

1994

## Agency Action, Finality and Geographical Nexus: Judicial Review of Agency Compliance With NEPA's Programmatic Environmental Impact Statement Requirement After *Lujan v. National Wildlife Federation*

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### Recommended Citation

Matthew C. Porterfield, *Agency Action, Finality and Geographical Nexus: Judicial Review of Agency Compliance With NEPA's Programmatic Environmental Impact Statement Requirement After Lujan v. National Wildlife Federation*, 28 U. Rich. L. Rev. 619 (1994).  
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AGENCY ACTION, FINALITY AND GEOGRAPHICAL NEXUS: JUDICIAL REVIEW OF AGENCY COMPLIANCE WITH NEPA'S PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT REQUIREMENT AFTER *LUJAN V. NATIONAL WILDLIFE FEDERATION*

*Matthew C. Porterfield\**

I. INTRODUCTION

In recent years, there has been an increasing recognition of the need to address the complex and interrelated impacts that result from human interaction with the environment.<sup>1</sup> One of the most effective tools for evaluating these impacts has been the preparation of programmatic environmental impact statements<sup>2</sup> (EISs) pursuant to the National Environmental Policy Act of 1969 (NEPA).<sup>3</sup> The status of programmatic EISs,

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1. See ALBERT GORE, *EARTH IN THE BALANCE* 2 (1992). The Vice President wrote: The ecological perspective begins with a view of the whole, an understanding of how the various parts of nature interact in patterns that tend toward balance and persist over time. But this perspective cannot treat the earth as something separate from human civilization; we are part of the whole too, and looking at it ultimately means also looking at ourselves. And if we do not see that the human part of nature has an increasingly powerful influence over the whole of nature—that we are, in effect, a natural force just like the winds and the tides—then we will not be able to see how dangerously we are threatening to push the earth out of balance.

*Id.* See also United States Dep't of Agric. Forest Serv., *Proceedings of the Nat'l Workshop: Taking an Ecological Approach to Management* (Apr. 27-30, 1992).

2. Although the terms "programmatic environmental impact statement" and "programmatic EIS" are used throughout this article, the courts also refer to a programmatic EIS as a "comprehensive impact statement" (*Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976)), a "cumulative EIS" (*Northern Alaska Env'tl. Ctr. v. Hodel*, 803 F.2d 466, 469 (9th Cir. 1986)), or a "generic environmental impact statement" (*Natural Resources Defense Council v. Nuclear Regulatory Comm'n*, 539 F.2d 824, 828 (2d Cir. 1976)).

3. 42 U.S.C. §§ 4321-4370(a) (1988). See generally Robert B. Keiter, *NEPA and*

however, has been called into question by the Supreme Court's decision in *Lujan v. National Wildlife Federation*,<sup>4</sup> which has been interpreted by numerous commentators as heralding the end of "programmatically" environmental lawsuits.<sup>5</sup> Even more significantly, *Lujan* has been cited by some courts declining to review federal agency actions with widespread environmental impacts.<sup>6</sup> In *Lujan*, the Supreme Court held that an environmental advocacy organization lacked standing to challenge the Bureau of Land Management's (BLM) administration of the "land withdrawal review program" under which the agency determined which federal lands under its administration would be available for mining and other commercial uses.<sup>7</sup> Although several years have passed since the Court decided the case, exactly what type of "programmatically" lawsuits are ostensibly precluded under *Lujan* remains unclear.

The uncertainty over the implications of *Lujan* exists to some extent because both commentators and courts that have de-

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*the Emerging Concept of Ecosystem Management on the Public Lands*, 25 LAND & WATER L. REV. 43 (1990).

4. 497 U.S. 871 (1990).

5. See Stephen M. Macfarlane, Note, *Lujan v. National Wildlife Federation: Standing, the APA, and the Future of Environmental Litigation*, 54 ALB. L. REV. 863, 921 (1990); Jonathan Poisner, Comment, *Environmental Values and Judicial Review After Lujan: Two Critiques of the Separation of Powers Theory of Standing*, 18 ECOLOGY L.Q. 335, 352 (1991); Sarah A. Robichaud, Note, *Lujan v. Defenders of Wildlife Federation: The Supreme Court Tightens the Reins on Standing for Environmental Groups*, 40 CATH. U. L. REV. 443, 473 (1991); Edward B. Sears, Note, *Lujan v. National Wildlife Federation: Environmental Plaintiffs are Tripped up on Standing*, 24 CONN. L. REV. 293, 355-59 (1991); Karin Sheldon, Note, *NWF v. Lujan: Justice Scalia Restricts Environmental Standing to Constrain the Courts*, 20 ENVTL. L. REP. (Envtl. L. Inst.) 10,577, 10,558 (1990); see also Barnett M. Lawrence, *Standing for Environmental Groups: An Overview and Recent Developments in the D.C. Circuit*, 19 *Envtl. L. Rev.* (Envtl. L. Inst.) 10,289, 10,297 (1989) (predicting, prior to the Supreme Court's decision in *Lujan*, an increased burden on environmental plaintiffs challenging programmatically government actions).

6. See *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 85-87 (D.C. Cir. 1991); *Foundation on Economic Trends v. Watkins*, 794 F. Supp. 395, 401 (D.D.C. 1992); *Resources Ltd. v. Robertson*, 789 F. Supp. 1529, 1534 (D. Mont. 1991); see also *City of Los Angeles v. National Highway Traffic Safety Admin.*, 912 F.2d 478, 494 (D.C. Cir. 1990) (declining review on other grounds but interpreting *Lujan* to impose a more stringent standard for review of agency actions with widespread environmental impacts); *Greenpeace U.S.A. v. Stone*, 748 F. Supp. 749, 756 (D. Haw. 1990) (declining review on other grounds but interpreting *Lujan* as imposing a more stringent standard for review of agency actions with widespread environmental impacts).

7. See *Lujan*, 497 U.S. at 885-900.

clined to review actions with broad environmental implications have failed to define what they mean by "programmatically" environmental lawsuits. The confusion is compounded by the court's application of three separate doctrines in precluding review: the need to identify reviewable "agency action" under section 702 of the Administrative Procedure Act (APA),<sup>8</sup> the requirement that the agency action be "final agency action" pursuant to section 704 of the APA,<sup>9</sup> and the necessity under section 702 and Article III of the Constitution<sup>10</sup> that a plaintiff alleging injury to her use and enjoyment of land demonstrate a "geographical nexus" to that land.

The conclusion that environmental organizations or individual citizens generally may not obtain judicial review of entire federal agency "programs," as defined by either the prospective plaintiffs or the federal agencies themselves, is unremarkable. The courts have traditionally been reluctant to review broad patterns of conduct and instead have insisted that plaintiffs identify particular instances of allegedly illegal conduct directly affecting them.<sup>11</sup> Conversely, the *Lujan* Court explicitly acknowledged that an individual adversely affected by a regulation promulgated by an agency may obtain judicial review of that regulation, and that if the regulation is struck down it will be invalidated for all parties, regardless of how widespread the environmental implications of the regulation are.<sup>12</sup>

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8. 5 U.S.C. § 702 (1988).

9. 5 U.S.C. § 704 (1988).

10. U.S. CONST. art. III.

11. See, e.g., *Allen v. Wright*, 468 U.S. 737, 759-60 (1984) (suits by parties not directly affected by the allegedly illegal conduct challenging the "programs agencies establish to carry out their legal obligations . . . are rarely if ever appropriate for federal-court adjudication"); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982) (the Supreme Court "has refrained from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches") (quoting *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975)).

One notable exception, however, is the area of civil rights law, which permits plaintiffs to challenge a "pattern or practice" of discriminatory employment practices by an employer, including a federal agency. See E. Gates Garrity-Rokous, *Preserving Review of Undeclared Programs: A Statutory Redefinition of Final Agency Action*, 101 YALE L.J. 643, 657-58 & n.99 (1991) (discussing § 707(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2003e-6(a) (1988)). Cf. *Racketeer Influenced and Corrupt Organizations Act*, 18 U.S.C. §§ 1961-1968 (1988) (providing for civil suits against "a pattern of racketeering activity").

12. See *Lujan*, 497 U.S. at 890-91 n.2; see also 5 U.S.C. § 551(13) (1994) (defining

The status of programmatic EISs, however, remains in question.<sup>13</sup> This article suggests that *Lujan* did not eliminate judicial review of agency compliance with NEPA's programmatic EIS requirement, and that when the nature of the agency action subject to review under NEPA is properly understood, the agency action, finality, and geographical nexus issues should not significantly impede the ability of environmental plaintiffs to obtain such review.

Section I of this article provides a brief overview of NEPA and the programmatic EIS requirement. Section II reviews the basic principles of standing and reviewable agency action which affect environmental plaintiffs' ability to obtain judicial review of federal agency actions affecting the environment. Section III examines the Supreme Court's holding and rationale in *Lujan*. Section IV analyzes implications of the *Lujan* decision for plaintiffs attempting to obtain judicial review of agency compliance with the programmatic EIS requirement and concludes that the *Lujan* decision, properly understood, should not unduly increase the burden on such plaintiffs.

## I. NEPA AND THE PROGRAMMATIC EIS REQUIREMENT

### A. NEPA

NEPA was enacted with the ambitious objectives of "encourag[ing] productive and enjoyable harmony between man and his environment; . . . promot[ing] efforts which will prevent or eliminate damage to the environment and biosphere and stimulat[ing] the health and welfare of man; [and] enrich[ing] the understanding of the ecological systems and natural resources important to the Nation . . . ."<sup>14</sup> In order to achieve

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reviewable agency action to include agency rules); *Lujan*, 497 U.S. at 913 (Blackmun, J., dissenting); *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 170 (1967); *Abbot Lab. v. Gardner*, 387 U.S. 136, 140 (1967).

13. See Poisner *supra* note 5, at 366; see also Sears, *supra* note 5, at 357 ("the [*Lujan*] Court either overruled *sub silentio*, or did not heed, the NEPA's requirement of [programmatic EISs]").

14. 42 U.S.C. § 4321 (1988); see also 42 U.S.C. § 4331(a) (1988) (declaring policy of the federal government to "create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans").

these goals, NEPA contains several "action forcing"<sup>15</sup> procedures.<sup>16</sup> The most significant of these procedures<sup>17</sup> is contained in section 102(2)(C), which states that "to the fullest extent possible" all federal agencies are required to prepare an EIS on every legislative proposal "and other major Federal actio[n] significantly affecting the quality of the human environment . . . ."<sup>18</sup> The EIS must describe the potential environmental impacts of the proposed action,<sup>19</sup> any unavoidable adverse environmental impacts of the action,<sup>20</sup> any alternatives to the proposed action,<sup>21</sup> "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity,"<sup>22</sup> and any "irreversible . . . commitments of resources"<sup>23</sup> which would result from the action.

The Supreme Court has noted that preparation of an EIS promotes NEPA's broad environmental objectives in two important ways:

It ensures that the agency, in reaching its decision [on the proposed action], 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

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15. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989); see also *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979); *Kleppe v. Sierra Club*, 427 U.S. 390, 409 & n.18 (1976).

16. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978) (describing NEPA's duties as "essentially procedural").

17. See, e.g., *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir. 1980) (describing the preparation of the EIS as NEPA's "primary" procedural requirement).

18. 42 U.S.C. § 4332(2)(C) (1988). Other procedural obligations imposed on federal agencies by NEPA include the obligation to use an interdisciplinary approach to planning and decisionmaking which may have environmental impacts, 42 U.S.C. § 4332(2)(A), to develop alternatives to any proposals which involve potentially conflicting uses of resources, 42 U.S.C. § 4332(2)(E), to cooperate in international environmental efforts when consistent with United States foreign policy, 42 U.S.C. § 4332(2)(F), and to provide environmental advice and information to the states, local governments, and members of the public, 42 U.S.C. § 4332(2)(G).

19. 42 U.S.C. § 4332(2)(C)(i).

20. 42 U.S.C. § 4332(2)(C)(ii).

21. 42 U.S.C. § 4332(2)(C)(iii). Only "reasonable alternatives" need be discussed in detail. 40 C.F.R. §§ 1502.14, 1508.25(b)(2) (1992).

22. 42 U.S.C. § 4332(2)(C)(iv).

23. 42 U.S.C. § 4332(2)(C)(v).

may also play a role in both the decisionmaking process and the implementation of that decision.<sup>24</sup>

The EIS requirement, however, is purely procedural—federal agencies are not required to pursue the environmentally preferable course of action.<sup>25</sup> As the Supreme Court has noted, “[i]f the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.”<sup>26</sup> Thus, the harm that results from non-compliance with NEPA’s EIS requirement is not the actual harm to the environment, but rather the increased risk that environmental harm will occur because of uninformed agency decisionmaking.<sup>27</sup>

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24. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); see also *Foundation on Economic Trends v. Heckler*, 756 F.2d 143, 147 (D.C. Cir. 1985) (citing *Baltimore Gas and Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983)) (noting the dual purposes of NEPA are the following: (1) to inform Congress, interested agencies and members of the public of the environmental consequences of the proposed actions that may significantly affect the environment, and (2) to ensure that agencies factor environmental values into their consideration of such proposed actions); *Jones v. District of Columbia Redevelopment Land Agency*, 499 F.2d 502, 511 (D.C. Cir. 1974) (purpose of environmental impact statements “is to ensure ‘meaningful consideration of environmental factors at all stage of agency decisionmaking’ and to inform both the public and agencies implicated at subsequent stages of decisionmaking of the environmental costs of the proposal.”); *Atchison T.S. & F. Railroad v. Callaway*, 431 F. Supp. 722, 730 (D.D.C. 1977), *motions for summary judgment denied*, 459 F. Supp. 188 (1978) and 480 F. Supp. 972 (1979), *aff’d in part sub nom. Izaak Walton League v. Marsh*, 655 F.2d 346 (D.C. Cir. 1981) (“NEPA creates ‘a statutory right or entitlement’ to environmental information” among members of the public).

25. See 490 U.S. at 349-50; *Strycker’s Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227-28 (1980) (per curiam); *Vermont Yankee Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978); *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

26. See 490 U.S. at 349.

27. See cases cited *supra* note 24; see also *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989) (noting the injury that results from noncompliance with NEPA is “the added risk to the environment which takes place when governmental decisionmakers make up their minds without having before them an analysis (with prior public comment) of the likely effects of their decision upon the environment”) (emphasis in original); 40 C.F.R. § 1502.1 (1993) (“[t]he primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government”); Leslye A. Hermann, *Injunctions for NEPA Violations: Balancing the Equities*, 59 U. CHI. L. REV. 1263, 1276 (1992) (“NEPA reduces risk to the environment by requiring informed decisionmaking.”).

