore, a party must have a legitimate stake in an otherwise justiciable controversy in order to have standing to seek judicial resolution of that controversy.[19] Article III requires a party invoking the court's authority to show[20] 1) that he personally suffered actual or threatened injury as a result of the defendant's allegedly illegal conduct (injury in fact);[21] 2) that the

rious pronouncements by various departments on one question.
Id. (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)); *see also* Goldwater v. Carter, 444 U.S. 996, 997-1002 (1979) (vacating lower court's ruling that President had power to terminate treaty with Taiwan without congressional approval); Gilligan v. Morgan, 413 U.S. 1, 5-12 (1973) (federal court would not evaluate state National Guard training, deferring instead to Congress' power to control military and militia); Coleman v. Miller, 307 U.S. 433, 447-50 (1939) (refusing to decide whether state could ratify proposed constitutional amendment, since state already rejected it); Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 129 (1912) (refusing to determine whether state government is republican); Luther v. Borden, 48 U.S. (7 How.) 1, 2 (1849) (refusing to decide which state government properly in power).

[18] *See* Abbott Lab. v. Gardner, 387 U.S. 136, 148 (1967) (rationale behind ripeness prevents premature judicial interference with abstract policy disagreements, thereby protecting agencies until concrete administrative decision formalized and effects are felt); Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 167 (1967) (ripeness inquiry asks if issue appropriate for judicial resolution and assesses injury to plaintiff if relief denied); *see also Penfold*, 857 F.2d at 1319 (environmental group's claim challenging future action of Bureau of Land Management not yet ripe for judicial review); Trustees for Alaska v. Hodel, 806 F.2d 1378, 1381 (9th Cir. 1982) ("A claim is fit for decision if the issues raised are primarily legal and do not require further factual development and the challenged action is final."); Friedman Bros. Inv. Co. v. Lewis, 676 F.2d 1317, 1319-20 (9th Cir. 1982) (ripeness determination "questions fitness for adjudication and the hardship to the parties if review is delayed").

[19] *See* Warth v. Seldin, 422 U.S. 490, 497 (1975) (standing inquires into whether litigant entitled to have court decide issues on merits as restricted by constitutional and prudential limitations); Sierra Club v. Morton, 405 U.S. 727, 731-32 (1972) (standing inquires into sufficiency of party's stake in "otherwise justiciable controversy"); *Baker*, 369 U.S. at 204 (question of standing is whether plaintiff has alleged personal stake in outcome of controversy so as to ensure adverseness necessary for sharp presentation of issues). *But see* Barrows v. Jackson, 346 U.S. 249, 256-57 (1953) (under peculiar circumstances of case, protection of fundamental rights outweighed prudential concern of rule which would deny standing to raise third party rights). *See generally* Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979) (discussing principles underlying justiciability); Fletcher, *supra* note 7, at 223-24 (advocating removing constitutional and prudential elements from standing inquiry and making inquiry into standing an examination on merits); Antonin Scalia, *The Doctrine of Standing As an Essential Element in the Separation of Powers*, 8 SUFFOLK U. L. REV. 881 (1983) (treatment of standing from federalist perspective).

[20] *See* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982); *see also* Allen v. Wright, 468 U.S. 737, 751 (1984) ("A plaintiff must allege personal injury fairly traceable to defendant's allegedly unlawful conduct and that such injury is likely to be redressed by the requested relief." (quoting *Valley Forge*, 454 U.S. at 472)).

[21] *See* Air Courier Conference v. American Postal Workers Union, 111 S. Ct. 913, 917-

injury is fairly traceable to the challenged action (causation);[22] and 3) that the injury is likely to be redressed by a favorable decision (redressability).[23]

A litigant who establishes these constitutional requirements may still lack standing to sue, however, if any of the prudential requirements are lacking.[24] First, the plaintiff must assert his own

18 (1991) (probable benefit from winning suit sufficient to meet Article III requirement of injury in fact); Hodel v. Irving, 481 U.S. 704, 711 (1987) (Article III standing satisfied by injury sufficient to give rise to case or controversy); *Allen*, 468 U.S. at 750-52 (plaintiff lacked standing for failure to allege distinct and palpable personal injury fairly traceable to defendant's conduct); Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983) (injury may not be abstract, conjectural or hypothetical); *Warth*, 422 U.S. at 501 (plaintiff must allege "distinct and palpable injury to himself"); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 217-27 (1974) (abstract injury insufficient to confer standing); Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973) (federal court jurisdiction can only be invoked when plaintiff himself has suffered threatened or actual injury resulting from illegal action); *Morton*, 405 U.S. at 739 (mere interest in problem insufficient to confer standing); *supra* note 7 (listing cases requiring injury in fact).

[22] *See* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 72 (1978) (personal stake in outcome of litigation understood as meaning not only distinct and palpable injury but fairly traceable causal connection); Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 261 (1977) (injury must be fairly traceable to defendant's conduct); *Linda R.S.*, 410 U.S. at 617 (appellants lacked standing for failure to allege sufficient nexus between injury asserted and claim to be adjudicated); *Warth*, 422 U.S. at 505 (plaintiff must establish injury was consequence of defendants' actions); Shoreham-Wading River Cent. Sch. Dist. v. United States Nuclear Regulatory Comm'n, 931 F.2d 102, 105 (D.C. Cir. 1991) (associations representing local residents near nuclear facility lacked standing to challenge NRC refueling order for lack of causal relationship between order and future injury). *See generally* Fletcher, *supra* note 7, at 239-43 (meaning of causation and redressability).

[23] *See* Watt v. Energy Action Educ. Found., 454 U.S. 151, 161 (1981) (party seeking relief must show fairly traceable causal relation between claimed injury and challenged conduct such that relief sought will redress injury); *Arlington Heights*, 429 U.S. at 261 (parties barred by injunction had sufficient standing since removal of injunction would redress injury); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976) (indigents lacked standing to challenge validity of IRS regulations reducing free medical care because plaintiff had not shown his injury likely to be redressed by favorable decision); *Warth*, 422 U.S. at 499 (judicial power exists to redress or otherwise protect against injury to complaining party, even though court's judgment may benefit others collaterally). *See generally* Fletcher, *supra* note 7, at 239-43 (discussing causation and redressability analysis in light of particular statute in issue); Gene R. Nichol, Jr., *Causation As a Standing Requirement: The Unprincipled Use of Judicial Restraint*, 69 Ky. L.J. 185, 201-13 (1981) (criticizing misuse of redressability analysis).

[24] *See* Franchise Tax Bd. of Cal. v. Alcan Aluminum, Ltd., 493 U.S. 331, 335 (1990) (standing consists of constitutional requirements and prudential considerations); *Valley Forge*, 454 U.S. at 474 (for determining standing, judiciary superimposes prudential principles on constitutional requirements); Warth v. Seldin, 422 U.S. 490, 498 (1975) (standing limited by constitution and exercise of juridprudence); Gerosa, Inc. v. Dole, 576 F. Supp. 344, 348 (S.D.N.Y. 1983) (standing based on prudential principles in addition to constitutional requirements).

legal rights and interests and not those of a third party.[25] Second, the harm complained of should not be of a type shared by the general public which would be more appropriately addressed by the representative branches of government.[26] Third, plaintiff's complaint must fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.[27]

When an association, rather than an individual, seeks to establish standing it must meet the additional requirements established by the Supreme Court in *Sierra Club v. Morton*.[28] In *Sierra Club*, the Supreme Court held that an organization must show: 1) that some or all of the members of the organization themselves have standing to bring suit; 2) that the interests the organization seeks to protect are germane to its purpose; and 3) that neither the relief requested nor the claims asserted require the participation of individual members.[29] Thus, federal courts limit access to those

[25] *See Warth*, 422 U.S. at 499; *see also* United States v. Richardson, 418 U.S. 166, 170-75 (1974) (holding that taxpayer did not have standing to challenge lack of CIA accounting since there was no showing of injury or threat of injury to plaintiff); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 166-67 (1972) (plaintiff lacked standing to challenge Moose Lodge's membership policy, which admitted only caucasians, since he never applied for, or had been denied, membership); United States v. Raines, 362 U.S. 17, 21 (1960) (person to whom application of statute is constitutional cannot attack it because it may be unconstitutional as applied to others).

In Singleton v. Wulff, 428 U.S. 106, 113-14 (1976), the Court discussed reasons why federal courts should hesitate resolving matters on the basis of a third party's rights. First, the third party may not wish to assert his rights or may be able to enjoy them whether or not the matter is litigated, and courts should avoid unnecessary lawsuits. *Id.* at 113-14. Second, the parties themselves are usually the most effective advocates of their own rights. *Id.* at 114. This advocacy is the foundation of our judicial system. *Id.* (citing Baker v. Carr, 369 U.S. 186, 204 (1962)).

[26] *See* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982) (Court refrains "from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances' . . . most appropriately addressed in the representative branches" (quoting *Warth*, 422 U.S. at 499-500)); *accord* Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 222 (1974) (parties lacked standing under Incompatibility Clause since they failed to show any greater interest than general interest of any citizen); O'Shea v. Littleton, 414 U.S. 488, 494 (1974) (abstract injury not enough), *vacated sub nom.* Spomer v. Littleton, 414 U.S. 514 (1974).

[27] *See supra* note 9 and accompanying text (zone of interests test as component of standing doctrine).

[28] 405 U.S. 727 (1972).

