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INFORMATIONAL AND PROCEDURAL STANDING AFTER *LUJAN V. DEFENDERS OF WILDLIFE*

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I. INTRODUCTION

In *Lujan v. Defenders of Wildlife*,[1] Justice Scalia issued what has been described as a "dramatic opinion [which] significantly shift[ed] the law of standing."[2] Justice Scalia drew a broad distinction between two types of cases.[3] "When . . . the plaintiff is himself an object of the action (or foregone action) at issue . . . there is ordinarily little question" that the plaintiff has standing.[4] However, the Court reasoned that when "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed."[5] This narrowing of standing, favoring those injured in a traditional sense, has called into question the continued existence of two non-traditional avenues into the federal courts: informational and procedural standing.[6] Because the

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1. 504 U.S. 555 (1992). *Defenders* involved a suit filed against the Secretary of the Interior by groups which were "dedicated to wildlife conservation and other environmental causes." *Id.* at 559. The Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) had promulgated a joint regulation on behalf of the Secretary of the Interior and the Secretary of Commerce, respectively. The regulation stated "that the obligations imposed by § 7(a)(2) [of the Endangered Species Act of 1973 (ESA), 87 Stat. 892, as amended, 16 U.S.C. § 1536 (1973)] extend to actions taken in foreign nations." *Defenders*, 504 U.S. at 558. The obligations imposed under § 7(a)(2) are as follows:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical.

Defenders, 504 U.S. at 558. One year after the FWS and NMFS extended § 7(a)(2) to actions in foreign nations, however, the "Interior Department . . . reexamine[d] its position" and subsequently issued and promulgated a "revised joint regulation, reinterpreting § 7(a)(2) to require consultation only for actions taken in the United States or on high seas." *Id.* at 558-59. Consequently, this suit was initiated with the organization seeking both a declaratory judgment which would declare "that the new regulation is in error as to the geographic scope of § 7(a)(2) and an injunction requiring the Secretary to promulgate a new regulation restoring the initial interpretation." *Id.* at 559.

2. Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 164-65 (1992). This article is a thorough and scathing attack on Justice Scalia's standing position; the attack focuses on the Court's approach in *Defenders* which lacks any textual or historical foundation. *See id.* at 166.

3. *Defenders*, 504 U.S. at 561. In distinguishing between cases where the claimed injury is due to the government's allegedly unlawful regulation of a third party and cases where the plaintiff is the object of the action, Justice Scalia wrote, "When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or foregone action) at issue." *Id.*

4. *Id.*

5. *Id.* at 562.

6. Informational standing is mostly employed by organizational plaintiffs which engage "in disseminating environmental information" to the public. Foundation on Economic Trends v. Lyng, 943 F.2d 79, 83 (D.C. Cir. 1991) (citation omitted). Such plaintiffs claim informational

National Environmental Policy Act of 1969 (NEPA)[7] and other environmental protection statutes[8] are principally informational and procedural statutes which do not convey traditional substantive rights,[9] *Defenders* could significantly inhibit environmentalists' and other groups' abilities to have their grievances addressed in federal court. Complaints brought under NEPA and other informational and procedural statutes generally fall within Justice Scalia's disfavored category where plaintiffs assert "injury aris[ing] from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*."[10] Therefore, a higher standing barrier must be overcome.[11]

The outlook for informational and procedural standing, however, is not entirely gloomy. Justice Kennedy, in his *Defenders* concurring opinion, joined by Justice Souter, expressed a flexible notion of the injury in fact standing requirement which could easily embrace

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standing on the basis of an injury arising from their lack of information when a government agency fails to provide an environmental impact statement (EIS) for a proposed project. *See id.* For example, informational standing was found in *Foundation* where a private biotechnological and genetics engineering interest group challenged the Department of Agriculture's failure to prepare an EIS under the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370 (1969). *Foundation*, 943 F.2d at 80, 83. The interest group claimed standing on the basis of informational injury. *Id.* at 83.

Procedural standing is standing to ensure that a governmental agency follows proper procedure as set out in a particular statute. *Defenders*, 504 U.S. at 572, requires a plaintiff to show two essential elements for procedural standing: (1) the plaintiff must be a "person who has been accorded a procedural right to protect [his or her] concrete interests . . . ," *id.* at n.7, and (2) the plaintiff must have "some threatened concrete interest . . . that is the ultimate basis of [his or her] standing. *Id.* at n.8. *See also* Douglas County v. Babbitt, 48 F.3d 1495, 1500 n.4 (9th Cir. 1995) (explaining that "[i]t is unclear whether this 'procedural right' must be conferred by a statute, or whether the right arises because a concrete interest is threatened").

7. 42 U.S.C. §§ 4321-4370 (1969).

8. *See, e.g.*, ESA, 16 U.S.C. §§ 1531-1544 (1988 & Supp. V 1993). The ESA attempts to "protect species of animals against threats to their continuing existence caused by man . . . by instruct[ing] . . . the Secretary of the Interior to promulgate by regulation a list of those species which are either endangered or threatened under enumerated criteria, and to define the critical habitat of these species." *Defenders*, 504 U.S. at 558.

9. NEPA requires that all federal agencies prepare an EIS for "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment . . . ." 42 U.S.C. § 4332(C) (1988 & Supp. V 1993). This requirement has been held to be merely procedural and not substantive. *See, e.g.*, Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980) (explaining that once agencies make their decisions under the guidelines of NEPA's procedural requirements, "the only role for a court is to insure that the agency has considered the environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken'" (quoting Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976))).

10. *Defenders*, 504 U.S. at 562.

11. *Id.* "Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but is ordinarily 'substantially more difficult' to establish." *Id.* (quoting Allen v. Wright, 468 U.S. 737, 758 (1984)).

informational injury.[12] In addition, because Justices Kennedy, Souter, and Stevens, in their concurring opinions,[13] and Justices Blackmun and O'Connor, in their dissenting opinion,[14] all accepted the *Defenders* plaintiffs' innovative standing theories, informational standing may still exist. Further, Justice Scalia did carve out a substantial niche for procedural rights from his general organizing principle.[15]

This article examines the continued viability of informational and procedural standing as non-traditional paths into federal courts. First examined are the traditional standing requirements re-articulated in *Defenders*. The discussion will then turn to the pre-*Defenders* concept of informational standing. Finally, this article will discuss the more recently articulated modified standing requirements for plaintiffs who seek to establish standing by relying on an injury to their procedural rights.

II. TRADITIONAL STANDING REQUIREMENTS

Prior to 1970, standing was rarely at issue within the courts.[16] In the rare case where standing was at issue, the question of standing was decided *not* by constitutional reference, but rather, "by deciding whether Congress or any other source of law had granted the plaintiff a right to sue."[17] In other words, "to have standing, a litigant [merely] needed a *legal right* to bring suit."[18] In fact, prior to 1970, cases which dealt with standing issues did not even use the well known modern phrase "injury in fact."[19] The injury in fact requirement was a completely unnecessary requirement prior to this time.

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12. *Id.* at 580 (Kennedy, J., concurring) (explaining that "[a]s Government programs and policies become more complex and far-reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition").

13. *See supra* note 12 and accompanying text for views held in the concurring opinions of Justices Kennedy and Souter. Justice Stevens' concurring opinion specifically found the plaintiffs' injuries redressable and imminent, but concurred in the judgment because he did not believe the ESA's consultation provision extended to activities in foreign countries. *Defenders*, 504 U.S. at 585 (Stevens, J., concurring).

14. Justice Blackmun also found sufficient immediacy and redressability for the plaintiffs to have standing. *Id.* at 589 (Blackmun, J., dissenting).

15. *Id.* at 572 n.7 ("There is much truth to the assertion that 'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.").

16. *See* Sunstein, *supra* note 2, at 169.

17. *Id.* at 170 (citation omitted).

18. *Id.* (emphasis added). *See, e.g.*, Tennessee Elec. Power Co. v. TVA, 306 U.S. 118, 137-38 (1939) (noting that a legal right included "one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege").

19. Sunstein, *supra* note 2, at 169 (noting that Barlow v. Collins, 397 U.S. 159 (1970), was the first case to actually use the phrase "injury in fact").

So long as "the common law, or some other source of law . . . conferred a right to sue," parties had standing without question.[20]

The notion of standing was further developed with "the enactment and interpretation of the Administrative Procedure Act (APA) in 1960."[21] The APA "was an effort to codify the developing body of judge-made standing law"[22] by requiring that parties seeking review of agency action must demonstrate that they have suffered a "legal wrong because of the agency action"[23] and that they were "adversely affected or aggrieved by agency action within the meaning of the relevant statute."[24] Thus, under the APA, parties could be entitled to standing by demonstrating that: a) their common law interests were at stake; b) their statutory interests were at stake; or c) Congress had granted them standing through a different statute.[25]

From the early 1960s through the mid-1970s, the notion of standing was expanded even further. The courts began to build upon the APA's "legal wrong" test by "grant[ing] standing to many individuals and groups intended to be benefitted by statutory enactments."[26] This expansion resulted from observers of regulatory law who "claimed that congressional purposes could be undermined not merely by excessive regulation, but also by insufficient regulation or

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20. *Id.* at 170 (noting that this notion of what entitled a person to have standing was derived from the courts' understanding of Article III of the U.S. Constitution).

21. *Id.* at 181 (citing APA, ch. 423, 60 Stat. 237 (1946)(codified at 5 U.S.C. §§ 551-59, 701-06 (1988 & Supp. V 1993))).