## B. Programmatic EISs

NEPA itself contains no mention of programmatic EISs.<sup>28</sup> The Council on Environmental Quality (CEQ)<sup>29</sup> Regulations Implementing NEPA's Procedural Provisions,<sup>30</sup> however, recognize that in addition to site-specific projects<sup>31</sup> such as dams<sup>32</sup> or highways,<sup>33</sup> the types of "major Federal action" subject to NEPA's EIS requirement include the following:

[a]doption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of federal resources, upon which future agency actions will be based . . . [and] [a]doption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.<sup>34</sup>

The CEQ Regulations encourage the preparation of programmatic EISs on federal actions which are related geographically, generically (e.g. actions with common timing, implementation or

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28. See generally 42 U.S.C. §§ 4321-4370a (1988).

29. The creation of the CEQ was mandated by NEPA § 202, 42 U.S.C. § 4342 (1988). The Council's primary duty is to advise the President on environmental issues. See NEPA § 204, 42 U.S.C. § 4344.

30. 40 C.F.R. §§ 1500-1508 (1993).

31. See 40 C.F.R. § 1508.18(b)(4) (1993).

32. See, e.g., *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989); *Homeowners Emergency Life Protection Committee v. Lynn*, 541 F.2d 814 (9th Cir. 1976); *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 728 (E.D. Ark. 1970).

33. See, e.g., *Lathan v. Brinegar*, 506 F.2d 677 (9th Cir. 1974); *Indian Lookout Alliance v. Volpe*, 484 F.2d 11 (8th Cir. 1973); *Dickman v. City of Sante Fe*, 724 F. Supp. 1341 (D.N.M. 1989); *Falls Road Impact Comm., Inc. v. Dole*, 581 F. Supp. 678 (E.D. Wis. 1984), *aff'd per curiam*, 737 F.2d 1476 (7th Cir. 1984); *Town of Matthews v. Department of Transp.*, 527 F. Supp. 1055 (W.D. N.C. 1981); *Hawthorn Envtl. Preservation Ass'n v. Coleman*, 417 F. Supp. 1091 (N.D. Ga. 1976), *aff'd* 551 F.2d 1055 (5th Cir. 1977); *Patterson v. Exon*, 415 F. Supp. 1276 (D. Neb. 1976); *Forty-Seventh Street Improvement Ass'n v. Volpe*, 3 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,162 (D. Colo. Jan. 8, 1973); *Committee to Stop Route 7 v. Volpe*, 346 F. Supp. 731 (D. Conn. 1972); *Scherr v. Volpe*, 336 F. Supp. 882 (W.D. Wisc. 1971), *aff'd*, 466 F.2d 1027 (7th Cir. 1972).

34. 40 C.F.R. § 1508.18(2)-(3) (1993) (emphasis added); see also 40 C.F.R. § 1502.4(b) (1993) ("[E]nvironmental impact statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs . . .").



subject matter) or by stage of technological development.<sup>35</sup> Through a process called "tiering," programmatic EISs can be used in conjunction with site-specific EISs or programmatic EISs of lesser scope:

"Tiering" refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basin-wide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared . . . .<sup>36</sup>

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35. Section 1502.4 of the CEQ Regulations states:

When preparing statements on broad actions . . . agencies may find it useful to evaluate the proposal in one of the following ways:

(1) Geographically, including actions occurring in the same general location, such as body of water, region, or metropolitan area.

(2) Generically, including actions which have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, media, or subject matter.

(3) By stage of technological development including federal or federally assisted research, development or demonstration programs for new technologies which, if applied, could significantly affect the quality of the human environment. Statements shall be prepared on such programs and shall be available before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives.

40 C.F.R. § 1502.4(c) (1993); *see also* 40 C.F.R. § 1508.25(a)(2) (1993) ("[c]umulative actions, which when viewed with other proposed actions have cumulatively significant impacts . . . should be discussed in the same impact statement"); 40 C.F.R. § 1508.7 (1993).

36. 40 C.F.R. § 1508.28 (1992).

Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (40 C.F.R. § 1508.28). Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues specific to the subsequent action. The subsequent document shall state where the earlier document is available. Tiering may also be appropriate for different stages of actions . . . .

40 C.F.R. § 1502.20 (1993).

The CEQ's Regulations, including the programmatic EIS requirement, were issued pursuant to an Executive Order charging CEQ with the lead role in implementing NEPA and authorizing CEQ to issue regulations which are binding on all federal agencies.<sup>37</sup> The Supreme Court has recognized that the CEQ's Regulations are entitled to substantial deference by the courts.<sup>38</sup>

### C. *The Kleppe Decision*

The Supreme Court endorsed the concept of programmatic EISs in *Kleppe v. Sierra Club*.<sup>39</sup> In *Kleppe*, several environmental organizations brought suit challenging the failure of the Department of the Interior ("DOI") to prepare a "comprehensive environmental impact statement" on its actions related to the development of coal reserves on federally owned or controlled land in an area identified by the plaintiffs as the "Northern Great Plains region."<sup>40</sup> The plaintiffs alleged that their members' use and enjoyment of the region was threatened by coal-related operations and sought both declaratory relief and an injunction prohibiting the DOI from taking any action to

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37. See Exec. Order No. 11,514, 3 C.F.R. 902 (1966-1970), reprinted as amended in 42 U.S.C. § 4321 (1988).

38. See *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 372 (1989); *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 355 (1989); *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979) (citations omitted).

39. 427 U.S. 390 (1976). A few lower federal courts had previously sanctioned the programmatic EIS requirement. See *Natural Resources Defense Council v. Nuclear Regulatory Comm'n*, 539 F.2d 824 (2d Cir. 1976) (requiring preparation of a "generic" EIS addressing cumulative environmental impacts of licensing of mixed uranium and plutonium fuel for commercial use); *Natural Resources Defense Council v. Callaway*, 524 F.2d 79 (2d Cir. 1975) (requiring preparation of an EIS addressing cumulative impacts of U.S. Navy dumping of polluted sludge in Long Island Sound); *Scientists' Inst. for Pub. Info., Inc. v. United States Atomic Energy Comm'n*, 481 F.2d 1079 (D.C. Cir. 1973) (requiring preparation of an EIS on liquid metal fast breeder reactor program); *Natural Resources Defense Council v. Morton*, 458 F.2d 827 (D.C. Cir. 1972) (holding an EIS prepared on proposed oil development of a region on the outer continental shelf inadequate); *Atchison, Topeka & Santa Fe Ry. Co. v. Callaway*, 382 F. Supp. 610 (D.D.C. 1974) (requiring preparation of programmatic EIS on expansion of Upper Mississippi navigation system); see also Patrick E. Barney, *The Programmatic Environmental Impact Statement and the National Environmental Policy Act Regulations*, 16 LAND & WATER L. REV. 1 (1981).

40. *Kleppe*, 427 U.S. at 395. The "Northern Great Plains region" as identified in the plaintiffs' complaint encompassed a coal-rich region including parts of Wyoming, Montana, North Dakota and South Dakota. *Id.* at 396.

permit the further development of coal reserves pending completion of the EIS.<sup>41</sup> The United States District Court for the District of Columbia granted the federal defendants' motion for summary judgment,<sup>42</sup> holding that no proposal existed for a regional program to develop coal reserves in the area identified by the plaintiffs.<sup>43</sup> The United States Court of Appeals for the District of Columbia Circuit reversed and enjoined the DOI's approval of four mining plans in the region of concern.<sup>44</sup> The court of appeals did not dispute the district court's conclusion that there was no proposal for a regional program. Instead, the court of appeals concluded that even though there had been no formal proposal for a regional program, the DOI had "contemplated" such a program, and, consequently the court of appeals remanded the case to the district court to determine whether a regional EIS was required under a four-part balancing test.<sup>45</sup>

The Supreme Court reversed, rejecting the court of appeals' reasoning that NEPA sometimes requires EISs for merely "contemplated" actions.<sup>46</sup> The Court held that there was no proposal for major federal action with regard to the Northern Great Plains Region triggering the EIS requirement.<sup>47</sup> The Court noted that the DOI had prepared a "Coal Programmatic EIS" on its entire proposed national coal-leasing program<sup>48</sup> as well as

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41. *Id.* at 395.

42. *Id.*

43. *Id.* at 395, 400.

44. *Sierra Club v. Morton*, 514 F.2d 856 (D.C. Cir. 1975).

45. The court of appeals identified the following four factors:

[1] How likely is the program to come to fruition, and how soon will that occur? [2] To what extent is meaningful information presently available on the effects of implementation of the program, and of alternatives and their effects? [3] To what extent are irretrievable commitments being made and options precluded as refinement of the proposal progresses? [4] How severe will be the environmental effects if the program is implemented?

*Morton*, 514 F.2d at 880.

46. 427 U.S. at 403-15.

47. *Id.* at 399.

48. *Id.* at 400. The Court observed:

[T]he federal petitioners agreed at oral argument that § 102(2)(C) required the Coal Programmatic EIS that was prepared in tandem with the new national coal-leasing program and included as part of the final report on the proposal for adoption of that program . . . . Their admission is well made, for the new leasing program is a coherent plan of national scope, and its adoption surely has significant environmental consequences.

EISs on individual decisions which affected coal mining—such as the issuance of right-of-way permits and the approval of mining plans<sup>49</sup>—in the region of interest to the plaintiffs.<sup>50</sup>

Nonetheless, the Court concluded:

[T]here is no evidence in the record of an action or a proposal for an action of regional scope. The District Court, in fact, expressly found that there was no existing or proposed plan or program on the part of the Federal Government for the regional development of the area described in respondents' complaint . . . . [The district court also] found no evidence that the individual coal development projects undertaken or proposed by private industry and public utilities in that part of the country are integrated into a plan or otherwise interrelated. These findings were not disturbed by the Court of Appeals, and they remain fully supported by the record in this Court.<sup>51</sup>

Significantly, the Supreme Court declined to require the DOI to prepare an EIS on a program which was merely contemplated. The Court indicated, however, that a programmatic EIS would be required if a proposal for programmatic action existed: "[W]hen several proposals for . . . actions that will have cumulative or synergistic environmental impact[s] . . . are pending concurrently before an agency, their environmental consequences must be considered together. Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action."<sup>52</sup> The DOI apparently recognized the need for programmatic EISs since, in addition to individual EISs on local decisions, it had also prepared a national programmatic EIS to address the cumulative impacts of those

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*Id.*

49. The Court noted that several federal courts of appeals have held that such decisions to permit private activities that have significant environmental impact are subject to NEPA's EIS requirement. *Kleppe*, 427 U.S. at 399 (citing *Scientists' Inst. for Pub. Info., Inc. v. United States Atomic Energy Comm'n*, 481 F.2d 1079, 1088-89 (D.C. Cir. 1973); *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972)).

50. *Id.* at 397-98, 400.

51. *Id.* at 400-01.

52. *Id.* at 410; see also *id.* at 409 (stating that section 102(2)(C) of NEPA may require a comprehensive impact statement in certain situations where several proposed actions are pending at the same time); *id.* at 413 ("Cumulative environmental impacts are, indeed, what require a comprehensive impact statement.").

individual decisions.<sup>53</sup> Moreover, the *Kleppe* Court made it clear that it viewed the DOI's decision not to prepare a regional programmatic EIS as final agency action subject to judicial review.<sup>54</sup>

Similarly, the lower federal courts have either required the preparation of or reviewed programmatic EISs prepared on a variety of federal actions,<sup>55</sup> including forest management plans,<sup>56</sup> a regional water marketing plan,<sup>57</sup> the licensing of mixed uranium and plutonium fuel for commercial use,<sup>58</sup> the granting of mining permits in national parks in Alaska,<sup>59</sup> the issuance of rules concerning handicapped access to mass transit,<sup>60</sup> the ocean dumping of dredged material,<sup>61</sup> the revision of the national plan for the development of public airports,<sup>62</sup> a regional power development program,<sup>63</sup> nuclear waste manage-

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53. *Id.* at 412-13.

54. *Id.* at 408-09. "[I]t also is possible to view the [plaintiffs'] argument as an attack upon the decision of the petitioners not to prepare one comprehensive impact statement on all proposed projects in the region. This contention properly is before us, for the petitioners have made it clear they do not intend to prepare such a statement." *Id.*

Several commentators have suggested that the Court's review in *Kleppe* of an agency decision not to prepare an EIS under the permissive arbitrary and capricious standard constituted a major setback for NEPA litigation. *See, e.g.*, FRANK GRAD, ENVIRONMENTAL LAW § 9.02, at 9-108.2, 9-110, 9-113, 9-114 (1993); DANIEL R. MANDELKER, NEPA LAW AND LITIGATION § 9.03, at 5-6 (Supp. 1991). Agency decisionmaking under NEPA, however, is normally only subject to the arbitrary and capricious standard. *See, e.g.*, *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 375-78 & n.23 (1989).

55. The preparation of programmatic EISs sometimes allows federal agencies to avoid doing site specific EISs. *See, e.g.*, *Natural Resources Defense Council, Inc. v. Hodel*, 819 F.2d 927 (9th Cir. 1987); *Park County Resource Council, Inc. v. United States Dep't of Agric.*, 817 F.2d 609 (10th Cir. 1987). *But see* *Sierra Club v. Penfold*, 664 F. Supp. 1299 (D. Alaska 1987), *aff'd*, 857 F.2d 1307 (9th Cir. 1988).

56. *See, e.g.*, *Sierra Club v. Espy*, 822 F. Supp. 356 (E.D. Tex. 1993); *Sierra Club v. Robertson*, 764 F. Supp. 546 (W.D. Ark. 1991).

57. *Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848 (9th Cir. 1979).

58. *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 539 F.2d 824 (2d Cir. 1976).

59. *Northern Alaska Env'tl. Ctr. v. Hodel*, 16 Env'tl. L. Rep. (Env'tl. L. Inst.) 20244 (D. Alaska 1985), *aff'd*, 803 F.2d 466 (9th Cir. 1986).

60. *American Pub. Transit Ass'n. v. Goldschmidt*, 485 F. Supp. 811 (D.D.C. 1980).

61. *National Wildlife Fed'n v. Benn*, 491 F. Supp. 1234 (S.D.N.Y. 1980).

62. *Environmental Defense Fund, Inc. v. Adams*, 434 F. Supp. 403 (D.D.C. 1977).

63. *Natural Resources Defense Council, Inc. v. Hodel*, 435 F. Supp. 590 (D. Or. 1977), *aff'd sub nom.* *Natural Resources Defense Council, Inc. v. Munro*, 626 F.2d 134 (9th Cir. 1980).

ment programs,<sup>64</sup> a proposed subway system,<sup>65</sup> and an outer continental shelf oil leasing program.<sup>66</sup>

## II. STANDING FOR ENVIRONMENTAL PLAINTIFFS BEFORE *LUJAN*

In order to understand the *Lujan* decision and its implications for judicial review of agency compliance with NEPA's programmatic EIS requirement, it is helpful to review basic constitutional and administrative law principles that affect the right of individuals to challenge actions of the federal government. These principles not only form the legal context in which *Lujan* must be evaluated, but they also provide a necessary foundation for evaluating the legitimacy of subsequent judicial interpretations of *Lujan's* somewhat cryptic pronouncements on standing.