[29] *See id.* at 739 ("a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA"); *see also* Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977) (organizational standing); United States v. Students Challenging Reg-

litigants best suited to advocate a particular claim, avoiding questions of broad social significance where no individual rights are at issue.[30]

Finally, standing may be provided for in a particular statute[31] or under the umbrella of other legislation.[32] For example, the Administrative Procedure Act ("APA")[33] grants standing to "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute . . . ."[34]

ulatory Agency Procedures (SCRAP), 412 U.S. 669, 683-90 (1973) (group bringing action under NEPA and APA had standing under *Sierra Club* three-prong test despite tenuous injury); Northern Plains Resource Council v. Lujan, 874 F.2d 661 (9th Cir. 1989) (environmental groups lacked standing to challenge Department of Interior action for failure to demonstrate requisite injury under *Sierra Club*); Humane Soc'y v. Hodel, 840 F.2d 45, 56-59 (D.C. Cir. 1988) (association had standing to challenge hunting in wildlife refuges since *Sierra Club* germaneness requirement for associational standing requires only that purposes of lawsuit be pertinent to organization's goals); International Primate Protection League v. Institute for Behavioral Research, Inc., 799 F.2d 934, 938 (4th Cir. 1986) (association lacked standing under *Sierra Club* to have members appointed guardians of abused chimpanzees), *cert. denied*, 481 U.S. 1004 (1987). *See generally* Jeanne A. Compitello, Note, *Organizational Standing in Environmental Litigation*, 6 TOURO L. REV. 295, 297 (1990) (criticizing *Sierra Club* requirements of standing as being unnecessarily rigid).

[30] Gladstone, Realtors v. Bellwood, 441 U.S. 91, 99-100 (1979); *see supra* notes 24-27 and accompanying text (prudential requirements for standing).

[31] *See, e.g.*, Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 135b(d) (1991) (any person adversely affected may obtain relief); Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544, *as amended by* 16 U.S.C. § 1540(g) (1988) ("any person" may commence suit to enjoin any person alleged to be in violation of Act); Surface Mining and Reclamation Act of 1977, 30 U.S.C. § 1270 (1992) (citizens suits provision); Clean Water Act (Water Pollution, Prevention and Control Act), 33 U.S.C. § 1365 (1991) (amended 1972) (citizens suit provision); Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. § 1415(g) (1991) (any person may bring civil action on their own behalf); Hazardous and Solid Waste Amendments of 1984 to Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6972 (1991) (citizens suit provision); Clean Air Act Amendments of 1990, 42 U.S.C. § 7404 (1991) (citizen suit provision); National Noise Pollution and Abatement Act of 1970, 42 U.S.C. § 7604 (1991) (citizens suit provision); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9659(a)(2) (1991) (any person authorized to bring suit against officer of United States for failure to perform any non-discretionary act or duty); Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10139 (1991) (judicial review provided as per NEPA, 42 U.S.C. §§ 4321-4361 and 42 U.S.C. § 10155(c)(1),(2)).

[32] *See, e.g.*, National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4361 (1991) (standing granted per Administrative Procedure Act, 5 U.S.C. § 702); State Environmental Quality Review Act (SEQRA), N.Y. ENVTL. CONSERV. LAW §§ 8-0101-0117 (McKinney 1984) (standing per New York common law rules).

[33] 5 U.S.C. §§ 701-706 (1992).

[34] *Id.* § 702. In Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177 (1990), the Court stated:

[T]o be 'adversely affected or aggrieved . . . within the meaning of a statute,' the

While the APA may entitle a party to judicial review, it does not eliminate the constitutional or prudential requirements for standing.[35] Furthermore, an association challenging agency action must meet the requirements set forth in *Sierra Club*.[36]

II. Challenges to the National Environmental Policy Act: The Federal Approach

The National Environmental Policy Act ("NEPA") was enacted in 1969 to create a comprehensive regulatory scheme to ensure proper agency consideration of environmental concerns before government action is taken.[37] NEPA, a procedural statute applying to all federal administrative agencies,[38] is triggered by any ma-

> plaintiff must establish that the injury he complains of (his aggrievement, or the adverse effect upon him) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.

Id. at 3186; *see* Sierra Club v. Robertson, 764 F. Supp. 546, 551-54 (W.D. Ark. 1991) (environmental group had standing under APA to challenge United States Forest Service adoption of land and resource management plan for national forest).

[35] *See* CCTW & M v. United States Envtl. Prot. Agency Region II, 452 F. Supp. 69, 74 (D.N.J. 1978) (party bringing suit under APA must also satisy constitutional and prudential requirements of standing).

[36] *See supra* notes 28-30 and accompanying text (describing *Sierra Club* requirements necessary for association to have standing).

[37] *See* 42 U.S.C. §§ 4321-4361 (1991).

[38] *See id.* § 4332(2)(C). NEPA does not apply to Congress. *See* 40 C.F.R. § 1508.12 (1989) (federal agency does not include Congress); League of Women Voters of Tulsa, Inc. v. United States Corps of Eng'rs, 730 F.2d 579, 583 (10th Cir. 1984) (NEPA not applicable to congressional directives); Minnesota v. Block, 660 F.2d 1240, 1259 (8th Cir. 1981) (act of Congress does not require preparation of environmental impact statement "despite any significant environmental impact resulting from the legislation"), *cert. denied*, 455 U.S. 1007 (1982). Moreover, NEPA does not apply to the judiciary. *See* 40 C.F.R. § 1508.12 (federal agency does not include judiciary); Citizens for a Better St. Clair County v. James, 648 F.2d 246, 250 (5th Cir. 1981) (NEPA provisions not applicable to courts). NEPA does not apply to the states. *See* North Hempstead v. Village of N. Hills, 482 F. Supp. 900, 903 (E.D.N.Y. 1979) (state government immune from NEPA requirements). *But see* 40 C.F.R. § 1508.12 (states assuming NEPA responsibilities become subject to NEPA). NEPA does not apply to the governments of trust territories. *See* Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n, 647 F.2d 1345, 1367 (D.C. Cir. 1981) ("NEPA's legislative history illuminates nothing in regard to extraterritorial application"); People of Saipan v. United States Dep't of Interior, 502 F.2d 90, 95 (9th Cir. 1974) (no indication NEPA intended to apply to trusts or protectorates), *cert. denied*, 420 U.S. 1003 (1975); Greenpeace USA v. Stone, 748 F. Supp. 749, 759 (D. Haw. 1990) (for extraterritorial application of NEPA court must consider foreign policy and executive committment), *appeal dismissed*, 924 F.2d 175 (9th Cir. 1991). Finally, NEPA does not apply to "the performance of staff functions for the President in his Executive Office." 40 C.F.R. § 1508.12 (1989); *see also Greenpeace*, 748 F. Supp. at 759 (NEPA does not apply to movement of munitions through and within West Germany pursuant to presidential agreement between United States and

jor action taken by such an agency that significantly affects the quality of the human environment.[39] The human environment includes human health and welfare, the quality of urban life, including some socio-economic effects, historic and cultural resources,[40] as well as aesthetic values.[41] NEPA requires federal agencies to take a "hard look" at the environmental consequences of their actions.[42] Courts define a "hard look" as a substantial inquiry into the facts that is both careful and searching.[43] A finding of significant effects on the human environment requires the agency to prepare an environmental impact statement ("EIS")[44]—an assess-

West Germany); Alaska v. Carter, 462 F. Supp. 1155, 1160 (D. Alaska 1978) (presidentially requested recommendations to Secretary of Interior regarding Antiquities Act not subject to NEPA). *See generally* VALERIE M. FOGELMAN, GUIDE TO THE NATIONAL ENVIRONMENTAL POLICY ACT 12 (1990) (discussing NEPA's applicability).

[39] *See* Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc. 462 U.S. 87, 97 (1983) (two purposes of NEPA are to "place upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action," and to ensure "that the agency will inform the public that it has considered environmental concerns in its decision making process"); Davis v. Coleman, 521 F.2d 661, 670-72 (9th Cir. 1975) (city alleging procedural injury had standing to challenge failure to issue EIS under NEPA and California Environmental Quality Act, since compliance with NEPA is primary duty of every federal agency); *see also* National Pork Producers Council v. Bergland, 631 F.2d 1353, 1363 (8th Cir. 1980) (no EIS required when major federal action does not significantly affect quality of human environment), *cert. denied*, 450 U.S. 912 (1981); Irving v. FAA, 539 F. Supp. 17, 28 (N.D. Tex. 1981) (impact of particular action on local residents considered case by case).

[40] *See Baltimore Gas & Elec.*, 462 U.S. at 106-07 ("NEPA requires an EIS to disclose the significant health, socio-economic, and cumulative consequences of the environmental impact of a proposed action); WATCH (Waterbury Action to Conserve Our Heritage, Inc.) v. Harris, 603 F.2d 310, 327 (2d Cir.) (NEPA applies to quality of urban life), *cert. denied*, 444 U.S. 995 (1979). *But see* South Hill Neighborhood Ass'n v. Romney, 421 F.2d 454, 460 (6th Cir. 1969) (per curiam) (nonprofit corporation interested in preservation of historical buildings lacked standing to contest demolition where it did not own any of them), *cert. denied*, 397 U.S. 1025 (1970).

[41] *See* Izaak Walton League of Am. v. St. Clair, 313 F. Supp. 1312, 1317 (D. Minn. 1970) (organization with interest in aesthetics, conservation and recreation in area of dispute had standing to challenge administrative action).

[42] *See* Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 368 (1989) (NEPA requires agency take hard look prior to taking proposed action); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 333-34 (1989) (same); *Baltimore Gas & Elec.*, 462 U.S. at 97 (same); Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1975) (court's duty is to ensure that agency took required hard look, not to substitute judgment for that of agency).

[43] *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971) (courts must conduct "substantial inquiry" into agency actions under APA). *See generally* William Rodgers, *A Hard Look at* Vermont Yankee*: Environmental Law Under Close Scrutiny*, 67 GEO. L.J. 669, 669 (1979) (discussing adequacy of hard look in context of Vermont Yankee nuclear power plant project).

