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## Bennett v. Plenert: Using the Zone-of-Interests Test to Limit Standing under the Endangered Species Act

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**BENNETT v. PLENERT: USING THE ZONE-OF-INTERESTS  
TEST TO LIMIT STANDING UNDER THE  
ENDANGERED SPECIES ACT**

I. INTRODUCTION

The zone-of-interests test is a standing requirement set forth by the United States Supreme Court.<sup>1</sup> The Court enunciated that to obtain standing, a plaintiff's injury must fall "arguably within the zone-of-interests" created by the statute in question.<sup>2</sup> The application of the test outside of the Administrative Procedure Act (APA),<sup>3</sup> however, has been questioned. In particular, its application as a means of denying citizen suit standing has been the point of much debate.<sup>4</sup>

Congress has incorporated citizen suit enforcement provisions into environmental statutes to allow "private individuals and organizations to file civil actions to remedy statutory violations or to compel the performance of federal agency actions made mandatory by

1. See *Association of Data Processing Servs. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970). See also *infra* notes 29-33 and accompanying text for a discussion of *Data Processing* and its application of the same interests test.

2. *Id.* at 153. For a discussion of the zone-of-interests test, see *infra* notes 29-41 and accompanying text.

3. Administrative Procedure Act (APA), Pub. L. No. 89-554, 80 Stat. 392 (1966) (codified as amended at 5 U.S.C. §§ 551-59, 701-06 (1994)). The APA grants standing to persons aggrieved by agency action within the meaning of a relevant statute. 5 U.S.C. § 702. Section 702 of the Administrative Procedure Act provides in pertinent part:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

*Id.*

4. Lisa M. Bromberg, *Lujan v. Defenders of Wildlife: Where Does the Standing Issue Stand in Environmental Litigation*, 16 AM. J. TRIAL ADVOC. 761, 764 (1993) (stating standing requirements and prudential limits are evasive and not subject to concrete definition); Jeffery W. Ring & Andrew F. Behrend, *Using Plaintiff Motivation to Limit Standing: An Inappropriate Attempt To Short-Circuit Environmental Citizen Suits*, 8 J. ENVTL. L. & LITIG. 345, 353 (1994) (citing Lawrence Gerschwer, *Informational Standing Under NEPA: Justiciability and the Environmental Decisionmaking Process*, 93 COLUM. L. REV. 996, 1009 (1993)) (stating prudential considerations should not be considered once Article III standing requirements have been satisfied).

those statutes.”<sup>5</sup> Despite Congress’s intent to make agency action reviewable, courts frequently impose prudential restrictions on standing which often require plaintiffs to satisfy certain components before the court grants standing.<sup>6</sup>

In *Bennett v. Plenert*,<sup>7</sup> the United States Court of Appeals for the Ninth Circuit reviewed a dismissal by the United States District Court for the District of Oregon of a citizen suit under the Endangered Species Act (ESA).<sup>8</sup> The Ninth Circuit held that the broad language of the citizen suit provision of ESA did not render the

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5. Robert B. June, *The Structure of Standing Requirements for Citizen Suits and the Scope of Congressional Power*, 24 ENVTL. L. 761, 762 (1994). As a response to perceptions of government failure to enforce the Clean Air Act (CAA), Congress, in 1970, included the citizen suit provision as the amendments to the statute. *Id.* at 764 (citing Clean Air Amendments of 1970, Pub. L. No. 91-604, §§ 12(a), 304, 84 Stat. at 1705-07 (1970) (codified as amended at 42 U.S.C. § 7604 (1988 & Supp. II 1990))). Following its inclusion into CAA, the citizen suit provision became the subject of environmental litigation. *Id.* at 765. Generally, citizen suit provisions grant authority to “any person” to file suits. *See, e.g.*, Solid Waste Disposal Act (SWDA) § 7002(a), 42 U.S.C. § 6972(a) (1988). *See also* The Endangered Species Act (ESA) Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531-44 (1994)). The citizen suit provision of the ESA provides in part that, subject to certain exceptions, “any person may commence a civil suit on his own behalf— (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof.” ESA § 11(g)(1)(a), 16 U.S.C. § 1540(g)(1)(A). Some citizen suit provisions include exceptions which preclude citizen standing where governmental agencies are pursuing enforcement actions or, where federal agencies have not received proper notice of violations to allow them to bring an action or correct any violations committed by the agency. Ring & Behrend, *supra* note 4, at n.25 (citing ESA § 11, 16 U.S.C. § 1540(g)(2)).

For example, § 11046(a) of the Emergency Planning and Community Right-to-Know Act limits citizen suits to enumerated violations in the Act. Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11046(a) (1988). Also, the Clean Water Act (CWA) limits citizen suits to plaintiffs alleging non-compliance with an “effluent standard or limitation.” CWA § 505(f), 33 U.S.C. § 1365(f) (1988).

6. Martha Colhoun & Timothy S. Hamill, *Environmental Standing In The Ninth Circuit: Wading Through The Quagmire*, 15 PUB. LAND L. REV. 249, 269 (1994). The Supreme Court has rendered prudential restrictions moot where Congress provided a citizen-suit provision. *Id.* at 270. Some examples of prudential requirements include the zone-of-interests test and third-party standing. *Id.* at 270-77. The zone-of-interests test requires that a plaintiff’s alleged injury fall within the zone-of-interests protected by the particular statute in question. *Id.* at 270. Third party standing restricts a plaintiff from asserting the legal rights of another. *Id.* at 275. The nexus requirement provides that there must be a relationship between the injury suffered and the constitutional right alleged to be violated. *Id.* at 277.

7. 63 F.3d 915 (9th Cir. 1995). For a discussion of *Plenert*, see *infra* notes 80, 90-115 and accompanying text.

8. *Id.* at 917. *See also* ESA § 2, 16 U.S.C. § 1531. For a discussion of ESA’s citizen suit provision, see *infra* note 9. Congress enacted the ESA for the conservation of endangered and threatened species. ESA § 2(b), 16 U.S.C. § 1531(b). Its policy for the statute was based upon the following findings:

zone-of-interests test inapplicable to the determination of prudential standing.<sup>9</sup> The court reasoned that the Ninth Circuit and other courts have repeatedly employed the zone-of-interests test in determining standing despite Congress's enactment of expansive citizen suit provisions.<sup>10</sup> Specifically, the court held that the plaintiffs lacked standing to bring an action pursuant to ESA, because they did not assert any interest in preserving endangered species of fish.<sup>11</sup>

This Note explores the zone-of-interests requirement adopted by the Ninth Circuit, focusing on the court's limitation of standing regarding the action brought pursuant to ESA's citizen suit provision.<sup>12</sup> Further, this Note analyzes the soundness of the court's analysis by evaluating the court's reliance on precedent as support for applying the zone-of-interests test in *Plenert*.<sup>13</sup> Next, this Note demonstrates that the Ninth Circuit's application of the zone-of-interests test, limiting standing under citizen suit provisions, is contrary to established precedent.<sup>14</sup> Finally, this Note discusses the impact that the Ninth Circuit's zone-of-interests test will have on a plaintiff's willingness to bring suit pursuant to ESA in addition to the impact that the decision will have on Congress's goal in enacting citizen suit provisions.<sup>15</sup>

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(1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;

(2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;

(3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people; . . . .

ESA § 2(a)(1)-(3), 16 U.S.C. § 1531(a)(1)-(3).

9. *Plenert*, 63 F.3d at 918.

10. *Id.* at 918 n.4. For a discussion of the Ninth Circuit's analysis in *Plenert*, see *infra* notes 96-115 and accompanying text.

11. *Plenert*, 63 F.3d at 921-22. For a discussion of the court's holding in *Plenert*, see *infra* notes 112-15 and accompanying text.

12. For a discussion of the Ninth Circuit's adoption of the zone-of-interests test as a standing requirement under the ESA, see *infra* notes 98-112 and accompanying text.

13. For a discussion of the cases the *Plenert* court relied on in support of its holding, see *infra* notes 111-12 and accompanying text.

14. For a discussion of cases and commentaries that contravene the Ninth Circuit's holding in *Plenert*, see *infra* notes 135-37 and accompanying text.

15. For a discussion of the impact of the *Plenert* court's holding, see *infra* notes 142-45 and accompanying text.

## II. BACKGROUND

## A. The United States Supreme Court's Position on Standing

Standing to sue is a doctrine that originated in Article III of the United States Constitution.<sup>16</sup> This doctrine limits judicial power to "cases or controversies" and has been developed through expanding case law.<sup>17</sup> The Supreme Court has delineated a three part test for standing: (1) a plaintiff must have suffered an "injury in fact," that is an invasion of a legally-protected interest which is concrete and particularized;<sup>18</sup> (2) "there must be a causal connection between the injury and the conduct complained of [such that] the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant and not . . . th[e] result [of] the independent action of some third party not before the court;' "<sup>19</sup> and (3) "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' "<sup>20</sup>

A plaintiff must demonstrate the minimum standing requirements in order to confer jurisdiction on a court to hear a case.<sup>21</sup> Congress, however, pursuant to its legislative power, also has the

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16. U.S. CONST. art. III, § 2, cl. 1. Article III provides in pertinent part: "The Judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution . . . [and] to Controversies between two or more States; between a State and Citizens of another State." *Id.*

17. *See, e.g.,* Allen v. Wright, 468 U.S. 737, 751 (1984) (stating that alleged injury must be "distinct and palpable" (quoting Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979)); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 37 (1976) ("No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies."); Flast v. Cohen, 392 U.S. 83, 97 (1968) (stating federal judicial power limited to disputes capable of resolution and restricted to a role consistent with system of separation of powers).

18. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (citing, *inter alia*, Allen v. Wright, 468 U.S. 737, 756 (1984)). For a discussion of the injury in fact requirement of standing, see *infra* note 21.

19. Lujan, 504 U.S. at 560-61 (quoting Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 41-42 (1976)) (alteration in original). For a discussion of the causation requirement of standing, see *infra* note 21.

20. Lujan, 504 U.S. at 561 (quoting Simon, 426 U.S. at 38, 43). For a discussion of the redressability requirement of standing, see *infra* note 21.

21. Colhoun & Hammill, *supra* note 6, at 279. The constitutional requirements to establish standing are injury in fact, causation and redressability. *Id.* at 252. The injury in fact component is the threshold issue of standing. *Id.* It ensures that the plaintiff has suffered an injury based on a "personal and cognizable interest that warrants judicial intervention." *Id.* The injury must be "concrete and particularized, and actual or imminent" rather than just hypothetical or conjectural. *Id.* at 252-53. Although, in the past, courts required plaintiffs to allege injury to economic or property interest, the Supreme Court has held that non-economic injuries could also satisfy the injury in fact requirement. *Id.* at 253. *See also* Sierra Club v. Morton, 405 U.S. 727, 738 (1972) (holding that " 'aesthetic, conservational, and recreational' " interests could satisfy injury in fact requirement)

authority to grant standing to a broad range of citizens so long as the minimum constitutional requirements are met.<sup>22</sup> Conversely, Congress can limit its grant of standing by use of statutory provisions that fall within the confines of the minimum constitutional requirements.<sup>23</sup>

The "injury in fact" requirement for standing can exist "solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'"<sup>24</sup> Congress enacted citizen suit provisions in many environmental statutes which enable any person, subject to certain limitations, to bring a civil suit to enforce environmental statutes.<sup>25</sup> For example, the Clean Water Act (CWA) allows any citizen to bring a civil suit on his or her behalf against any other person, including the United States, for violation of "[any] effluent standard or limitation under [the Act]."<sup>26</sup> Further, the Solid Waste Disposal Act (SWDA) allows any person to bring suit against any other person in violation of "any permit, standard, regulation, condition, re-

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(quoting *Association of Data Processing Servs. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970)).

The causation requirement for standing requires that there be a causal connection between the plaintiff's "injury and the defendant's misconduct, or that the injury is fairly traceable to the action being challenged." Colhoun & Hamill, *supra* note 6, at 266. The redressability component of standing requires that the injury complained of be redressed by the relief requested. *Id.*

22. *Lujan*, 504 U.S. at 578. See also *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (holding that Congress can extend standing under statute to limit of Article III).

23. June, *supra* note 5, at 793-94. For example, Congress can limit citizen suit provisions by enacting notice requirements and specifying the type of actions that can be brought under citizen suits. *Id.* at 793. These legislative limitations, however, are subject to Article III boundaries. *Id.* at 794. See U.S. CONST. art. III, § 2, cl. 1.

24. *Lujan*, 504 U.S. at 578 (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973))). The Court in *Lujan* noted that when a plaintiff asserts harm to a procedural interest created by statute he must demonstrate harm both to a procedural interest and to a separate substantive interest. *Id.*

25. For a discussion of Congressional enactment of citizen suit provisions, see *supra*, note 5 and accompanying text.

26. Federal Water Pollution Control Act (FWPCA) § 505(a), 33 U.S.C. § 1365(a)(1988). The statute's citizen suit provision provides in pertinent part:

[A]ny citizen may commence a civil action on his own behalf— (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

*Id.*

quirement, prohibition, or order which has become effective pursuant to [SWDA].”<sup>27</sup> Accordingly, when Congress has expressly augmented standing through citizen suit provisions, a court lacks authority to create prudential barriers to standing.<sup>28</sup>

The zone-of-interests test first appeared as a standing requirement in *Association of Data Processing Service Organizations, Inc. v. Camp*.<sup>29</sup> In *Data Processing*, the plaintiffs were in the business of selling data processing services to other companies and sued to challenge a ruling made by the Comptroller of the Currency which allowed banks to compete with plaintiffs by engaging in this field.<sup>30</sup>

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27. Solid Waste Disposal Act (SWDA) § 7002(a), 42 U.S.C. § 6972(a) (1988). The Act’s citizen suit provision states in pertinent part:

[A]ny person may commence a civil action on his own behalf— (1) (A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or (B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

*Id.*

28. See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982) (noting when Congress intends standing to extend to full limits of Article III, courts lack authority to create prudential barriers to standing under statute in question); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (noting that Congress can extend standing to limits of Article III); *National Wildlife Fed’n v. Coleman*, 400 F. Supp. 705, 710 (D. Miss. 1975) (noting that ESA’s citizen suit provision “confers automatic standing on any person claiming a violation thereof”), *rev’d on other grounds*, 529 F.2d 359 (5th Cir. 1976), *cert. denied*, 429 U.S. 979 (1976).

29. 397 U.S. 150 (1970).

30. *Id.* at 151. In *Data Processing*, the Comptroller of Currency ruled that national banks in general, including defendant American National Bank & Trust Company, can make data processing services available to other banks and to bank customers as part of their banking services. *Id.* Plaintiffs alleged that the Comptroller’s ruling violated the National Bank Act, Rev. Stat. § 5136, 12 U.S.C. § 24 (1994). *Data Processing*, 397 U.S. at 157 n.2. The National Bank Act provides “that national banks have power to exercise ‘all such incidental powers as shall be necessary to carry on the business of banking.’” *Id.* (quoting National Bank Act, § 5136, 12 U.S.C. § 24 (1994)). The district court dismissed the complaint for lack of standing. *Id.* at 151. The Court of Appeals for the Eighth Circuit affirmed the district court’s decision. *Id.* The Supreme Court found that the plaintiffs had standing and remanded the case for a hearing on the merits. *Id.* at 158.

Interpreting APA section 702, the Supreme Court held that apart from the "case or controversy" test,<sup>31</sup> a plaintiff seeking judicial review pursuant to APA must also show that the interest sought to be protected is "arguably within the zone-of-interests to be protected or regulated by the statute or constitutional guarantee in question."<sup>32</sup> Accordingly, the Court analyzed the legislative history of the Banking Service Corporation Act, finding that competitors were within the zone-of-interests protected by the statute.<sup>33</sup>

Following *Data Processing*, courts began to apply the zone-of-interests test as a prudential restriction on standing.<sup>34</sup> Consequently, the United States Supreme Court re-examined the zone-of-interests test in *Clarke v. Security Industry Ass'n*.<sup>35</sup> In *Clarke*, the Supreme Court addressed the propriety of the Comptroller of the Currency permitting two national banks to establish and purchase discount securities brokerage offices.<sup>36</sup> The Court ultimately reaffirmed the validity of the zone-of-interests test set forth in *Data Processing*, and reasoned that the plaintiff in *Clarke* had standing based on interests sufficiently related to the underlying policies of the statute at issue, the McFadden Act.<sup>37</sup>

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31. For description of Article III standing under the U.S. Constitution, see *supra* note 16.

32. *Data Processing*, 397 U.S. at 153. APA grants standing to persons aggrieved by agency action within the meaning of a relevant statute. 5 U.S.C. § 702.

33. *Data Processing*, 397 U.S. at 155-156. Section 4 of the Bank Service Corporation Act of 1962, 76 Stat. 1132, 12 U.S.C. § 1864 provides: "No bank service corporation may engage in any activity other than the performance of bank services for banks." *Id.* This portion of the statute was enacted in response to fears expressed by senators, that "without such a prohibition, the bill would have enabled 'banks to engage in a non-banking activity.'" *Data Processing*, 397 U.S. at 155. (quoting S. REP. NO. 2105, 87th Cong., 2d Sess., 7-12 (supplemental views of Senators Murkie and Clarke)).

34. See *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-75 (1982). Article III requirements limit judicial power and are not merely factors to be weighed as "so-called 'prudential' considerations." *Id.* at 475.

35. *Clarke v. Security Indus. Ass'n*, 479 U.S. 388 (1987).

36. *Id.* at 390-91. In *Clarke*, the Court reviewed an application of the zone-of-interests test as applied to Security Pacific National Bank's and Union Planters National Bank of Memphis' application for establishment of discount brokerage subsidiaries. *Id.* at 390-91. The plaintiff in this case is a trade association representing both banks. *Id.* at 392.

The court noted that the McFadden Act "limits 'the general business' of a national bank to its headquarters and any 'branches' permitted by § 36." *Id.* at 391 (citing the McFadden Act, 12 U.S.C. §§ 36, 81 (1994)). Section 36(f) of the McFadden Act defines "branch" as including "any branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which deposits are received, or checks paid, or money lent." 12 U.S.C. § 36(f).

