McGeorge Law Review

Volume 23 | Issue 1 Article 8

1-6-1991

Lujan v. National Wildlife Federation: Standing and the Two Million Acre Question

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The United States Supreme Court decision in *Lujan v. National Wildlife Federation*[1] illustrates how large amounts of judicial time and energy may be expended on justiciability issues without ever reaching the underlying substantive law of a case.[2] The Supreme Court, in granting a motion for summary judgment, concluded that the National Wildlife Federation [hereinafter NWF] was not a proper plaintiff to bring the environmental suit because the organization lacked standing.[3] In so ruling, the Supreme Court has no doubt sent a chilling message to future environmental plaintiffs that, despite prior decisions which might have been interpreted

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1. 110 S. Ct. 3177 (1990). The case was initially filed in the United States District Court, District of Columbia as *National Wildlife Federation v. Burford*, 676 F. Supp. 271 (D.D.C. 1985).

2. Seven written opinions were generated by this case: Lujan v. Nat'l Wildlife Fed'n, 110 S. Ct. 3177 (1990); National Wildlife Fed'n v. Burford, 878 F.2d 422 (D.C. Cir. 1989); National Wildlife Fed'n v. Burford, 844 F.2d 889 (D.C. Cir. 1988) (*per curiam*); National Wildlife Fed'n v. Burford, 835 F.2d 305 (D.C. Cir. 1987); National Wildlife Fed'n v. Burford, 699 F. Supp. 327 (D.D.C. 1988); National Wildlife Fed'n v. Burford, 676 F. Supp. 280 (D.D.C. 1986); National Wildlife Fed'n v. Burford, 676 F. Supp. 271 (D.D.C. 1985). *See* note 153 for procedural history of *Lujan*. The National Wildlife Federation originally filed suit in July 1985 and the case traveled through the courts for five years. A number of complex procedural questions were dealt with, including preliminary injunctions, intervention of parties, joinder of indispensable parties, motions for dismissal and summary judgment, laches and justiciability issues concerning mootness, ripeness, and standing.

3. Lujan v. Nat'l Wildlife Fed'n, 110 S. Ct. at 3194. The Supreme Court identified the essence of the standing question in Warth v. Seldin, 422 U.S. 490, 498 (1975), as "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Id.*

otherwise,[4] environmental suits are subject to a rigid application of the standing requirements.

Prior to *Lujan*, environmental plaintiffs, evaluating their ability to meet standing requirements, were encouraged by the Court's seemingly permissive approach to standing as illustrated in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP).*[5] In *SCRAP*, the Court held that a group of law students had standing to bring a suit against the Interstate Commerce Commission based upon the claim that an increase in railroad freight rates would result in injury to the students' aesthetic and recreational interests due to the increased exploitation of forests, mountains and streams within the area.[6] *SCRAP* is considered by some to be the Supreme Court's most liberal application of the standing requirement because of the tenuous chain of causation.[7] However, in *Lujan*, the Supreme Court, speaking with four new justices since the 1973 *SCRAP* decision, refused to find that an environmental group had standing to enjoin the Bureau of Land Management [hereinafter BLM] from reclassifying certain federal lands to allow for mining activities.[8]

The standing problem presented in *Lujan* involved an unusually complex factual setting. The plaintiff, NWF, asserted standing to

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4. *See, e.g.*, Middlesex County Sewage Auth. v. Nat'l Sea Clammers Assoc., 453 U.S. 1 (1980) (interpreting Clean Water Act § 505 as adopting the *Sierra Club v. Morton*, 405 U.S. 727 (1972), standing requirements, despite more restrictive interpretations of standing in the interim); United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973) (recognizing that injury-in-fact may consist solely of harm to aesthetic well-being); *Sierra Club, infra* (an organization has standing to bring an action as a representative of members who would themselves have standing).

5. 412 U.S. 669 (1973).

6. *Id.* at 686-90. *See infra* notes 54-60 and accompanying text (discussing facts and holding of *SCRAP*).

7. K.C. DAVIS, ADMINISTRATIVE LAW TREATISE 322 (1983).

8. Lujan v. Nat'l Wildlife Fed'n, 110 S. Ct. 3177, 3181 (1990). The 1973 Court, which decided *SCRAP*, was comprised as follows: The majority, deciding in favor of the plaintiffs' standing, were Justices Blackmun, Brennan, Douglas, Marshall and Stewart. *SCRAP*, 412 U.S. at 669. Dissenting to the portion of the opinion allowing the plaintiffs' standing were Chief Justice Burger and Justices White and Rehnquist. *Id.* Justice Powell took no part in the decision of the case. *Id.* The 1990 Court which decided *Lujan* had the following composition: The majority, deciding against the plaintiffs' standing, were Chief Justice Rehnquist, and Justices Kennedy, O'Connor, White and Scalia. *Lujan*, 110 S. Ct. at 3181. Dissenting to the opinion were Justices Blackmun, Brennan, Stevens, and Marshall. *Id.*

challenge over 1,250 individual decisions of the BLM which affected over 180,000,000 acres of public land.[9] The NWF based its assertion of standing primarily upon a single member's claim of recreational use and aesthetic enjoyment "in the vicinity" of a 2,000,000 acre parcel, which contained 4,500 acres specifically affected by a BLM decision.[10]