[44] *See* 42 U.S.C. § 4332(2)(c) (1991) (EIS must be prepared for "proposals for major Federal actions significantly affecting the quality of the human environment."); Township

ment of all substantial impacts on the human environment resulting from the proposed agency action.[45]

In order for a plaintiff to bring suit in federal court, he must allege standing in the pleadings.[46] Few challenges are brought exclusively under NEPA since the Act itself does not authorize a private right of action.[47] Instead, such actions are brought under both NEPA and the APA.[48]

Since NEPA's zone of interest is environmental, a party must allege environmental injury in fact.[49] Economic damages which are a consequence of an environmental action are also redressable[50] as long as the environmental concerns are not so in-

of Lower Alloways Creek v. Public Serv. Elec. & Gas Co., 687 F.2d 732, 741 (3d Cir. 1982) (finding of significant environmental impact under NEPA requires agency prepare EIS); Davis v. Coleman, 521 F.2d 661, 670 (9th Cir. 1975) (NEPA requires federal agency produce environmental impact statement).

[45] *See* 40 C.F.R. § 1508.25(b) (1988) (NEPA requires agency consider mitigation of effects of proposed action); *id.* § 1502.14(f) (agency must consider alternatives to proposed action); *id.* § 1502.16(h) (agency must consider all relevant consequences of proposed action); *id.* § 1505.2(c) (agency must explain its ultimate decision).

[46] *See* United States v. Students Challenging Regulatory Agency Procedures (*SCRAP*), 412 U.S. 669, 670 (1973) (pleadings alleged facts sufficient to establish standing); National Wildlife Fed'n v. Hodel, 839 F.2d 694, 703 (D.C. Cir. 1988) (allegation of injury in pleadings sufficient to establish standing), *rev'd on other grounds*, National Wildlife Fed'n v. Lujan, 928 F.2d 453 (D.C. Cir. 1991); *cf.* Sierra Club v. Morton, 405 U.S. 727, 731-32 (1972) (pleadings lacking allegation of "specific injury" insufficient to establish standing).

[47] *See* Sierra Club v. Penfold, 857 F.2d 1307, 1315 (9th Cir. 1988) (NEPA itself does not authorize private right of action); Noe v. Metropolitan Atlanta Rapid Transit Auth. 644 F.2d 434, 439 (5th Cir. 1981) (same), *cert. denied*, 454 U.S. 1126 (1982).

[48] *See supra* notes 33-36 and accompanying text (applicability of Administrative Procedure Act).

[49] *See* Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177, 3185-86 (1990) (to have standing to challenge agency action under NEPA plaintiffs must show they have been adversely affected by said agency action within meaning of NEPA); *SCRAP*, 412 U.S. at 686 (interest in aesthetic, conservational, and recreational values support standing when plaintiff association alleges use of area by members and adverse effect upon them); *see also* Los Angeles v. National Highway Traffic Safety Admin., 912 F.2d 478, 483-84, 491-99 (D.C. Cir. 1990) (cities, state, and environmental organization had standing to challenge lowering of minimum average fuel economy requirements which would result in increased air pollution making it more difficult to comply with air quality standards imposed upon them by Clean Air Act); Sabine River Auth. v. United States Dep't of Interior, 745 F. Supp. 388, 397 (E.D. Tex. 1990) (plaintiff lacked standing because he suffered no environmental injury in fact); *supra* notes 7-9 (discussing requirement of injury in fact within zone of interests to be protected). *But see* Competitive Enters. Inst. v. National Highway Traffic Safety Admin., 901 F.2d 107, 123 (D.C. Cir. 1990) (consumer organizations lacked standing under NEPA to challenge NHTSA issuance of minimum fuel economy standards since Act's only concern was informing other government agencies and public about environmental consequences, not all possible consequences).

[50] *Compare* Churchill Truck Lines, Inc. v. United States, 533 F.2d 411, 416 (8th Cir.

significant that they should be disregarded altogether.[51] Moreover, where agency action is widespread, a plaintiff must show individualized harm different from that suffered by the general population (special injury),[52] and the interests affected must be capable of being redressed by the agency action (redressability).[53]

Standing of associations challenging agency environmental actions under NEPA is reviewed under the *Sierra Club* test.[54] The first environmental case to reach the Supreme Court after NEPA's enactment was *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*.[55] Students Challenging Regulatory Agency Procedures ("the Students") challenged an Interstate Commerce Commission order allowing railroads to collect a surcharge on freight rates pending the adoption of selective rate

1976) (solely economic motivation vis-a-vis competitors outside NEPA's zone of interests) *with* Cartwright Van Lines, Inc. v. United States, 400 F. Supp. 795, 802-03 (W.D. Mo. 1975) (economic injury redressable when standing supported by environmental damage from increased air pollution from longer trucking routes), *aff'd*, 423 U.S. 1083 (1976).

[51] *See* Robinson v. Knebel, 550 F.2d 422, 425 (8th Cir. 1977) (individuals with pecuniary interest can have standing "provided that their environmental concerns are not so insignificant that they ought to be disregarded altogether"); *see also* Evanston v. Regional Transp. Auth., 825 F.2d 1121, 1126 (7th Cir. 1987) (city lacked standing to challenge environmental action for failure to show any injury more than general disfavor of project), *cert. denied*, 484 U.S. 1005 (1988); *Churchill Truck Lines*, 533 F.2d at 416 (common carrier lacked standing to challenge Interstate Commerce Commission grant of permit to applicant competitor); National Helium Corp. v. Morton, 455 F.2d 650, 655 (10th Cir. 1971) (court "unable to say that the companies are motivated solely by protection of their own pecuniary interest and that the public interest aspect is so infinitesimal that it ought to be disregarded altogether" found standing); Gerosa, Inc. v. Dole, 576 F. Supp. 344, 348-49 (S.D.N.Y. 1983) (commercial dock owners had standing to challenge railroad trestle projects when their economic harm inextricably linked to significant environmental harm).

[52] *See supra* note 1 (describing common law requirement that private plaintiff make showing of special injury under tort theory of public nuisance in order to maintain action).

[53] *See* Whitmore v. Arkansas, 495 U.S. 149, 155 (1990) (litigant must satisfy redressability requirement of Article III standing); Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 110-11 (1986) (statutory standing requires litigant demonstrate injury of type Congress sought to redress); Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568, 604-05 (1985) (redressability "examines the causal connection between the alleged injury and the judicial relief requested" (quoting Allen v. Wright, 468 U.S. 737, 753 n.19 (1984)); National Wildlife Fed'n v. Hodel, 839 F.2d 694, 705 (D.C. Cir. 1988) (party seeking judicial relief must show likelihood that favorable decision will redress his injury): *see also supra* note 23 (discussing redressability).

[54] *See* Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177, 3186-87 (1990) (party seeking review must satisfy *Sierra Club* requirements of standing); Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 16-17 (1981) (same); United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 670 (1973) (same).

[55] 412 U.S. 669 (1973).

increases.[56] Since it costs more to ship recycled material than new material, the Students alleged that the increase in rates would create, through this tenuous causal relationship, an increase in the use of nonrecycleable commodities, thereby increasing litter and debris in national parks in the Washington area.[57] Alleging that members of the group used the parks and would be injured in their aesthetic enjoyment of the parks by the increase in such litter, the Students met the guidelines laid down in *Sierra Club* and were granted standing.[58] *SCRAP* has since been described by the Supreme Court as defining the outer limits of standing.[59]

Following *SCRAP*, public interest and conservation groups have continually challenged agency environmental actions.[60] Recently, in *Lujan v. National Wildlife Foundation*,[61] National Wildlife Foundation ("the Foundation") was denied standing to challenge an administrative agency action for failure to allege special and distinct injury to itself or its members.[62] The Foundation challenged the land withdrawal review program of the Bureau of Land Management.[63] Under that program, reclassification of previously protected public land would open that land up to mining activities, which the Foundation alleged would destroy its natural beauty.[64]

[56] *Id.* at 674-76.

[57] *Id.* at 678.

[58] *See id.*

[59] *See* Whitmore v. Arkansas, 495 U.S. 149, 159 (1990) (*SCRAP* goes "to the very outer limit of the law" and marks most attenuated injury conferring Article III standing); Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177, 3189 (1990) (same).

[60] *See Lujan*, 110 S. Ct. at 3183 (NWF challenged Bureau of Land Management land withdrawal review program); Northern Plains Resource Council v. Lujan, 874 F.2d 661, 663-64 (9th Cir. 1989) (environmental groups challenged equal value determination of Department of Interior granting of land patents); Sierra Club v. Penfold, 857 F.2d 1307, 1319 (9th Cir. 1988) (environmental group challenged Bureau of Land Management action); Defenders of Wildlife v. Hodel, 851 F.2d 1035, 1039 (8th Cir. 1988) (environmental organizations brought challenge under Endangered Species Act of 1973), *aff'd*, Defenders of Wildlife v. Lujan, 911 F.2d 117 (1990), *cert. granted*, 111 S. Ct. 2008 (1991); Humane Soc'y v. Hodel, 840 F.2d 45, 47 (D.C. Cir. 1988) (association challenged hunting in wildlife refuges); International Primate Protection League v. Institute for Behavioral Research, Inc., 799 F.2d 934, 938 (4th Cir. 1986) (association attempted to be guardians of abused chimpanzees), *cert. denied*, 481 U.S. 1004 (1987); Conservation Council of N.C. v. Costanzo, 505 F.2d 498, 501-02 (4th Cir. 1974) (standing denied to licensee or trespasser organizations who suffered no injury due to loss of use of private lands).

[61] 110 S. Ct. 3177 (1990).

[62] *Id.* at 3186.

[63] *Id.* at 3183.

[64] *Id.* at 3183-84. Pursuant to directives of the Federal Land Policy and Management

The denial of standing was based on the Court's determination that member use "in the vicinity"[65] was insufficient to support the *Sierra Club* requirements.[66] It is submitted that the result in *Lujan* suggests the Supreme Court's unwillingness to relax the requirement of injury necessary for standing in environmental challenges.