### A. Constitutional and Prudential Limitations on Standing

Article III of the United States Constitution limits the scope of judicial review in the federal courts to the resolution of "cases" and "controversies."<sup>67</sup> The Supreme Court has interpreted this provision to limit standing to plaintiffs who have suffered an "injury in fact."<sup>68</sup> In order to establish an injury in fact, a plaintiff must demonstrate: "[1] he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant . . . [2] that the injury fairly can be traced to the challenged action and [3] is likely to be redressed by a favorable decision."<sup>69</sup>

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64. *Natural Resources Defense Council, Inc. v. Energy Research & Dev. Admin.*, 451 F. Supp. 1245 (D.D.C. 1978), *aff'd in part, rev'd in part sub nom. Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 606 F.2d 1261 (D.C. Cir. 1979).

65. *Save Our Sycamore v. Metropolitan Atlanta Rapid Transit Auth.*, 576 F.2d 573 (5th Cir. 1978).

66. *California ex rel. Younger v. Morton*, 404 F. Supp. 26 (C.D. Cal. 1975).

67. U.S. CONST. art. III, § 2, cl. 1.

68. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472-73 (1982); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976).

69. See cases cited *supra* note 68.

In addition to these three constitutional standing requirements of injury, causation, and redressability, the Supreme Court has also applied several "prudential principles"<sup>70</sup> in determining whether a plaintiff has standing to sue.<sup>71</sup> First, the Court has denied standing to plaintiffs attempting to vindicate the rights of third parties.<sup>72</sup> Second, the Court has declined to address "'abstract questions of wide public significance' which amount to 'generalized grievances' pervasively shared and most appropriately addressed in the representative branches."<sup>73</sup> Third, the Court has limited review to plaintiffs whose affected interests fall within the "zone of interests to be protected or regulated by the statute or constitutional guarantee in question."<sup>74</sup>

### B. *Standing and Reviewable Agency Action Under the Administrative Procedure Act*

Congress, however, may remove prudential barriers to standing by explicitly providing for judicial review.<sup>75</sup> The broadest right of review Congress granted appears in section 702 of the Administrative Procedure Act,<sup>76</sup> which states that "[a] person

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70. Justice Scalia has questioned the source of the Court's authority to alter the scope of congressionally granted standing through the imposition of "prudential" criteria, and he has suggested that when courts apply the prudential factors, they are really applying a set of presumptions to determine whether Congress intended to create a judicially enforceable legal right. See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 885-86 (1983). Professor Davis has criticized the concept of prudential limitations on standing for plaintiffs who have suffered injury-in-fact. See 4 KENNETH C. DAVIS, ADMINISTRATIVE LAW § 24:5 (2d ed. 1983).

71. *Valley Forge*, 454 U.S. at 474-75.

72. *Id.* at 474 (citing *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

73. *Id.* at 475 (quoting *Warth*, 422 U.S. at 499-500).

74. *Id.* at 475 (quoting *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)). The "zone of interests" standard is also treated as an element of standing under the APA. See *infra* nn. 79-84 and accompanying text.

75. See *Warth*, 422 U.S. at 501 ("Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules."); *Camp*, 397 U.S. at 154.

76. 5 U.S.C. § 702 (1988). Although both courts and commentators frequently refer to the APA as granting the federal courts jurisdiction to review agency actions, technically the APA only creates a cause of action for which there must be a separate basis of jurisdiction. See CHARLES H. KOCH JR., ADMINISTRATIVE LAW AND PRACTICE § 8.49 (Supp. 1992) (discussing *Califano v. Sanders*, 430 U.S. 99 (1977)).

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.”<sup>77</sup> This provision addresses both standing (by limiting review to persons suffering legal wrong or adversely affected within the meaning of a statute) and the scope of reviewable action (by limiting the subject of review to “agency action”).<sup>78</sup>

The standing element of section 702 requires that a party seeking judicial review of agency conduct have suffered some “injury in fact” to an interest “arguably within the zone of interests to be protected or regulated” by the statutes that the agencies were claimed to have violated.<sup>79</sup> The injury in fact analysis under section 702 is essentially identical to the analysis under Article III of the Constitution,<sup>80</sup> requiring injury, causation and redressability.<sup>81</sup> The “zone of interests” test adds the requirement that, keeping in mind the general presumption in favor of review of administrative action under the APA,<sup>82</sup> the plaintiff’s adversely affected interests be among the type of interests (but not necessarily the particular type of plaintiff)

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77. 5 U.S.C. § 702 (1988). Justice Scalia suggests in *Lujan* that the “within the meaning of a relevant statute” language of Section 702 applies both to plaintiffs who are claiming they have been “adversely affected” and to plaintiffs claiming they have been aggrieved by agency action. See *Lujan v. National Wildlife Fed’n*, 497 U.S. 871, 883 (1990). Professor Davis, however, makes a compelling case based on the legislative history of the APA that the “within the meaning of a relevant statute” qualification should be read to apply only to plaintiffs claiming they have been “aggrieved by agency action,” and that any person adversely affected *in fact*, without regard to the objectives of any particular statutory provision, should be granted standing under Section 702. See DAVIS, *supra* note 70, § 24:3.

78. See *Lujan*, 497 U.S. at 882-83. The identification of “agency action” under section 702 is not “strictly speaking . . . a standing requirement because it does not relate to the person bringing suit.” *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 87 (D.C. Cir. 1991) (Buckley, J., dissenting in part and concurring in the judgment) (citing *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982)).

79. *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972) (quoting *Camp*, 397 U.S. at 153, and citing *Barlow v. Collins*, 397 U.S. 159 (1970)). Prior to the Supreme Court’s decisions in *Camp* and *Barlow*, plaintiffs claiming standing to sue under a statute were required to demonstrate that the statute created a legal right in them that was adversely affected. See e.g., *Tennessee Elec. Power Co. v. Tennessee Valley Auth.*, 306 U.S. 118 (1939).

80. See *Community for Creative Non-Violence v. Pierce*, 814 F.2d 663, 667 (D.C. Cir. 1987); *National Wildlife Fed’n v. Burford*, 835 F.2d 305, 311 (D.C. Cir. 1987).

81. *Burford*, 835 F.2d at 311.

82. *Block v. Community Nutrition Inst.*, 467 U.S. 340, 349 (1984).



that one can reasonably presume Congress intended to protect when it passed the statute.<sup>83</sup> The Supreme Court has indicated that the zone of interests standard should be applied liberally. It should only preclude standing

[i]f 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. *The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff.*<sup>84</sup>

Regarding section 702's limitation of judicial review to "agency action," the APA broadly defines agency action<sup>85</sup> as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."<sup>86</sup> If the agency action for which review is sought is not specifically made reviewable by some statutory provision, then under section 704 of the APA, it must be "final agency action."<sup>87</sup>

Although many environmental statutes contain their own citizen suit provisions,<sup>88</sup> section 702 of the APA has provided a basis for judicial review of certain environmentally significant statutes—primarily NEPA and the various public land

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83. See *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 883 (1990), 497 U.S. at 883; *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 400 (1987).

84. *Clarke*, 479 U.S. at 399-400 (emphasis added). Professor Davis has criticized the zone of interests test as being without basis in section 702 and for failing to take into account common law interests entitled to protection. See DAVIS *supra* note 70, § 24:17, at 275-76. Professor Davis has also suggested that the test has been inconsistently applied and provides little predictive value for resolving standing issues. *Id.* at 276-80.

85. See 5 U.S.C. § 701(b) (1988) ("For the purpose of this chapter . . . 'agency action' ha[s] the meaning[] given . . . by section 551 of this title.").

86. 5 U.S.C. § 551(13) (1988).

87. 5 U.S.C. § 704 (1988).

88. See, e.g., Toxic Substances Control Act § 19(a), 15 U.S.C. § 2618(a) (1988); Federal Water Pollution Control Act § 505(a), 33 U.S.C. § 1365(a) (1988); Marine Protection, Research, and Sanctuaries Act of 1972 § 105(g)(1), 33 U.S.C. § 1415(g)(1) (1988); Safe Drinking Water Act § 1449, 42 U.S.C. § 3000j-8 (1988); Resource Conservation and Recovery Act of 1976 § 7002(a), 42 U.S.C. § 6972(a) (1988); Clean Air Act § 304, 42 U.S.C. § 7604 (1988); Comprehensive Environmental Response Compensation and Liability Act of 1980 § 310, 42 U.S.C. § 9659 (1988).

management statutes<sup>89</sup> which lack their own judicial review provisions.<sup>90</sup>

### C. *Injury in Fact and Reviewable Agency Action In Environmental Litigation*

The Supreme Court first addressed APA standing for environmental plaintiffs in *Sierra Club v. Morton*.<sup>91</sup> In *Morton*, the Sierra Club sought an injunction restraining the Forest Service from approving the construction of a ski resort in the Sequoia National Forest.<sup>92</sup> The Sierra Club asserted standing under section 702 of the APA,<sup>93</sup> based upon its "special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country . . . ."<sup>94</sup> The plaintiffs alleged that construction of the proposed facility

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89. See, e.g., the Multiple-Use Sustained-Yield Act of 1960 §§ 1-4, 16 U.S.C. §§ 528-531 (1988); Wilderness Act of 1964 §§ 2-7, 16 U.S.C. §§ 1131-1136 (1988); National Forest Management Act of 1976 §§ 2-16, 16 U.S.C. §§ 1600-1614 (1988); Mining and Minerals Policy Act of 1970 § 2, 30 U.S.C. § 21a (1988); General Mining Laws of 1872, 30 U.S.C. §§ 22-54 (1988); Taylor Grazing Act §§ 1-13, 43 U.S.C. § 315-315 (1988); Public Rangelands Improvement Act of 1978 §§ 2-5, 6(a), 9, 11-12, 43 U.S.C. §§ 1901-1908 (1988).

90. See, e.g., *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1514 (9th Cir. 1992) (recognizing APA right to review of agency compliance with the National Forest Management Act (NFMA)); *Perkins v. Bergland*, 608 F.2d 803, 806 (9th Cir. 1979) (recognizing APA right to review of agency compliance with Federal Land Policy and Management Act (FLPMA) and the Multiple-Use Sustained-Yield Act); *Krueger v. Morton*, 539 F.2d 235, 238 n.6 (D.C. Cir. 1976) (recognizing APA right to review of agency compliance with the Mining and Mineral Policy Act of 1970); *Sierra Club v. Espy*, 822 F. Supp. 356, 360-62 (E.D. Tex. 1993) (recognizing APA right to review of agency compliance with NFMA); *Sierra Club v. Robertson*, 764 F. Supp. 546, 551-54 (W.D. Ark. 1991) (recognizing APA right to review of agency compliance with the NFMA); *Pathfinder Mines Corp. v. Clark*, 620 F. Supp. 336, 338 (D. Ariz. 1985) (recognizing APA right to review of agency compliance with the General Mining Laws of 1872); *Natural Resources Defense Council, Inc. v. Hodel*, 618 F. Supp. 848, 868 (E.D. Cal. 1985) (recognizing APA right to review of agency compliance with FLPMA, the Taylor Grazing Act, and the Public Rangelands Improvement Act 1978); *Sierra Club v. Block*, 615 F. Supp. 44, 47-48 (D. Colo. 1985) (recognizing APA right to review of agency compliance with the Wilderness Act of 1964).

91. 405 U.S. 727 (1972).

92. *Id.* at 730. The plaintiffs alleged various statutory and regulatory violations. See *id.* at 730 n.2.

93. See *id.* at 732-33.

94. *Id.* at 735 n.8 (quoting Sierra Club's Complaint ¶ 3).

would cause injury in fact because of the adverse ecological and aesthetic effects.<sup>95</sup>

Significantly, the Supreme Court accepted that such aesthetic and environmental injury could constitute "injury in fact" under section 702 of the APA.<sup>96</sup> Nonetheless, the Court held that the Sierra Club lacked standing because it alleged only a "special interest" in the conservation of public lands, rather than alleging that the Sierra Club itself or any member's use of the area would be adversely affected by the construction of the proposed resort.<sup>97</sup> Such specific harm, the Court noted, was necessary to render a party "adversely affected" or "aggrieved" within the meaning of section 702.<sup>98</sup>

The Supreme Court next discussed standing for environmental plaintiffs in *United States v. Students Challenging Regulatory Agency Procedures*<sup>99</sup> ("*SCRAP I*"). In *SCRAP I*, the Court made it clear that although plaintiffs must demonstrate some specific injury to establish standing, they need not be the only parties suffering the injury. *SCRAP I* involved a challenge to the Interstate Commerce Commission's decision to permit the increase of freight rates.<sup>100</sup> The plaintiffs claimed that the rate structure discouraged the use of recyclable materials and encouraged the use of new materials, thereby increasing the amount of litter and further "adversely affecting the environment by encouraging unwarranted mining, lumbering, and other extractive activities."<sup>101</sup> The plaintiffs argued that they had standing to sue because they used part of the adversely affected

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95. *Id.* at 734.

96. *Id.*

97. *Id.* at 734-39.

98. *Id.* at 739. The Court noted that some lower federal courts had previously suggested that an interest in consumer or environmental issues could be sufficient to confer standing on an organization. See *id.* at 738-39 & n.14 (quoting *Environmental Defense Fund v. Hardin*, 428 F.2d 1093, 1097 (D.C. Cir. 1970)); *Citizens Committee for the Hudson Valley v. Volpe*, 425 F.2d 97, 105 (2d Cir. 1970); *Scenic Hudson Preservation Conf. v. Federal Power Comm'n*, 354 F.2d 608, 615-16 (2d Cir. 1965); *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 728, 734-36 (E.D. Ark. 1971); *Izaak Walton League of America v. St. Clair*, 313 F. Supp. 1312, 1317 (D. Minn. 1970).

99. 412 U.S. 669 (1973).

100. *Id.* at 678.

101. *Id.* at 676.

land in the Washington metropolitan area for recreational and aesthetic purposes.<sup>102</sup>

The Supreme Court found the plaintiffs' standing allegations to be adequate under *Morton*, noting:

[S]tanding is not to be denied simply because many people suffer the same injury . . . . To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion.<sup>103</sup>

Accordingly, under *Morton* and *SCRAP I*, plaintiffs alleging injury to their environmental interests must demonstrate that they have suffered specific injury, but they need not demonstrate that no other parties have been injured in a similar manner.<sup>104</sup> The continued viability of this approach, however, has been called into question by the Supreme Court's decision in *Lujan v. National Wildlife Federation*.<sup>105</sup>

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102. *Id.* at 678.

103. *Id.* at 687-88.