37. *Clarke*, 479 U.S. at 403. Sections 36 and 81 of the McFadden Act reflect Congress's intent "to keep national banks from gaining a monopoly over credit



The *Clarke* Court redefined the zone-of-interests test, stating that it "is a guide for deciding whether, in view of Congress's evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision."<sup>38</sup> Moreover, the court broadened the scope of the test, denying review only if "the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit."<sup>39</sup> Further, the Court demonstrated the test's elasticity, noting that explicit congressional purpose is not necessary in order for a "would-be plaintiff" to be benefitted.<sup>40</sup>

Significantly, the Court in *Clarke* modified future application of the zone-of-interests test by commenting that, although prudential standing inquiries outside of the APA context may resemble the zone-of-interests test inquiry under the APA, courts should not feel free to apply the test universally.<sup>41</sup> As a result of the Court's broad

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and money through unlimited branching." *Id.* at 403. Congress was concerned with "the perceived dangers of unlimited banking." *Id.* at 402. This concern is demonstrated in Representative McFadden's explanation that:

[The Act] prohibits national banks from engaging in state-wide branch banking in any State (secs. 7 and 8); it prohibits a national bank from engaging in county-wide branching in any state (secs. 7 and 8); it prohibits national and State member banks [of the Federal Reserve System] from establishing any branches in cities of less than 25,000 population (secs. 8 and 9); it prohibits national banks from having any branches in any city located in a State which prohibits branch banking (sec. 8); it prohibits a national bank after consolidating with a State bank to continue in operation any branches which the state bank may have established outside of city limits (sec. 1).

*Id.* at 402 n.17 (quoting 66 CONG. REC. 1582 (1925) (remarks of Rep. McFadden)).

38. *Id.* at 399. In *Block v. Community Nutrition Inst.*, 467 U.S. 340, 351 (1984), the Supreme Court recognized a presumption in favor of judicial review of agency action but found that the presumption is "overcome whenever the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'" *Id.* (quoting *Data Processing*, 397 U.S. at 157).

39. *Clarke*, 479 U.S. at 399. For a discussion of cases where plaintiffs were granted standing because of the broad scope of the *Clarke* test, see *infra* note 42 and accompanying text.

40. *Clarke*, 479 U.S. at 399-400. Courts that have applied the zone-of-interests test as a standing requirement have noted that notwithstanding the test, the minimum constitutional requirements of injury in fact, causation, and redressability must be met. See, e.g., *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982) (noting that prudential limitations on standing should not be mistaken for Article III requirements; Article III requirements are not factors to be weighed in prudential considerations but instead act as limitations on judicial power).

41. *Clarke*, 479 U.S. at 400 n.16. The Court stated that "[w]hile inquiries into reviewability or prudential standing in other contexts may bear some resemblance to a 'zone-of-interests' inquiry under the APA, it is not a test of universal application." *Id.* The Court commented that the zone-of-interests test historically has been applied to APA claims and "is understood as a gloss on the meaning of sec-

construction of the zone-of-interests test, it became difficult for courts to deny standing to a plaintiff under the APA.<sup>42</sup> More importantly, despite *Clarke's* limitation of the test's application to non-APA actions, many courts continued to apply the test as a prudential standing requirement in non-APA as well as APA actions.<sup>43</sup> This ambiguity has created a split in the circuits concerning the application of the zone-of-interests test as a prudential limitation on citizen suits.<sup>44</sup>

## B. Division Among the Circuits

In *Defenders of Wildlife v. Hodel (Defenders of Wildlife II)*,<sup>45</sup> the Eighth Circuit considered the application of the zone-of-interests test as a standing requirement to an action brought under ESA.<sup>46</sup> Plaintiffs, a group of environmental associations, brought an action to challenge a final regulation issued by the Department of Interior which provided that federal agencies which finance projects in foreign countries are not required to follow ESA's consultation provi-

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tion 702." *Id.* The Court further stated that the "invocation of the 'zone-of-interests' test . . . should not be taken to mean that the standing inquiry under whatever constitutional or statutory provision a plaintiff asserts is the same as it would be if the 'generous review provisions' of the APA apply." *Id.* (quoting *Association of Data Processing Servs. Orgs., Inc. v. Camp*, 397 U.S. 150, 156 (1970)).

42. *See, e.g., Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1582-83 (9th Cir. 1993) (finding that even if plaintiffs' interests were inconsistent with underlying purpose of Arizona-Idaho Conservation Act (AICA), defendant still must show "that this inconsistency is so fundamental as to make it impossible to believe that Congress intended to permit [plaintiffs] to bring suit"). *But see Nevada Land Action Ass'n v. United States Forest Service*, 8 F.3d 713, 716 & n.2 (9th Cir. 1993) (holding that plaintiffs lacked standing under National Environmental Policy Act (NEPA) because they asserted economic rather than environmental injuries).

43. *See, e.g., Dan Caputo Co. v. Russian River County Sanitation Dist.*, 749 F.2d 571 (9th Cir. 1984) (noting that zone-of-interests test in cases not under APA is same when applied to actions under APA). In *Dan Caputo*, the court acknowledged that the action would not involve the APA, yet it applied the zone-of-interests test as a prudential basis for standing. *Id.* at 574-75. *See also Hazardous Waste Treatment Council v. EPA*, 861 F.2d 277, 281-85 (D.C. Cir. 1988). The court applied the zone-of-interests test as a prudential standing requirement to deny judicial review of agency action under the Resource Conservation and Recovery Act of 1976 (RCRA). *Id.* *See Resource Conservation and Recovery Act of 1976 (RCRA) §§ 3001-5006*, 42 U.S.C. §§ 6921-56 (1988 & Supp. V 1993). The plaintiffs did not bring their claim directly under the citizen suit provision of RCRA, but instead sought review of agency action under APA. *Id.*

44. For a discussion of the split amongst the circuits, see *infra* notes 45-61 and accompanying text.

45. 851 F.2d 1035 (8th Cir. 1988), *reh'g denied*, (1988), *on remand to* 707 F. Supp. 1082 (D. Minn. 1989), *aff'g sub nom. Defenders of Wildlife v. Lujan*, 911 F.2d 117 (8th Cir. 1990), *cert. granted*, 500 U.S. 915 (1991), *rev'd on other grounds*, 504 U.S. 555 (1992).

46. *Defenders of Wildlife II*, 851 F.2d at 1039.

sion.<sup>47</sup> Plaintiffs alleged that the Department of Interior regulation violated the consultation provision of ESA by not requiring consultation in foreign countries.<sup>48</sup> The United States District Court for the District of Minnesota dismissed the action for lack of subject matter jurisdiction finding that the plaintiffs did not satisfy Article III standing requirements.<sup>49</sup>

Subsequently, the Eighth Circuit clarified the requirements necessary to establish standing under Article III of the Constitution and found that the plaintiffs had met the standing requirement.<sup>50</sup> In addressing the application of the zone-of-interests test to ESA actions, the Eighth Circuit demonstrated the inapplicability of the

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47. *Id.* at 1036-38. Plaintiffs are members of various environmental organizations: Defenders of Wildlife, Friends of Animals and Their Environment, and the Humane Society of the United States (collectively Defenders). *Id.* at 1036.

48. *Id.* at 1037-38. ESA provides that a federal agency must consult with the Secretary to ensure "that any action it authorizes, funds or carries out, in the United States or upon the high seas is not likely to jeopardize the continued existence of any listed species . . ." 50 C.F.R. § 402.01(a) (1995). See ESA §§ 4, 7, 16 U.S.C. §§ 1533, 1536. Section 4(b)(2) provides in pertinent part: "The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." ESA § 4(b)(2), 16 U.S.C. § 1533 (b)(2). Section 7(a)(2) provides:

Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as "agency action") 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, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2).