In addition to challenges by public interest and conservation groups, the courts have been faced with challenges brought by business-related entities seeking to affect environmental actions for their own pecuniary reasons.[67] As indicated above, such economic motivation/harm will not disqualify these parties from possessing standing to bring such challenges in federal courts, provided the challenge is a result of environmental action.[68]

Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1731 (1986), the Bureau of Land Management administers the land withdrawal program in eleven western states. *See Lujan*, 110 S. Ct. at 3183. The program is one facet of the consolidation of federal land management under the FLPMA. *See* 43 U.S.C. §1701(a) (1986). FLPMA policy favors retention of public lands . . . constituting approximately one-third of the land within the United States . . . for multiple use management. *Id.* § 1701. The land withdrawal program is the means by which land held by any federal agency, federal department, or the Bureau of Land Management is relinquished to the public for multiple use management. *See id.* §1701(a)(7).

[65] *Lujan*, 110 S. Ct. at 3188-89.

[66] *Id.* at 3187.

[67] *See* Churchill Truck Lines, Inc. v. United States, 533 F.2d 411, 416 (8th Cir. 1976) (interstate carter challenged agency action allowing competitor to enter area); National Helium Corp. v. Morton, 455 F.2d 650, 655 (10th Cir. 1971) (plaintiff challenged gas program affecting its profits); Overseas Shipholding Group, Inc. v. Skinner, 767 F. Supp. 287, 289-90 (D.D.C. 1991) (corporate shipholder group challenged Maritime Administration rule enactment because no EIS was done); Gerosa, Inc. v. Dole, 576 F. Supp. 344, 348-49 (S.D.N.Y. 1983) (commercial dock owners challenged railroad trestle projects); Cartwright Van Lines, Inc. v. United States, 400 F. Supp. 795, 802-03 (W.D. Mo. 1975) (trucking company challenged agency assignment of longer truck routes), *aff'd*, 423 U.S. 1083 (1976).

[68] *See* Mobil Oil Corp. v. Federal Trade Comm'n, 430 F. Supp. 855, 863 (S.D.N.Y.) (oil company had standing to challenge FTC's failure to prepare EIS for oil pipeline divestiture since FTC action affected domestic exploration and production of oil thereby affecting natural resources), *rev'd on other grounds*, 562 F.2d 170 (2d Cir. 1977); Pack v. Corps of Eng'rs of United States Army, 428 F. Supp. 460, 464-65 (M.D. Fla. 1977) (commercial shrimpers and affiliates alleging conservational and environmental interest in preservation of shrimp and other marine life had standing to challenge erosion control program for lack of EIS); *Cartwright Van Lines*, 400 F. Supp. at 802-03 (common carrier, subject to Interstate Commerce Commission order forcing carrier to use more circuitous truck routes had standing to challenge finding of no significant adverse effect on human environment); Chemical Leaman Tank Lines, Inc. v. United States, 368 F. Supp. 925, 947-48 (D. Del. 1973) (railroad and motor waste products carriers, alleging increased volume of motor traffic, air pollution, highway congestion and depletion of national fuel supply, had standing to challenge failure of Interstate Commerce Commission to prepare EIS prior to issuance of

However, parties who are affected by the agency action itself, rather than the environmental harm resulting from that action, lack standing.[69] It is submitted that federal courts properly deny standing to plaintiffs whose injury results from the agency action itself, rather than the environmental consequences of that action. It is further submitted that standing must be found when plaintiff's injury is a result of the environmental consequences of agency action, even if it is likely the case will be lost on the merits; an examination of standing should be separate and distinct from an examination of the merits.

However, it is asserted that when it is not clear whether a plaintiff has standing, federal courts blur the distinction between an examination prior to the merits and an examination on the merits in order to "tip the scales" towards one determination. For example, in *Shoreham-Wading River Central School District v. United States Nuclear Regulatory Commission,*[70] the Court of Appeals for the District of Columbia Circuit found that plaintiffs, residents in the area of the Shoreham Nuclear Plant, did not have standing to challenge an order which banned refueling of the Shoreham Facility.[71] The court found that the order was not "final," but rather

operating authority to transport waste); Getty Oil Co. (Eastern Operations) v. Ruckelshaus, 342 F. Supp. 1006, 1013 (D. Del. 1972) (companies operating refinery and power station had standing to challenge Environmental Protection Agency's failure to prepare EIS in approving regulation limiting amount of sulfur content in burned fuel), *cert. denied*, 409 U.S. 1125 (1973).

[69] *See Churchill Truck Lines*, 533 F.2d at 416 (carrier lacked standing to challenge another company's application to be contract carrier in area of plaintiff's business); Benton County Sav. & Loan Ass'n v. Federal Home Loan Bank Bd., 450 F. Supp. 884, 890 (W.D. Ark. 1978) (four existing savings and loans lacked standing to challenge board resolution allowing another savings and loan to establish branch in locale); Presidio Bridge Co. v. Secretary of State, 486 F. Supp. 288, 294 (W.D. Tex. 1978) (plaintiff operator of only toll bridge spanning river in area lacked standing to challenge, on purely economic grounds, proposed second bridge); Clinton Community Hosp. Corp. v. Southern Md. Medical Ctr., 374 F. Supp. 450, 454-55 (D. Md. 1974) (hospital lacked standing to challenge proposed new hospital on grounds competitor and that as hospital it enjoys environment like any "consumer"), *aff'd*, 510 F.2d 1037 (4th Cir.), *cert. denied*, 422 U.S. 1048 (1975).

[70] 931 F.2d 102 (D.C. Cir. 1991).

[71] *See id.* at 105. The Shoreham Nuclear Power station was shut down before it was ever operated. *Id.* at 104. Prior to issuance of the full power operating license, the plant was transferred to New York State under an agreement which the power company read as preventing it from ever operating the plant. *Id.* As such, plaintiffs attempted to have the Nuclear Regulatory Ban on refueling removed. *Id.* They alleged that the ban would "lay foundation" for future agency actions that would injure them. *Id.* at 105. However, the ban was immediately effective. *Id.*

"immediately effective."[72] It is submitted that this is a distinction without meaning—there is no practical difference between "final" and "immediately effective" when an agency can continue to issue temporary orders indefinitely. It is suggested that the issue of standing in *Shoreham* could have been decided in either party's favor. However, when the court examined the merits, which revealed two decades of political battling over the power plant's construction,[73] it "tipped the scales" and denied standing. The court held that it lacked jurisdiction to decide an issue which was not final but was continuing.[74]

Conversely, the Third Circuit, in *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*[75] held that plaintiffs, local residents and a representative association, had standing to challenge the continuing pervasive pollution of the Kill Van Kull in Bayonne, New Jersey.[76] Plaintiffs' standing was challenged on appeal after the defendant was found liable for dumping untreated sewage into the Kill Van Kull.[77] Judge Aldisert, concurring, expressed his "nagging doubt about standing"[78] especially in the wake of *Lujan*.[79] Expecting petition for certiorari to the Supreme Court, he candidly admitted that he wanted to find standing for the plaintiffs.[80] Nevertheless, he noted the flimsiness of the

[72] *Id.* at 104.

[73] *Id.*

[74] *Id.* at 105. The court noted that the order was not final, but rather "immediately effective," since it was still under agency review. *Id.* at 104.

[75] 913 F.2d 64 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1018 (1991).

[76] *See id.* at 70-73. Judge Nygaard, writing for the court, applied the traditional approach for determining standing, as provided for in Article III and *Sierra Club*, and found an injury in fact fairly traceable to defendant's alleged conduct that was redressable by the courts. *Id.* at 70-71. Four affidavits were produced in court to show that the individual plaintiffs had standing in their own right, and therefore, as members of the association, supplied the association with standing under *Sierra Club* and *SCRAP* as modified by *Lujan*. *Id.* at 71-73.

[77] *See* Public Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals, Inc., 720 F. Supp. 1158, 1163-65 (D.N.J. 1989), *aff'd in part, rev'd in part*, 913 F.2d 64 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1018 (1991).

[78] *Powell Duffryn*, 913 F.2d at 83 (Aldisert, J., concurring).

[79] *See id.* at 84 (Aldisert, J., concurring). Judge Aldisert stated that: "The question[s] for this court [is]: Were the recruited live bodies sufficiently injured to sustain this action . . . ." *Id.*

[80] *See id.* (Aldisert, J., concurring). Judge Aldisert found "standing here only on the most questionable of grounds—a belief that somehow the Supreme Court might be inclined to relax its stringent requirements of standing in environmental cases." *Id.*

local resident plaintiffs' standing by including parts of their depositions in his concurring opinion.[81] Subsequently, the Supreme Court denied the petition for certiorari.[82] It is submitted that the Court correctly found standing for these local plaintiffs, because if they could not bring suit, then no private party would have standing to challenge the dumping. It is therefore suggested that the Third Circuit, having the benefit of the district court's findings of fact, used these findings on the merits to "tip the scales" in favor of standing.

III. New York's Approach to Standing in SEQRA Challenges

A. *State Environmental Quality Review Act: New York's Version of NEPA*

In 1975, New York adopted the State Environmental Quality Review Act ("SEQRA"), which follows the language used in NEPA, for the purpose of encouraging environmental awareness.[83] Under SEQRA, all state agencies are charged with considering the environmental consequences of their actions.[84] Compli-

[81] *See id.* at 87 (Aldisert, J., concurring).

Q. To you personally then the outcome of this lawsuit won't affect your use of the park, right?
A. Correct.
Q. If you had been read paragraph #7 by any representative of Terris & Sunderland, would you have authorized them to use you as a person on whom they could rely for standing?
A. No.
Q. If . . . it was important that the allegations of paragraph #7 have to be correct as to you, would you object to participating in this lawsuit?
A. Yes.
Q. Did [plaintiff's] paralegal explain to you that the allegations in this suit were that there was a direct adverse effect on your aesthetic, environmental, economic, recreational activites due to Powell Duffryn's discharge?
A. No.
Q. If [the allegations in the suit] had been explained to you, would you have been able to join in this suit?
A. No.
Q. Would you have been able to sign the affidavit?
A. No.