104. The Court took a similarly relaxed approach with respect to the causation and redressability elements of Article III's injury in fact requirement in *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59 (1978). In *Duke Power*, the plaintiffs challenged the Price-Anderson Act (42 U.S.C. § 2210 (1988)), which imposes a limit on liability for accidents at nuclear power plants. *Id.* at 82-94. The plaintiffs argued on the merits that the liability limitation violated the Fifth Amendment of the Constitution because it deprived them of due process and could lead to the taking of their property without just compensation. *Id.* at 69.

The Court granted standing to the plaintiffs; however, its determination was based on a different harm: the emission of radiation into the plaintiffs' environment and the adverse impacts of two nuclear power plants on water quality. *Id.* at 73-74. Although the plaintiffs failed to establish a direct link between the harm forming the basis for their standing and their claim on the merits, the Court found that the plaintiffs satisfied Article III's standing requirements. The Court based its reasoning on a "substantial likelihood" that the offending nuclear plants would not have been constructed without the liability limitation. "Our recent cases have required no more than a showing that there is a 'substantial likelihood' that the relief requested will redress the injury claimed . . . [thereby] satisfy[ing] the [causation] prong of the constitutional standing requirement." *Id.* at 75 n.20 (citing *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 262 (1977)).

105. 497 U.S. 871 (1990).

III. *LUJAN V. NATIONAL WILDLIFE FEDERATION*

In *Lujan*, the National Wildlife Federation (NWF) brought suit in the United States District Court for the District of Columbia alleging that the Director of BLM and other federal officials violated the Federal Land Policy Management Act of 1976 (FLPMA), NEPA and the APA through their mismanagement of BLM's "land withdrawal review program."<sup>106</sup> The challenged program consisted of numerous actions taken by the BLM which affected the availability of federal public lands for private uses, including mining.<sup>107</sup>

The federal defendants challenged NWF's standing<sup>108</sup> and moved for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. The district court granted the government's motion, holding that NWF lacked standing because it failed to demonstrate "injury in fact" as required under section 702 of the APA.<sup>109</sup> NWF argued that it had standing based on its organizational interests<sup>110</sup> in obtaining information concerning the land withdrawal review program, participating in the federal decision-making process,<sup>111</sup> and because of the environmental harm suffered by its members.<sup>112</sup> The district court rejected the claim of organizational harm, finding NWF's declaration, a declaration submitted in support of NWF's claim, "conclusory and completely devoid of specific facts."<sup>113</sup> The district court similarly found the two affidavits of NWF members, submitted in support of the claim of environmental harm, "vague, conclusory and lack[ing] [in the] factual

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106. *Id.* at 875.

107. *Id.* at 877-79.

108. *National Wildlife Fed'n v. Burford*, 699 F. Supp. 327 (D.D.C. 1988).

109. *Id.* at 329-32.

110. *Id.* at 329-32. Adverse impacts on an organization's activities may be sufficient to support standing; however, general setbacks to an organization's social goals are not sufficient. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

111. *Burford*, 699 F. Supp. at 330.

112. *Id.* at 330-32. An organization has standing to bring an action on behalf of its members if "(a) [one or more of the organization's] members would otherwise have standing to sue in their own right; (b) the interests [that the organization] seeks to protect are germane to the organization's purposes; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

113. *Burford*, 699 F. Supp. at 330.

specificity" needed to establish "injury in fact" under section 702 of the APA and Article III of the Constitution.<sup>114</sup> The court stressed that the affiants alleged only that they used land "in the vicinity" of the land affected by the Land Withdrawal Review Program rather than the affected land itself.<sup>115</sup> Moreover, the allegations of environmental harm, resulting from decisions affecting two specific areas, did not provide "any basis for standing to challenge, as violative of the Federal Land Policy Management Act, the legality of each of the 1250 or so individual classification terminations and withdrawal revocations."<sup>116</sup>

The United States Court of Appeals for the District of Columbia Circuit reversed.<sup>117</sup> The court of appeals found that the allegation that the affiant used land in the vicinity of the land affected by the Interior Department's decisions could only refer to the lands within the affected area itself; otherwise, "her allegation of impairment to her use and enjoyment would be meaningless, or perjurious."<sup>118</sup> The court of appeals further noted that the affidavit was, at worst, merely ambiguous as to whether the lands the affiant used were among the lands affected. Consequently, the court of appeals held the district court was obligated, on a motion for summary judgment, to resolve that ambiguity in favor of the non-moving party.<sup>119</sup> Moreover, the court of appeals found that the district court abused its discretion by refusing to consider four supplemental declarations on standing which NWF had submitted after the district court requested supplemental memoranda on the standing issue.<sup>120</sup>

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114. *Id.* at 331-32.

115. *Id.* at 331-32.

116. *Id.* at 332. The district court had previously granted NWF's motion for a preliminary injunction against any changes in the classifications of the public lands at issue. *National Wildlife Fed'n. v. Burford*, 676 F. Supp. 271 (D.D.C. 1985), *reconsideration denied*, 676 F. Supp. 280 (1986). The court of appeals affirmed the decision. *National Wildlife Fed'n v. Burford*, 835 F.2d 305 (D.C. Cir. 1987), *reh'g denied*, 844 F.2d 889, 890 (1988).

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

118. *Id.* at 431.

119. *Id.* at 431 (citations omitted).

120. *Id.* at 433. The court of appeals noted that "[n]o party to this litigation seriously disputes that NWF's supplemental affidavits, if considered, easily satisfy the level of specificity needed for standing under any of the Supreme Court's articulated tests." *Id.*

The Supreme Court granted certiorari<sup>121</sup> and reversed in a five-to-four decision.<sup>122</sup> Justice Scalia, writing for the Court, rejected the two affidavits originally submitted by NWF in support of its claim of standing. Scalia embraced the district court's conclusion that the allegations of harm to the affiants' use and enjoyment of land "in the vicinity" of the lands adversely affected were insufficient to establish injury in fact under section 702 of the APA.<sup>123</sup>

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121. 493 U.S. 1042 (1990).

122. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 874 (1990).

123. *Id.* at 885-89. This aspect of the *Lujan* opinion has been the subject of extensive commentary. See, e.g., Bradley J. Larsen, *Meeting the Requirements of Standing: A Framework for Environmental Interest Groups: Lujan v. National Wildlife Federation*, 14 *HAMLIN L. REV.* 277 (1990); James M. Duncan, Note, *Lujan v. National Wildlife Federation: Standing and the Two-Million Acre Question*, 23 *PAC. L. J.* 223 (1991); Bill J. Hays, Comment, *Standing and Environmental Law: Judicial Policy and the Impact of Lujan v. National Wildlife Federation*, 39 *U. KAN. L. REV.* 997 (1991); Tae P. Ho, Note, *Lujan v. National Wildlife Federation: Non-User Plaintiffs and the Standing Requirement of Injury in Fact in Environmental Litigation*, 5 *J. ENVTL. L. & LITIG.* 99 (1990); Macfarlane, *supra* note 5, at 863; Robichaud, *supra* note 5, at 443 (1991); Sears, *supra* note 5, at 293 (1991); Sheldon, *supra* note 5, at 10,577; Michael J. Shinn, Note, *Misusing Procedural Devices to Dismiss an Environmental Lawsuit—Lujan v. National Wildlife Federation*, 66 *WASH. L. REV.* 893 (1991); Katherine B. Steuer & Robin L. Juni, Note, *Court Access for Environmental Plaintiffs: Standing Doctrine in Lujan v. National Wildlife Federation*, 15 *HARV. ENVTL. L. REV.* 187 (1991); Stu Stuller, Note, *Lujan v. National Wildlife Federation*, 62 *U. COLO. L. REV.* 933 (1991); John Treangen, Note, *Standing: Closing the Doors of Judicial Review, Lujan v. National Wildlife Federation*, 36 *S.D. L. REV.* 136 (1991).

The Supreme Court reaffirmed its restrictive reading of the specificity of allegations required on a motion for summary judgment to satisfy APA section 702's "injury in fact" requirement for environmental plaintiffs in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992). In *Defenders of Wildlife*, several environmental organizations challenged a regulation promulgated by the Secretary of the Interior that excluded federally funded actions in foreign countries from the consultation requirement of section 7(a) of the Endangered Species Act of 1973 (ESA). *Id.* at 2135. The United States District Court for the District of Minnesota dismissed the action, holding that the plaintiffs lacked standing. *Defenders of Wildlife v. Hodel*, 658 F. Supp. 43, 47-48 (D. Minn. 1987). The Court of Appeals for the Eighth Circuit reversed. *Defenders of Wildlife, Friends of Animals & Their Env't v. Hodel*, 851 F.2d 1035 (8th Cir. 1988). On remand, the district court held for the plaintiffs and the court of appeals affirmed. *Defenders of Wildlife, Friends of Animals & Their Env't v. Lujan*, 911 F.2d 117 (8th Cir. 1990) *aff'g* *Defenders of Wildlife v. Hodel*, 707 F. Supp. 1082 (D. Minn. 1989).

The Supreme Court reversed. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992). The Court held that while the desire to observe an animal species was a cognizable basis for standing, affidavits submitted by members of the plaintiff organizations were insufficient to establish "imminent" injury. *Id.* at 2138. These affidavits stated that the members had visited and intended to revisit in the future, regions of foreign countries where endangered species were threatened by actions of United

The Court next rejected the Eighth Circuit's alternative holding that the four supplemental affidavits submitted by NWF were sufficient to establish its right to review.<sup>124</sup> The Court focused not on the specificity of the affiants' allegations of harm, but rather on the scope of the challenged activities.<sup>125</sup> The Court concluded that the land withdrawal review program was not subject to judicial review:

[It was not an] "agency action" within the meaning of § 702, much less a "final agency action" within the meaning of § 704 . . . . [Instead] [i]t is simply the name by which [the BLM] ha[s] occasionally referred to the continuing (and thus constantly changing) operations of the BLM in reviewing withdrawal revocation applications of public lands and developing land use plans . . . . As the District Court explained, the "land withdrawal review program" extends to . . . "1250 or so individual classification terminations and withdrawal revocations."<sup>126</sup>

The Court acknowledged that some of the individual actions identified in the affidavits which affected the status of particular areas of public lands might constitute reviewable "agency action."<sup>127</sup> Nonetheless, the Court suggested that even those actions would not be ripe for review until the actual physical disturbance of the land became imminent.<sup>128</sup>

Finally, the Court rejected NWF's assertion that it had standing in its own right because of harm to its organizational interests in receiving and disseminating information and in partici-

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States agencies. *Id.* The Court concluded that "[s]uch '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." *Id.*

In dicta, Justice Scalia also suggested that the plaintiffs were seeking impermissible "programmatic" review because they challenged the regulation rather than the individual, federally-funded projects overseas. *Id.* at 2140. The ability of persons to obtain review of agency regulations which adversely affect them, however, is not seriously in question. See *infra* nn. 151-52 and accompanying text.

124. *Lujan*, 497 U.S. at 890-94. The Court also held that the district court had not abused its discretion by refusing to consider the four supplemental affidavits. *Id.* at 894-98.

125. *Id.*

126. *Id.* at 890 (quoting *Burford*, 699 F. Supp. at 332).

127. *Id.* at 892.

128. *Id.* at 892-93 & n.3.



pating in the decisionmaking processes regarding federal lands.<sup>129</sup> As with the affidavits alleging environmental harm to NWF members, the Court found an affidavit submitted in support of NWF's claim of organizational standing to be deficient because it failed to identify an agency action or final agency action subject to review under sections 702 and 704.<sup>130</sup>

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129. *Id.* at 898-99. The *Lujan* Court accepted without deciding that organizations may establish standing on the basis of their interest in receiving and disseminating information and using such information to participate in agency decisionmaking. *Id.* at 899. A long line of cases had previously endorsed the concept of "informational standing." See, e.g., *Public Citizen v. United States Dept' of Justice*, 491 U.S. 440, 448-50 (1989); *Scientists' Inst. for Pub. Info., Inc. v. United States Atomic Energy Comm'n*, 481 F.2d 1079, 1087 n.29 (D.C. Cir. 1973); *Foundation on Economic Trends v. Lyng*, 680 F. Supp. 10, 14 (D.D.C. 1988); *National Org. for the Reform of Marijuana Laws (NORML) v. Department of State*, 452 F. Supp. 1226, 1230 (D.D.C. 1978); *Atchison, Topeka & Santa Fe Ry. v. Callaway*, 431 F. Supp. 722, 729-30 (D.D.C. 1977), *aff'd in part sub nom. Isaac Walton League v. Marsh*, 655 F.2d 346 (D.C. Cir. 1981); see also *Competitive Enter. Inst. v. National Highway Traffic Safety Admin.*, 901 F.2d 107, 122 (D.C. Cir. 1990); *Public Citizen v. Federal Trade Comm'n*, 869 F.2d 1541, 1546 & n.7 (D.C. Cir. 1989).

Arguably, all NEPA plaintiffs are "informational standing" plaintiffs in the sense that NEPA does not require any substantive relief from environmental harm. NEPA merely requires that information about environmental harm be made available to the public and the federal decisionmakers. Nonetheless, in recent years some courts have either questioned the legitimacy of informational standing, see *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 83-85 (D.C. Cir. 1991); *Public Citizen v. Office of the United States Trade Representative*, 782 F. Supp. 139, 143-44 (D.D.C. 1992); *Foundation on Economic Trends v. Watkins*, 794 F. Supp. 395, 398-99 (D.D.C. 1992), or suggested that informational standing is only available to plaintiffs who can demonstrate that they may suffer actual environmental harm from the deprivation of relevant environmental information. See *City of Los Angeles v. National Highway Traffic Safety Admin.*, 912 F.2d 478, 492 (D.C. Cir. 1990) ("the procedural and informational thrust of NEPA gives rise to cognizable injury from denial of its explanatory process, so long as there is a reasonable risk that environmental injury may occur"); *Colorado Env'tl. Coalition v. Lujan*, 803 F. Supp. 364, 367 (D. Colo. 1992)); Lawrence Gerscher, Note, *Informational Standing Under NEPA: Justiciability and the Environmental Decisionmaking Process*, 93 COLUM. L. REV. 996 (1993).

The limitation of informational standing to plaintiffs who can demonstrate that they are subject to actual environmental harm would essentially eliminate informational standing since such plaintiffs could establish standing based on threatened environmental harm alone. At least one recent case, however, suggested that informational standing under NEPA remains viable even for plaintiffs who are not threatened by specific environmental harm. See *Public Citizen v. Office of the United States Trade Representative*, 822 F. Supp. 21, 29 n.12 (D.D.C. 1993), *rev'd on other grounds*, 5 F.3d 549 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 685 (1994).

130. *Lujan*, 497 U.S. at 898-99.