49. *Defenders of Wildlife v. Hodel (Defenders of Wildlife I)*, 658 F. Supp. 43, 48 (D. Minn. 1987), *rev'd*, 851 F.2d 1035 (8th Cir. 1988), *on remand to* 707 F. Supp. 1082 (D. Minn. 1989), *aff'g sub nom. Defenders of Wildlife v. Lujan*, 911 F.2d 117 (8th Cir. 1990), *rev'd on other grounds*, 504 U.S. 555 (1992). The district court found that the plaintiffs lacked any showing of "actual or threatened injury traceable to the Secretary's reinterpretation of Section 7" of ESA. *Id.* In addition to their alleged injuries, the plaintiffs submitted several additional reasons why the court should hear their case. *Id.* at 46 n.4. First, they contended that the issue raised by their complaint is one of law, and thus is appropriate for a judicial determination. *Id.* Second, they asserted that the scope of the lawsuit is purely legal, and a factual record or factual setting is unwarranted. *Id.* Finally, they asserted that they have a profound interest in protecting endangered species. *Id.* The district court found that "[e]ven these practical considerations, standing alone or when combined, cannot overcome the requirements of Article III." *Id.*

50. See *Defenders of Wildlife II*, 851 F.2d at 1039 n.2. For a discussion of constitutional requirements for standing see *supra* notes 16-21 and accompanying text.

zone-of-interests test in limiting citizen suit provisions of ESA.<sup>51</sup> The court stated that when Congress has enacted statutes establishing judicial review of actions by public officials authorized to perform particular functions, the question of standing “must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff.”<sup>52</sup> The court found that because ESA’s citizen suit provision allows that “‘any person’ may commence a suit to enjoin any person who is alleged to be in violation of ESA . . . [d]efenders therefore need meet only the constitutional requirements for standing for their claim under ESA.”<sup>53</sup>

Conversely, in *Humane Society of the United States v. Hodel*,<sup>54</sup> the United States Court of Appeals for the District of Columbia applied the zone-of-interests test to plaintiffs’ claims brought pursuant to ESA.<sup>55</sup> In *Humane Society*, plaintiffs, an animal protection organization and one of its members, brought an action against the Fish and Wildlife Service for allowing hunting on certain national wildlife refuges.<sup>56</sup> Finding that plaintiffs met the constitutional requirements for standing,<sup>57</sup> the D.C. Circuit implemented the zone-of-in-

51. *Defenders of Wildlife II*, 851 F.2d at 1039. The court noted that through legislation Congress may eliminate prudential limitations. *Id.*

52. *Id.* at 1039 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972)). The Eighth Circuit noted that apart from constitutional requirements, courts have frequently imposed prudential or policy requirements on plaintiffs to establish standing. *Id.*

53. *Id.* Defenders also alleged violations under APA § 702. *Id.* at n.2.

54. 840 F.2d 45 (D.C. Cir. 1988).

55. *Id.* at 61. Plaintiffs were the Humane Society of the United States (HSUS) and Rodger Kindler, a member of HSUS. *Id.* at 47. Plaintiffs allege that the Wildlife Service violated the National Environmental Policy Act of 1969 (NEPA) §§ 101-105, 42 U.S.C. §§ 4331-35 (1988); ESA §§ 2-18, 16 U.S.C. §§ 1531-44 (1994); the Refuge Recreation Act of 1962 (RRA), 16 U.S.C. §§ 460(k)(1)-(4) (1994); and the National Wildlife Refuge System Administrative Procedure Act (NWRSA), 16 U.S.C. § 668dd (1994). *Id.* The district court held that Kindler had standing solely as to the NEPA violations, and HSUS did not have standing as to any of the claims. *Id.* Deciding the ESA claim, the district court found that HSUS’s injuries fell outside the zone-of-interests protected by the ESA. *Id.* The Eighth Circuit reversed the district court’s finding that HSUS failed to establish standing pursuant to any of the statutes, and remanded the case to permit HSUS to pursue its challenge to the introduction of hunting at the Chincoteague preserve. *Id.*

56. *Id.* at 48-49. America has over 400 national wildlife refuges scattered throughout most of the states and 5 trust territories. *Id.* at 47. Many of the wildlife refuges were created through executive orders and others through “statutorily-authorized land purchases.” *Id.* at 47-48. Many of the orders creating these refuges contain provisions “prohibiting the taking of wildlife ‘except under such rules as may be promulgated by the appropriate Secretary.’” *Id.* at 48. (citations omitted).

57. *Id.* at 51 (citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982)). The D.C. Circuit Court of Appeals described standing as having three demands:

[A]t an irreducible minimum, Art. III requires the party who invokes the Court’s authority to ‘show that he personally has suffered some actual

terests test as an additional requirement.<sup>58</sup> The court relied on *Clarke*, stating that “[t]he zone of interests test is a guide for deciding whether, in view of Congress’ evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision.”<sup>59</sup> Accordingly, the court found that the plaintiffs’ claim fell within the zone-of-interests protected by ESA.<sup>60</sup> The court, however, failed to address whether the zone-of-interests test overrides ESA’s citizen suit provision.<sup>61</sup>

Hearing the appeal of *Defenders of Wildlife II*, the Supreme Court in *Lujan v. Defenders of Wildlife*,<sup>62</sup> limited the scope of citizen

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or threatened injury as a result of the putatively illegal conduct of the defendant,’ and that the injury ‘fairly can be traced to the challenged action’ and is ‘likely to be redressed by a favorable decision.’

*Id.* at 51 (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982)). The circuit court found that HSUS’s allegations that it demonstrated a strong interest in the preservation, enhancement and humanitarian treatment of wildlife is a “mere emotional injur[y]” and noncognizable. *Id.* at 52. The court, however, ruled that HSUS’s second injury of obstruction of recreational use of the refuge system and observation of the wildlife is “clearly cognizable.” *Id.* The court further found that HSUS had standing to bring a suit on behalf of its members stating:

[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. - *ft Id.* at 52-53 (quoting *Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 343 (1977)).

58. *See id.* at 61. After consulting the legislative history of the Refuge Acts, the court determined that the Act’s policies encompassed the protection of human aesthetic interest in viewing live animals and birds. *Id.* at 61. As such the court held that the plaintiffs’ interests bore a “plausible relationship” to “the overall context” of the Acts. *Id.*

59. *Humane Society*, 840 F.2d at 60. For a discussion of the zone-of-interests test, see *supra* notes 29-43 and accompanying text.

60. *Id.* at 61.

61. *See id.* at 61 (finding that plaintiffs’ interests in watching animals and birds are within zone-of-interests protected by RRA and ESA without addressing whether zone-of-interests test overrides ESA’s citizen suit provision). *See also* *National Audubon Soc’y v. Hester*, 801 F.2d 405, 407 n.2 (D.C. Cir. 1986) (finding plaintiff’s activity of observing and studying wildlife fell within zone-of-interests protected by ESA and NEPA, without addressing whether test overrides ESA’s citizen suit provision); *Idaho, By and Through Idaho Pub. Utils. Comm’n. v. Interstate Commerce Comm’n.*, 35 F.3d 585, 592 (D.C. Cir. 1994) (finding state’s property interest in wildlife management brings it within ESA’s zone-of-interests).

62. 504 U.S. 555 (1992). The Supreme Court reversed the Eighth Circuit’s decision in *Defenders of Wildlife II*, 851 F.2d 1035 (8th Cir. 1988), holding that plaintiffs lacked standing to bring their action. *Id.* at 578. For a discussion of the Eighth Circuit’s decision in *Defenders of Wildlife II*, see *supra* notes 45-53 and accompanying text.

suit standing.<sup>63</sup> In *Lujan*, plaintiffs brought an action challenging a regulation requiring federal agencies to consult with the Secretary of the Interior concerning the applicability of ESA to federally funded projects in the United States and on the high seas.<sup>64</sup> The Court rejected the view that the injury-in-fact requirement for constitutional standing is fulfilled through citizen suit provisions which provide that citizens have “[a] . . . ‘right’ to have the Executive observe the procedures required by law.”<sup>65</sup> Instead, the Court found that a plaintiff must be able to demonstrate “that the statute is invalid” and “that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement,” rather than some indefinite injury shared in common with people generally.<sup>66</sup> As a result, the Supreme Court held that plaintiffs lacked standing to bring the action.<sup>67</sup> Although the Court did not define the boundaries of standing conferred by ESA’s citizen suit provision, its decision would allow Congress to expand standing, by way of citizen suit provisions, to the full extent allowed by Article III.<sup>68</sup>

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63. *Lujan*, 504 U.S. at 572-78.

64. *Lujan*, 504 U.S. at 558-59. The plaintiffs brought the action pursuant to § 7 of the ESA. *Id.* at 559. Section 7(a)(2) divides responsibilities regarding the protection of endangered species between the Secretary of the Interior and the Secretary of Commerce, and requires each federal agency to consult with the relevant Secretary to ensure that any action funded by the agency is not likely to “jeopardize the continued existence” or habitat of any endangered or threatened species. ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2).

65. *Lujan*, 504 U.S. at 573 & n.8. The Court of Appeals for the District of Columbia Circuit found that plaintiffs had standing simply because they had suffered a “procedural injury” established by the ESA’s citizen suit provision. *Id.* at 571-72 (citing *Defenders of Wildlife v. Lujan*, 911 F.2d 117, 121-122 (8th Cir. 1990)). The appellate court had held that because the citizen suit provision creates a “procedural right[t]” . . . *anyone* can file suit in federal court to challenge the Secretary’s . . . failure to follow procedures” established in the statute, without regard to any concrete injury flowing from the failure. *Id.* at 572 (citing *Defenders of Wildlife v. Lujan*, 911 F.2d 117, 121-22 (8th Cir. 1990)) (emphasis added). The Supreme Court noted, however, that it was “*not* hold[ing] that an individual cannot enforce procedural rights.” *Id.* at 573 n.8. Rather, “so long as the procedures in question are designed to protect some threatened concrete interest” of an individual, he or she would have standing. *Id.*

66. *Id.* at 574 (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488-89 (1923)). The Supreme Court found that if it were to grant standing to plaintiffs without some demonstration of direct injury, the court would be overstepping its bounds and “assum[ing] a position of authority over the governmental acts of another and co-equal department, an authority which plainly [the court] do[es] not possess.” *Id.* (quoting *Mellon*, 262 U.S. at 488-89).