Id.

[82] 111 S. Ct. 1018 (1991)..

[83] *See infra* note 109 and accompanying text (purpose of SEQRA). *See generally* Nicholas A. Robinson, *SEQRA's Siblings: Precedent from Little NEPAS in Sister States,* 46 Alb. L. Rev. 1155, 1156-62 (1982) (adoption of SEQRA).

[84] *See infra* note 110 and accompanying text (agency responsibilities under SEQRA).

ance with the statute has resulted in challenges to the sufficiency of agencies' environmental reviews.[85] Agencies have attempted to use the doctrine of standing to keep parties from gaining judicial review.[86]

B. History of Standing in New York

Although the New York Constitution has no analogue to Article III of the United States Constitution, New York courts have adopted the Supreme Court test for determining the threshold question of standing.[87] In order to have standing, a plaintiff must show injury in fact.[88] When challenging administrative agency action, a plaintiff must also show that the interest sought to be protected is within the zone of interests the act was intended to protect.[89]

[85] *See infra* notes 92-95 and accompanying text (examples of challenges to agency action under SEQRA).

[86] *See infra* note 114 and accompanying text (cases where standing used as defense to challenges to actions under SEQRA).

[87] *See* Society of the Plastics Indus., Inc. v. County of Suffolk, 77 N.Y.2d 761, 772, 573 N.E.2d 1034, 1040, 570 N.Y.S.2d 778, 784 (1991) (court discusses following *Data Processing* test); Dairylea Coop., Inc. v. Walkley, 38 N.Y.2d 6, 9, 339 N.E.2d 865, 869, 377 N.Y.S.2d 451, 454 (1975) (same); Columbia Gas of New York v. New York Elec. & Gas Corp., 28 N.Y.2d 117, 123, 268 N.E.2d 790, 793, 320 N.Y.S.2d 57, 61 (1971) (same); *see also* Mobil Oil Corp. v. Syracuse Indus. Dev. Agency, 76 N.Y.2d 428, 431, 559 N.E.2d 641, 644, 559 N.Y.S.2d 947, 950 (1990) (citing how test was applied by *Dairylea Coop.*); Sun-Brite Car Wash, Inc. v. Board of Zoning & Appeals, 69 N.Y.2d 406, 409, 508 N.E.2d 130, 134, 515 N.Y.S.2d 418, 421 (1987) (applying *Dairylea Coop.* test).

[88] *See Society of the Plastics Indus.*, 77 N.Y.2d at 772, 573 N.E.2d at 1040, 570 N.Y.S.2d at 784 (injury in fact required); *Mobil Oil Corp.*, 76 N.Y.2d at 431, 559 N.E.2d at 644, 559 N.Y.S.2d at 950 (plaintiff must show special injury); *Sun-Brite Car Wash*, 69 N.Y.2d at 409, 508 N.E.2d at 134, 515 N.Y.S.2d at 421 (petitioner must show challenged action has harmful effect); *In re* District Attorney of Suffolk County, 58 N.Y.2d 436, 440, 448 N.E.2d 440, 443, 461 N.Y.S.2d 773, 776 (1983) (same); Fritz v. Huntington Hosp., 39 N.Y.2d 339, 345, 348 N.E.2d 547, 552, 384 N.Y.S.2d 92, 97 (1976) (same); *Dairylea Coop.*, 38 N.Y.2d at 9, 339 N.E.2d at 869, 377 N.Y.S.2d at 454 (same).

[89] *See* New York v. Civil Serv. Comm'n, 60 N.Y.2d 436, 443, 458 N.E.2d 354, 358, 470 N.Y.S.2d 113, 117 (1983) (determining whether Personnel Director's ensuring of Civil Service promotions were within zone of interests of Civil Service Law); Bradford Cent. Sch. Dist. v. Ambach, 56 N.Y.2d 158, 164, 436 N.E.2d 1256, 1259, 451 N.Y.S.2d 654, 657 (1982) (school district had standing to seek review of Commissioner of Education's decision because hiring qualified teachers within zone of interests); *Dairylea Coop.*, 38 N.Y.2d at 9, 339 N.E.2d at 867, 377 N.Y.S.2d at 454 (party must show administrative action will cause injury and that injury is within zone of interests statute was enacted to protect). *But see* Greer v. Illinois Housing Dev. Auth., 524 N.E.2d 561, 574 (Ill. 1988) (rejecting zone of interests test); KENNETH C. DAVIS, ADMINISTRATIVE LAW TEXT § 22.07 (3d ed. 1971). Professor Davis agrees that the zone of interest test is imprecise and widely rejected by state

Because of the readiness of New York courts to dismiss challenges against administrative agency actions for lack of standing, the New York Court of Appeals demonstrated an intent to liberalize standing requirements.[90] However, as applied to challenges under SEQRA, New York courts have been more restrictive because of the countervailing public policy of disallowing parties who do not have environmental motives for bringing an action[91] and who cannot not show a specific injury, to bring suit.[92]

Furthermore, New York courts have stated that the assertion of economic injury alone will not confer standing to a party challenging an administrative agency action under SEQRA[93]—except in

courts. *Id.* The test is inconsistent with a common law action for damages or an injunction. *Id. See generally* MICHAEL B. GERRARD ET AL., ENVIRONMENTAL IMPACT REVIEW IN NEW YORK § 7.07 (1990) [hereinafter IMPACT REVIEW] (party must show injury in fact and injury within zone of interest statute protects); DAVID SIEGAL, NEW YORK PRACTICE § 136 (2d ed. 1991) (since law allows only aggrieved parties to bring lawsuit, plaintiff must show injury in fact within zone of interests).

[90] *See Dairylea Coop.*, 38 N.Y.2d at 10-11, 339 N.E.2d at 868, 377 N.Y.S.2d at 455 (court recognized right to judicial review of administrative actions by parties adversely affected as fundamental tenet to system of remedies); Boryszewski v. Brydges, 37 N.Y.2d 361, 363-64, 334 N.E.2d 579, 581-82, 372 N.Y.S.2d 623, 625-26 (1975) (court disposition has been to expand rather than contract doctrine of standing); Douglaston Civic Ass'n v. Galvin, 36 N.Y.2d 1, 6, 324 N.E.2d 317, 320, 364 N.Y.S.2d 830, 834 (1974) (in zoning dispute court discussed need to broaden rules of standing); New York State Bldrs. v. State, 98 Misc. 2d 1045, 1050, 414 N.Y.S.2d 956, 959 (Sup. Ct. Albany County 1979) (anyone who can show adverse environmental impact as result of agency action would have standing to seek judicial review). *See generally* IMPACT REVIEW, *supra* note 89, § 7.07 (in mid-1970's court of appeals decreed new era of liberalized standing rules). *But see Sun-Brite Car Wash*, 69 N.Y.2d at 412, 508 N.E.2d at 133, 515 N.Y.S.2d at 421 (noting that doctrine of standing could allow special interest groups to unduly delay final dispositions).

[91] *See Society of the Plastics Indus.*, 77 N.Y.2d at 778, 573 N.E.2d at 1043, 570 N.Y.S.2d at 787 (plaintiff denied standing because purely economic motive); *Sun-Brite Car Wash*, 69 N.Y.2d at 413, 508 N.E.2d at 133, 515 N.Y.S.2d at 421 (although standing principles should be broad, welfare of community must be protected by limiting who can seek review of administrative agency action); Young v. Pirro, 170 A.D.2d 1033, 1035, 566 N.Y.S.2d 177, 178 (4th Dep't 1991) (standing denied because no concrete environmental injury alleged).

[92] *See Society of the Plastics Indus.*, 77 N.Y.2d at 778, 573 N.E.2d at 1043, 570 N.Y.S.2d at 787 (failure to allege special injury will keep standing from being conferred); Otsego 2000, Inc. v. Planning Bd. of Otsego, 171 A.D.2d 258, 261, 575 N.Y.S.2d 584, 586-87 (3d Dep't 1991) (plaintiff denied standing for failure to allege specific injury). *See generally* Peter G. Crary, *Procedural Issues Under SEQRA*, 46 ALB. L. REV. 1211 (1982) (despite recent liberal trend concept of standing has not been completely dismantled in this state).

[93] *See* Society of the Plastics Indus., Inc. v. County of Suffolk, 77 N.Y.2d 761, 773, 573 N.E.2d 1034, 1041, 570 N.Y.S.2d 778, 785 (1991) (economic injury does not confer standing to sue under SEQRA because by itself it is not within SEQRA's zone of interests); Mobil Oil Corp. v. Syracuse Indus. Dev. Agency, 76 N.Y.2d 428, 433, 559 N.E.2d 641, 644, 559 N.Y.S.2d 947, 950 (1990) (party must demonstrate environmental injury because

cases where the plaintiff is a property owner—because a property owner is presumptively aggrieved.[94] In land use cases, these courts have required a plaintiff to suffer injury different from the injury suffered by the general public,[95] except when the plaintiff is an affected property owner.[96] Additionally, New York has adopted the three-prong test promulgated by the Supreme Court in *Sierra Club*, for determining whether a party has organizational standing.[97] This test has been applied to cases involving challenges to SEQRA.[98] These requirements have been used by New York courts to ensure that plaintiffs have a direct interest in the admin-

solely economic injury will not confer standing); Weiss v. Planning Bd., 130 Misc. 2d 381, 383, 496 N.Y.S.2d 627, 629 (Sup. Ct. Dutchess County 1985) (competitive injury alone not enough to confer standing); Webster Assoc. v. Town of Webster, 112 Misc. 2d 396, 402, 447 N.Y.S.2d 401, 405 (Sup. Ct. Monroe County) (plaintiff had no standing because only commercial damage alleged), *aff'd*, 85 A.D.2d 882, 446 N.Y.S.2d 995 (4th Dep't 1981), *rev'd on other grounds*, 59 N.Y.2d 220, 451 N.E.2d 189, 464 N.Y.S.2d 431 (1983). *See generally* IMPACT REVIEW, *supra* note 89, § 7.08(3)(b) (competitive interest not protected by SEQRA).