IV. *LUJAN* AND PROGRAMMATIC EISS

The *Lujan* decision has been interpreted by courts<sup>131</sup> and commentators<sup>132</sup> in a manner that raises three closely related problems for litigants attempting to obtain judicial review of agency compliance with the programmatic EIS requirement. First, and most significantly,<sup>133</sup> *Lujan* has been read to hold that an agency's decision not to prepare a programmatic EIS is unreviewable because programs are too broad in scope to constitute reviewable agency action under section 702 of the APA.<sup>134</sup> Second, even if it is accepted that an agency's decision not to prepare a programmatic EIS constitutes reviewable agency action, *Lujan* has been interpreted to hold that an agency's compliance with NEPA is not "final" for the purposes of section 704 until some specific commitment of resources has been made.<sup>135</sup> Third, *Lujan* has been interpreted as holding that section 702 of the APA requires environmental plaintiffs to demonstrate that they use specific areas of land affected by government action. This requirement makes it difficult for environmental plaintiffs to establish standing to challenge the government's failure to prepare programmatic EISs affecting vast areas.<sup>136</sup>

As discussed below, however, each of these arguments is based on a fundamental misconception about the nature of the agency action which is subject to review under NEPA. Once the nature of the agency action subject to APA review under NEPA is understood, the issues of scope of reviewable action, timing of review and geographical nexus should not serve to preclude agency compliance with the programmatic EIS requirement.

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131. See cases cited *supra* note 6.

132. See sources cited *supra* note 5.

133. As discussed *infra* in sections IV B and IV C, the confusion over the nature of the agency action subject to review under NEPA is arguably the source of both the finality and geographical nexus problems for NEPA plaintiffs.

134. See *Foundation on Economic Trends v. Lyng*, 943 F.2d 79 (D.C. Cir. 1991).

135. See *Resources Ltd. v. Robertson*, 789 F. Supp. 1529, 1534 (D. Mont. 1991) (citing *Lujan* in holding that a forest management plan and its accompanying EIS was not ripe for review until some "concrete action implementing the plan is about to be taken . . .").

136. See *City of Los Angeles v. National Highway Traffic Safety Admin.*, 912 F.2d 478 (D.C. Cir. 1990); *Foundation on Economic Trends v. Watkins*, 794 F. Supp. 395 (D.D.C. 1992); *Greenpeace U.S.A. v. Stone*, 748 F. Supp. 749, 756 (D. Haw. 1990).

### A. Programmatic EISs and Agency Action

As already noted,<sup>137</sup> the APA defines reviewable agency action broadly to include "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."<sup>138</sup> Accordingly, prior to the Supreme Court's discussion of the issue in *Lujan*,<sup>139</sup> the "agency action" requirement of section 702 of the APA had not constituted a significant barrier to judicial review of environmentally significant agency actions.<sup>140</sup>

In *Foundation on Economic Trends v. Lyng*,<sup>141</sup> however, a panel<sup>142</sup> of the United States Court of Appeals for the District of Columbia Circuit cited *Lujan* in support of its holding that plaintiffs challenging the Department of Agriculture's refusal to prepare an EIS on its "germplasm protection program" lacked standing because they failed to identify an "agency action" subject to review under the APA.<sup>143</sup> The court of appeals concluded that the Supreme Court in *Lujan* had implicitly held that an agency's refusal to prepare an EIS did not constitute "agency action" within the meaning of section 702 of the APA; instead, the agency action which must be identified in the context of NEPA is the "major federal action" subject to the EIS requirement.<sup>144</sup> The "germplasm protection program" challenged by the plaintiffs, the court stated, did not constitute identifiable "agency action" any more than the "Land Withdrawal Review Program" at issue in *Lujan*.<sup>145</sup>

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137. See *supra* notes 85-86 and accompanying text.

138. 5 U.S.C. § 551(13) (1988).

139. See *supra* notes 124-30 and accompanying text.

140. See, e.g., *Kleppe v. Sierra Club*, 427 U.S. 390, 408-09 (1976).

141. 943 F.2d 79 (D.C. Cir. 1991).

142. Judge Randolph wrote for the court of appeals. Judge Buckley dissented in part but concurred in the judgment. *Id.* at 80.

143. *Id.* at 85-87.

144. *Id.* at 85.

145. *Id.* at 86. Arguably the court of appeals decision in *Lyng* is limited by its terms to plaintiffs claiming "informational standing" rather than injury in fact to their use and enjoyment of land. See *id.* at 87. Whatever quantum of logic underlies the court of appeals' discussion of agency action in *Lyng*, however, would seem equally applicable to either "informational harm" or "use and enjoyment" plaintiffs.

This interpretation of *Lujan* as implicitly equating “agency action” under section 702 of the APA with “major federal action” under section 102(2)(C) of NEPA, however, finds little support in the *Lujan* opinion itself. Justice Scalia did not direct his discussion of agency action at NEPA, but instead at “programmatic” review of the BLM’s compliance with its substantive obligations under the FLPMA. At no point in his agency action discussion did Justice Scalia address the programmatic EIS issue or discuss the criteria for determining whether an agency’s actions are subject to NEPA’s programmatic EIS requirement.<sup>146</sup> In addition, the parties only made one brief reference to the programmatic EIS requirement in the memoranda they submitted to the Supreme Court.<sup>147</sup> The litigation was focused from the beginning on the FLPMA: seven of the eight counts in NWF’s complaint were based on the FLPMA and only one was based on NEPA.<sup>148</sup>

Moreover, Justice Scalia explicitly acknowledged in the *Lujan* opinion that

[if there were] some specific order or regulation, applying some particular measure across the board to all individual classification terminations and withdrawal revocations . . . it can of course be challenged under the APA by a person adversely affected—and the entire “land withdrawal review program,” insofar as the content of that particular action is concerned, would thereby be affected.<sup>149</sup>

A decision not to prepare a programmatic EIS where one was required would be exactly the type of challengeable agency action described by Scalia, since it could affect the entire program subject to the EIS requirement.<sup>150</sup> Consequently, Justice Scalia’s assertion in *Lujan* that the land withdrawal review

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146. See *Lujan*, 497 U.S. at 890-94.

147. See Brief in Opposition for Respondent at 5, *Lujan v. National Wildlife Fed’n*, 497 U.S. 871 (1990) (No. 89-640).

148. Amended Complaint of NWF (filed Aug. 19, 1985).

149. 497 U.S. at 890-91 n.2.

150. See *id.* at 913 (Blackmun, J., dissenting) (noting that reviewable “agency action” sometimes includes rules of broad applicability, and that plaintiffs may seek “programmatic” review of such actions in the sense that “if the plaintiff prevails, the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual.”).

program challenged by NWF was "not an 'agency action' within the meaning of [section] 702, much less a 'final agency action' within the meaning of [section] 704"<sup>151</sup> should be read to apply only to NWF's attempt to seek programmatic review under the FLPMA.

The *Lyng* court's erroneous reading of *Lujan* is largely attributable to Justice Scalia's failure in his programmatic review discussion to distinguish between review under the APA of an agency's compliance with NEPA and compliance with its organic statutes.<sup>152</sup> The FLPMA, the organic statute at issue in *Lujan*, imposes various substantive obligations on the BLM involving the management of public lands.<sup>153</sup> Similarly, most other statutes for which the APA is asserted as a basis of review impose substantive obligations on the agency.<sup>154</sup> Thus when a plaintiff seeks review of agency compliance with such statutes under the APA, they are asking the court to examine the actual substantive decisions made and actions taken by the agency.<sup>155</sup>

NEPA, by contrast, imposes only the procedural requirement that agencies consider environmental factors through the preparation of an EIS before taking major actions.<sup>156</sup> Thus the "agency action" at issue under NEPA is the agency's compliance with the EIS requirement, not the substantive action itself which is the subject of the EIS. The Supreme Court recently acknowledged this distinction between review under NEPA and

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151. *Id.* at 890.

152. *See id.* at 890-94.

153. Obligations imposed on the BLM under the FLPMA include keeping an inventory of public lands and making determinations regarding the availability of public lands for commercial uses such as mining. *See id.* at 877.

154. *See, e.g.*, 16 U.S.C. §§ 528-531 (1988) (requiring Secretary of Agriculture to administer the national forests for multiple use and sustained yield); 16 U.S.C. § 1131-1136 (1988) *id.* §§ 1131-1136 (requiring agencies with jurisdiction over wilderness areas to maintain them in a manner consistent with their wilderness character); 16 U.S.C. §§ 1600-1614 (1988) (providing guidelines for the management of the national forests); 30 U.S.C. § 21a (1988) (requiring Secretary of the Interior to carry out policy of developing mineral resources); 30 U.S.C. §§ 22-54 (providing for public access to hardrock mineral resources on federal lands); 43 U.S.C. §§ 315-315I (1988) (establishing system for private livestock grazing on public rangelands); 43 U.S.C. §§ 1701-1782 (1988) (governing BLM procedures for making public lands available for private ownership or use); 43 U.S.C. §§ 1901-1908 (1988) (providing additional guidelines for managing public rangelands).

155. *See cases cited supra*, note 90.

156. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

review under statutes which impose substantive obligations in *Lujan v. Defenders of Wildlife*.<sup>157</sup> In *Defenders of Wildlife*, with Scalia again writing for the Court, the Court held that the plaintiffs lacked standing to challenge regulations promulgated by the Secretary of Interior which required other agencies to confer with him under section 7(a)(2) of the Endangered Species Act<sup>158</sup> only with regard to federally funded projects in the United States or on the high seas.<sup>159</sup> However, the Court observed in dicta:

There is this 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. 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 [EIS] will cause the license to be withheld or altered, and even though the dam will not be completed for many years.<sup>160</sup>

Through its discussion of the “arbitrary and capricious” standard of review under NEPA, the Supreme Court has also indicated that the issuance of an EIS or a decision not to prepare an EIS is the “agency action” subject to review.<sup>161</sup>

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157. 112 S. Ct. 2130 (1992).

158. 16 U.S.C. § 1536(a)(2) (1988).

159. 112 S. Ct. at 2134.

160. *Id.* at 2142-43 n.7. See also *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

161. See *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 375-78 (1989) (discussing “arbitrary and capricious” standard of review for decision not to prepare a supplemental EIS); see also *City of Los Angeles v. National Highway Traffic Safety Admin.*, 912 F.2d 478, 499-500 (D.C. Cir. 1990); *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988); *Park County Resource Council v. United States Dep’t of Agric.*, 817 F.2d 609, 621 (10th Cir. 1987); *Louisiana v. Lee*, 758 F.2d 1081, 1083 (5th Cir. 1985); *River Rd. Alliance, Inc. v. Corps of Eng’rs of the Army*, 764 F.2d 445, 449 (7th Cir. 1985), *cert. denied*, 475 U.S. 1055 (1986); *Foundation on Economic Trends v. Heckler*, 756 F.2d 143, 151 (D.C. Cir. 1985); *Town of Orangetown v. Gorsuch*, 718 F.2d 29, 35 (2d Cir. 1983); *Webb v. Gorsuch*, 699 F.2d 157, 159 (4th Cir. 1983); *Township of Lower Alloways Creek v. Public Serv. Elec. & Gas Co.*, 687 F.2d 732, 742 (3d Cir. 1982); *Boles v. Onton Dock, Inc.*, 659 F.2d 74, 75-76 (6th Cir. 1981); *Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269, 271 (8th Cir. 1980).

In addition to its failure to consider that the EIS requirement constitutes a separate procedural obligation in addition to the underlying "major federal action," the *Lyng* court's analysis is seriously flawed for two other reasons. First, the equation of "agency action" under section 702 of the APA with "major federal action" under section 102(2)(C) of NEPA is inconsistent with the plain language of NEPA. Section 102(2)(C) of NEPA treats "proposals for legislation" as "major federal action" subject to the EIS requirement,<sup>162</sup> yet clearly agency legislative proposals in and of themselves are not "agency action" subject to review under the APA. Second, as noted by Judge Buckley in his opinion dissenting in part and concurring in the *Lyng* majority's judgment, in order to ensure that the environmental impacts of a proposed major federal action are adequately considered, an EIS must be prepared before a major federal action has been finally approved.<sup>163</sup> Under the *Lyng* majority's analysis, judicial review would be inappropriate until the agency had actually begun the major federal action, which "would effectively eliminate judicial oversight of NEPA's procedural requirements."<sup>164</sup> Consequently, the *Lyng* court's equation of the "agency action" required for review under the APA with the "major federal action" which triggers NEPA's EIS requirement

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162. See 42 U.S.C. § 4332(2)(C) (1988) (requiring preparation of EISs "on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment . . .").

163. *Lyng*, 943 F.2d at 89 (quoting *City of Los Angeles v. NHTSA*, 912 F.2d 478, 492 (D.C. Cir. 1990) and *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)); see also *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989).

164. *Lyng*, 943 F.2d at 87 (Buckley, J., dissenting in part and concurring in the judgment). Judge Buckley would have found the USDA's decision not to prepare an EIS, contained in a "finding of no significant impact" (FONSI), to be reviewable agency action. *Id.* at 88. Buckley, however, would have held against the plaintiffs on the merits. *Id.* at 89-90.

should be rejected in favor of the traditional view<sup>165</sup> of the EIS decision itself as the reviewable agency action.<sup>166</sup>

*B. Programmatic EISs and Final Agency Action Under APA Section 704*

Given the confusion over the nature of the agency action subject to review under NEPA, it is not surprising that the Supreme Court's suggestion in *Lujan v. National Wildlife Federation*<sup>167</sup> that review of the BLM's land classification actions would not be appropriate until some physical disturbance of the

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165. Several courts in cases decided since *Lujan* have embraced the traditional view of the EIS decision as the agency action subject to review under § 702 of the APA. In *Sierra Club v. Robertson*, 764 F. Supp. 546 (W.D. Ark. 1991), for example, the district court rejected the argument that under *Lujan* a forest management plan and its accompanying EIS were too general in scope to constitute reviewable "agency action" under § 702 of the APA. *Id.* at 553-54. The court noted that the activities at issue in *Lujan* had only been defined as a coherent program by the plaintiffs, whereas an integrated forest management plan was mandated under the National Forest Management Act. *Id.* at 554 & n.10 (citing 16 U.S.C. § 1604 (1988)); see also *Colorado Envtl. Coalition v. Lujan*, 803 F. Supp. 364, 369 (D. Colo. 1992) (holding Secretary of the Interior's decision not to prepare a supplemental EIS on his removal of five wilderness study areas from wilderness recommendation to be a particular agency action which caused the plaintiffs harm); *Portland Audubon Soc'y v. Lujan*, 795 F. Supp. 1489 (D. Or. 1992), *aff'd* 998 F.2d 705 (9th Cir. 1993) (holding a BLM decision not to prepare a supplemental EIS on a timber sales program to be reviewable agency action).