67. *Id.* at 578. The Court reversed the opinion of the Court of Appeals finding that they erred in not granting summary judgment to the United States. *Id.*

68. *See id.* at 581 (Kennedy, J., concurring). *See also supra* note 28 and accompanying text for a discussion of Congress’ expansion of standing to the full limits of Article III.

Nevertheless, courts have continued to apply the zone-of-interests test to limit standing on a prudential basis without addressing whether it overrides the citizen suit provision of the particular statute. For example, in *Gonzales v. Gorsuch*,<sup>69</sup> a group of private citizens sued to challenge expenditures approved by EPA and made by the Association of Bay Area Governments (ABAG).<sup>70</sup> The United States District Court for the Northern District of California granted summary judgment for EPA.<sup>71</sup> The Court of Appeals affirmed because plaintiff's injury would not be redressed by the relief sought.<sup>72</sup> Similarly, in *Dan Caputo Co. v. Russian River County Sanitation Dist.*,<sup>73</sup> the Ninth Circuit noted that to challenge the agency action under the APA, the plaintiffs, two construction companies, must show not only that they satisfy Article III requirements for standing, but also that they satisfy the zone-of-interests test.<sup>74</sup> The Court denied the plaintiffs' standing under the CWA's citizen suit provision, holding that the plaintiffs' injury did not "arise from an

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69. 688 F.2d 1263 (9th Cir. 1982).

70. *Id.* at 1264. "ABAG is a public entity comprised of 92 local governments." *Id.* at 1265 n.1. ABAG applied for, and received, a grant of \$4.3 million from EPA. *Id.* at 1264-65. The grant was provided to develop and implement a workplan pursuant to section 208 of the Clean Water Act, "which authorizes areawide waste treatment management plans, administered by the government and funded by the EPA." *Id.* at 1265. Gonzales alleged that ABAG used some of the funds for contracts unrelated to water pollution planning. *Id.* at 1265 n.7.

71. *Id.* at 1265 (citing *Gonzales v. Costle*, 463 F. Supp. 335 (N.D. Cal. 1978)).

72. *Id.* at 1267-68. The Ninth Circuit found that even though it ordered ABAG to refund any illegally spent funds, it would not correct the injury allegedly caused by the misappropriation of funds by ABAG. *Id.* at 1268. Moreover, the court found that "[a]ny injunction against future action, [. . .] would proceed necessarily on an unsubstantiated assumption that more grants would be forthcoming." *Id.*

73. 749 F.2d 571 (9th Cir. 1984).

74. *Id.* at 574. In *Dan Caputo*, the plaintiffs asserted standing pursuant to section 10(a) of APA. *Id.* (citing APA § 10(a), 5 U.S.C. § 702). Russian River Sanitation District ("Russian River") awarded the plaintiffs, Dan Caputo Co. and Wagner Construction Co., a contract to build a sewage treatment system. *Id.* at 573. A grant from EPA supplied the money for the venture. *Id.* A dispute arose between plaintiffs and defendant Russian River concerning contractual obligations. *Id.* As a result, plaintiffs stopped work on the contract and the money from the grant remained unspent. *Id.* Pursuant to an agreement between Russian River, EPA and the California Water Resources Control Board (WRCB), Russian River solicited bids with the remaining grant money for the completion of the plaintiffs' work. *Id.* The plaintiffs brought suit on grounds that the bid solicitation and the contract offered violated EPA regulations; that the WRCB failed to ensure Russian River's compliance with the regulations; and that EPA improperly dismissed plaintiffs' bid protest. *Id.* The district court found that plaintiffs lacked standing because they lacked Article III's "injury-in-fact" requirement. *Id.* The plaintiffs appealed to the Ninth Circuit. *Id.*

interest in the environment,” and plaintiffs did “not seek to vindicate environmental concerns.”<sup>75</sup>

The Ninth Circuit addressed this issue in *Bennett v. Plenert*<sup>76</sup> and found that the zone-of-interests test applied even though ESA contains a citizen suit provision.<sup>77</sup> In its analysis, the Ninth Circuit cited *Pacific Northwest Generating Co-op v. Brown*<sup>78</sup> and *Mt. Graham Red Squirrel v. Espy*<sup>79</sup> as precedent for its conclusion that the zone-of-interests test had been applied directly to suits brought under ESA.<sup>80</sup>

In *Pacific Northwest*, the plaintiffs, purchasers of hydropower, brought a suit challenging an endangered or threatened species listing of three salmon populations by the Secretary of Commerce and Bonneville Power Administration.<sup>81</sup> The plaintiffs brought actions pursuant to ESA and APA, alleging that the defendants violated section seven of ESA’s “cumulative impact” provision, its “no jeopardy” provision, its “incidental take” provision, and its “consultation” provision.<sup>82</sup> The United States District Court for the District of Oregon found that plaintiffs lacked standing to bring ESA claims.<sup>83</sup> The Court of Appeals, however, held that the plaintiffs had sufficient economic stake in the status of the salmon to qualify for standing.<sup>84</sup>

75. *Id.* at 575.

76. 63 F.3d 915 (9th Cir. 1995).

77. *Id.* at 919. For a discussion of *Plenert’s* adoption of the zone-of-interests test, see *infra* notes 98-112 and accompanying text.

78. 38 F.3d 1058, 1065 (9th Cir. 1994).

79. 986 F.2d 1568, 1581 (9th Cir. 1993).

80. *Plenert*, 63 F.3d at 918.

81. *Pacific Northwest*, 38 F.3d at 1060. The National Marine Fisheries Service listed Snake River sockeye salmon as an endangered species pursuant to ESA, and the Snake River spring/summer chinook salmon and Snake River fall chinook salmon as threatened species pursuant to ESA. *Id.* at 1061. The Army Corps of Engineers and the Bureau of Reclamation, two of the defendants, increased the water flow in the Columbia River to benefit the salmon. *Id.* Because of the defendants’ action, the use of water for power production was diminished and the cost of power supplied by the Bonneville Power Administration was increased. *Id.* The Pacific Northwest Generating Cooperative, who purchases power supplied by Bonneville Power Administration, estimated that the increased costs of Bonneville Power Administration would cause them to either restrict their own output or purchase power from more expensive sources. *Id.*

82. *Id.* at 1061. See ESA § 7, 16 U.S.C. § 1536. The plaintiffs further alleged that in the challenged actions, defendants violated APA by engaging in behavior “arbitrary, capricious, an abuse of discretion and not in accordance with law.” *Pacific Northwest*, 38 F.3d at 1062.

83. *Id.*

84. *Id.* at 1063-66.



In *Mt. Graham*, the plaintiffs, environmental groups led by Sierra Club, Inc., sought an injunction to halt the University of Arizona's construction of an observatory, which was to be situated in the habitat of the endangered red squirrel.<sup>85</sup> The United States District Court for the District of Arizona denied relief.<sup>86</sup> The Court of Appeals ordered limited remand and thereafter affirmed.<sup>87</sup> However, the Ninth Circuit found that the plaintiffs had standing because they suffered sufficient injury and their injury was within the zone-of-interests protected by the Arizona-Idaho Conservation Act (AICA).<sup>88</sup> Although the *Plenert* court originally cited *Pacific Northwest* and *Mt. Graham* for support that the zone-of-interests test applied to ESA actions, the court relied on its regular application of the zone-of-interests test to other statutes.<sup>89</sup>

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85. *Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1569-70 (9th Cir. 1993). Plaintiffs alleged that the project would endanger the Mount Graham red squirrel, "an endangered species that lives on Mount Graham and exists nowhere else in the world." *Id.* at 1569. The University took its proposal to the United States Forest Service, which resulted in formal consultation between the Forest Service and the Fish and Wildlife Service (FWS), as required by ESA. *Id.* at 1570 (citing ESA § 7, 16 U.S.C. § 1536). Pursuant to ESA regulations, a "Biological Opinion" is issued at the culmination of formal consultation. The FWS issues its conclusions regarding the likely effects of the proposed action. *Id.* See 50 C.F.R. § 402.02 (1994). The "Biological Opinion" concluded that the University's project would "significantly increase the risks faced by the red squirrel." *Mt. Graham*, 986 F.2d at 1570. The opinion identified three "reasonable and prudent alternatives" to the plan which "would avoid the adverse consequences for the red squirrel that were likely to follow from implementation of the University's original proposal." *Id.* Due to the possibility that other members of the project might build the observatory in another country, the University acted to prevent further delay, asking Congress to intervene. *Id.* As a result, Congress enacted Title VI of the Arizona-Idaho Conservation Act (AICA). *Id.* AICA deemed the requirements of section 7 of ESA satisfied with respect to the consultation portion of the project, and therefore instructed the Secretary of Agriculture "immediately" to issue a "special use permit" allowing construction to go forward. *Id.* (citing AICA, § 602(a) (1988)).

Section 602(a) of the Arizona-Idaho Conservation Act provides:

Subject to the terms and conditions of Reasonable and Prudent Alternative Three of the Biological Opinion, the requirements of section 7 of the Endangered Species Act shall be deemed satisfied as to the issuance of a Special Use Authorization for the first three telescopes and the Secretary shall immediately approve the construction of the following items: (1) three telescopes to be located on Emerald Peak; (2) necessary support facilities; and (3) an access road to the Site.