[94] *See* Har Enters. v. Town of Brookhaven, 74 N.Y.2d 524, 529, 548 N.E.2d 1289, 1292, 549 N.Y.S.2d 638, 642 (1989) (property owner has cognizable interest in ensuring compliance with SEQRA); Magee v. Rocco, 158 A.D.2d 53, 58, 557 N.Y.S.2d 759, 762 (3d Dep't 1990) (property owner challenging SEQRA action need not allege environmental injury).

[95] *See Society of the Plastics Indus.*, 77 N.Y.2d at 774, 573 N.E.2d at 1041, 570 N.Y.S.2d at 785 (requirement of injury requires something more than injury to public in order for person to be granted standing); *Mobil Oil Corp.*, 76 N.Y.2d at 433, 559 N.E.2d at 644, 559 N.Y.S.2d at 494 (injury different from injury to community must be shown); Sun-Brite Car Wash, Inc. v. Universal Broadcasting Corp., 69 N.Y.2d 406, 413, 508 N.E.2d 130, 133, 515 N.Y.S.2d 418, 421 (1987) (something more than general interest to public required to entitle person to seek judicial review).

[96] *See Har Enters.*, 74 N.Y.2d at 528, 548 N.E.2d at 1292, 549 N.Y.S.2d at 641 (special damage or actual injury not needed when party's relationship to subject gives rise to presumption of standing); *Sun-Brite Car Wash*, 69 N.Y.2d at 413, 508 N.E.2d at 133, 515 N.Y.S.2d at 421 (special damage not necessary if value or enjoyment of one's property would be adversely affected).

[97] *See* Dental Soc'y of New York v. Carey, 61 N.Y.2d 330, 333-34, 462 N.E.2d 362, 363, 474 N.Y.S.2d 262, 263 (1984) (adopting test from Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977)).

In *Hunt*, the Supreme Court, in reaffirming the test from *Sierra Club*, stated that whether an association has standing to invoke the Court's remedial powers on behalf of its members depends on the nature of the relief sought. 432 U.S. at 343. The relief sought must directly benefit the members of the association. *See* Warth v. Seldin, 432 U.S. 490, 515 (1975). An organization may seek an injunction, declaratory judgment or some other form of prospective relief, when a member would be injured without such relief. *Id.*; *see also supra* note 29 and accompanying text (*Sierra Club* organizational standing test).

[98] *See* Center Square Ass'n, Inc., v. Corning, 105 Misc. 2d 6, 10, 430 N.Y.S.2d 953, 956-57 (Sup. Ct. Albany County 1980) (applying three prong test in order to decide whether association had standing under SEQRA); Ecology Action v. Van Cort, 99 Misc. 2d 664, 668, 417 N.Y.S.2d 165, 169 (Sup. Ct. Tompkins County 1978) (same). *See generally* IMPACT REVIEW, *supra* note 89, § 7.07 (test applied in SEQRA cases).

istrative agency action challenged.[99]

The New York Court of Appeals was recently confronted with the issue of standing in the *Society of the Plastics Industry, Inc. v. County of Suffolk ("SPI").*[100] In a 4-3 decision, the court denied standing to plaintiffs[101] who attempted to have the Suffolk County Plastics Law declared null and void because the legislature failed to adhere to SEQRA.[102] This law banned food from being wrapped in polystyrene and polyvinyl chloride.[103] The principal

[99] *See infra* note 124 and accompanying text (discussing special interest injury assuring adversity).

[100] 77 N.Y.2d 761, 768, 573 N.E.2d 1034, 1037, 570 N.Y.S.2d 778, 781 (1991). The court of appeals reversed the decision of the appellate division which conferred standing to plaintiffs and declared the Plastics Law null and void. *Id.* The appellate division court found that the County's assertion that plaintiffs lacked standing was without merit. 154 A.D.2d 179, 183, 552 N.Y.S.2d 138, 141 (2d Dep't 1990). The appellate division reversed, in part, the decision of the Suffolk County Supreme Court. *Id.* That court found standing, but stayed the law until an Environmental Impact Statement (EIS) could be prepared. *Id.*

An EIS is prepared to help an agency decide if a plan should be enacted. *See* N.Y. ENVTL. CONSERV. LAW § 8-0105(7) (McKinney 1984). An EIS must be prepared whenever any action may have a significant effect on the environment. *Id.* § 8-0109(2).

[101] Society of the Plastics Indus., Inc. v. County of Suffolk, 77 N.Y.2d 761, 764, 573 N.E.2d 1034, 1035, 570 N.Y.S.2d 778, 779 (1991). Plaintiffs in this case were 1) Society of the Plastics Industry, Inc.; 2) Flexible Packaging Association; 3) Polystyrene Packaging Coalition; 4) Dart Container Corp. of Pennsylvania; 5) Kema Corp.; and 6) Lawrence Wittman and Co., Inc. *See* Brief for Respondent, at 21, Society of the Plastics Indus., Inc. v. County of Suffolk, 77 N.Y.2d 761, 573 N.E.2d 1034 (No. 11262), 570 N.Y.S.2d 778 (1991).

[102] *See Society of the Plastics Indus.*, 77 N.Y.2d at 767, 573 N.E.2d at 1037, 570 N.Y.S.2d at 781. The plaintiffs alleged that the Suffolk County legislature failed to comply with the New York Environmental Conservation Law. *Id.* Specifically, the legislature failed to comply with Section 8-0109 which provides that "All agencies . . . shall prepare, or cause to be prepared by contract or otherwise an environmental impact statement on any action they propose or approve which may have a significant effect on the environment." *Id.*

Given the potential for air and water pollution resulting from the effects of the Plastics Law, plaintiffs alleged that defendants' failure to take a hard look at the adverse effects of the Plastics Law and to prepare an environmental impact statement violated SEQRA. *See id.* Plaintiffs further alleged that the Plastics Law violated 1) Article 2, Section 27-0704, prohibiting preparation of sites to be used as new landfills or the expansion of existing ones; 2) the Equal Protection Clause and the Due Process Clause of both the New York State and United States Constitutions; 3) Article I, Section 2 of the New York Constitution; and 4) the Commerce Clause of the United States Constitution. *Id.* at 766-67, 573 N.E.2d at 1037, 570 N.Y.S.2d at 781.

[103] Suffolk County, N.Y., [1988] N.Y. Local Laws 10-1988 (No. 10). This law states:

> § 3(a) . . . that no retail food establishment located or doing business within Suffolk County shall sell or convey food directly to ultimate consumers . . . unless such is placed . . . in biodegradable packaging at the end of the transaction.
>
> § 3(b) No retail food establishment located or doing business within Suffolk County shall sell, give or provide eating utensils or food containers within Suffolk County if such utensils or food container is composed of polystyrene or polyvinyl

plaintiffs were the Society of the Plastics Industry, Inc. ("the Society"), an industry lobbying group, Lawrence Wittman & Co. Inc., a local plastic products manufacturer and member of the Society, whose products were unaffected by the Plastics Law.[104] This case gave rise to issues concerning economic injury, special injury and organizational standing and will be the focus of the following analysis.

C. *Analysis*

1. Economic Injury

There is no provision in SEQRA which grants standing to a particular class of parties.[105] In *SPI*, the majority concluded that the absence of such a provision, coupled with the legislature's failure to pass a "citizen suit" bill which would grant standing to any citizen, indicated legislative intent to limit standing.[106] Thus, the court relied on prior decisions to conclude that plaintiffs did not have standing to bring an action under SEQRA unless they could show environmental injury.[107] However, the language of SEQRA does not limit itself to purely environmental harm, but specifically provides that social and economic concerns be addressed as well.[108] It is submitted that this court's narrow interpretation of

chloride.
Id.

[104] *See supra* note 101 (listing plaintiffs in *Society of the Plastics Indus.*).

[105] *See Society of the Plastics Indus.*, 77 N.Y.2d at 770, 573 N.E.2d at 1039, 570 N.Y.S.2d at 783 ("SEQRA contains no provision regarding Judicial review"); *see also* E.F.S. Ventures Corp. v. Foster, 71 N.Y.2d 359, 371, 520 N.E.2d 1345, 1351, 526 N.Y.S.2d 56, 62 (1988) (SEQRA intended to protect quality of environment for benefit of all people of New York). *See generally* N.Y. ENVTL. CONSERV. LAW § 8-0109:6 commentary at 79 (McKinney 1984) (same).

[106] *See Society of the Plastics Indus.*, 77 N.Y.2d at 770, 573 N.E.2d at 1039, 570 N.Y.S.2d at 783 (legislative rejection of open door policy by not passing citizen suit bill).

[107] *See id.* at 773, 573 N.E.2d at 1040, 570 N.Y.S.2d at 784 (court cites prior decisions requiring injury in fact and claim within zone of interests for standing). As applied by New York courts, Section 8-0109:6 of SEQRA limits standing to review SEQRA compliance to one asserting environmental injury. *See* N.Y. ENVTL. CONSERV. LAW § 8-0109:6 commentary at 79; *see also* A&M Bros., Inc. v. Waller, 150 A.D.2d 563, 564, 541 N.Y.S.2d 237, 239 (2d Dep't 1989) (SEQRA was enacted to preserve environment for people of New York therefore actual injury must be environmental). *See generally* IMPACT REVIEW, *supra* note 89, §7.07(3)(a) (purpose of SEQRA).

[108] *See infra* notes 109-112 and accompanying text (SEQRA discusses weighing social and economic factors).

SEQRA eliminates the ability of parties who suffer social and economic injuries to challenge an agency's action under SEQRA.