166. Arguably even *Lyng* can be read to permit review of a decision not to prepare an EIS so long as the plaintiff can point to a specific "major federal action" within the meaning of NEPA—regardless of whether the particular major federal action is a site-specific project or a programmatic action. If this interpretation is correct, the *Lyng* decision was based only on the court of appeals' conclusion that no germplasm preservation program existed which constituted major federal action requiring preparation of an EIS. See *Lyng*, 943 F.2d at 86-87. Thus *Lyng* may not increase the burden on NEPA plaintiffs; it may only shift the identification of major federal action from the merits to a threshold inquiry necessary to establish jurisdiction. See *id.* at 85 ("We recognize that this tends to merge standing under the APA with the merits of a plaintiff's NEPA claim."). As the *Lyng* court noted, such an approach is not without precedent. The *Data Processing* approach to standing requires the identification of "injury in fact," which traditionally would be considered an aspect of the merits of the action. See *id.* at 86 (citing STEPHEN G. BREYER & RICHARD B. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 1094 (2d ed. 1985)); see also *Barlow v. Collins*, 397 U.S. 159, 168 (1970) (Brennan, J., dissenting) (arguing that *Data Processing's* zones of interest standard "confus[es] the merits with the plaintiffs' standing to challenge [agency] action.").

167. 497 U.S. 871 (1990).



land was imminent<sup>168</sup> has similarly been misconstrued to limit judicial review of agency compliance with NEPA's programmatic EIS requirement.<sup>169</sup> In *Resources Ltd. v. Robertson*,<sup>170</sup> for example, several environmental organizations challenged the adequacy of a forest management plan and its accompanying EIS. These organizations alleged that the plan and the EIS failed to properly consider alternatives and failed to adequately address fisheries, endangered species, and water quality.<sup>171</sup> The United States District Court for the District of Montana cited *Lujan* in holding that the forest management plan and its accompanying EIS would not be ripe for review until some "concrete action implementing the plan is about to be taken . . . ."<sup>172</sup>

In reaching this conclusion, however, the *Resources Ltd.* court failed to address either the standard for making finality determinations or the issuance of the allegedly flawed EIS as the agency action subject to review. An agency action is usually considered final under section 704 if "the agency has completed its decisionmaking process, and . . . the result of the process is one that will directly affect the parties."<sup>173</sup> Under NEPA, once

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168. See *Lujan*, 497 U.S. at 891-93 & n.3.

169. Some controversy surrounds whether the Court's discussion of agency action and finality in *Lujan* was holding or dicta. Justice Blackmun indicates in his *Lujan* dissent that it was dicta. See *id.* at 913 (Blackmun, J., dissenting). This interpretation has been embraced by some commentators. See, e.g., Shinn, *supra* note 123, at 903; Steller, *supra* note 123, at 950-52, 956. Several other commentators, however, have treated the agency action and finality discussion as holding. See E. Gates Garrity-Rokous, *supra* note 11, at 645, 654-55. Macfarlane, *supra* note 5, at 921. Sheldon, *supra* note 5, at 10,562; Sears, *supra* note 5, at 333-34.

The latter view is more persuasive, since the *Lujan* majority's conclusion that the land withdrawal review program was not agency action or final agency action under §§ 702 and 704 was one of the two bases for rejecting the four supplemental environmental harm affidavits. Further, it was the *only* basis for rejecting NWF's claim of organization standing based upon the other affidavit. See *Lujan*, 497 U.S. at 892-94. Therefore while the programmatic discussion might be considered dicta as to the scope of review, it must be holding insofar as it was necessary to find no agency action and no final agency action in order to reject the five affidavits.

170. 789 F. Supp. 1529 (D. Mont. 1991).

171. *Id.* at 1531-32.

172. *Id.* at 1534.

173. *Franklin v. Massachusetts*, 112 S. Ct. 2767, 2773 (1992). The Supreme Court first articulated the modern approach to issues of finality and ripeness in 1967 in the *Abbott Laboratories* trilogy: *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) ("*Abbott Laboratories*") and its two companion cases, *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158 (1967) ("*Toilet Goods I*"), and *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167 (1967) ("*Toilet Goods II*"). In *Abbott Laboratories*, the Supreme Court held that

an agency has either issued a final EIS or made a final decision not to prepare an EIS, the agency has completed the decisionmaking process with regard to NEPA compliance.<sup>174</sup> Moreover, the decision is "final" under section 704 of the APA as soon as that decision is made, because the harm which occurs from noncompliance with NEPA is the increased risk of environmental harm that results from making decisions on major federal actions without adequately considering the environmental consequences.<sup>175</sup> If an agency fails to adequately comply with section 102(2)(C) of NEPA, that increased risk of flawed decisionmaking resulting in environmental harm occurs as soon as the agency determines that no further consideration of potential environmental impacts is required.<sup>176</sup>

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regulations of the Food and Drug Administration (FDA) requiring prescription drug manufacturers to include the generic name of the drug next to the trade name in printed material were ripe for review because, *inter alia*, withholding review would have "direct and immediate impact" on the plaintiff manufacturers. *Abbott Lab.*, 387 U.S. at 152. The Court held another set of regulations permitting the FDA to inspect cosmetic manufacturers' facilities, processes, and formulae to be not ripe for review in *Toilet Goods I*. The Court noted that "no irremediable adverse consequences flow from requiring a later challenge to this regulation by a manufacturer who refuses to allow this type of inspection." *Toilet Goods I*, 387 U.S. at 164-65. A third set of FDA regulations that expanded the number of substances subject to regulation as color additives and were "self-executing and ha[d] an immediate and substantial impact upon the [plaintiffs]" were found ripe in *Toilet Goods II*, 387 U.S. at 171.

In the *Abbott Laboratories* trilogy, the Supreme Court treated finality under § 704 as limited to the issue of whether the agency's decisionmaking process was complete. See *Abbott Laboratories*, 387 U.S. at 151; *Toilet Goods I*, 387 U.S. at 162-63. The ripeness inquiry addressed not only the completeness of the decisionmaking process, but also other factors affecting the appropriateness of judicial review such as whether a purely legal issue was involved and whether the agency's action would have an immediate adverse impact on the plaintiff. *Abbott Laboratories*, 387 U.S. at 150-54; *Toilet Goods I*, 387 U.S. at 162-64; *Toilet Goods II*, 387 U.S. at 168-69. The Supreme Court, however, has apparently ceased to distinguish between ripeness and finality and incorporates the issue of whether the agency action directly impacts the plaintiff into its finality analysis. See, e.g., *Franklin*, 112 S. Ct. at 2773. The Court has thus converted finality from being merely an aspect of ripeness or of a cause of action under the APA to a standing issue because resolving questions of finality now requires examining the status of the plaintiff. See *id.* at 2776. Professor Davis has suggested, however, that there is no need to distinguish between the doctrines of ripeness and finality. See 4 KENNETH C. DAVIS, ADMINISTRATIVE LAW § 26.10, at 458 (2d ed. 1983).

174. See *Aberdeen & Rockfish R.R. Co. v. Students Challenging Regulatory Agency Procedures (SCRAP II)*, 422 U.S. 289, 319 (1975).

175. See *supra* notes 24-27 and accompanying text.

176. Cf. Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1465 (1988) (noting that in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), the Supreme Court found that the "increased risk" that

As the Supreme Court noted in *Aberdeen & Rockfish Railroad Co. v. Students Challenging Regulatory Agency Procedures (SCRAP II)*:<sup>177</sup>

NEPA . . . create[s] a discreet procedural obligation on government agencies to give written consideration of environmental issues in connection with certain major federal actions and a right of action in adversely affected parties to enforce that obligation. When agency or departmental consideration of environmental factors in connection with that "federal action" is complete, notions of finality . . . do not stand in the way of judicial review of the adequacy of such consideration, even though other aspects of the . . . [major federal action] are not ripe for review.<sup>178</sup>

Accordingly, in *Kleppe v. Sierra Club*,<sup>179</sup> the Supreme Court held on the merits that there was no proposal for a regional coal development program subject to NEPA's EIS requirement, implicitly finding that the decision not to prepare an EIS constituted reviewable final agency action.<sup>180</sup> The *Kleppe* Court noted that judicial review is appropriate as soon as a proposal for major federal action is made and "someone protests either the absence or the adequacy of the final [environmental] impact statement. This is the point at which an agency's action has reached sufficient maturity to assure that judicial intervention will not hazard unnecessary disruption."<sup>181</sup> The lower federal courts have similarly indicated that an agency's final disposition of its obligations under section 102(2)(C) of NEPA is "final agency action" reviewable under section 704 of the APA.<sup>182</sup>

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the plaintiff would not be admitted to a medical school because of an affirmative action program was sufficient injury for standing purposes).

177. 422 U.S. 289 (1975).

178. *Id.* at 319-20.

179. 427 U.S. 390 (1976).

180. *Id.* at 403-06. The Supreme Court's decision on the merits in *Kleppe* involved an issue which is sometimes confused with the § 704 finality: whether an agency's contemplation of some potential action has become sufficiently concrete to constitute an actual *proposal* for major federal action within the meaning of § 102(2)(C) of NEPA. *See id.* This issue, however, unlike the finality inquiry, goes to the merits of whether the plaintiff has identified the major federal action or proposal for major federal action necessary to trigger § 102(2)(C)'s EIS requirement.

181. *Id.* at 406 n.15.

182. *See, e.g., Oregon Env'tl. Council v. Kunzman*, 817 F.2d 484, 492 (9th Cir. 1987) (finding "the controversy is ripe because the agency's action in issuing the EIS

Although Justice Scalia's discussion of programmatic review in the *Lujan v. National Wildlife Federation*<sup>183</sup> decision has created some confusion as to the nature of the final agency action which a NEPA plaintiff must identify,<sup>184</sup> the *Lujan* decision did not purport to overrule either *SCRAP II* or *Kleppe* on the ripeness issue.<sup>185</sup> Moreover, *Lujan* can be harmonized with *SCRAP II* and *Kleppe* if Scalia's final agency action discussion is read to apply only to programmatic review of the BLM's compliance with its substantive obligations under the FLPMA. As already noted, the Court in *Lujan* was primarily concerned with APA review of the BLM's compliance with the FLPMA, not NEPA. The denial of review of the BLM's compliance with the FLPMA was appropriate, since the FLPMA imposes substantive mandates on the BLM.<sup>186</sup> Consequently, any actions taken under the FLPMA would only be "final" when the harm intended to be prevented under the FLPMA—actual environmental harm—was about to occur. Under NEPA, in contrast, an agency action is final under section 704 as soon as the agency

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is clear and final"); *Friedman Bros. Inv. Co. v. Lewis*, 676 F.2d 1317, 1319 (9th Cir. 1982) (holding that the decision not to prepare an EIS is "final" in that it is the culmination of the agency's administrative procedures and will not be reconsidered at any later date"); *Izaak Walton League v. Marsh*, 655 F.2d 346, 369 (D.C. Cir. 1981) ("a concluding environmental impact statement is a 'final agency action' within the meaning of the APA."); *cert. denied*, 454 U.S. 1092 (1981); *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1086 n.29 (D.C. Cir. 1973) ("The instant case is ripe . . . since the issue tendered for review is whether an impact statement itself . . . is presently required under NEPA. That the statement would consider the future effects of the [proposed] program does not detract from the ripeness of this legal issue."); *see also* 40 C.F.R. § 1500.3 1993 (judicial review of agency NEPA compliance is appropriate as soon as agency has issued a final EIS, a final finding of no significant impact, or taken action which will have result in irreparable injury).

The Court of Appeals for the Second Circuit has indicated that a final EIS may in certain narrow circumstances be found unripe for review if the underlying major federal action is "undergoing further study [and] may ultimately be abandoned or substantially altered . . ." *See National Wildlife Fed'n v. Goldschmidt*, 677 F.2d 259, 263 (2d Cir. 1982). In *Goldschmidt*, however, the court of appeals suggested that supplemental EISs would be required if a determination was made to proceed with the two proposed sections of interstate highway at issue. *Id.* at 264. Thus, although nominally final EISs had already been issued on the highway segments, *Goldschmidt* can best be read as turning on the lack of a truly "final" disposition by the agency of its responsibilities under section 102(2)(C) of NEPA.

183. 497 U.S. 871 (1990).

184. *See Resources Ltd., v. Robertson*, 789 F. Supp. 1529 (D. Mont. 1991).

185. *See Lujan*, 497 U.S. at 890-94.

186. *Id.*

has either issued a final EIS or made a proposal for major federal action without preparing an EIS, because that is the point at which the procedural harm NEPA compliance is intended to prevent occurs.<sup>187</sup>

Several federal court opinions decided after *Lujan* have reflected this distinction between final agency action under NEPA and other substantive statutes. In *Colorado Environmental Coalition v. Lujan*,<sup>188</sup> for example, the United States District Court for the District of Colorado held that the Secretary of the Interior's decision not to prepare a supplemental EIS<sup>189</sup> on his removal of five wilderness study areas from wilderness recommendation was a final agency action subject to review under section 704 of the APA.<sup>190</sup> The court rejected the argument that under *Lujan* the plaintiffs had failed to identify any final agency action, noting that unlike *Lujan*, the plaintiffs' affidavits established that they were suffering "direct and immediate" effects from the decision.<sup>191</sup> Moreover, because of the procedural nature of NEPA, the harm to the decisionmaking process occurred as soon as the Secretary made his decision to remove five wilderness study areas from wilderness recommendation without preparing a supplemental EIS.<sup>192</sup>

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187. See *supra* notes 177-179 and accompanying text. The Court of Appeals for the District of Columbia Circuit's recent decision in *Public Citizen v. United States Trade Representative*, 5 F.3d 549 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 685 (1994), is not inconsistent with this analysis. In *Public Citizen* the court of appeals held that the North American Free Trade Agreement ("NAFTA") negotiated by the Office of the United States Trade Representative ("OTR") was not "final agency action" subject to NEPA's EIS requirement because it would not become a final proposal until it was submitted to Congress for approval. *Id.* at 551-52. Moreover, because under the Trade Act of 1974, 19 U.S.C. § 2903(a)(1)(B) (1988), NAFTA would be submitted to Congress by the President, and not the OTR, although it would be "final" when submitted, it would no longer be "agency action" since the President is not an agency subject to judicial review under the APA. *Id.* The court of appeals noted that this limitation on judicial review under section 704 of the APA applied only in those rare instances in which "the President has final constitutional or statutory responsibility for the final step necessary for the agency action directly to affect the parties." *Id.* at 552.

188. 803 F. Supp. 364 (D. Colo. 1992).

189. Agencies must prepare a supplemental EIS if either "(i) [t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1) (1993).

190. 803 F. Supp. at 370.

191. *Id.* at 369.

192. *Id.* at 369-70.

Similarly, in *Portland Audubon Society v. Lujan*,<sup>193</sup> the United States District Court for the District of Oregon found that *Lujan* did not preclude it from holding that a BLM decision not to prepare a supplemental EIS on a timber sales program was reviewable final agency action.<sup>194</sup> In *Sierra Club v. Robertson*,<sup>195</sup> the United States District Court for the Western District of Minnesota rejected the argument that under *Lujan* a forest management plan and its accompanying EIS were not final agency action subject to judicial review.<sup>196</sup> These cases indicate that the courts in future NEPA actions may continue to apply the traditional finality and ripeness analysis of *SCRAP II* and *Kleppe* rather than construing *Lujan* to have radically altered the final agency action analysis under NEPA.