AICA, Pub. L. No. 100-696, § 602(a) (1988).

86. *Mt. Graham*, 986 F.2d at 1570.

87. *Id.*

88. *Id.* at 1581-82.

89. *Bennett v. Plenert*, 63 F.3d 915, 918 (9th Cir. 1994). For a discussion of the cases relied on by the *Plenert* court, see *infra* notes 126, 129-33 and accompanying text.

### III. *BENNETT V. PLENERT*

#### A. Facts and Procedural History

In *Plenert*, plaintiffs, two ranch operators and two irrigation districts, filed a suit against the United States government challenging its biological opinion issued pursuant to ESA.<sup>90</sup> In its opinion, the government determined that to preserve the Lost River and Short Nose species of sucker fish a specific minimum water level should be maintained in two reservoirs.<sup>91</sup> Plaintiffs asserted standing pursuant to ESA based on their "use of the reservoir water for commercial (and recreational) purposes."<sup>92</sup> They maintained that their reason for seeking to prevent the government from raising the minimum reservoir levels was to guarantee water will be obtainable for their own commercial and recreational use.<sup>93</sup> Plaintiffs alleged that the opinion was devoid of data to support the United States Fish and Wildlife Service's judgement that the extended operation of the Klamath Project would detrimentally affect the sucker fish.<sup>94</sup> The district court held that plaintiffs lacked standing because their

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90. *Id.* at 916. Section 7(b)(3)(A) of the ESA states in part:

Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat.

ESA § 7(b)(3)(A), 16 U.S.C. § 1536(b)(3)(A).

91. *Plenert*, 63 F.3d at 916. The issuance of a "Biological Opinion," whereby the Fish and Wildlife Service presents its conclusions concerning the likely effects of the proposed action, follows "formal consultation" between the Forest Service and the Fish and Wildlife Service. 50 C.F.R. § 402.02. "[A]'Biological assessment' refers to the information prepared by or under the direction of the Federal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation potential effects of the action on such species and habitat." *Id.* " 'Formal consultation' is a process between the Service and the Federal agency that commences with the Federal agency's written request for consultation under section 7(a)(2) of the Act and concludes with the Service's issuance of the biological opinion under section 7(b)(3) of the Act." *Id.*

92. *Plenert*, 63 F.3d at 916. Plaintiffs filed suit for declaratory and injunctive relief in an effort to compel the government to retract portions of the biological opinion. *Id.*

93. *Id.* The plaintiffs brought suit pursuant to ESA, alleging that the government violated ESA's consultation provisions and declined to contemplate the economic effect of its conclusion. *Id.* at 916-17. For the textual language of ESA's consultation provision, see *supra* note 48.

94. *Plenert*, 63 F.3d at 916. Plaintiffs alleged that the evidence demonstrates that the fish are not in need of special protection but instead are "reproducing successfully." *Id.*

suits were based on an interest not aligned with those protected by ESA.<sup>95</sup>

## B. Narrative Analysis

In *Plenert*, the United States Court of Appeals for the Ninth Circuit addressed the issue of whether the zone-of-interests test precluded plaintiffs' action under ESA.<sup>96</sup> The court stressed that it was not inquiring whether plaintiffs met the constitutional requirements for standing.<sup>97</sup> Accordingly, the court in *Clarke* commenced its analysis by examining the genesis of the zone-of-interests test in *Data Processing* and its "exegesis."<sup>98</sup> Although, the *Plenert* court acknowledged *Clarke's* limitation on the application of the test,<sup>99</sup> the court applied the zone-of-interests test to deny standing to plaintiffs' claims brought pursuant to ESA.<sup>100</sup> The Ninth Circuit concluded that *Clarke* did not explain how the test might differ when applied to non-APA actions.<sup>101</sup> As a result, they followed the practice of other courts that applied the test to non-APA actions.<sup>102</sup>

95. *Id.* at 917. The interests protected by ESA are those of the fish's use of the water as a habitat. *Id.* at 919. The plaintiffs also brought related claims under APA, 5 U.S.C. §§ 701-06, and NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C). *Id.* at 916. This Note focuses only on the EPA claim brought by the plaintiffs, and its application to EPA's citizen suit provision.

96. *Id.* at 917.

97. *Id.* The Ninth Circuit noted that the zone-of-interests test applies even to plaintiffs that have satisfied the requirements for constitutional standing by asserting a procedural injury. *Id.* at 917 n.1 (citing *Douglas County v. Babbitt*, 48 F.3d 1495, 1500-1501 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 698 (1996)); *Yesler Terrace Community Council v. Cisneros*, 37 F.3d 442, 447 (9th Cir. 1994).

98. *Plenert*, 63 F.3d at 917. For a discussion of the zone-of-interests test as applied in *Clarke*, see *supra* notes 35-41 and accompanying text. For a discussion of the zone-of-interests test in *Data Processing*, see *supra* notes 29-33 and accompanying text.

99. *Id.* The *Plenert* court stated that "the *Clarke* Court made it clear that some form of the zone test applies even in cases which are not brought under the Administrative Procedure Act." *Id.* (citing *Clarke v. Security Indus. Ass'n*, 479 U.S. 388, 400 n.16 (1987)). The Court in *Clarke*, however, noted that the test, while not one of universal application, has been traditionally used in APA contexts. *Clarke*, 479 U.S. at 400 n.16.

100. *Plenert*, 63 F.3d at 919. The court noted that any ruling to the contrary would give plaintiffs ground to sue even though their purposes were plainly inconsistent with, or only "marginally related" to, those of the ESA. *Id.* (citing *Clarke v. Security Indus. Ass'n*, 479 U.S. 388, 399 (1987)).

101. *Id.* at 917.

102. *Id.* The Ninth Circuit cited several cases where courts have applied the zone-of-interests test to APA as well as non-APA actions. *Id.* See, e.g., *Central Arizona Water Conservation Dist. v. EPA*, 990 F.2d 1531, 1539, *cert. denied*, 114 S. Ct. 94 (1993) (finding that District's economic injury falls within zone-of-interests protected by CAA); *Self-Insurance Inst. of Am., Inc. v. Koriotoh*, 993 F.2d 479, 484 (5th Cir. 1993) (finding that employer plan sponsors and contract administrators are within Employee Retirement Income Security Act's zone-of-interests); *ANR Pipe-*

The court next addressed the issue of whether the zone-of-interests test is applicable in limiting standing in light of ESA's citizen suit provision.<sup>103</sup> The court cited *Pacific Northwest Generating Co-op v. Brown*,<sup>104</sup> and *Mt. Graham Red Squirrel v. Espy*,<sup>105</sup> as support that the zone-of-interests test has been applied directly to claims brought pursuant to ESA.<sup>106</sup> The Ninth Circuit then renounced its dependence on *Pacific Northwest* and *Mt. Graham* as support in applying the zone-of-interests test to ESA.<sup>107</sup> The court, nonetheless, concluded that the zone-of-interests test was applicable despite Congress's enactment of citizen suit provisions.<sup>108</sup>

The *Plenert* court relied on cases involving statutes containing citizen suit provisions to demonstrate that the zone-of-interests test may be utilized to assess the standing of plaintiffs who have sued

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line Co. v. Corporation Comm'n of Oklahoma, 860 F.2d 1571, 1579 (10th Cir. 1988) (finding that pipeline companies are within zone-of-interests to be protected under Natural Gas Act and Natural Gas Policy Act), *cert. denied*, 490 U.S. 1051 (1989).

103. *Bennett v. Plenert*, 63 F.3d 915, 918 (9th Cir. 1995). For a discussion of ESA's citizen-suit provision, see *supra* note 25.

104. 38 F.3d 1058 (9th Cir. 1994).

105. 986 F.2d 1568 (9th Cir. 1993).

106. *Plenert*, 63 F.3d at 918 (citing *Pacific Northwest Generating Co-Op v. Brown*, 38 F.3d 1058, 1065 (9th Cir. 1994)); *Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1581 (9th Cir. 1993)). Plaintiffs contended that these cases do not answer the question of whether ESA's citizen-suit provision overrides the zone-of-interests test's limitation on standing. *Id.* The court further acknowledged that there is a split in the circuits as to whether the zone-of-interests test applies to ESA suits. *Id.* at n.3. See *Idaho By and Through Idaho Pub. Utils. Comm'n v. ICC*, 35 F.3d 585, 592 (D.C. Cir. 1994) (finding that Idaho's property interest in Wildlife Management Area falls within ESA's zone-of-interests); *Humane Soc'y of the United States v. Hodel*, 840 F.2d 45, 61 (D.C. Cir. 1988) (finding that plaintiff's aesthetic interests in watching animals and birds on refuges fell within zone-of-interests protected by ESA and Refuge Acts); *National Audubon Soc'y v. Hester*, 801 F.2d 405, 407 n.2 (D.C. Cir. 1986) (finding that Audubon Society's interest in observing and studying wild condors are within zone-of-interests of EPA and NEPA). *But see* *Defenders of Wildlife v. Hodel (Defenders of Wildlife II)*, 851 F.2d 1035, 1039 (8th Cir. 1988), *rev'd*, (*Defenders of Wildlife I*), 658 F. Supp. 43 (D. Minn. 1987), *on remand to* 707 F. Supp. 1082 (D. Minn. 1989), *aff'g sub nom.* *Defenders of Wildlife v. Lujan*, 911 F.2d 117 (8th Cir. 1990), *rev'd on other grounds*, 504 U.S. 555 (1992) (holding that plaintiffs need only satisfy constitutional requirements for standing under ESA).