22. *Id.*

23. 5 U.S.C. § 702 (1988 & Supp. V 1993). Plaintiffs could demonstrate they suffered a legal wrong in one of two ways. First, any person who could show an "invasion of a common law interest" would meet the APA's legal wrong requirement and would therefore "be entitled to bring suit." Sunstein, *supra* note 2, at 181. Second, a person "could show that they suffered a legal wrong within the meaning of APA by demonstrating that their statutory interests were at stake." *Id.* at 181-82.

24. 5 U.S.C. § 702 (1988 & Supp. V 1993). To demonstrate that they were "aggrieved by agency action within the meaning of a relevant statute," the parties were required to demonstrate that any relevant statute "*other than* the APA . . . granted them standing by providing that people 'adversely affected or aggrieved' were entitled to bring suit . . . . The APA thus provided for congressional authorization of actions by people lacking legal injuries." Sunstein, *supra* note 2, at 182. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) is one example of a federal statute which grants standing to "any person" to bring suit against the United States, government agencies or instrumentalities, and the U.S. President or other U.S. officers for violating the "guidelines, rules, regulations, or criteria" for any "preliminary assessments carried out . . . for facilities at which hazardous substances are located." 42 U.S.C. §§ 9620, 9659 (a)(1) & (a)(2) (1988 & Supp. V 1993). *See also, e.g.*, the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6972(a)(1) & (a)(2) (1988 & Supp. V 1993); the Clean Air Act, 42 U.S.C. § 7604(A) (1988 & Supp. V 1993); the Federal Water Pollution Control Act, 33 U.S.C. § 1365(a) (1988 & Supp. V 1993).

25. *See* Sunstein, *supra* note 2, at 182.

26. *Id.* at 184; *see also* Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920, 932 (2d Cir. 1968); Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1000-06 (D.C. Cir. 1967).

agency hostility to statutory programs. If conformity to law was a goal of administrative law, there was no reason to distinguish between the beneficiaries and the objects of regulation."[27]

The more traditional standing doctrine was articulated by the Supreme Court in *Association of Data Processing Service Organizations v. Camp*.[28] In *Camp*, a decision by the Comptroller of the Currency which permitted national banks to provide data processing services was challenged by the association.[29] The Court articulated a two-part test, one part statutory and one part constitutional, that must be satisfied for a party to have standing.[30]

The statutory test "concerns . . . the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute."[31] The constitutional requirement, taken directly from Article III, section 2 of the Constitution, requires that courts only resolve "cases" or "controversies" if "the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise."[32] The "otherwise" may "reflect 'aesthetic, conservational, and recreational' as well as economic values."[33]

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27. Sunstein, *supra* note 2, at 183 (citation omitted).

28. 397 U.S. 150 (1970).

29. *Id.* at 151.

30. *Id.* at 153. Note that under the *Camp* test, plaintiffs "no longer [need] to show a 'legal interest' or 'legal injury.'" Sunstein, *supra* note 2, at 185. Rather, plaintiffs are required "to show an injury in fact." *Id.*

31. *Camp*, 397 U.S. at 153. This issue was not addressed by the *Defenders* court and thus will not be expanded upon further for purposes of this article.

32. *Id.* at 152. *See also* Warth v. Seldin, 422 U.S. 490, 498-99 (1975). The case or controversy requirement from Article III, section 2 reads as follows:

> 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 all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—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;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2; *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 3-7 (2d ed. 1988). Note, however, that Article III, section 2 does not even mention "injury in fact," but rather, it mentions only cases and controversies. U.S. CONST. art. III, § 2. Also implicit within Article III is a cause of action, since "[w]ithout a cause of action, there [is] no case or controversy and hence no standing." Sunstein, *supra* note 2, at 170. Thus, the additional standing requirements, such as injury in fact, have been formed through judicial opinions. *See, e.g., Camp*, 397 U.S. at 152-53. Also, the APA's "legal interest" test is no longer a standing issue; rather, such a test "goes to the merits." *Id.* at 153.

33. *Camp*, 397 U.S. at 154; *cf. Warth*, 422 U.S. at 500 (finding limits on federal courts that prevent them from deciding "abstract questions . . . unnecessary to protect individual rights").

Consequently, what began as a relatively simple test progressively lost its simplicity upon re-articulation. The injury in fact must now be "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) 'actual or imminent', not 'conjectural' or 'hypothetical.'"[34] The phrase "particularized" in this context means "the injury must affect the plaintiff in a personal and individual way."[35] Furthermore, a causal connection must exist "between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . [the] result [of] the independent action of some third party not before the court.'"[36] Finally, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"[37] Thus, under this traditional notion of standing, plaintiffs must demonstrate injury in fact, causality, and redressability to gain standing to bring suit in federal court.[38]

III. THE PRE-*DEFENDERS* CONCEPT OF INFORMATIONAL STANDING

The existence of informational standing as an independent standing basis remains unclear after *Defenders*. Many courts, however, have noted the Supreme Court's disposition toward narrowing standing.[39] An illustrative pre-*Defenders* example is the D.C.

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34. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); *see also* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982) (holding that a litigant must demonstrate an "actual or threatened injury amenable to judicial remedy"); Rizzo v. Goode, 423 U.S. 362, 372 (1976) (stating that a litigant must show "'real and immediate' injury").

35. *Defenders*, 504 U.S. at 560 n.1.

36. *Id.* at 560 (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)); *see also* Allen v. Wright, 468 U.S. 737, 751 (1984) (holding that a litigant must allege "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief").

37. *Defenders*, 504 U.S. at 561.

38. *See also* Friends of Boundary v. Thomas, 53 F.3d 881, 886 (8th Cir. 1995) (noting that the Article III elements of constitutional standing are "injury in fact, traceability, and redressability").

39. For general discussions on the Supreme Court's pronounced disposition toward narrowing standing see Patti A. Meeks, *Justice Scalia and the Demise of Environmental Law Standing*, 8 J. LAND USE & ENVTL. L. 343 (1993); Edward B. Sears, Note, Lujan v. National Wildlife Federation: *Environmental Plaintiffs Are Tripped Up on Standing*, 24 U. CONN. L. REV. 293 (1991). One example of a court playing too safe in light of this disposition toward narrowing standing is *Region 8 Forest Service Timber Purchasers Council v. Alcock*, 993 F.2d 800, 805-10 (11th Cir. 1993) (holding that certain timber-purchasing companies and the Region 8 Forest Service. Timber Purchasers Council lacked economic, quality of life, environmental, and procedural injuries; thus, the court allowed dismissal of the suit against the U.S. Forest Service for its alleged "failure to fully implement the Woodpecker Chapter as required by the [Endangered] Species Act and its subsequent adoption of the Policy in violation of the [Endangered] Species Act, NEPA, and the Forest Management Act;" in particular, the court relied on *Defenders* for the proposition that the alleged injuries here, as in *Defenders*, were "nothing more than a

Circuit's opinion in *Foundation on Economic Trends v. Lyng*.[40] In *Foundation*, a biotechnology and genetic engineering interest group challenged the Department of Agriculture's failure to prepare an EIS under NEPA regarding its activities with plant germplasm.[41] The district court did not address standing since neither party raised the standing issue.[42] The court of appeals, however, addressed the issue when the Department of Agriculture claimed that the genetic engineering interest group had no standing based on the Supreme Court's decision in *Lujan v. National Wildlife Federation*.[43]

A. Informational Standing & the D.C. Circuit

1. *Foundation on Economic Trends v. Lyng*[44]

In its decision, the *Foundation* court took the opportunity to review its position on informational standing by first tracing the existence of informational standing to a footnote in *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission* [hereinafter *SIPI*].[45] In *SIPI*, the Atomic Energy Commission (AEC) was conducting a "Liquid Metal Fast Breeder Reactor program [LMFBR]."[46] With "growing concern about a possible energy crisis,"[47] the AEC implemented the program as an effort "to build an industrial base and obtain acceptance for LMFBR plant types by utilities, primarily through planned Government-assisted construction of commercial scale LMFBR electrical power plants."[48] The plaintiff organization sought declaratory relief and "a judgment requiring the AEC, on the basis of the impact statement covering the overall program, 'to adopt that course which most conforms to

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'generalized grievance about government' which 'does not state an Article III case or controversy'" since "[t]he asserted injuries are not peculiar to the Council and the Timber Companies but rather are shared by all citizens") (quoting *Defenders*, 504 U.S. at 571), *cert. denied, Service Timber Purchasers Council v. Meier*, 114 S. Ct. 683 (1994).

40. 943 F.2d 79 (D.C. Cir. 1991).

41. *Id.* at 81-83.

42. *Id.* at 82.

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

44. 943 F.2d 79 (D.C. Cir. 1991).

45. 481 F.2d 1079, 1086-87 n.29 (D.C. Cir. 1973). The *SIPI* decision has subsequently been called into doubt by *National Wildlife Federation v. FERC*, 912 F.2d 1471 (D.C. Cir. 1990) and *Foundation on Economic Trends v. Watkins*, 794 F. Supp. 395 (D.D.C. 1992). In addition, the *SIPI* decision was limited by *Competitive Enterprise Institute v. National Highway Traffic Safety Administration*, 901 F.2d 107 (D.C. Cir. 1990).

46. *SIPI*, 481 F.2d at 1082.

47. *Id.* at 1084.

48. *Id.* at 1083 (citation omitted). The AEC wanted to implement the LMFBR because such fast breeder reactors "ma[de] possible [the] vast expansion of fuel available for nuclear reactors." *Id.* Such reactors, stated the AEC, "were essential to long-range major use of nuclear energy." *Id.* (citation omitted).