### C. Programmatic EISs and The "Geographical Nexus" Requirement

Prior to the Supreme Court's decision in *Lujan*, a line of cases had indicated that in order to satisfy the "injury in fact" requirement of Article III and section 702 of the APA,<sup>197</sup> there must be a "geographical nexus" between the area used and enjoyed by an environmental plaintiff and the area where the adverse impacts of the challenged government action are occurring or will occur.<sup>198</sup> Because it merely constitutes the axiomatic requirement that a plaintiff basing his claim of standing upon his use and enjoyment of a certain area of land demonstrate that he actually uses and enjoys that land, the geographical nexus standard has not imposed any great burden on envi-

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193. 795 F. Supp. 1489 (D. Or. 1992).

194. *Id.* at 1505.

195. 764 F. Supp. 546 (W.D. Ark. 1991).

196. *Id.* at 554-55.

197. *See supra* notes 80-81 and accompanying text.

198. *See, e.g.,* *Friends of the Earth v. United States Navy*, 841 F.2d 927, 932 (9th Cir. 1988); *Oregon Natural Resources Council v. Kunzman*, 817 F.2d 484, 491 (9th Cir. 1987); *City of Evanston v. Regional Transp. Auth.*, 825 F.2d 1121, 1126 (7th Cir. 1987); *South East Lake View Neighbors v. Department of Housing and Urban Dev.*, 685 F.2d 1027, 1039 (7th Cir. 1982); *California ex rel. Younger v. Andrus*, 608 F.2d 1247, 1249 (9th Cir. 1979); *United States v. 18.2 Acres of Land*, 442 F. Supp. 800, 805 (E.D. Cal. 1977); *Conservation Law Found. of R.I. v. General Servs. Admin.*, 427 F. Supp. 1369, 1373-74 (D.R.I. 1977); *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975).

ronmental plaintiffs alleging injury to their use and enjoyment of land.<sup>199</sup>

The Court's conclusion in *Lujan* that the allegations in the NWF's members' affidavits of use and enjoyment of lands "in the vicinity" of the lands adversely affected were insufficiently specific,<sup>200</sup> however, has been interpreted in several recent decisions<sup>201</sup> as imposing a more stringent geographical nexus standard which could cause problems for programmatic EIS plaintiffs. One court suggested, without explication, that *Lujan* imposed "more restrictive requirements" than the traditional geographical nexus standard.<sup>202</sup> It has been suggested in another recent decision either that an individual whose use of a certain area of land is adversely affected by an agency's failure to prepare an EIS (or the preparation of an inadequate EIS) does not have standing to challenge that failure if the EIS would address a much larger area than that actually used by

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199. See *City of Los Angeles v. National Highway Traffic Safety Admin.*, 912 F.2d 478, 494 (D.C. Cir. 1990); *Oregon Natural Resources*, 817 F.2d at 489; *City of Evanston*, 825 F.2d at 1126; *South East Lake View Neighbors*, 685 F.2d at 1039; *Public Citizen v. United States Trade Representative*, 822 F. Supp. 21 (D.D.C. 1993), *rev'd on other grounds*, 5 F.3d 549 (1993), *cert. denied*, 114 S. Ct. 685 (1994); *Conservation Law Found. of R.I. v. General Servs. Admin.*, 427 F. Supp. 1369, 1373-74 (D.R.I. 1977); *18.2 Acres of Land*, 442 F. Supp. at 805.

200. See *Lujan*, 497 U.S. at 885-89.

201. See *City of Los Angeles v. National Highway Traffic Safety Admin.*, 912 F.2d 478 (D.C. Cir. 1990); *Foundation on Economic Trends v. Watkins*, 794 F. Supp. 395 (D.D.C. 1992); *Greenpeace USA v. Stone*, 748 F. Supp. 749, 756 (D. Haw. 1990); see also *People for the Ethical Treatment of Animals v. Department of Health and Human Servs.*, 917 F.2d 15, 17 (9th Cir. 1990) (granting summary judgment against animal rights activists who failed to identify specific portions of a large metropolitan area they used that were threatened by a federal agency's failure to prepare EISs before awarding grants to institutions involved in animal research).

Several commentators have similarly construed *Lujan* as requiring a more strenuous geographical nexus standard. See, e.g., Hays, *supra* note 123, at 1014-17; (noting difficulty of applying geographical nexus requirement in a NEPA action when the location of the harm may not be known until an EIS has been prepared); Tac Pan Ho, *supra* note 123, at 122; ("the [post-*Lujan*] Court now may refuse to hear claims based on harm extending from the point of its origin and may require actual present use of the exact geographical location of the harm's source."); Katherine B. Steur & Robin L. Juni, *Court Access for Environmental Plaintiffs: Standing Doctrine in Lujan v. National Wildlife Federation*, 15 HARV. ENVTL. L. REV. (1991) ("the gravamen of the injury in fact test in *Lujan* becomes the question of geographical specificity, that is, whether the land used by the plaintiff's members corresponds to the land affected by the challenged agency actions").

202. *Greenpeace*, 748 F. Supp. at 756 (discussed *infra* notes 215-19 and accompanying text).

the plaintiff and many other persons suffer similar harm,<sup>203</sup> or that such a plaintiff only has standing if the area the plaintiff uses is subject to particularly severe harm.<sup>204</sup> An even more disturbing opinion indicated that the plaintiff must have a geographical nexus to the area of the challenged government action, not the area of adverse impacts.<sup>205</sup>

As discussed below, these cases misconstrue the geographical nexus requirement by treating it as some additional, indeterminate standing requirement rather than as what it is—simply a gloss on the injury in fact requirement when the plaintiff is basing her claim of standing on injury to her use and enjoyment of a certain area of land.<sup>206</sup> Moreover, these cases ignore the implications of the Supreme Court's observation in *Lujan* that parties adversely affected by a single administrative action with broad effects would have standing to challenge that action.<sup>207</sup> Consequently, the geographical nexus requirement should not preclude standing for any plaintiff who can demonstrate that her use and enjoyment of a specified area of land has been adversely affected by an agency's failure to comply with the programmatic EIS requirement.

### 1. The Origins of the "Geographical Nexus" Requirement

The term "geographical nexus" first appeared in NEPA case law in *City of Davis v. Coleman*.<sup>208</sup> In *City of Davis*, a city in California challenged the Secretary of Transportation's decision not to prepare an EIS on a proposed freeway exchange.<sup>209</sup> The Court of Appeals for the Ninth Circuit held that the risk that

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203. See *City of Los Angeles*, 912 F.2d at 484-85.

204. *Id.*

205. See *Foundation on Economic Trends*, 794 F. Supp. at 401 (discussed *infra* notes 229-32 and accompanying text).

206. One commentator has suggested that because the Supreme Court has not always focused upon the precise geographical area used by environmental plaintiffs, the geographical nexus requirement can be interpreted as a prudential limitation on standing rather than as an aspect of the constitutional and statutory injury in fact requirement. See *Hays*, *supra* note 203, at 1015-16. As Justice Scalia has noted, however, the constitutional source of the courts' authority to impose purely "prudential" limitations on standing is unclear. Scalia, *supra* note 70, at 885-86.

207. See *Lujan*, 497 U.S. at 890-91 n.2.

208. 521 F.2d 661 (9th Cir. 1975).

209. *Id.* at 665-66.



serious environmental impacts will be overlooked because of the failure to prepare an EIS was "a sufficient 'injury in fact' to support standing, provided this injury is alleged by a plaintiff having a sufficient geographical nexus to the site of the challenged project that he may be expected to suffer whatever environmental consequences the project may have."<sup>210</sup> The court of appeals acknowledged that this was a "broad test"<sup>211</sup> but noted that such a standard was necessary because "the nature and scope of environmental consequences are often highly uncertain before [an EIS has been prepared]."<sup>212</sup> Subsequent cases have approved this rationale and stressed the necessary liberality of the geographical nexus requirement.<sup>213</sup>

## 2. Post-*Lujan* Geographical Nexus Analysis

Some of the cases that have referenced the geographical nexus requirement since *Lujan* was decided have raised several novel suggestions about *Lujan*'s impact on the geographical nexus requirement: that a plaintiff no longer has standing to challenge an agency's compliance with NEPA with regard to a federal action with environmental impacts covering a much broader area than that used by the plaintiff, that the plaintiff only has standing if the impacts of the federal action are particularly severe on the area of land he actually uses, or even that the plaintiff must have a geographical nexus to the federal

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210. *Id.* at 671.

211. *Id.*

212. *Id.*; see also Hays, *supra* note 123, at 1016 (noting the uncertainty of time and place of environmental harm prior to the preparation of an EIS). *But see* Wilderness Soc'y v. Griles, 824 F.2d 4 (D.C. Cir. 1987) (denying standing to environmental plaintiffs who failed to identify specific areas of land they used that would be affected by proposed transfers of federal land in Alaska to the state of Alaska and native corporations).

213. See, e.g., Friends of the Earth v. United States Navy, 841 F.2d 927, 932 (9th Cir. 1988); South East Lake View Neighbors v. Department of Housing and Urban Dev., 685 F.2d 1027, 1039 (7th Cir. 1982); California *ex rel.* Younger v. Andrus, 608 F.2d 1247, 1249 (9th Cir. 1979); Public Citizen v. United States Trade Representative, 822 F. Supp. 21 (D.D.C. 1993), *rev'd on other grounds*, (1993), *cert. denied*, 114 S. Ct. 685 (1994); United States v. 18.2 Acres of Land, 442 F. Supp. 800, 805 (E.D. Cal. 1977); see also Oregon Env'tl. Council v. Kunzman, 817 F.2d 484, 491 (9th Cir. 1987) (holding that residents of one state with a gypsy moth problem had sufficient geographical nexus to challenge the adequacy of an EIS prepared on a national gypsy moth eradication program).

action itself rather than the harm caused by the federal action.<sup>214</sup> As discussed below, however, these cases fail to address either the traditional injury in fact analysis or the procedural nature of NEPA's mandate.

The United States District Court for the District of Hawaii suggested that *Lujan* had imposed a more stringent geographical nexus standard on environmental harm plaintiffs in *Greenpeace, U.S.A. v. Stone*.<sup>215</sup> In *Greenpeace*, the plaintiffs brought suit under NEPA seeking to enjoin the United States Army from transporting a stockpile of nerve gas from Germany to an atoll in the Pacific Ocean where the nerve gas was to be destroyed.<sup>216</sup> Addressing the plaintiffs' standing, the district court noted that although the Ninth Circuit had traditionally applied a liberal geographical nexus standard, the *Lujan* holding "appears to heighten the requirements for establishing actual injury for purposes of standing under NEPA . . ."<sup>217</sup> Although the court found it unnecessary to decide the issue,<sup>218</sup> it indicated that even under the "broad" geographical nexus standard, the plaintiffs might have trouble establishing injury in fact for the transoceanic portion of the proposed action.<sup>219</sup>

In *City of Los Angeles v. National Highway Traffic Safety Administration*,<sup>220</sup> the Court of Appeals for the District of Columbia Circuit held that an organization could demonstrate geographical nexus to redress widely shared harm so long as the threatened harm would "personally affect" the organization's members.<sup>221</sup> The plaintiffs had challenged the decision of the National Highway Traffic Safety Administration (NHTSA) not to prepare a "cumulative" environmental impact statement on its corporate average fuel economy (CAFE) standards for automobiles.<sup>222</sup>

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214. See *infra* notes 215-32 and accompanying text.

215. 748 F. Supp. 749 (D. Haw. 1990).

216. *Id.* at 752-53.

217. *Id.* at 756.

218. *Id.* The court avoided ruling on the standing issue by finding on the merits that the defendants had not violated NEPA. *Id.* at 757-65.

219. *Id.* at 756.

220. 912 F.2d 478.

221. *Id.* at 494.

222. *Id.* at 482-83.

One of the plaintiffs, the Natural Resources Defense Council (NRDC), argued that the NHTSA's refusal to prepare an EIS created the risk that the NHTSA would not adequately consider a lower CAFE standard. Consequently, the increase in fossil fuel combustion would contribute to global warming, causing a rise in sea levels which would damage coastal areas of California, where many members of NRDC lived.<sup>223</sup> In support of their assertion of standing, NRDC submitted an affidavit from one of its members who lived, recreated, and farmed in California.<sup>224</sup> The court of appeals rejected the argument that the geographical nexus requirement precluded standing because of the widespread nature of global warming, holding that NRDC satisfied the standing requirement by "demonstrat[ing] that failure to prepare an EIS explaining the effects of the rollbacks on global warming presents the risk of overlooking an environmental injury that will personally affect its members."<sup>225</sup>

Other language in *City of Los Angeles*, however, could be read to find injury in fact to challenge geographically widespread harm only in instances in which the plaintiffs live in areas where the harm would be particularly severe.<sup>226</sup> The court of appeals noted that (according to affidavits submitted by NRDC) "the implications of the greenhouse effect for California are 'particularly grave,'"<sup>227</sup> and concluded that "[a]lthough the effects of a change in global atmosphere would obviously be felt throughout this country, and indeed the world, NRDC has satisfied the geographical nexus requirement of NEPA standing by showing the likelihood of particularly devastating consequences to NRDC members in California."<sup>228</sup> Thus it is unclear to what extent the court of appeals' finding of standing was dependent upon the "particularly devastating consequences" of global warming in California, or whether, for example, it would have found standing if the NRDC had relied upon the adverse effects of its members who live in Kansas.

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223. *Id.* at 494.

224. *Id.*

225. *Id.* (citing *Lujan v. National Wildlife Fed'n*, 457 U.S. 871 (1990)).

226. *Id.*

227. *Id.*

228. *Id.* (citing *Oregon Env'tl. Council v. Kunzman*, 817 F.2d 484 (9th Cir. 1987)).

An opinion in the United States District Court for the District of Columbia went even further, suggesting that under NEPA the geographical nexus must actually be to the major federal action which is the subject of the EIS, not the potential environmental harm caused by the major federal action. In *Foundation on Economic Trends v. Watkins*,<sup>229</sup> the district court rejected the plaintiff's claim that he had standing to challenge the government's failure to consider the effects of various government actions on global warming in NEPA documents because the rising water levels which would allegedly be caused by global warming would adversely affect his use and enjoyment of certain eastern seashore areas.<sup>230</sup> The court stated that the plaintiff had not alleged a sufficient nexus to the various government activities which were allegedly contributing to global warming,<sup>231</sup> and the opinion further indicated that the plaintiff lacked standing because "the Supreme Court [in *Lujan*] has made it abundantly clear that a litigant may no longer obtain across-the-board, nationwide correction of agency actions under the APA simply because his use of one locality may be adversely affected."<sup>232</sup>

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229. 794 F. Supp. 395 (D.D.C. 1992).