107. *Plenert*, 63 F.3d at 918.

108. *Id.* The court's conclusion followed from the fact that the Ninth Circuit, in addition to other courts, "ha[s] regularly employed the zone-of-interests test in determining standing despite Congress's enactment of expansive citizen-suit provisions." *Id.* The court further noted that, irrespective of the applicability of the zone-of-interests test, Congress's use of the phrase "any person" in the citizen-suit provision of ESA, refers to a more limited class than the statute suggests. *Id.* at 918 n.4.

pursuant to citizen suit provisions.<sup>109</sup> Accordingly, the court held that ESA's citizen suit provision "does not automatically confer standing on every plaintiff who satisfies constitutional requirements and claims a violation of the Act's procedures."<sup>110</sup>

After concluding that the zone-of-interests test applied, the court addressed whether plaintiffs' claim, of commercial and recreational use of the water, falls within the zone-of-interests to be protected by ESA.<sup>111</sup> Relying on the legislative history of ESA, the court concluded that only those plaintiffs whose interests are based on preserving endangered species are protected by the Act.<sup>112</sup> Finally, the *Plenert* court concluded that ESA provision did not impliedly confer standing to maintain a citizen suit to anyone who might possibly claim that the government's failure to consider any of the enumerated factors negatively affected him.<sup>113</sup>

#### IV. CRITICAL ANALYSIS

The Ninth Circuit improperly interpreted *Clarke v. Security Industry Ass'n*<sup>114</sup> as a basis for applying the zone-of-interests test

109. *Plenert*, 63 F.3d at 918-19. For a discussion of cases on which the court relied to show that other courts have applied the zone-of-interests test in determining a plaintiff's standing, see *infra* note 125.

110. *Plenert*, 63 F.3d at 919.

111. *Id.* The court noted that the purposes of the ESA are dedicated to species preservation, and do not encompass plaintiffs' economic and recreational challenges. *Id.* at 920 (citing *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978)). Additionally, the Ninth Circuit noted that although ESA states that the government should consider economic factors in designating critical habitat for a species, its intent was not to "confer standing on every plaintiff who could conceivably claim that the failure to consider one of those factors adversely affected him." *Id.* at 921. See ESA § 4(b)(1)(B)(2), 16 U.S.C. § 1533(b)(1)(B)(2). This section provides in pertinent part: "The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the *economic impact*, and any other relevant impact, of specifying any particular area as critical habitat." *Id.* (emphasis added).

112. *Id.* ESA provides that its purposes are:

[T]o provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of the section.

ESA § 2(b), 16 U.S.C. § 1531(b); see also *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) (discussing Congress's intent in enacting ESA).

113. *Plenert*, 63 F.3d at 921. The court noted that by setting forth factors to be weighed in formulating a plan to protect species, Congress intended simply to ensure a rational decision-making process to guide government officials. *Id.*

114. *Clarke v. Security Industry Ass'n*, 479 U.S. 388 (1987).

outside of the APA context.<sup>115</sup> The *Plenert* court applied the zone-of-interests test to deny standing to plaintiffs' claims brought pursuant to ESA. As several commentators have noted, however, *Clarke*'s recognition that the zone-of-interests test is not one of universal application demonstrates that the test should be applied only in the APA context.<sup>116</sup>

Furthermore, the Ninth Circuit misapplied *Pacific Northwest*<sup>117</sup> and *Mt. Graham*<sup>118</sup> as precedent for its contention that notwithstanding ESA's citizen suit provision, the zone-of-interests test has been applied to actions brought directly under ESA.<sup>119</sup> Contrary to the Ninth Circuit's contention in *Plenert*, the *Pacific Northwest* court noted that the question of whether plaintiffs must satisfy the "prudential 'zone-of-interests' test" along with Article III standing requirements remains open.<sup>120</sup> The court stated that "[it] will assume that the requirement must be met."<sup>121</sup> Thus, the *Pacific Northwest* court did not address the application of the zone-of-interests test in offsetting ESA's citizen suit provision. Similarly, in *Mt. Graham*, the court never addressed the issue of standing under ESA because standing was conferred by APA.<sup>122</sup>

Furthermore, the Ninth Circuit improperly applied cases involving citizen suits as support for its proposition that the zone-of-interests test applies to limit standing despite Congress's enactment of broad citizen suit provisions.<sup>123</sup> In *Gonzales v. Gorsuch*, the Ninth

115. See *supra* note 101 for a discussion of the Ninth Circuit's reliance on *Clarke* as a basis for applying the zone-of-interests test in the non-APA context.

116. See Colhoun & Hamill, *supra* note 6, at 166 (noting that zone-of-interests test was intended to grant presumptive review in APA cases only - not to limit court access as prudential restriction). See also June, *supra* note 5, at 780 (recognizing that " 'zone-of-interests' test is peculiar to the APA requirement that the plaintiff is injured 'within the meaning of a relevant statute' ").

117. 38 F.3d 1058 (9th Cir. 1994).

118. 986 F.2d 1568 (9th Cir. 1993).

119. See *Bennett v. Plenert*, 63 F.3d 915, 918 (9th Cir. 1995).

120. *Pacific Northwest*, 38 F.3d at 1065. The court acknowledged the Eighth Circuit's refusal to apply the zone-of-interests test to ESA claims as a prudential standing requirement. *Id.* (citing *Defenders of Wildlife v. Hodel*, 851 F.2d 1035, 1039 (8th Cir. 1988)).

121. *Id.* Without concluding that the zone-of-interests test applied, the court found that plaintiffs had a genuine economic interest in preserving the salmon and, consequently, their interest was protected by ESA. *Id.*

122. *Mt. Graham*, 986 F.2d at 1581-83. The court found that plaintiffs had standing under the APA § 10(a) which provides that "a person . . . adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." *Id.* at 1581 (quoting APA, 5 U.S.C. § 702 (1994)).

123. *Bennett v. Plenert*, 63 F.3d 915, 918-19 (9th Cir. 1995). In *Plenert*, the Ninth Circuit stated that the plaintiff in that case was granted standing. *Plenert*, 63

Circuit held that the plaintiffs, a group of private individuals, did not have standing under CWA's citizen suit provision.<sup>124</sup> The court noted that although the legislative history demonstrated that the provision "was intended to grant standing to a nationwide class, comprised of citizens who alleged an interest in clean water," the relief plaintiffs sought would not redress the injuries alleged.<sup>125</sup> Accordingly, the court never applied the zone-of-interests test to determine standing because it denied standing based on the absence of the redressability requirement of standing under Article III.<sup>126</sup>

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F.3d at 918 (citing *Gonzales v. Gorsuch*, 688 F.2d 1263, 1266 (9th Cir. 1982)). However, in *Gorsuch*, the Ninth Circuit actually held that the plaintiff did *not* have standing under the Clean Water Act's citizen suit provision because the plaintiff did not satisfy the redressability requirement for standing. *Gorsuch*, 688 F.2d at 1266-67. See also *Alvarez v. Longboy*, 697 F.2d 1333, 1336-38 (9th Cir. 1983) (concluding that citizen suit provision of Farm Laborer Contractor Registration Act (FLCRA) conferred standing on migrant farmworkers because plaintiffs fell within zone-of-interests that statute protected); *Davis Forestry Corp. v. Smith*, 707 F.2d 1325, 1328-29 (11th Cir. 1983) (concluding that FLCRA's citizen suit provision did not confer standing on competitors of farm labor contractors because their claimed injury fell outside zone-of-interests to be protected by statute).

124. 688 F.2d 1263, 1266-67 (9th Cir. 1982).

125. *Id.* The court cited the legislative history of the Water Pollution Control Act. *Id.* at 1266. The legislative history on the Water Pollution Act quotes Senator Muskie as stating:

[E]very citizen of the United States has a legitimate and established interest in the use and quality of the navigable waters of the United States. Thus, I would presume that a citizen of the United States, regardless of residence, would have an interest as defined in this bill regardless of the location of the waterway and regardless of the issue involved.

118 CONG. REC. § 33,717 (daily ed. Oct. 4, 1972) (statement of Sen. Muskie), reprinted in COMM. ON PUBLIC WORKS, 93d Cong., 1st Sess., A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, 221 (Comm. Print 1973)). Senator Bayh stated in pertinent part:

I believe that the conference provision will not prevent any person or group with a legitimate concern about water quality from bringing suit against those who violate the act or a permit, or against the Administrator if he fails to perform a nondiscretionary act. These sorts of citizen suits in which a citizen can obtain an injunction but cannot obtain money damages for himself- are a very useful additional tool in enforcing environmental protection laws. . . .