NEPA's policies.'"[49] Conversely, the AEC argued that "NEPA requires [a] detailed statement only for particular facilities, and that no separate NEPA analysis on an entire research and development program [was] required."[50] The *SIPI* court observed that, because the plaintiff organization distributed scientific information to the public, an activity adversely affected by the agency's failure to prepare an EIS, the organization might have standing to challenge the decision not to prepare the EIS.[51]

Next, the D.C. Circuit reviewed its prior opinion in *National Wildlife Federation v. Hodel*[52] which also addressed standing in the NEPA context. In *Hodel*, the National Wildlife Federation (NWF) and other environmental groups[53] brought suit to challenge the Secretary of the Interior's 1983 revision of the regulations regarding the Surface Mining Control and Reclamation Act of 1977.[54] The Act regulated "[e]nvironmental impacts from surface coal mining" through "a permit system (§§ 506-514) and a series of performance standards (§§ 515-516)."[55] The 1983 revision of the Act "granted both state regulators and coal mine operators greater discretion in complying with the general requirements of the statute."[56] In dealing with whether the groups had sufficient standing to sue, the court, after noting the *SIPI* footnote, stated that "for affiants voicing environmental concerns . . . the elimination of the opportunity to see and use an EIS prepared under federal law does constitute a constitutionally sufficient injury on which to ground standing."[57] The identified injury in fact in *Hodel* was the impairment of the "ability to evaluate and oppose future mining in the absence of an EIS."[58]

Finally, the D.C. Circuit reviewed their discussion of informational standing in the NEPA context in *Competitive Enterprise Institute v. National Highway Traffic Safety Administration*.[59] In *Competitive Enterprise*, the Competitive Enterprise Institute (CEI) and Consumer Alert brought suit to challenge the "orders of the National Highway Traffic Safety Administration ("NHTSA") [which] lower[ed] the

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49. *Id.* at 1082 n.1 (citation omitted in original).
50. *SIPI*, 481 F.2d at 1085.
51. *Id.* at 1087 n.29.
52. 839 F.2d 694 (D.C. Cir. 1988).
53. *Id.* at 702.
54. Pub. L. No. 95-87, 91 Stat. 445 (codified as amended at 30 U.S.C. §§ 1201 et seq. (1988 & Supp. V 1993)).
55. *Hodel*, 839 F.2d at 700.
56. *Id.* at 702.
57. *Id.* at 712.
58. *Id.*
59. 901 F.2d 107, 122 (D.C. Cir. 1990).

minimum Corporate Average Fuel Economy ("CAFE") standards for passenger cars manufactured in [certain] model years."[60] The CEI and Consumer Alert claimed standing because their ability to inform their members and the public was allegedly injured by the NHTSA's refusal to prepare an EIS before amending the CAFE standards.[61] The *Competitive Enterprise* court acknowledged that informational injury was constitutionally sufficient: "Allegations of injury to an organization's ability to disseminate information may be deemed sufficiently particular for standing purposes where that information is essential to the injured organization's activities."[62] The court denied standing, however, because the statutory requirement for standing was not satisfied since the organizations sought an "EIS as a vehicle for obtaining or disseminating information on a non-environmental issue," namely, to inform the public about "traffic fatalities."[63]

After reviewing prior decisions implicating informational standing, the *Foundation* court stated that despite its previous general statements, the D.C. Circuit had never "*sustained* an organization's standing in a NEPA case solely on the basis of 'informational injury,' that is, damage to the organization's interest in disseminating the environmental data an impact statement could be expected to contain."[64] By making such a statement, the D.C. Circuit arguably ignored both the letter and the spirit of its prior decisions. First, the *Foundation* court apparently distinguished *Hodel* because, unlike *Hodel*, the informational injury in *Foundation* was to several individuals as opposed to an organization.[65] Second, the *Foundation* court was either unaware of, or simply ignored, the doctrine of derivative standing articulated by the Supreme Court in *Hunt v. Washington Apple Advertising Commission*.[66] Finally, the court's distinction of

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60. *Id.* at 110 (citation omitted).

61. *Id.* at 111, 122.

62. *Id.*

63. *Id.* at 123. The court noted that to gain informational standing, the information which is sought must "relate[] to environmental interests that NEPA was intended to protect." *Id.* The parties here sought an to inform the public of traffic fatalities. Such an interest "falls outside the sphere of any definition of injury adopted in NEPA cases." *Id.* Consequently, the statutory requirement that the interests must be "environmental" was not satisfied. *Id.*

64. Foundation on Economic Trends v. Lyng, 943 F.2d 79, 84 (D.C. Cir. 1991) (emphasis added).

65. *Id.*

66. 432 U.S. 333, 343 (1977):

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Competitive Enterprise was even more strained since the distinction was based solely upon the fact that the *Competitive Enterprise* court did not *sustain* standing.[67] Again, the *Foundation* court ignored the fact that the decision to refuse standing in *Competitive Enterprise* was based on grounds completely unrelated to the sufficiency of informational standing as a doctrine.[68] Therefore, in *Foundation*, no statutory standing existed under the APA.[69]

2. *Criticism of the Foundation Rationale*

The *Foundation* court did acknowledge the "logical appeal" of constitutionally recognizing informational injury standing:

> [I]f the *injury in fact* is the lack of information about the environmental impact of agency action, it follows that the injury is *caused* by the agency's failure to develop such information in an impact statement and can be *redressed* by ordering the agency to prepare one.[70]

The court, however, chose to apply policy over logic in its *Foundation* decision. Informational standing, stated the court, "would potentially eliminate *any* standing requirement in NEPA cases, save when an organization was foolish enough to allege that it wanted the information for reasons having nothing to do with the environment."[71] The court did not explain how this elimination of the standing requirement would happen, but presumably the elimination would result because all citizens could claim an interest in receiving the information.[72] Fortunately, mechanisms already exist to prevent such a gutting of the standing requirement.[73]

An aesthetic injury example is helpful in demonstrating why this virtual elimination of standing is not possible. When a Rocky Mountain vista is damaged due to the effects of air pollution,

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Id.

67. Competitive Enter. Inst. v. National Highway Traffic Safety Admin., 901 F.2d 107, 123 (D.C. Cir. 1990).

68. *Foundation*, 943 F.2d at 84.

69. *Id.* A litigant has standing under the APA where that person is "suffering a legal wrong" from an agency action or is "adversely affected or aggrieved" by the agency action. 5 U.S.C. § 702 (1988 & Supp. V 1993). For an interpretation of this language see Lujan v. National Wildlife Fed'n, 497 U.S. 871, 882 (1990) [hereinafter *NWF*] (establishing a two part test consisting of an injury in fact that was to an interest protected or regulated by the statute allegedly violated by the agency).

70. *Foundation*, 943 F.2d at 84 (emphasis in original).

71. *Id.* (emphasis added).

72. This argument is commonly known as the "flood gates" argument.

73. For instance, to gain standing for an aesthetic injury, the Supreme Court has required that plaintiffs seeking standing have a burden to prove that they presently use or have used and plan to use again the area which has been aesthetically injured. See NWF, 497 U.S. at 883.

everyone in the United States, and even the world, might be aggrieved by the damage to one of the world's natural wonders. Everyone aggrieved, however, does not have standing. The courts have not been flooded by environmental groups who can demonstrate standing at will.

Indeed, there is a long line of NEPA cases where environmental groups have been unable to present sufficient facts to avoid summary judgment.[74] The reason is quite simple. The burden is on the party seeking review to demonstrate that the party has been "adversely affected or aggrieved" by showing that the party, or its members, actually use or have used and plan to use again the aesthetic injury area.[75] This same requirement would apply to those seeking informational standing. Informational standing is granted only to groups that can show "specific facts" which prove that they normally use the information contained in the EIS.[76] This type of standing would not embrace all citizens of the United States; rather, standing would be available only to participants in the environmental political process. Consequently, the "flood gates" argument is simply not a persuasive critique of informational standing.[77]

The *Foundation* court ignored Supreme Court precedent which described the important informational values furthered by the EIS[78]

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74. *See, e.g., NWF* 497 U.S. at 898; *see also* Sierra Club v. Morton, 405 U.S. 727 (1972); Public Interest Research Group of New Jersey, Inc. v. Federal Highway Admin., 884 F. Supp. 876 (D.N.J. 1995), *aff'd*, 65 F.3d 163 (3d Cir. 1995); Clairon Sportsmen's Club v. Pennsylvania Turnpike Comm'n, 882 F. Supp. 455 (D. Pa. 1995); Oregon Natural Resources Council v. Devlin, 776 F. Supp 1440 (D. Or. 1991); Colorado Public Interest Research Group, Inc. v. Hills, 420 F. Supp. 582 (D. Colo. 1976).

75. *See NWF*, 497 U.S. at 883.

76. *Id.*

77. The *Foundation* court attempted to buttress its argument with Supreme Court authority. The court noted that in *Sierra Club v. Morton*, 405 U.S. 727 (1972), "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 to establish standing. Foundation on Economic Trends v. Lyng, 943 F.2d 79, 85 (D.C. Cir. 1991) (quoting *Sierra Club*, 405 U.S. at 739).