230. *Id.* at 400. The court also rejected the argument by the plaintiff and two plaintiff organizations that they had "informational standing" based upon the harm to their information dissemination activities by the government's failure to address global climate change in NEPA documents. *Id.* at 398-99.

231. *Id.* at 400 (citing *City of Los Angeles*, 912 F.2d at 492).

232. *Id.* at 401, (citing *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990)). The court also indicated that the plaintiff had failed to demonstrate that his alleged environmental injury was "fairly traceable" to the government actions at issue. *Id.*

A different judge of the same court, however, came to a contrary conclusion on the geographical nexus issue in *Public Citizen v. United States Trade Representative*, 822 F. Supp. 21 (D.D.C. 1993), *rev'd on other grounds*, 5 F.3d 549, (D.C. Cir. 1993), *cert. denied* 114 S. Ct. 685 (1994). In *Public Citizen*, several environmental and consumer organizations challenged the failure of the Office of the United States Trade Representative to prepare an EIS on the proposed North American Free Trade Agreement (NAFTA). 822 F. Supp. at 23. The plaintiffs argued that the NAFTA would cause injury in fact to its members because it could result in the modification of certain domestic environmental and health laws, contribute to the deterioration of the border region between Mexico and the United States, and adversely affect the air quality of certain urban areas. 822 F. Supp. at 27-28 & nn. 7-8.

The court rejected the argument that these adverse affects were "too widespread" to satisfy the geographical nexus requirement, noting that "the absence of a geographical nexus does not defeat a claim of standing because that 'would mean that the most injurious and widespread Government actions could be questioned by nobody.' . . . Thus, the Court concludes that standing is proper where the allegations of

The suggestion in these cases that plaintiffs may not have standing to challenge the failure to comply with NEPA's EIS requirement with regard to major federal actions affecting large areas of land is particularly problematic for programmatic EIS plaintiffs, because a programmatic EIS typically addresses large areas of land and affects many people. The bases of the courts' conclusions about the implications of *Lujan* for the geographical nexus standard, however, are unclear. The cases neither explain exactly how the *Lujan* decision imposed a more stringent geographical nexus requirement nor cite the same section of *Lujan* in support of their geographical nexus discussion.<sup>233</sup>

Three primary factors, however, appear to have contributed to the misinterpretation of the *Lujan* decision's implications for the geographical nexus requirement. First, as with the agency action and finality issues discussed above, these cases appear to misconstrue the geographical nexus requirement in the NEPA context because they fail to properly identify the issuance of an allegedly flawed EIS or the decision not to prepare an EIS as the agency action subject to review. Thus these cases do not account for the broad scope of environmental impacts and individuals who are potentially affected by that single agency action. Similarly, they fail to address Justice Scalia's acknowledgement in *Lujan* that an agency action under section 702 of the APA which has broad effects is nonetheless subject to judicial review.<sup>234</sup>

Second, the cases advocating a heightened geographical nexus requirement do not analyze the geographical nexus standard as an aspect of the "injury in fact" standing requirement. Consequently, they fail to address the procedural nature of the harm which NEPA is intended to prevent—the increased chance of environmental harm that results from uninformed decision-making. Thus, the relevant inquiry should be whether the

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environmental harm to particular members of the Plaintiff organizations are sufficiently concrete." 822 F. Supp. at 28-29 (citing *United States v. SCRAP* (SCRAP I), 412 U.S. 669, 688 (1973)).

233. See *City of Los Angeles v. National Highway Traffic Safety Admin.*, 912 F.2d 478, 494 (D.C. Cir. 1990); *Watkins*, 794 F. Supp. at 401 (citing *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990)); *Greenpeace, USA v. Stone*, 748 F. Supp. 749, 756-57 (D. Haw. 1990) (citing *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990)).

234. See *supra* note 149 and accompanying text.

alleged failure to comply with NEPA's EIS requirement has increased the risk of harm to land used and enjoyed by the plaintiff, even if the plaintiff only uses one portion of the potentially affected land. That more land is involved and that other people may also be adversely affected do not reduce the injury to the plaintiff, as noted by the Supreme Court in *SCRAP I*: "[s]tanding is not to be denied simply because many people suffer the same injury."<sup>235</sup>

Similarly, the suggestion in *Watkins* that the geographical nexus must be to the federal action itself and not the area where the effects of the action are felt fails to address geographical nexus as injury in fact. The function of the geographical nexus test is to ensure that a plaintiff has suffered actual injury to her use of adversely affected land. Consequently, it is the location of the harm, not the activity causing the harm, which is relevant. A party challenging a chemical factory's pollution of a river, for instance, need not demonstrate that it uses and enjoys the area where the factory is located, instead it need only demonstrate that it uses and enjoys an adversely affected portion of the river.<sup>236</sup>

Another hazard of the failure to analyze the geographical nexus doctrine within the context of injury in fact is that it obscures an inescapable limitation on the applicability of the doctrine: it only applies when the plaintiff is alleging injury in fact to her use and enjoyment of land. If a plaintiff uses and enjoys a resource at a location unrelated to the location where the harm to that resource is initially occurring, the plaintiff's geographical relationship to the location of that harm is irrelevant.<sup>237</sup> In *National Organization for the Reform of Mari-*

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235. *United States v. SCRAP (SCRAP I)*, 412 U.S. 6369, 687 (1973).

236. *See, e.g., Sierra Club v. Morton*, 405 U.S. 727, 735 (1972); *Public Interest Research Group of New Jersey v. Powell Duffryn Terminals*, 913 F.2d 64, 71 (3d Cir. 1990) (citing *SCRAP I*, 412 U.S. at 689 n.14); *Friends of the Earth v. Consolidated Rail Co.*, 768 F.2d 57, 61 (2d Cir. 1985).

237. *See Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2154 (1992) ("[m]any environmental injuries . . . cause harm distant from the area immediately affected by the challenged action . . . . It cannot seriously be contended that a litigant's failure to use the precise or exact site where animals are slaughtered or where toxic waste is dumped into a river means he or she cannot show injury.") (Blackmun, J., dissenting); *see also* Roberta J. Borchardt, *Lujan v. Defenders of Wildlife: Unwarranted Judicial Interference with Congressional Power and Environmental Protection*, 1993 WISC. L. REV. 1337, 1367-68 (1993). Hays, *supra* note 123, at 1014-15 (noting that courts do

*juana Laws (NORML) v. United States Department of State*,<sup>238</sup> for example, the United States District Court for the District of Columbia held that an organization which advocates the legalization of marijuana had standing to challenge the failure to prepare an EIS on the United States' participation in the spraying of herbicides on marijuana in Mexico. The court did not require any geographical nexus between the plaintiffs and the action in Mexico, instead it found standing based upon the plaintiffs' allegations of "health, recreational and informational injuries."<sup>239</sup> Thus the geographical nexus standard should only preclude review when a plaintiff is relying solely upon her use and enjoyment of land to establish standing and cannot demonstrate that the challenged action may harm the land she uses and enjoys.

The final factor underlying the interpretation of *Lujan* as imposing a more demanding geographical nexus standard is the apparent concern that granting parties standing to challenge widely shared harm could result in adjudication of generalized grievances rather than specific cases.<sup>240</sup> The Supreme Court's reluctance to adjudicate generalized grievances, however, did not prevent it from finding in *SCRAP I* that the plaintiffs had standing based upon injury which was admittedly "widespread."<sup>241</sup>

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not focus on geographical nexus when the plaintiff is claiming an economic or preservational injury).

238. 452 F. Supp. 1226 (D.D.C. 1978).

239. *Id.* at 1230. The court seemed particularly impressed with NORML's claim of injury to its information dissemination activities. *See id.* at 1230 (citing Scientists' Institute for Pub. Info. Inc. v. United States Atomic Energy Comm'n, 481 F.2d 1079 (D.C. Cir. 1973)). As noted above, however, the status of "informational standing" has been called into question by some recent opinions. *See supra* note 129. Nonetheless, if and to the extent that harm to an organization's information dissemination activities remains a viable basis for standing, the geographical relationship of the plaintiffs to the challenged major federal action or resulting environmental harm in such cases would clearly be irrelevant. *See* Lawrence Gerschwer, *Informational Standing Under NEPA: Justiciability and the Environmental Decisionmaking Process*, 93 COLUM. L. REV. 996, 1017-18, 1038 (1993) (discussing the logical inapplicability of a geographical nexus requirement to informational standing plaintiffs).

240. *See, e.g.,* City of Los Angeles v. National Highway Traffic Safety Admin., 912 F.2d 478, 484 (D.C. Cir. 1990) (D.H. Ginsburg, J., dissenting on standing issue); Foundation on Economic Trends v. Watkins, 794 F. Supp. 395, 400 (D.D.C. 1992).

241. *SCRAP I*, 412 U.S. at 688; *see also* *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2147 (1992) ("it does not matter how many persons have been injured by the challenged action [if] the party bringing suit [can] show that the action injures him

Moreover, the mere breadth of the class of persons adversely affected does not normally preclude standing to sue for individual members of that class.<sup>242</sup> The courts will permit class action suits, for example, even when the proposed class which the plaintiff purports to represent includes over one million individuals.<sup>243</sup> Similarly, the Supreme Court has explicitly rejected the suggestion that the members of a plaintiff class must live within a limited geographical area.<sup>244</sup> Consequently, as long as a plaintiff can demonstrate that an agency's failure to prepare an adequate programmatic EIS has increased the risk that a natural resource (including but not necessarily limited to land) will be adversely affected, he is entitled to judicial review regardless of how many other persons are also potentially harmed and notwithstanding any vague prohibition against the adjudication of "generalized grievances."<sup>245</sup>

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in a concrete and personal way") (Kennedy, J., concurring); *Center for Auto Safety v. National Highway Traffic Safety Admin.*, 793 F.2d 1322, 1334 (D.C. Cir. 1986) ("(t)he question of *how many suffer* from an injury is logically unrelated to the question of *whether there is* an injury and has nothing to do with the fitness of a party to bring a claim"). *Cutler v. Kennedy*, 475 F. Supp. 836, 848 (D.D.C. 1979) (noting that "plaintiffs are not limited to asserting unique economic or physical injuries, but may also seek judicial relief to challenge environmental, esthetic and other sorts of non-economic injuries which are widely shared").

242. See Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1470 (1988) (noting that companies or members of an industry would have standing to challenging a carcinogen regulation affecting them regardless of how many other affected parties existed).

243. See *Zachary v. Chase Manhattan Bank*, 52 F.R.D. 532, 534-35 (S.D.N.Y. 1971); see also *Johnson v. Uncle Ben's, Inc.*, 71 F.R.D. 19, 20 (S.D. Tex. 1975) (finding sheer size of class need not defeat a class action); *Metropolitan Area Housing Alliance v. United States Dep't of Housing and Urban Dev.*, 69 F.R.D. 633, 638 (N.D. Ill. 1976) (finding nationwide class certifiable).

244. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

245. One commentator has suggested that the distinction between a mere "generalized complaint" and harm sufficient to support standing which is incidentally widespread concerns principles of separation of powers which are not implicated in environmental litigation:

The deciding factor appears to be whether the Court believes that it is encroaching on the territory of another government branch. Most often, this encroachment will occur in suits involving areas especially sensitive to federalism claims, such as fiscal and military operations. Environmental and other actions, in which the injury seems distinct and the remedy clear, are less likely to present problems.

2 CHARLES H. KOCH, JR., *ADMINISTRATIVE LAW AND PRACTICE* § 10.8 (1985); see also *Allen v. Wright*, 468 U.S. 737, 751 (1984) (referring to "the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches . . . .") In Justice Scalia's view, however, the prohibition against the adjudication



## V. CONCLUSION

As discussed above, the confusion in the federal courts over the implications of the *Lujan* decision for judicial review of agency compliance with NEPA's programmatic EIS requirement is largely attributable to the court's failure to properly identify both the nature of the agency action at issue under NEPA and the nature of the harm that NEPA is intended to prevent. Once it is understood that the decision not to prepare an EIS or the issuance of an allegedly flawed EIS is the agency action subject to review and that the harm which NEPA is intended to prevent is the increased risk of environmental harm caused by uninformed decisionmaking, the problems of agency action, finality and geographical nexus would seem to present no more problems for plaintiffs seeking an adequate programmatic EIS than for any other NEPA plaintiff.<sup>246</sup>

Unfortunately, however, something more than obscure points of environmental and administrative law appear to be involved in the increasing reluctance of the courts to enforce the programmatic EIS requirement. Some lower federal courts seem to be taking their cue not so much from Justice Scalia's analysis in *Lujan*, but instead from the hostile tone of his discussion of environmental litigation addressing broad public policy issues.<sup>247</sup> Nonetheless, despite Justice Scalia's apparent antipa-

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of generalized grievances clearly extends to environmental litigation.

246. Some recent decisions have, in fact, held agency compliance with the programmatic EIS requirement to be reviewable. *See, e.g., Resources Ltd. v. Robertson*, 8 F.3d 1394, 1397-98 (9th Cir. 1983) (granting plaintiffs standing to challenge Forest Service's programmatic EIS on its management program for a national forest); *Public Servs. Comm'n v. Andrus*, 825 F. Supp. 1483 (D. Idaho 1993) (reviewing Department of Energy's decision not to prepare an EIS on its program for transporting and storing spent nuclear fuel in Idaho); *Sierra Club v. Espy*, 822 F. Supp. 356 (E.D. Texas 1993) (reviewing Forest Service's EIS on its management program for a national forest); *Colorado Envtl. Coalition v. Lujan*, 803 F. Supp. 364 (D.Colo. 1992); *Portland Audubon Soc'y v. Lujan*, 795 F. Supp. 1489 (D. Or. 1992); *Sierra Club v. Robertson*, 764 F. Supp. 546 (W.D. Ark. 1991); *see also Sierra Club v. Watkins*, 808 F. Supp. 852, 862-64 (D.D.C. 1991) (rejecting claim that Department of Energy was required to prepare a programmatic EIS on the importation of spent fuel rods from foreign nations, but approving concept of programmatic EISs).

The Congress has also recently indicated that it appreciates the significance and utility of programmatic EISs by requiring the preparation of a programmatic EIS on California's "Central Valley Project" water distribution system. *See Pub. L. No. 102-575, § 3409, 106 Stat. 4600 (1992).*

247. *See Lujan*, 497 U.S. at 890-94. While still on the United States Court of Ap-

thy for public interest environmental litigation, there is little doctrinal support for the wholesale preclusion of judicial review of agency compliance with NEPA's programmatic EIS requirement. When reduced to the principles of agency action, finality and geographical nexus, the chimera of impermissible "programmatic review" quickly disappears.

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peals for the District of Columbia Circuit, Justice Scalia complained in a law review article about "the judiciary's long love affair with environmental litigation." Scalia, *supra* note 70, at 884.