The stated purpose of SEQRA is to promote the enhancement of the environment, and does not include any mention of economic factors.[109] Yet, SEQRA states an intent to weigh social, economic and environmental factors when reaching decisions on proposed activities.[110] Additionally, legislative history shows that economic implications were a concern of the legislature.[111] During the Senate debate, Senator Smith, who introduced SEQRA as a bill, spoke of the drafters' intention to weigh environmental concerns with social and economic interests.[112]

While the New York Court of Appeals has often stated that the scope of the doctrine of standing should be widened,[113] it has refused to recognize economic interest as a basis for finding standing under SEQRA.[114] The court has reasoned that economic in-

[109] *See* N.Y. ENVTL. CONSERV. LAW § 8 (McKinney 1984). Section 8-0101 provides in pertinent part: "It is the purpose of this act to declare a state policy . . . to promote efforts which will prevent or eliminate damages to the environment . . . ." *Id.* For the most part the language in Section 8-0101, as well as other sections, comes from the National Environmental Policy Act of 1969 (NEPA). *Compare* 42 U.S.C. §§ 4321-4361 (1991) *with* N.Y. ENVTL. CONSERV. LAW § 8-0101 commentary at 61.

[110] *See* N.Y. ENVTL. CONSERV. LAW § 8-0103(7) (providing that "[i]t is the intent of the legislature that the protection and enhancement of the environment, . . . shall be given appropriate weight with social and economic considerations in public policy"); *id.* § 8-0109(1) (providing that "[a]gencies . . . shall act and choose alternatives that are consistent with social, economic, and other important considerations"); *id.* § 8-0113(2)(b) (providing that commissioner shall adopt "[c]riteria for determining whether or not a proposed action may have a significant effect on the environment, taking into account social and economic factors to be considered in determining the significance of an environmental effect").

[111] *See infra* note 112 and accompanying text (economic consideration accounted for in legislative history).

[112] NEW YORK STATE SENATE DEBATE L.1975 ch.216, at 8697 (Sen. Smith's statement on intent of drafters of SEQRA to consider economic injury).

[113] *See supra* note 90 and accompanying text (cases that suggest broadening doctrine of standing).

[114] *See* Society of the Plastics Indus., Inc. v. County of Suffolk, 77 N.Y.2d 761, 777, 573 N.E.2d 1034, 1043, 570 N.Y.S.2d 778, 787 (1991) (economic injury not within SEQRA's zone of interests and thus does not alone confer standing); Mobil Oil Corp. v. Syracuse Indus. Dev. Agency, 76 N.Y.2d 428, 433, 559 N.E.2d 641, 644, 559 N.Y.S.2d 947, 950 (1990) (party must demonstrate environmental injury because solely economic injury will not support standing); Weiss v. Planning Bd., 130 Misc. 2d 381, 384, 496 N.Y.S.2d 627, 629 (Sup. Ct. Dutchess County 1985) (competitive injury alone does not confer standing); Webster Assoc. v. Webster, 112 Misc. 2d 396, 401, 447 N.Y.S.2d 401, 405 (Sup. Ct. Monroe County) (allegation of commercial injury insufficient for standing), *aff'd*, 85 A.D.2d 882, 446 N.Y.S.2d 995 (4th Dep't 1981), *rev'd on other grounds*, 59 N.Y.2d 220, 451 N.E.2d 189, 464 N.Y.S.2d 431 (1983); IMPACT REVIEW, *supra* note 89, § 7.07(3)(b) (well

jury is not within the zone of interests SEQRA was enacted to protect.[115] The court believed that permitting anyone to bring an action would undermine the final disposition of administrative agency actions because any party (e.g., a special interest group) could bring an action for their own benefit and not necessarily for the benefit of society.[116] However, it is submitted that the economic injuries considered in SEQRA refer to those economic injuries which would affect all of society, not merely a small segment thereof. It is further submitted that by focusing on the purpose provision of SEQRA to the exclusion of the intent section, the New York Court of Appeals has inappropriately limited the full extent of SEQRA's protection.

Federal courts, in cases challenging an act under NEPA, have been less restrictive in finding standing in cases where economic injury is alleged.[117] It is submitted that in *SPI,* plaintiff Lawrence Wittman ("Wittman") would have had standing in a federal court. Federal courts do not balance a party's economic interests against that party's environmental interests.[118] Instead, federal courts find

settled that competitive interest not protected under SEQRA): Weinberg, *supra* note 4, at 19 (several decisions have limited standing to those asserting environmental injury as opposed to purely economic injury). *But see* Moran v. Village of Philmont, 147 A.D.2d 230, 233, 542 N.Y.S.2d 873, 875 (3d Dep't) (economic injury would confer standing because SEQRA speaks of both consequences), *dismissed on other grounds,* 74 N.Y.2d 943, 549 N.E.2d 447, 550 N.Y.S.2d 275 (1989).

[115] *See Society of the Plastics Indus.*, 77 N.Y.2d at 777, 573 N.E.2d at 1043, 570 N.Y.S.2d at 787. The court of appeals stated that this result is consistent with the policy of protecting the welfare of the community by limiting judicial review of remedial legislation when challenges are made by pressure groups seeking to delay or defeat actions to further their own economic interests. *Id.* at 779, 573 N.E.2d at 1045, 570 N.Y.S.2d at 789; *see also* Sun-Brite Car Wash, Inc. v. Board of Zoning & Appeals, 69 N.Y.2d 406, 415, 508 N.E.2d 130, 134, 515 N.Y.S.2d 418, 422 (1987) (plaintiff alleging economic injury outside zone of interests of zoning law denied standing). *But see Moran,* 147 A.D.2d at 233, 542 N.Y.S.2d at 874 (SEQRA contemplates economic injury); Weinberg, *supra* note 4, at 19 (failure to grant standing based upon finding of purely economic injury is arbitrary decision which New York Court of Appeals should abandon).

[116] *See Society of the Plastics Indus.*, 77 N.Y.2d at 774, 573 N.E.2d at 1041, 570 N.Y.S.2d at 785; *cf.* 4 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING § 27.09 (3d ed. 1986) (allowing anyone to seek judicial review would make administrative acts cumbersome).

[117] *See* Gerosa, Inc. v. Dole, 576 F. Supp. 344, 349 (S.D.N.Y. 1983) (economically motivated plaintiff had standing because there was environmental injury as well); Cartwright Van Lines, Inc. v. United States, 400 F. Supp. 795, 802 (W.D. Mo. 1975) (economic injury did not hinder standing since environmental injury alleged), *aff'd,* 423 U.S. 1082 (1976); IMPACT REVIEW, *supra* note 89, § 7.07(3)(b) (noting plaintiff may have standing even if environmental harm somewhat "strained").

[118] *See* National Helium Corp. v. Morton, 455 F.2d 650, 655 (10th Cir. 1971) (court does

standing as long as the environmental interest alleged is not insignificant.[119]

Furthermore, the federal courts allow noncompetitive economic harm as long as environmental harm is present.[120] Ironically, NEPA does not require agencies to consider economic consequences when reviewing an environmental project,[121] unlike SEQRA, which explicitly requires that economic factors be weighed with environmental considerations.[122] Therefore, it is suggested that the New York Court of Appeals re-evaluate SEQRA and allow standing when a party suffers noncompetitive economic harm and there is a significant environmental injury alleged.

2. Special Injury

The requirement that a plaintiff suffer special injury different from the type suffered by the general public has been applied in cases where the plaintiff alleged a local injury, as opposed to an injury to the community at large.[123] It is suggested that this re-

not weigh economic interest against environmental interest when deciding question of standing).

[119] *See* Robinson v. Knebel, 550 F.2d 422, 425 (8th Cir. 1977) (standing exists as long as environmental injury significant).

[120] *See supra* notes 50-51 and accompanying text (federal court redressability of economic injury).

[121] *Compare* National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(B) (1991) ("all agencies of the Federal Government shall — identify and develop procedures . . . which will insure that presently unquantified environment amenities and values may be given appropriate consideration in decision making along with economic and technical considerations") *with* N.Y. ENVTL. CONSERV. LAW § 8-0109(1) (McKinney 1984) (agencies shall act and choose alternatives consistent with economic considerations). *See generally* Neil Orloff, *SEQRA: New York's Reformation of NEPA*, 46 ALB. L. REV 1128, 1132 (1982) (language of SEQRA taken from NEPA).

[122] *See supra* notes 110-12 and accompanying text (weighing of economic factors); *see also* Har Enters. v. Town of Brookhaven, 74 N.Y.2d 524, 528, 548 N.E.2d 1289, 1292, 549 N.Y.S.2d 638, 641 (1989) (social, economic and environmental factors shall be considered when reaching decisions on proposed environmental activities).

[123] *See* Mobil Oil Corp. v. Syracuse Indus. Dev. Agency, 76 N.Y.2d 428, 430, 559 N.E.2d 641, 642, 559 N.Y.S.2d 947, 948 (1990) (owner of real property near site of proposed mall construction project had standing to bring action alleging general injury to community); *Har Enters.*, 74 N.Y.2d at 526, 548 N.E.2d at 1291, 549 N.Y.S.2d at 640 (owner of property had standing to seek review of zoning changes that would have adverse effects on land); Sun-Brite Car Wash, Inc. v. Board of Zoning & Appeals, 69 N.Y.2d 406, 411, 508 N.E.2d 130, 133, 515 N.Y.S.2d 418, 421 (1987) (plaintiff had standing to bring action opposing grant of permit to construct competing business in area of plaintiff's business).

quirement has been used to further the policy of ensuring that parties have a true adversarial interest when challenging an environmental action.[124]

In *SPI*, the court of appeals denied Wittman standing for failure to allege a special and distinct injury.[125] Although plaintiff argued, and the dissent agreed, that the alleged injuries from disposal of paper would be widespread, the majority found that if injuries occurred they would be centered around disposal sites.[126] Since Wittman did not live close to a disposal site, the court found that he did not directly suffer any harm.[127]

One of plaintiffs' claims was that the Plastics Law[128] would lead to pollution of the aquifer that provides water to the Long Island community.[129] Since the majority did not decide whether specific injury is needed when the community at large is affected, it is suggested that it must have looked to the merits of the case when deciding to discount this claim. Although the zone of interests test calls for a brief look at the merits in order to decide whether the alleged injury is within the zone of interests of the statute,[130] here, it is suggested, the court looked further into the merits than the zone of interests test allows for. It is submitted that the merits should be examined by a court solely to determine whether the injury alleged is genuinely environmental injury, and if it is, standing should be granted and the case decided on its merits.