78. *See infra* text accompanying notes 80-82 for the Supreme Court's description of the importance of an EIS. *See also, e.g.*, Friends of Fiery Gizzard v. Farmers Home Admin., 864 F. Supp. 717, 721 (M.D. Tenn. 1994) (discussing that environmental impact statements are important where environmental assessments (EA) identify either "significant adverse impacts from [a] project . . . [or where] both significant adverse and beneficial impacts are identified"; a mere showing by an EA of only beneficial impacts, however, "smacks [of] a ploy to effect delay and expense in an effort to make the agency change the decision"), *aff'd*, 61 F.3d 501 (6th Cir. 1995); Foundation on Economic Trends v. Heckler, 587 F. Supp. 753, 756 (D.D.C. 1984) (noting EISs are not only "the principle mechanism[s] chosen by Congress to implement the environmental policies articulated in NEPA," but EISs also serve to identify certain facts "which the policymaker considers probative to the assessment of environmental hazards, [to] afford . . . the public an opportunity to observe and understand the reasoning of the federal policymaker," and serve as "a testament and record of the investigation, deliberation and resolution of the environmental questions posed by proposed federal action"), *aff'd in part, vacated in part*, 756 F.2d 143 (D.C. Cir. 1985).

and, implicitly, the existence of the informational injury caused when an EIS is wrongfully omitted, as in *Robertson v. Methow Valley Citizens Council*:[79]

> The statutory requirement that a federal agency contemplating a major action prepare such an environmental impact statement serves NEPA's "action-forcing" purpose in two important respects [citation omitted]. It ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; *it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision. . . .*
>
> Publication of an EIS, both in draft and final form, also serves a larger informational role. It gives the public the assurance that the agency "has indeed considered environmental concerns in its decisionmaking process," [citation omitted], and, *perhaps more significantly, provides a springboard for public comment* [citation omitted].[80]

Thus, organizations or individuals that need specific information typically contained in an EIS to further their educational and political purposes do not have "a mere 'interest in a problem.'"[81] Rather, the interest is a right to participate in particular policy-making and political processes, a right that cannot be meaningfully exercised without specific information, and a right Congress specifically created to ensure that the broad purposes of NEPA are carried out.[82]

3. Policy Considerations Supporting Informational Standing

By recognizing informational injury as cognizable injury in fact, courts can advance the Supreme Court's primary standing policies: "(1) reduction of the risk that agencies will engage in lawless conduct and (2) reduction of the risk that agency decision making will be infected by factional bias."[83] The first policy, often called the "private

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79. 490 U.S. 332 (1989).

80. *Id.* at 349 (emphasis added).

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

82. For the purposes NEPA was designed to serve, see *Natural Resources Defense Council v. Lujan*, 768 F. Supp. 870, 877 (D.C. Cir. 1990) (noting NEPA's purpose is to "ensur[e] well-informed government decisions"). *See also* Competitive Enter. Inst. v. National Highway Traffic Safety Admin., 901 F.2d 107, 123-24 (D.C. Cir. 1990) ("NEPA's concern is to inform other governmental agencies and the public about the environmental consequences of its proposed activities, not to inform them about all possible consequences of the agency's action."); Sierra Club v. March, 872 F.2d 497, 500 (1st Cir. 1989) ("NEPA's object is to minimize . . . the risk of uninformed choice.").

83. KENETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 16.11 (3d ed. 1994).

attorney general theory," is particularly relevant under NEPA.[84] When agency action might harm many people, collective action problems arise. Conceivably, no individual will have the incentive or resources to challenge the unlawful conduct.[85] This is particularly true under NEPA. NEPA is principally an informational statute,[86] but information deprivation is rarely a sufficient incentive to motivate a lone individual to take action. Yet, Congress presumably felt the interest was important, or it would not have enacted the requirement. Recognizing informational injury also allows both individuals and their organizations to police the Congressional requirements. This, in turn, advances Congressional intent and enhances agency decision making.

Second, recognizing informational injury as injury in fact ameliorates another serious problem in democracy: factional bias. The Framers were very concerned that one faction might dominate and distort decision making.[87] In terms of agency decision making, factional bias or capture can occur as a result of the agency's narrow specialty. Most agencies have very specific duties, interests, and goals which revolve around the accomplishment of their primary objectives and which rarely (excepting the EPA) focus on environmental interests. Subjecting agency action to heavy political criticism and scrutiny, as, for example, the Office of the Trade Representative has been scrutinized in its enactment of the North American Free Trade Agreement (NAFTA) and the General Agreement on Tariffs and Trade (GATT), increases the risk that the agency will be "captured" by those who reflect narrow parochial interests and hope to achieve the Office of the Trade Representative's objective of brokering a trade deal.[88] Recognizing informational injury reduces this risk by providing standing to those concerned with evaluating the values that Congress desires to protect.

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84. *Id.*

85. *Id.*

86. *See generally* Natural Resources Defense Council v. Lujan, 768 F. Supp. 870, 879 (D.D.C. 1991) (explaining that one effect of NEPA is to "enable effective public participation in the process leading to legislation and [to] promote the use of full and accurate information in that debate").

87. *Id.* The Framers' concern with factional bias is evidenced in The Federalist No. 10, in which Madison wrote the following:

> Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. The Friend of popular governments never finds himself so much alarmed for their character and fate as when he contemplates their propensity to this dangerous vice.

THE FEDERALIST NO. 10 (James Madison).

88. *See* George Stigler, *The Theory of Economic Regulation*, BELL J. OF ECON. 3 (1971); Sam Peltzman, *Toward a More General Theory of Regulation*, J.L. & ECON. 211 (1976).

4. Informational Standing in the D.C. Circuit After Foundation

After detailed consideration of informational standing, the *Foundation* court followed the lead of the recently issued Supreme Court decision *Lujan v. National Wildlife Federation* [hereinafter *NWF*][89] and assumed away the problem of informational standing.[90] The court then refused standing on other grounds. Like the plaintiff in *NWF*, the plaintiff in *Foundation* complained of a wide ranging general agency program.[91] The *Foundation* court construed *NWF* as requiring "plaintiffs in NEPA cases . . . [to] point to 'action' at least arguably triggering the agency's obligation to prepare an impact statement."[92] Essentially, the *Foundation* court merged the APA's standing requirement that "an identifiable action or event" must exist, other than the "day to day operations" of the agency, with the NEPA standing requirement that plaintiffs identify "major Federal action . . . significantly affecting the quality of the human environment."[93]

Ironically, after the great lengths to which the *Foundation* court went to distinguish prior D.C. Circuit precedent recognizing informational standing, subsequent D.C. Circuit courts distinguished *Foundation*[94] because the court finally avoided deciding the case on informational standing grounds. Such examples include the D.C. court opinions in *Animal Defense Fund, Inc. v. Espy*[95] and *Public Citizen v. Office of the United States Trade Representative*.[96]

Although constitutionally recognizing informational standing, the *Animal Defense* court aligned with the *Competitive Enterprise* court and refused standing because the interests in obtaining and providing general information to the public about specific animals were outside the zone of interests of the Animal Welfare Act.[97] The court indicated that had the plaintiff alleged informational interests related to specific *educational* or *political needs* of its members, the result may have been different.[98]

Similarly, *Public Citizen*, one of a series of cases where an environmental group challenged the Office of the Trade Representative's

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89. 497 U.S. 871 (1990).

90. *Foundation*, 943 F.2d 79, 85 (D.C. Cir. 1991).

91. *Id.* at 82.

92. *Id.* at 85.

93. *Id.* (quoting *NWF*, 497 U.S. 871, 898 (1990), and 42 U.S.C. § 4332(2)(C)(1988)).

94. Such cases include Animal Defense Fund, Inc. v. Espy, 23 F.3d 496, 502 (D.C. Cir. 1994); Public Citizen v. Office of the U.S. Trade Representative, 822 F. Supp. 21, 29 n.12 (D.D.C. 1993), *rev'd*, 5 F.3d 549 (1993), *cert. denied*, 114 S.Ct. 685 (1994).

95. 23 F.3d 496 (D.C. Cir. 1994).

96. 822 F. Supp. 21 (D.D.C. 1993), *rev'd*, 5 F.3d 549 (1993), *cert. denied*, 114 S. Ct. 685 (1994).

97. *Animal Defense*, 23 F.3d at 501-02.

98. *Id.* at 503.

decision not to prepare an EIS for an international trade agreement it negotiated,[99] was confronted by the plaintiff's claim of informational standing.[100] Finding standing on other grounds, the court commented in a footnote:

> The Court also notes that the Plaintiffs also allege standing on the basis of an injury to their organizational interests by claiming that they are unable to keep their members adequately informed. The Supreme Court has stated that such injury is within the zone of interest that the NEPA was designed to protect. [*NWF*] Such claims of informational standing have been rejected where a plaintiff has been unable to identify any particular agency action as the source of injury.. [*Foundation*] However, the Court is not convinced that such informational standing is wholly improper where the Plaintiffs are challenging a specific proposal for legislation . . . .[101]

Other courts,[102] including the *Public Citizen* trade agreement decision, did not distinguish *Foundation* even while noting the substantial precedent supporting informational standing:

> There was also substantial precedent in this circuit, predating . . . *NWF* and *Foundation*, which left open the possibility that an allegation of informational injury like that asserted by plaintiffs here would satisfy the standing requirement. [citations omitted] The decision in *Foundation*, of course, settles this open question in a way which precludes the bringing of this action at this time.[103]

The D.C. Circuit panels that have reviewed these conflicting *Public Citizen* cases have refused to reach standing on other grounds and therefore have not addressed the informational standing issue.[104]

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99. *See, e.g.*, Public Citizen v. Office of the U.S. Trade Representative, 970 F.2d 916 (D.C. Cir. 1992); Public Citizen v. Office of the U.S. Trade Representative, 782 F. Supp. 139 (D.D.C. 1992).

100. *Public Citizen*, 822 F. Supp. at 29 n.12.

101. *Id.*

102. *See* Foundation of Economic Trends v. Watkins, 794 F. Supp. 395 (D.D.C. 1992) [hereinafter *Watkins*]. The *Watkins* court specifically refused to treat the informational standing material in *Foundation* as dicta when requested to do so by the plaintiffs. The court stated:

> Plaintiffs argue that the [*Foundation*] majority's criticism of informational standing is merely *dicta*, and that informational standing, as generally described in the *Competitive Enterprise Institute* opinion, remains the law of this circuit. This Court believes that the most recent expression on the subject from the court of appeals is not so easily ignored, and that the effect of that expression is to indicate that the court of appeals no longer regards informational standing alone under NEPA as a sound concept.