*Id.* The court, however, denied standing stating that, "[i]t is a prerequisite of justiciability that judicial relief will prevent or redress the claimed injury, or that there is a significant likelihood of such redress." *Gorsuch*, 688 F.2d at 1267 (citing *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38-39 (1976)). The court further noted that redressability is an aspect of standing. *Id.*

126. *Id.* at 1267-68. The Ninth Circuit noted various reasons that could make a court unable to redress a plaintiff's injury. *Id.* at 1267. The relief requested may worsen the plaintiff's position. *Id.* (citing *NAACP, Boston Chapter v. Harris*, 607 F.2d 514, 520 (1st Cir. 1979)). Additionally, the court may not be able to form a meaningful decree, thus making the relief insufficient. *Id.* (citing *Greater Tampa Chamber of Commerce v. Goldschmidt*, 627 F.2d 258, 263-64 (D.C. Cir. 1980)).

Similarly, in *Dan Caputo*, the Ninth Circuit ruled that the plaintiffs met the Article III standing requirements, but failed the zone-of-interests requirement.<sup>127</sup> The court then analyzed the plaintiffs' assertion of standing under the citizen suit provision of CWA.<sup>128</sup> After describing the purpose of the citizen suit provision, the court concluded that plaintiffs did not have standing because their claims did not arise out of an interest in the environment.<sup>129</sup> The court further noted that the test for standing in actions brought under the APA is essentially the same as the test for non-APA actions.<sup>130</sup> The *Dan Caputo* court's contention that the zone-of-interests test is a generally applicable prudential limitation on standing, however, was later rejected by the Supreme Court in *Clarke*.<sup>131</sup>

Additionally, case law does not support the Ninth Circuit's application of the zone-of-interests test as a prudential standing limitation to ESA actions.<sup>132</sup> In *Defenders of Wildlife II*, the Eighth Circuit held that by passing the citizen suit provision of ESA, Congress removed judicial authority to establish prudential or policy limita-

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127. *Id.* at 574-75. The court ruled that the injury-in-fact portion of the test is satisfied because, based upon plaintiffs' allegations that they had a right to the reallocated grant of funds, "it reasonably could be inferred that . . . there is a substantial probability" that once the defendants spend the reallocated funds, the plaintiffs will not be able to collect it from Russian River. *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 504 (1975)).

The Ninth Circuit noted that the plaintiffs did not meet the zone-of-interests portion of the standing requirement. *Id.* at 575. The court ruled that Title II of the Clean Water Act does not protect contractors against the reallocation of grant funds after contract disputes. *Id.* at 574-75. (citing Clean Water Act §§ 201-17, 33 U.S.C. §§ 1281-1297 (1988)). Further, the court denied the plaintiffs' contention that they were protected under 40 C.F.R. § 35.939 which "allows would-be bidders to protest bid solicitations to EPA." *Id.* at 575 (citing 40 C.F.R. § 35.939 (1983)). The Ninth Circuit ruled that the regulation was not intended to provide a forum for funding disputes. *Id.*

128. *Id.* at 575. For a description of the citizen-suit provision of the Clean Water Act, see *supra* note 26 and accompanying text.

129. *Dan Caputo*, 749 F.2d at 575. The Ninth Circuit analyzed the purposes of the citizen suit provision of the Clean Water Act, noting that it "is to ensure that an interest in the environment and clean water, whether or not economically based, is a sufficient basis for a citizen suit." *Id.* (quoting *Gonzales v. Gorsuch*, 688 F.2d 1263, 1268 (9th Cir. 1982)). In *Dan Caputo*, the plaintiffs' claim did not invoke an interest in the environment and thus they did not have standing. *Id.*

130. *Id.* The court determined that plaintiffs' amended complaint did not arise under APA. *Id.* Applying the zone-of-interests test, the court found that plaintiffs did not fall within the zone-of-interests of the statute to be protected. *Id.*

131. For a discussion of *Clarke's* limitation of the zone-of-interests test, see *supra* note 41 and accompanying text.

132. For a discussion of cases rejecting the application of the zone-of-interests test to limit standing under citizen suit provisions, see *supra* note 28.



tions on standing.<sup>133</sup> Further, the Supreme Court has noted that citizen suit provisions extend to the full extent of Article III.<sup>134</sup> Many commentators have agreed that the Court cannot invoke prudential limitations to deny citizen suit standing as long as Article III standing requirements are met.<sup>135</sup> As Justice Scalia noted, " 'when the legislature explicitly says that a private right exists, this so-called 'prudential' inquiry is displaced.' "<sup>136</sup> These types of prudential inquiries by the judiciary, despite Congress's clear intent to confer standing on citizens who meet the constitutional requirements, are a violation of the separation of powers.<sup>137</sup> Congress possesses the authority to limit the potential plaintiffs that can assert standing under its citizen suit provisions.<sup>138</sup> Accordingly, courts lack the authority to create prudential barriers to standing under citizen suit provisions.<sup>139</sup>

## V. IMPACT

By applying the zone-of-interests test to deny standing to plaintiffs bringing suit pursuant to ESA, the Ninth Circuit has usurped

133. 851 F.2d 1035, 1039 (8th Cir. 1988). For a discussion of the Eighth Circuit's abrogation of the zone-of-interests test as a standing limitation to citizen suits, see *supra* notes 45-53 and accompanying text.

134. See *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 103 n.9 (1979) (noting that when Congress demonstrates intention to grant standing, normal prudential rights do not apply). See also *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (noting that Congress may grant right of action to persons who would be barred by prudential standing). For a discussion of constitutional requirements for standing under Article III, see *supra* notes 18-21 and accompanying text.

135. Ring & Behrend, *supra* note 4, at 353 (citing Lawrence Gerschwer, *Informational Standing Under NEPA: Justiciability and the Environmental Decisionmaking Process*, 93 COLUM. L. REV. 996, 1009 (1993)).

136. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 886 (1983) (emphasis in original).

137. Lujan v. Defenders of Wildlife, 504 U.S. 555, 580-81 (1992); see also Harold Leventhal, Article, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509; 526-27 (1974) (commenting on effectiveness of environmental decisionmaking when judicial supervision is limited).

138. See Ring & Behrend, *supra* note 4, at 351 & n.25 (citing *Kennecott Copper Corp. v. Costle*, 572 F.2d 1349 (9th Cir. 1978) (noting Congress's limitation of Clean Air Act's citizen suit provision "to challenging acts flowing from mandatory, but not discretionary duties")).

139. See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982) (citing *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 103 (1979)); see also *Competitive Entertainment Inst. v. National Highway Traffic Safety Admin.*, 901 F.2d 107, 118-19 (D.C. Cir. 1990) (allowing no prudential considerations under Energy Policy and Conservation Act (EPCA)); *Center for Auto Safety v. National Highway Traffic Safety Admin.*, 793 F.2d 1322, 1337-38 (D.C. Cir. 1986) (finding that "[b]ecause EPCA grants standing to a broad group of the beneficiaries of the statute's programs to conserve fuel, the judicial principal restricting review of so-called 'generalized grievances' is inapplicable").

Congress's traditional law-making function.<sup>140</sup> This contravenes the constitutional doctrine of separation of powers. Due to the courts' application of the zone-of-interests test as a prudential standing requirement, Congress's goal of providing enforcement of environmental statutes through its citizen suit provisions will be stifled.<sup>141</sup> By allowing this prudential bar, it is impossible to predict the extent of future judicial lawmaking in this field.

Moreover, creating additional elements to satisfy the standing requirement can deter "worthy plaintiffs" from seeking to "vindicate valid legal interests."<sup>142</sup> This may lead to unnecessary litigation which in turn burdens the judicial system.<sup>143</sup>

The zone-of-interests test should not be applied to limit standing under citizen suit provisions. The Ninth Circuit departed from Congress's explicit intent to allow citizens to bring suit to enforce ESA. Finally, the Ninth Circuit's application of the zone-of-interests test to limit standing under ESA's citizen suit provision, is contrary to precedent set by the Supreme Court and other federal courts.

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140. See Ring & Behrend, *supra* note 4, at 355. "For courts to judicially amend environmental statutes to provide standing to those parties that a court subjectively finds to be suitable representatives confounds [the] legislat[ure's] purpose and contradicts the weight of precedent." *Id.* "If a 'citizen' or 'person' with the minimum standing required by Article III presents a claim that the government has violated or failed to enforce a statute, courts should consider the claim, not invent procedural hurdles to dismiss it." *Id.*

141. *Id.* at 363. "[I]f Congress lacks power to provide effective enforcement of the [environmental] statutes, regulatory goals will not be achieved." *Id.*

142. *Id.* at 351. "A test for plaintiff motivation adds yet another hurdle to the already tortuous and confusing gauntlet facing plaintiffs who wish to establish standing." *Id.* at 359.

143. *Id.* at 360 & n. 59-60 (citing *Valley Forge Christian College v. Americans United for Separation of Church and State Inc.*, 454 U.S. 464, 490-91 (1982) (Brennan, J., dissenting)). Additional standing requirements lead to two separate trials on the merits. First, the plaintiff must satisfy Article III injury and redressability requirements to establish standing. *Id.* at 360. The plaintiff must then introduce sufficient evidence to demonstrate "proper" motivation. *Id.* If standing is granted, or its denial is successfully appealed, the plaintiff must cover the same issues again on a trial on the merits. *Id.*