[124] *See* Society of the Plastics Indus. Inc. v. County of Suffolk, 77 N.Y.2d 761, 778, 573 N.E.2d 1034, 1044, 570 N.Y.S.2d 778, 788 (1991) (requiring special injury prevents parties from misusing statute and delaying governmental action); *Sun-Brite Car Wash*, 69 N.Y.2d at 412, 508 N.E.2d at 133, 515 N.Y.S.2d at 421 (allowing anyone to sue would "proliferate" litigation).

[125] *See Society of the Plastics Indus.*, 77 N.Y.2d at 778, 573 N.E.2d at 1044, 570 N.Y.S.2d at 788.

[126] *See id.* at 781, 573 N.E.2d at 1045, 570 N.Y.S.2d at 789.

[127] *See id.* at 778, 573 N.E.2d at 1044, 570 N.Y.S.2d at 788 (injury will affect those directly around landfills).

[128] *See supra* note 103 and accompanying text (excerpts from Plastics Law).

[129] *See* Brief for Respondent at 9, *Society of the Plastics Indus.* 77 N.Y.2d 761, 573 N.E.2d 1034, 570 N.Y.S.2d 778 (No. 11262) (acquifer is Long Island's main water supply).

[130] *See generally* Cass R. Sunstein, *Standing and the Privitization of Public Law*, 88 COLUM. L. REV. 1432, 1445 (1988) (zone of interests test arguably calls for examination of merits of case to determine whether injury within zone of interests).

3. Organizational Standing

The *Sierra Club* test has been utilized by the New York Court of Appeals[131] to ensure that only proper parties are able to bring actions,[132] most notably by preventing special interest groups from delaying the implementation of administrative agency acts.[133]

In *SPI* the court of appeals applied this test and denied plaintiffs standing.[134] Although plaintiff, the Society of the Plastics Industry, alleged environmental interests,[135] the court held that since plaintiff is a for profit trade organization, its interests were not related to the purpose of SEQRA.[136] It is suggested that this test, as applied in *SPI*, is a valuable tool to ensure that legislative action is not hindered because of a group's "personal" agenda.

D. A Comparison with Other Jurisdictions

New York is only one of many states that has enacted a statute similar to NEPA.[137] For example, Washington and Wisconsin have

[131] *See* Dental Soc'y of New York v. Carey, 61 N.Y.2d 330, 333-34, 462 N.E.2d 362, 363, 474 N.Y.S.2d 262, 262 (1984) (adoption of test in *Hunt v. Washington State Apple Advertising Comm'n* which in turn adopted *Sierra Club* test); *see also supra* notes 28-30 and accompanying text (*Sierra Club* test).

[132] *See* Society of the Plastics Indus., Inc. v. County of Suffolk, 77 N.Y.2d 761, 774, 573 N.E.2d 1034, 1041, 570 N.Y.S.2d 778, 785 (1991) (requirement ensures proper parties seek redress for environmental injury); Douglaston Civic Ass'n v. Galvin, 36 N.Y.2d 1, 7, 324 N.E.2d 317, 320, 364 N.Y.S.2d 830, 835 (1974) (same).

[133] *See Society of the Plastics Indus.*, 77 N.Y.2d at 778, 573 N.E. 2d at 1043, 570 N.Y.S.2d at 787 (*Dental Soc'y*'s three-prong test furthers judicial policy of not sanctioning misuse of statute); *supra* notes 116 and 124 and accompanying text. *See generally* IMPACT REVIEW, *supra* note 89, § 7.07 (2)(b)(i) (three-prong test).

[134] *See Society of the Plastics Indus.*, 77 N.Y.2d at 776, 573 N.E.2d at 1043, 570 N.Y.S.2d at 787.

[135] *Id.* at 776, 573 N.E.2d at 1043, 570 N.Y.S.2d at 787 (plaintiffs advocated SPI had commitment to protect environment).

> Through its committees and task forces, SPI is actively involved in the development of effective solutions to environmental concerns affecting the Plastics Industry. SPI is dedicated to the protection of the environmental interests of its members and the collective membership of SPI has a strong commitment to the manufacture and sale of plastic products in an environmentally sound manner.

Id.

[136] *See id.* at 776, 573 N.E.2d at 1043, 570 N.Y.S.2d at 787. In applying the three- prong test from *Dental Soc'y*, the court found that the interests SPI asserted were not related to the interests of its members. *Id.* SPI stated that it had a strong commitment to the manufacture and sale of plastics in an environmentally safe manner. *Id.* The court said this was not related to the interests of SPI's members to have a healthy environment. *Id.*

[137] *See generally* Robinson, *supra* note 83, at 1157-59 (discussing mini-NEPA states).

similar requirements a party must meet before challenging administrative agency action under their "little NEPA" statutes.[138] In both of these states courts have refused to grant standing to parties challenging an environmental action when solely economic injuries are alleged.[139]

However, California courts have been liberal in conferring standing[140] to parties seeking enforcement of the California Environmental Quality Act ("CEQA").[141] These courts have reasoned that the benefit of ensuring protection of the environment outweighs the value of preventing parties from bringing action by interposing strict rules of standing.[142]

By contrast, Connecticut and New Jersey provide "citizen suit" laws that specify who may challenge an administrative agency action affecting the environment.[143] As previously stated, a citizen

[138] *See, e.g.,* Concerned Olympia Residents v. City of Olympia, 657 P.2d 790, 793 (Wash. App. 1983) (injury in fact and zone of interest requirements); Milwaukee Brewers Baseball Club v. Wisconsin Dep't of Health and Social Servs., 343 N.W.2d 245, 250 (Wis. 1986) (standing granted because traffic congestion met environmental injury requirement under WEPA).

[139] *See* IMPACT REVIEW, *supra* note 89, § 7.07(3)(b) (stating that Washington and Wisconsin deny standing based solely on economic injury); *see also Concerned Olympia Residents*, 657 P.2d at 793 (economic harm not within zone of interests of State Environmental Policy Act); Fox v. Wisconsin Dep't of Health & Social Servs., 334 N.W.2d 532, 538 (Wis. 1983) (injury must be caused by change in environment). *See generally* Weinberg, *supra* note 4, at 20 (economic injury alone will not confer standing).

[140] *See* Bozung v. Local Agency Formation Comm'n, 529 P.2d 1017, 1023 (Cal. 1975) (discussing liberal view of standing); Kane v. Redevelopment Agency, 224 Cal. Rptr. 922, 924 (2d Dist. 1986) (individual within class of persons interested in redevelopment combined with status as resident of city sufficient to satisfy liberal standing requirements).

[141] California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21000-21176 (West 1976) (California's version of NEPA).

[142] *See generally* Robert M. Meyer, *Standing in Public Interest Litigation: Removing the Procedural Barriers,* 15 LOY. L.A. L. REV. 1, 17-19 (1981) (California courts have abandoned rigid standing requirements to ensure issues of public importance resolved).

[143] *See* CONN. GEN. STAT. ANN. § 22a-19 (1985). The statute provides that:

> [A]ny person, partnership, corporation, association, organization or other legal entity may intervene as a party on the filing of a verified pleading asserting that the proceeding or action for judicial review involves conduct which has, or which is reasonably likely to have, the effect of unreasonably polluting, impairing, or destroying the public trust in the air, water or other natural resources of the state.

Id.; N.J. STAT. ANN. § 2A:35A-4(a) (West 1987). This statute provides that "[a]ny person may maintain an action . . . against any other person to enforce, or to restrain the violation of, any statute, regulation, or ordinance which is designed to prevent or minimize pollution, impairment or destruction of the environment." *Id.*; *see also* Red Hill Coalition, Inc. v. Town Plan & Zoning Comm'n, 563 A.2d 1347, 1351 (Conn. 1989) (anyone may raise environmental claims); Department of Transp. v. PSC Resources, Inc., 387 A.2d 393 (N.J. 1978) (plaintiff met standing requirement of citizens' suit bill under Water Quality Im-

suit provision expressly gives citizens standing to sue.[144] It is submitted that these states have taken a more liberal approach to standing than New York courts, as evidenced by the broad spectrum of litigants allowed to pursue their actions on the merits.

Conclusion

Courts must balance the competing policies of preventing unwarranted intrusion into administrative agency action by inappropriate parties against the danger of preventing parties who suffer injury within the zone of interests from "getting their day in court." Standing is properly denied to plaintiffs who suffer injury as the result of agency action. Standing is properly granted to plaintiffs whose injury is a result of the environmental consequences of the action, even if the case will probably fall on the merits. When it is unclear whether or not a party has standing, courts are entitled to "tip the scales" by inquiring into the merits. This is a rational means of avoiding arbitrary decisions.

New York's view of standing narrows in the presence of economic injury and is not in harmony with federal practice. Instead, New York courts have looked further into the merits than federal courts in order to determine whether the party bringing the action has an economic motive. If such an economic interest exists, the action will be dismissed. The result has been that New York is more likely to deny standing to parties challenging the sufficiency of environmental review than federal courts. This approach is contrary to the New York Court of Appeals declaration that the scope of standing should be widened. Based on the inconsistency between New York policy and practice, combined with the tremendous concern for the environment, it is time for the New York Legislature to take a "hard look" at SEQRA and codify standing in a "citizen suit" provision.

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provement Act).

[144] *See supra* note 143 (examples of citizen suit provisions).