Id. at 399 (citations omitted).

103. *Public Citizen*, 782 F. Supp. at 144.

104. Public Citizen v. Office of the U.S. Trade Representative, 970 F.2d 916, 917 (D.C. Cir. 1992) (refusing to reach standing, but dismissing plaintiffs' suit "because plaintiffs . . . failed to identify any 'final agency action' judicially reviewable within the [APA]"); *accord* Public Citizen

B. *Informational Standing in Other Circuits and Districts After Foundation*

Other circuits and districts have not taken such a clear message from *Foundation* as those courts within the D.C. Circuit. In *Citizens To End Animal Suffering and Exploitation, Inc. v. The New England Aquarium*,[105] the United States District Court for the District of Massachusetts relied heavily on the *Foundation* court's exposition of law and policy weighing against recognizing informational standing and eventually adopted the *Foundation* position.[106] In contrast, the United States District Court for the District of Colorado acknowledged informational injury and expressly distinguished *Foundation* as dicta in *Colorado Environmental Coalition v. Lujan*.[107] Consequently, no clear consensus or trend exists among courts that have examined informational injury standing.

IV. FOOTNOTE SEVEN PROCEDURAL STANDING

A. *Procedural Rights Are Special*

Defenders represents a forceful reaffirmation of the role of standing as a barrier between plaintiffs claiming injury and judicial review of the courts.[108] Justice Scalia, writing for the Court on this issue, created a special exception for procedural rights violations. Distinguishing the fact pattern in *Defenders*, the Court stated:

> This is not a case where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs (*e.g.*, the procedural requirement for a hearing prior to denial of their license application, or the procedural requirement for an environmental impact statement before a federal facility is constructed next door to them).[109]

In footnote seven, the Court added further gloss on the special status of procedural rights:

> There is this much truth to the assertion that "procedural" rights are special: The person who has been accorded a procedural right

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v. Office of the U.S. Trade Representative, 5 F.3d 549, 550 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 685 (1994).

105. 836 F. Supp. 45 (D. Mass. 1993).

106. *See id.* at 57-58.

107. 803 F. Supp. 364, 367 (D. Colo. 1992) ("In [*Foundation*,] the issue of standing based on 'informational injury' was not reached, although the court stated that an organization's standing has never been sustained solely on the basis of 'informational injury.'").

108. *See generally* Sunstein, *supra* note 2.

109. *Defenders*, 504 U.S. 555, 572 (1992).

> to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case-law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an Environmental Impact Statement, even though he cannot establish with any certainty that the Statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years. (That is why we do not rely, in the present case, upon the Government's argument that, even if the other agencies were obliged to consult with the Secretary, they might not have followed his advice.)[110]

Consequently, procedural rights are special in that a plaintiff seeking to enforce such rights may prove standing with a lesser showing of immediacy, part of the injury in fact requirement, and a lesser showing of redressability. The issue then becomes how much less of these two factors is sufficient.

B. The Immediacy Requirement for Procedural Rights Claims

The plaintiffs in *Defenders* did not have standing because they could not satisfy the immediacy element of the injury in fact requirement.[111] In this case, the Defenders of Wildlife sought to challenge a Department of the Interior (DOI) rule. The plaintiffs alleged that the ESA,[112] which mandated that federal agencies should consult with the DOI to ensure that their actions did not destroy the habitat of an endangered species, also applied to agency actions performed outside the United States.[113] The plaintiffs' claimed injury in fact was that the lack of consultation with the DOI with respect to U.S. Government-funded activities abroad "increas[ed] the rate of extinction of endangered and threatened species."[114]

The Court found the affidavits insufficient as allegations of injury in fact because "past exposure to illegal conduct does not in itself show a present case or controversy . . . if unaccompanied by any continuing, present adverse effects."[115] The affidavits contained only an intent to return to observe the endangered species. The Court responded:

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110. *Id.* at 572 n.7.
111. *Id.* at 564.
112. 16 U.S.C. § 1536 (1988 & Supp. V 1993).
113. Lujan v. Defenders of Wildlife, 504 U.S. at 563.
114. *Id.* at 562 (quoting Complaint paragraph 5, App. 13).
115. *Id.* at 564 (quoting Los Angeles v. Lyons, 461 U.S. 95, 102 (1982)).

> [T]he affiants' profession of an "inten[t]" to return to the places they had visited before—where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species—is simply not enough. Such "some day" intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the "actual or imminent" injury that our cases require.[116]

In a footnote, the Court expanded on the imminence requirement:

> Although "imminence" is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to insure that the alleged injury is not too speculative for Article III . . . . It has been stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control.[117]

Apparently, to satisfy the imminence requirement, the Court merely required something sufficiently concrete, such as reserved airplane tickets. Justice Kennedy defended this requirement in his concurrence:

> While it may seem trivial to require that Mss. Kelly and Skilbred acquire airline tickets to the project sites or announce a date certain upon which they will return, . . . this is not a case where it is reasonable to assume that the affiants will be using the sites on a regular basis . . . nor do the affiants claim to have visited the sites since the projects commenced.[118]

The imminence threshold for sufficiency lies somewhere between the *Defenders'* facts and the Court's hypothetical. The Court is clearly uncomfortable that the alleged injury will only occur at an indefinite time, if at all.[119] Yet, indefiniteness alone does not abrogate standing. In the Court's hypothetical, plaintiffs complaining of a proposed federal dam construction next to their homes have standing even though the "dam will not be completed for many years."[120] The difference between the *Defenders'* plaintiffs and the plaintiffs in the Court's hypothetical is that the *Defenders'* plaintiffs *controlled* the timing of their injury, while the hypothetical plaintiffs did not control the timing. Implicitly, plaintiffs seeking procedural rights may ignore the indefiniteness of the timing of their injury, unless the

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116. *Id.* (emphasis in original).
117. *Id.* at 564-65 n.2.
118. *Defenders*, 504 U.S. 555, 579 (1992) (Kennedy, J., concurring).
119. *Id.* at 564; *see also* Meeks, *supra* note 39, at 356-57.
120. *Defenders*, 504 U.S. at 572 n.7.

plaintiffs control the timing. In that case, the plaintiffs must cure the indefinite timing by some specifically dated act; i.e., by purchasing a dated plane ticket. As previously mentioned, Justice Kennedy, in his concurrence, suggested that even a specifically dated act might not be necessary "where it is reasonable to assume that the affiants will be using the sites on a regular basis."[121]

C. *The Geographical Proximity Element of Imminence*

A geographical proximity element to the imminence requirement exists.[122] In distinguishing the *Defenders* facts from those in *Japan Whaling Association. v. American Cetacean Society,*[123] Justice Scalia noted:

> It is even plausible—though it goes to the outermost limit of plausibility—to think that a person who observes or works with animals of a particular species *in the very area of the world where that species is threatened* by a federal decision is facing [perceptible] harm, since some animals that might have been the subject of his interest will no longer exist. . . . It goes beyond the limit . . . to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection.[124]

In a footnote, Justice Scalia clarified the role of geographic proximity in a plaintiff's burden to adduce facts which could reasonably suggest a concrete injury was "certainly impending:"[125]

> The dissent may be correct that the geographic remoteness of those members [the affiants] (here in the United States) from Sri Lanka and Aswan does not "*necessarily*" prevent such a finding—but it assuredly does so when no further facts have been brought forward . . . showing that the impact upon animals in those distant places will in some fashion be reflected here.[126]

This geographic proximity element is also expressed in the Court's footnote seven hypothetical. In contrasting the person who lives

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121. *Id.* at 579 (Kennedy, J., concurring).

122. In *Defenders,* the Dissent claims that the geographical proximity element is an additional barrier for those complaining of environmental injuries. *See id.* at 594 (Blackmun, J., dissenting). *See generally* Marla E. Mansfield, *Standing and Ripeness Revisited: The Supreme Court's "Hypothetical" Barriers,* 68 N.D. L. REV. 1 (1992).

123. 478 U.S. 221 (1986). In *Japan Whaling,* the Court granted standing where respondents claimed that, under the Administrative Procedure Act, their studies of whales would be adversely affected by continued whale harvesting. *Id.*

124. *Defenders,* 504 U.S. 555, 566-67 (1992) (emphasis added).

125. *Id.* at 567 n.3.

126. *Id.* (emphasis in original).

next to a proposed federal dam site, who has a sufficiently concrete interest, with others who do not, the non-concretely injured persons are described as "persons who live (and propose to live) at the other end of the country from the dam."[127]

Apparently, under Justice Scalia's clarification, to meet the geographic proximity requirement, plaintiffs must show sufficient contact with the area where the concrete injury will occur, similar to the *Japan Whaling* plaintiffs who "observe[d] or work[ed] with animals . . . where that species is threatened."[128] Plaintiffs cannot argue that an injury to a species anywhere will be "reflected" to the location of the plaintiffs.[129] The plaintiff must go to the site of the injury.

D. The Redressability Requirement

Simply put, *Defenders* is a fragmented and convoluted opinion on the issue of redressability. As one commentator stated:

> On the question of redressability, there was no majority for the Court. Three justices [sic] saw no problem with redressability; two Justices refused to speak to the issue; four Justices found a constitutional defect. Because no majority spoke, the . . . [*Defenders*] case has little precedential value on this question.[130]

Section III B in *Defenders* is the first part of Justice Scalia's opinion to address redressability. The plurality found no redressability for two reasons. First,

> [s]ince the agencies funding the projects were not parties to the case, the District Court could accord relief only against the Secretary [of the Interior]: He could be ordered to revise his regulation to require consultation for foreign projects. But this would not remedy respondents' alleged injury unless the funding agencies were bound by the Secretary's regulation, which is very much an open question. . . . The short of the matter is that redress of the only injury in fact respondents complain of requires action (termination of funding until consultation) by the individual funding agencies; and any relief the District Court could have provided in this suit against the Secretary was not likely to produce that action.[131]

The phrase "any relief the District Court could have provided . . . *was not likely* to produce that action"[132] resembles the general

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127. *Id.* at 572 n.7.

128. *Id.* at 566.

129. *Id.* at 567 n.3 ("It cannot be that a person with an interest in an animal automatically has standing to enjoin federal threats to that species of animal, anywhere in the world.").

130. Sunstein, *supra* note 2, at 206.

131. *Defenders*, 504 U.S. at 568, 570-71.

132. *Id.* at 571 (emphasis added).

redressability requirement which Justice Scalia articulated as "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"[133]

Second, Justice Scalia noted:

> A further impediment to redressability is the fact that the agencies generally supply only a fraction of the funding for a foreign project. [I]t is entirely conjectural whether the nonagency activity that affects respondents will be altered or affected by the agency activity they seek to achieve.[134]

The phrase "a further impediment" suggests that Justice Scalia believes the first impediment alone was sufficient; further, he believes the second impediment, alone, will bar redressability standing.

1. The Plurality's Discussion of Redressability Is Not Relevant to the Relaxed Standard of Redressability

Implicitly, Justice Scalia's opinion suggests that he was applying the regular standard of redressability rather than the relaxed standard of redressability that a "person who has been accorded a procedural right to protect his concrete interests"[135] is entitled. Presumably, the *Defenders* plaintiffs did not receive the relaxed redressability requirements because they failed to demonstrate the prerequisite injury in fact sufficiently concrete to violate a procedural right which redressability was designed to protect. Had the *Defenders* plaintiffs satisfied the immediacy element of the injury in fact requirement, by having dated airplane reservations, for instance, they may have been entitled to the relaxed redressability standard, which they might have passed. The fact that "any relief the District Court could have provided . . . was *not likely* to produce [the result]"[136] desired would not have been an impediment; the plaintiffs still would have standing "even though [they could not] establish with any certainty that the [consultation could] cause the . . . [funding] to be withheld or altered . . . ."[137] Thus, the plurality's extended discussion and application of regular redressability is not relevant to the relaxed standard of redressability described in section IV of the opinion.

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133. *Id.* at 561 (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38, 43 (1976)).

134. *Id.* at 571.

135. *Id.* at 572 n.7.

136. *Defenders*, 504 U.S. 555, 571 (1992) (emphasis added).

137. *Id.* at 572 n.7.

2. The Plurality's Discussion of Redressability States Two Limitations on the Relaxed Redressability Standard

Alternatively, the discussion of redressability in section III B of *Defenders* is not in conflict with the discussion of relaxed redressability and the dam hypothetical in section IV. Rather, the discussion in III B establishes an outer limit of redressability that applies to both the general and relaxed standards.

Thus, under this reading of the opinion, the *Defenders'* fact pattern and the dam hypothetical fact pattern are significantly different. In the dam hypothetical, the agency that was to follow the procedure by preparing an EIS is a party to the suit. As a result, the district court could order that agency to prepare the EIS. Although the exact effect of the action would still be uncertain, the action's existence would not be uncertain.

Conversely, in the *Defenders'* fact pattern, the agency that was to follow the procedure (consultation with the Secretary of the Interior) was not a party to the suit.[138] The only relief the district court could grant was against the Secretary of the Interior, who was a party to the case. As Justice Scalia stated, "[the agencies that were to follow the consultation procedure] were not parties to the suit, and there is no reason they should be obliged to honor an incidental legal determination the suit produced."[139] Therefore, not only was the effect of the procedure uncertain, as in the dam hypothetical, but since neither the district court nor the Secretary of the Interior[140] had the power to force the funding agencies to undertake the procedure, the actual occurrence of the action was also uncertain. Thus, even if the effect of the procedure is uncertain, plaintiffs may still have standing. If, however, whether the agency must follow the procedure is uncertain, insufficient redressability exists, even under the relaxed standard of footnote seven.

Whether the agency must follow the procedure would be an important issue in only a few suits because the agency that neglected to follow the procedure must not be a party to the suit. If the agency were a party, a district court would be able to order the agency to follow the procedure. The issue will most often arise in programmatic challenges where, as in *Defenders*,

> [i]nstead of attacking the separate decisions to fund particular projects allegedly causing them harm, [the plaintiffs] chose to challenge a more generalized level of Government action (rules

138. *Id.* at 568.
139. *Id.* at 569.
140. *See id.* at 568.

> regarding consultation), the invalidation of which would affect all overseas projects. This programmatic approach has obvious practical advantages, but also obvious difficulties insofar as proof of causation or redressability is concerned.[141]

This scenario might also arise where an intervening entity exists, such as Congress or the President, that is not subject to the procedural requirement.[142]

The second reason the plurality found no redressability could also be read as a requirement of *both* the general and relaxed standards of redressability. Justice Scalia stated:

> A further impediment to redressability is the fact that the agencies [which not follow the procedure] generally supply only a fraction of the funding for a foreign project . . . . [I]t is entirely conjectural whether the nonagency activity that affects respondents will be altered or affected by the agency activity [following the procedure] they seek to achieve.[143]

This infrequent fact pattern is significantly different than the dam hypothetical since not only is the effect of the procedure on the agency uncertain, but even where the agency can be persuaded by the plaintiffs, the agency's ability to affect a foreign governments' actions is also uncertain. "It is entirely conjectural" that even if the agency completed the procedure, the agency could affect another government's activities.[144]

Consequently, lower courts seeking to apply the reduced standard for redressability can find either little or no guidance from the four Justice plurality in *Defenders*. As previously discussed,[145] two Justices did not address the issue;[146] three of the seven Justices that did address the issue did not do so in the context of a relaxed standard for procedural plaintiffs.[147] One commentator's characterization of *Defenders* as having little precedential value on the issue of redressability is of no surprise.[148]

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141. *Defenders*, 504 U.S. 555, 569 (1992).

142. *See* Public Citizen v. United States Trade Representative, 5 F.3d 549, 551-53 (D.C. Cir. 1993) (reasoning that the OTR did not have to prepare an EIS for NAFTA because there was no final agency action as required for APA review because the harm to the plaintiffs would not occur until the President, who is not an agency, submitted the treaty to Congress), *cert. denied*, 114 S. Ct. 685 (1994).

143. *Defenders*, 504 U.S. at 571.

144. *See id.*

145. *See supra* text accompanying note 130.

146. Sunstein, *supra* note 2, at 206.

147. *Id.*

148. *Id.*

E. The Lower Courts' Response to Footnote Seven Standing

The Ninth Circuit has embraced the relaxed requirements of redressability and immediacy and has dubbed these relaxed requirements "footnote seven standing."[149] This Circuit, other courts and commentators have assumed footnote seven standing includes a causality element,[150] even though Justice Scalia's opinion only mentions redressability and immediacy as relaxed elements.[151] Admittedly, causality and redressability are linked concepts, but oddly, courts and commentators have applied, without comment, an additional element that is at best implicit in a newly articulated Supreme Court standard.

The second area of confusion surrounds the amount of relaxation of the redressability and immediacy requirements. Justice Scalia stated that "[t]he person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."[152] The issue becomes how much redressability and immediacy must a procedural plaintiff show.

1. The Immediacy Requirement Under Footnote Seven

The immediacy requirement for procedural plaintiffs is virtually, if not completely, eliminated if plaintiffs do not control the timing of the injury, as in the dam hypothetical.[153] Years, or even decades might pass before the adjacent landowner's property would be concretely injured by a proposed dam. If, however, the plaintiff does control the timing of the injury, as in the *Defenders'* fact pattern, the plaintiff must cure the indefiniteness problem by taking action that will date the injury, like purchasing a plane ticket with specific dates.[154] Even this may not be necessary if courts could reasonably

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149. *See, e.g.*, Pacific Northwest Generating Coop. v. Brown, 25 F.3d 1443, 1449 (9th Cir. 1994), *amended and superseded*, 38 F.3d 1058 (9th Cir. 1994) [hereinafter *Pacific Northwest*]. A recent Ninth Circuit environmental case dealing with standing did not decide whether the plaintiffs had footnote seven standing since the issue before the court was whether the plaintiffs' action was precluded by the zone of interest test, a prudential standing limitation, and not whether the plaintiffs satisfied the constitutional standing requirements. Bennett v. Plenert, 63 F.3d 915, 917 (9th Cir. 1995).

150. *Id.*; Idaho Farm Bureau Fed'n v. Babbitt, 1995 WL 548335 (D. Idaho Aug. 31, 1995) (stating that "such requirements of causation and redressability are relaxed where a plaintiff can establish 'procedural injury' under footnote seven of *Defenders*"); Bruce Morris, *How Footnote 7 in Lujan II May Expand Standing for Procedural Injuries* 75 NAT. RESOURCES & ENV'T Winter 1995.

151. *Defenders*, 504 U.S. 555, 572 n.7 (1992).

152. *Id.*

153. *Id.*

154. *See id.* at 564.

assume that the plaintiffs will be using the site on a regular basis.[155] Courts, such as the Ninth Circuit, have often dispensed with a discussion of the immediacy requirement once the court decides that footnote seven applies.[156]

2. Redressability Under Footnote Seven

As also previously discussed, the redressability requirement is unclear. The *Defenders* opinion can be interpreted as either failing to indicate how footnote seven should be applied or as setting broad outer limits that are only approached infrequently. Using either interpretation, *Defenders* provides little guidance, other than the language in footnote seven itself, for the more standard situations where plaintiffs complain of violations of procedural rights.

The Ninth Circuit, although enthusiastic about footnote seven standing, is one example of a lower court which *has been* uncertain in its response. In *Pacific Northwest*, the Ninth Circuit tackled the footnote seven issue.[157] In *Pacific Northwest*, a group of energy consumers, both cooperatives and industrial users, challenged various federal agencies' responses to the listing of three salmon populations as threatened or endangered.[158] All parties agreed that the salmon were endangered; at issue was the agencies' responses.[159]

The Army Corps of Engineers decided to increase the Columbia River's water flow, thus increasing the water velocity and helping juvenile salmon to reach downstream.[160] Increasing the Columbia River flow, however, hampered the dam's ability to generate power. Consequently, the plaintiffs then had to purchase power from more expensive sources, costing them approximately $3.5 million more a month.[161] *Pacific Northwest*, however, was not the typical hydropower versus salmon case. Here, power consumers complained that agencies were not doing enough to protect the salmon. The court found sufficient as injury in fact the plaintiffs' interest in having the salmon protected so populations would rebound to such an extent that they would no longer have to be listed as threatened or endangered species.[162] Once the salmon were off the list, the Columbia

155. *Id.* at 579 (concurring opinion).
156. *See Pacific Northwest*, 25 F.3d 1443, 1449 (9th Cir. 1994) (Kennedy, J., concurring).
157. *Id.* at 1443.
158. *Id.* at 1444.
159. *Id.*
160. *Id.* at 1445.
161. *Pacific Northwest*, 25 F.3d 1443, 1445 (9th Cir. 1994).
162. *Id.* at 1450.

River's flow could be reduced, and power consumers would again have inexpensive power.

The plaintiffs claimed, inter alia, that various agencies failed to engage in the consultation processes required by section seven of the ESA.[163] The plaintiffs' claim created an ideal opportunity for the court of appeals to apply footnote seven standing because the district court rejected standing based, in part, on the plaintiffs' inability to demonstrate causation and redressability under the traditional standard.[164] In reversing the district court, the *Pacific Northwest* court stated:

> They [the plaintiff power consumers] "cannot establish with any certainty" that any change in the biological opinions would cause the flow rates and spills . . . to be altered; but there is the possibility that successful challenges to the consultation process would have an impact on the conduct of the agency which regulates the water flow . . . . Under the rule set out in footnote seven of *Defenders* it could be argued that . . . [the procedural plaintiffs] need not establish causation or redressability with anything more than *reasonable probability*.[165]

The *Pacific Northwest* court found that a "reasonable probability" satisfied the relaxed standard because "there [was] the possibility that" if the agencies were forced to go through the consultation process it "would have an impact on the conduct of the agency which regulates the water flow . . . ."[166]

The court, however, amended its opinion four months later.[167] In this amended opinion, the court omitted the "reasonable probability" language altogether and stated that although "the redress sought is not certain in its effect . . . Congress has linked agency consultation causally to the continuation of the protected species."[168] Perhaps the *Pacific Northwest* court became nervous about extracting a specific "reasonable probability" standard from the vague words "with any certainty." The court then dodged the redressability threshold question by stating that "the redress sought is not certain in its effect" but was still sufficient enough to fulfill the requirement.[169] Perhaps the Ninth Circuit found its "reasonable probability" standard in the

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163. *Id.* at 1446. The ESA is found at 16 U.S.C. §§ 1531-1544 (1988 & Supp. V 1993).

164. Pacific Northwest Generating Coop. v. Brown, 822 F. Supp. 1479, 1502-03 (D. Or. 1993), *aff'd*, 38 F.3d 1058 (9th Cir. 1994).

165. *Pacific Northwest*, 25 F.3d at 1449 (emphasis added).

166. *Id.*

167. Pacific Northwest Generating Coop. v. Brown, 38 F.3d 1058 (9th Cir. 1994).

168. *Id.* at 1065.

169. *Id.*

pre-*Defenders* D.C. Circuit decision *City of Los Angeles v. National Highway Traffic Safety Administration*,[170] which stated:

> The procedural and informational thrust of NEPA gives rise to a cognizable injury from denial of its explanatory process, so long as there is a reasonable risk that environmental harm may occur.[171]

Currently, the Ninth Circuit's position is unclear on this issue. In a very recent case, *Douglas County v. Babbitt*,[172] the Ninth Circuit avoided the "reasonable probability" language again and simply stated that the footnote seven standards were satisfied.[173] In *Babbitt*, the plaintiff, Douglas County, claimed that the Secretary of the Interior failed to comply with NEPA when he designated certain federal land as critical habitat for the Northern Spotted Owl without preparing an EIS.[174] The court found standing because the plaintiff satisfied the procedural standing requirements set out in *Defenders*.[175]

After a detailed discussion of the injury in fact requirements, the court dealt with the redressability issue summarily:

> It is uncertain whether the findings of an EIS would affect the Secretary's critical habitat designation and when the adjacent county lands would actually be harmed. But under [*Defenders*], those concerns are not important: "The person who has been accorded a procedural right to protect his concrete interests can assert the right without meeting all the normal standards for redressability [sic] and immediacy."[176]

By stating that under the relaxed footnote seven standard redressability concerns "are not important," the court suggests no redressability requirement exists once the injury in fact requirement is met.[177] Since this was an "easy" case, directly analogous to the facts used in footnote seven, perhaps the court thought any normal boundaries to the relaxation were not at issue and were therefore "not important." A literal reading of the court's words, however, might suggest that the court felt footnote seven contains no redressability requirement.[178]

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170. 912 F.2d 478 (D.C. Cir. 1990).
171. *Id.* at 492.
172. 48 F.3d 1495 (9th Cir. 1995).
173. *Id.* at 1501.
174. *Id.* at 1498.
175. *Id.* at 1501.
176. *Id.* (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 572 n.7 (1992)).
177. Douglas County v. Babbitt, 48 F.3d 1495, 1501 (9th Cir. 1995).
178. *See id.*

In *Florida Key Deer v. Stickney*,[179] a Florida district court concurred, although the court may have misapplied the footnote seven standard. The plaintiff, National Wildlife Federation, claimed that the Federal Emergency Management Agency (FEMA) violated the ESA's consultation requirement in its administration of the National Flood Insurance Program (NFIP), thereby endangering the Florida Key deer.[180] The court, finding injury in fact and causality, proceeded to apply the footnote seven redressability requirement:[181]

> The injury to Plaintiffs' procedural interests can be redressed by requiring FEMA to recognize its obligations under the ESA, initiate consultation with the USFWS [United States Federal Wildlife Service], and undertake a detailed review of implementation of the NFIP within the habitat of the Key deer.[182]

The court found redressability not because the concrete injury could be redressed, here the endangerment of the Key deer, but rather, because the procedural injury, not consulting with the USFWS, could be redressed by a court order. This misapplies footnote seven. The footnote seven dam hypothetical focused on the chance that a favorable ruling by the court would affect the construction of the dam, not on the chance that a favorable ruling would affect the completion of the EIS.

The D.C. Circuit also addressed the issue of footnote seven standing in *Moreau v. FERC*.[183] In *Moreau*, the plaintiff complained that the Federal Energy Regulatory Commission (FERC) did not give proper notice of a hearing discussing the possible construction of a large natural gas pipeline.[184] FERC argued that since the line had already been constructed, making removal of the operational pipeline prohibitively expensive, a favorable decision redressing plaintiff's injuries would be highly unlikely.[185] After quoting the text of footnote seven, the court stated:

> We deem these principles controlling here and fully supportive of petitioners' standing. By complaining of FERC's failure to give them personal notice of the TN Gas proceedings . . . petitioners clearly seek to enforce "procedural requirement[s] the disregard of which could impair a separate concrete interest of theirs. . . . That being the case, the mere fact that petitioners may not "meet . . . all

179. 864 F. Supp. 1222 (S.D. Fla. 1994).
180. *Id.* at 1224.
181. *Id.* at 1224-25.
182. *Id.* at 1226.
183. 982 F.2d 556 (D.C. Cir. 1993).
184. *Id.* at 562.
185. *Id.* at 565.

> the normal standards for redressability and immediacy" does not, standing alone, defeat their standing. We therefore conclude that petitioners do have Article III standing. . . .[186]

Like other courts, the court in *Moreau* avoided defining the threshold level of redressability and merely noted that the facts were sufficient.[187] This case differs from the NEPA, EIS, and ESA consultation cases.[188] In the NEPA and ESA cases, the decision making agency must get additional information, either through its own research with the EIS or the Secretary of the Interior with the ESA consultation. In *Moreau*, the procedure allegedly violated was the failure to give personal notice to the plaintiff, even though the plaintiff had public notice.[189] The agency was not going to be presented with any information not considered in the first decision. It is therefore even more speculative and uncertain under these facts that an order from the court to follow the procedure, here merely giving the plaintiff personal notice, will affect the final decision than in the NEPA and ESA contexts, where the agency is arguably exposed to new information. *Moreau* suggests a low threshold requirement for redressability.[190]

The D.C. Circuit also interpreted the redressability requirement under footnote seven in *Idaho v. ICC*.[191] The plaintiffs, including the state of Idaho and certain mining companies, claimed that the ICC should have prepared an EIS under NEPA and a biological assessment under the ESA concerning its decision to allow Union Pacific to abandon a portion of railroad track.[192] After finding the plaintiffs had sufficient injury in fact, because they had to find an alternate means of shipping their product,[193] the court said:

> [T]he Supreme Court has made clear that neither the causation requirement nor the redressability requirement for constitutional standing should hinder enforcement of "procedural rights," such as the right to require an agency to prepare an environmental impact statement or a biological assessment: [The court quoted the text of

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186. *Id.* at 567 (quoting *Defenders*, 504 U.S. at 572 n.7).

187. *Id.*

188. *See, e.g.*, Douglas County v. Babbitt, 48 F.3d 1495 (9th Cir. 1995); Florida Key Deer v. Stickney, 864 F. Supp. 1222 (S.D. Fla. 1994); Pacific Northwest Generating Coop v. Brown, 25 F.3d 1443 (9th Cir. 1994).

189. Moreau v. FERC, 982 F.2d 556, 568 (D.C. Cir. 1993).

190. *Id.*

191. 35 F.3d 585 (D.C. Cir. 1994).

192. *Id.* at 590.

193. *Id.* at 591.

> footnote seven]. . . . Accordingly, we conclude that the [plaintiff] has constitutional standing.[194]

Ignoring that causality is not expressly included in footnote seven, the court's statement that the "redressability requirement . . . should not hinder the enforcement of 'procedural rights'"[195] suggests no redressability requirement exists at all for procedural rights. Again, because this case was an "easy" case, directly analogous to the fact pattern in footnote seven, the court was comfortable with deciding the issue in a cursory fashion. If redressability is a hurdle for a procedural plaintiff in the D.C. Circuit at all, it is a very low hurdle, although no fact pattern has yet tested the boundaries of the redressability requirement.

A clear articulation of the boundaries, if any, of the relaxation of the redressability requirement for procedural plaintiffs has not yet been articulated by lower courts. The courts have not been presented with facts that test the extent of the relaxation. Rather, most fact patterns involve neglected procedures under NEPA or the ESA where the actor was subject to the court's power, because it was a party, and subject to the statute's requirement, not that of the President or Congress.

Nevertheless, a trend to dispense with the redressability requirement altogether exists.[196] The D.C. Circuit's *Moreau* opinion comes closest to standing for this proposition.[197] Since the only procedure violated in that case concerned the *type* of notice,[198] rather than whether notice was given, an order from the court to readminister the hearing with proper notice would present the agency with no new information. In essence, the only chance plaintiffs would have of having their concrete injuries redressed is if the agency by its own initiative second guessed itself. The line between this level of probability and pure conjecture is extremely thin.

If presented with a fact pattern similar to *Defenders*,[199] where the plaintiffs had airplane tickets, a court could read the plurality's discussion in section III B as placing a limit on the relaxation of redressability. If, as in *Defenders*, both the occurrence and effect of a

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194. *Id.*

195. Idaho v. ICC, 35 F.3d 585, 591 (D.C. Cir. 1994).

196. One recent decision held that "[h]aving satisfied all three elements for procedural standing . . . Plaintiffs need not show that . . . the requested remedy will redress the asserted injury." Idaho Farm Bureau Fed'n v. Babbitt, 1995 WL 548335 (D. Idaho Aug. 31, 1995).

197. Moreau v. FERC, 982 F.2d 556 (D.C. Cir. 1993); *see supra* text accompanying notes 183-90 for a discussion of the *Moreau* facts.

198. *Id.* at 568.

199. 504 U.S. 555 (1992).

procedure are uncertain, perhaps some limit on the relaxation of redressability might be defined.

If, however, procedural rights really "are special"[200] such that the Constitution tolerates much more uncertainty in the potential effect of a court's remedy on the plaintiff's concrete injury than in all other types of cases, distinguishing among the causes of that uncertainty is pointless. The minute chance that requiring an EIS will stop construction of a dam and save an endangered species is not changed because the acting entity is not bound by the court's decision, either because the agency is not a party to the suit, is an immune entity like the President, or is a foreign government primarily responsible for the construction of the dam. The chance of redress is still minute. If the Constitution permits what are in essence purely conjectural or speculative requests for relief for plaintiffs complaining of violations of their procedural rights, all claims of this type should be permitted. Any other rule adds complexity unnecessary to the already arcane standing jurisprudence.

V. SUMMARY

In sum, this article suggests that a) informational injury should be sufficient to satisfy the Article III standing requirements, and b) courts should utilize footnote seven standing to completely remove redressability as a barrier for procedural plaintiffs.

A. Informational Injury Should Be Sufficient to Satisfy the Article III Standing Requirements

Nothing in *Defenders* categorically prevents informational injury from serving as the separate concrete interest that is paired with a procedural right, such as the EIS requirement under NEPA. The imminence requirement for injury in fact would require the informational injury plaintiff to allege concrete plans with specific dates involving the use of the information,[201] thus satisfying the Court's predictable concerns that often[202] the timing of the informational injury will be controlled by the plaintiff. Instead of buying a plane ticket, the plaintiff would have to demonstrate that newsletters were sent out, seminars were scheduled, and appointments with members of Congress were arranged. If an organization conducted these

200. *Id.* at 572 n.7.

201. *Id.* at 564-65 n.2.

202. The timing of the informational injury would indeed be out of the plaintiff's control if it were alleged that the information was to be used to lobby Congress on the passage of a bill or treaty, as was the case with NAFTA and the *Public Citizen* cases. *See supra* section III,A,2.

activities regularly, courts would possibly cite Justice Kennedy's opinion and would reasonably assume that the plaintiff would be using this information regularly.[203]

Similarly, the geographic element of imminence would not be a problem for informational injury in the ordinary case. Since most of the information would be disseminated in the United States, and in most cases locally, the injury from the lack of that information would be local. It is possible to imagine a case where a plaintiff might challenge an agency's decision not to disseminate information about contraceptives in Central America where the informational injury would not be local; this, however, would be the exception rather than the rule.

Informational injury does not necessarily fit the traditional notion of injury, but as Justice Kennedy, joined by Justice Souter, stated in his concurring opinion in *Defenders*:

> As Government programs and policies become more complex and far reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition. Modern litigation has progressed far from the paradigm of Marbury suing Madison to get his commission, *Marbury v. Madison* . . . or Ogden seeking an injunction to halt Gibbons' steamboat operations, *Gibbons v. Ogden* . . . .[204]

Indeed, prior to *Sierra Club v. Morton*[205] it was not certain that aesthetic injury alone was insufficient to convey standing. As the Court stated in *Sierra Club*:[206]

> Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process. But the "injury in fact" test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself [or herself] among the injured.[207]

Recognition of aesthetic and environmental injury has not eliminated the bedrock barrier of standing. Recognition of informational standing will not do so either. As aesthetic and environmental interests are essential to quality of life in the United States, informational

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203. *Defenders*, 504 U.S. at 579 (Kennedy, J., concurring).
204. *Id.* (citations omitted).
205. Sierra Club v. Morton, 405 U.S. 727 (1972).
206. *Id.*
207. *Id.* at 734.

interests must also be considered essential to quality of life in this Information Age. Despite the Supreme Court's apparently more restrictive approach to standing, the future of informational standing is not entirely dim. Justices Kennedy and Souter have taken a flexible approach toward the nature of the injury.[208] Justices Blackmun and O'Conner, the *Defenders* dissenters, along with Justice Stevens, all have an expansive notion of what injury in fact is sufficient under Article III.[209] These Justices each found the alleged injuries in *Defenders* sufficient. While serving on the D.C. Circuit, Justice Ginsburg concurred in *City of Los Angeles v. National Highway Traffic Safety Administration* and recognized informational injury.[210] Thus, since the present makeup of the Court has changed slightly, the status of informational injury is uncertain; yet, taking the cases into consideration, the status of informational injury is not altogether gloomy either.

B. Courts Should Utilize Footnote Seven Standing to Completely Remove Redressability as a Barrier For Procedural Plaintiffs

Unlike the status of informational injury, the status of footnote seven standing is certain. Conversely, the actual contours of the relaxation of the redressability requirement, if any, are uncertain. As previously discussed, the majority in *Defenders* offers no further explanation other than the text itself.[211] The plurality's discussion of redressability in section III B can be read alternatively as either not discussing redressability in the footnote seven context, or as defining some limits, albeit limits not at issue in ordinary cases. Finally, the *Defenders'* dissenters and Justice Stevens simply do not discuss redressability in the footnote seven context.

The lower courts have embraced the rule of footnote seven standing, but have attempted to finesse the issue of any limitations on the relaxation standard. The language used by the courts suggests a position that no redressability requirements exist once the prerequisites for footnote seven standing are met. This is the better rule. Once courts have established that procedural rights really "are special" in such a way that the Constitution can tolerate much more uncertainty in the potential effect of a court's remedy on the plaintiff's concrete injury than in all other types of cases, distinguishing among the causes of that uncertainty makes little sense as the

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208. *Defenders*, 504 U.S. 555, 589 (Kennedy, J., concurring).
209. *See id.* at 582 (Stevens, J., concurring), and at 590 (Blackmun, J., dissenting).
210. 912 F.2d 478, 504 (D.C Cir. 1990).
211. *See generally Defenders*, 504 U.S. 555 (1992).

alternative reading of section III B of the *Defenders* plurality opinion would suggest. Great uncertainty is great uncertainty, no matter the cause.

C. Conclusion

Despite the Supreme Court's designation of suits where plaintiffs assert "injury aris[ing] from the government's allegedly unlawful regulation (or lack of regulation) of someone else"[212] as a disfavored category and the Court's application of a higher standing barrier,[213] environmental groups and other plaintiffs can remain confident that they will be granted standing under statutes like NEPA and the ESA. The future of the non-traditional standing theories of informational and footnote seven standing, although uncertain in some respects, appears bright. Interest groups will continue to act as effective private attorney generals and thus will be able to enforce in federal court those interests which Congress felt sufficiently important to protect with a specific procedure.

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212. *Id.* at 562.

213. *Id.* ("Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but is ordinarily 'substantially more difficult' to establish.").