The *Lujan* decision is evidence of the new direction the Supreme Court will now take in evaluating a plaintiff's standing in environmental cases.[11] *Lujan* indicates that *SCRAP* was a highwater mark for standing to which the Court will not soon return.[12] Arguably, *Lujan* has changed standing requirements in environmental cases by dictating that to obtain judicial review the plaintiff must not only be injured, but the location at which the injury is claimed must correspond to the location of the act which is the subject of the complaint.[13] Alternatively, the Court's decision in *Lujan* may be explained by the argument that the affidavits supporting the plaintiffs' standing in *Lujan* were not specific enough in stating how the plaintiffs were injured by the actions of the defendants.[14] Finally, the majority and dissenting opinions in *Lujan* present two different views within the Court for determining whether a plaintiff has made a sufficient showing to survive a motion for summary judgment.[15]

Part I of this Note reviews the legal background of the standing doctrine, detailing the constitutional and prudential requirements,

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9. Brief for Petitioners at 11, 15, Lujan v. Nat'l Wildlife Fed'n, 110 S. Ct. 3177 (1990) (No. 89-640).

10. *Lujan*, 110 S. Ct. at 3187-88. The Court of Appeals based its finding of NWF's standing upon one affidavit. National Wildlife Fed'n v. Burford, 878 F.2d 422, 431 n.13 (D.C. Cir. 1989).

11. *See, e.g.*, Student Pub. Int. Res. Group v. P.D. Oil & Chem., 913 F.2d 64, 84 (3d Cir. 1990) (Aldisert, J., concurring) (viewing *Lujan* as an indication that the Supreme Court is not relaxing standing requirements in environmental cases).

12. *See infra* notes 54-60 and 257-272 and accompanying text (discussing the expansive standing approach allowed in *SCRAP*).

13. *See infra* notes 246-256 and accompanying text (presenting argument that *Lujan* has changed the requirements for injury-in-fact).

14. *See infra* notes 246-256 and accompanying text (presenting argument that *Lujan* did not change the injury-in-fact requirement).

15. *See infra* notes 234-245 and accompanying text (comparing the majority's strict adherence to facts explicitly stated within the record and the willingness of the dissent to make inferences "in light of" the record as a whole).

legislative provisions, and procedural considerations in applying the doctrine of standing.[16] Part II reviews the legal background of the Federal Land Policy Management Act, the substantive law involved in *Lujan*.[17] Part III summarizes the facts of *Lujan* and reviews the majority and dissenting opinions of that decision.[18] Finally, Part IV of this Note discusses the possible legal ramifications that the *Lujan* decision will have in determining whether a plaintiff has standing for judicial review, particularly for bringing an environmental action.[19]

I. LEGAL BACKGROUND TO STANDING

A. Justiciability Doctrines

The power of federal courts to hear and review cases is limited by the various justiciability doctrines which include ripeness, mootness, political question, and standing.[20] These doctrines serve several purposes.[21] First, because the justiciability requirement limits the power of the judiciary in reviewing legislative and executive actions, the doctrines implement the constitutional requirement of separation of powers by confining the scope of judicial review.[22] Second, the doctrines conserve judicial resources by allowing the courts to dismiss cases which do not meet the justiciability criteria.[23] The justiciability doctrines are also intended to limit cases before the court to those in which adverse litigants with a stake in the outcome of the litigation are presenting a concrete controversy, appropriate for judicial review.[24] Finally, the justiciability doctrines are designed to promote fairness,

16. *See infra* notes 20-139 and accompanying text.
17. *See infra* notes 140-152 and accompanying text.
18. *See infra* notes 153-233 and accompanying text.
19. *See infra* notes 234-272 and accompanying text.
20. Flast v. Cohen, 392 U.S. 83, 94-97 (1968).
21. *See generally* E. CHEMERINSKY, FEDERAL JURISDICTION, 37-145 (1989).
22. *Id.* at 39.
23. *Id.* As an example, mootness conserves judicial resources by allowing courts to dismiss a case where there is no longer a live controversy. *Id.*
24. *Id.* at 40.

particularly in cases where judicial review of a matter results in the adjudication of the rights of someone who is not a party to the lawsuit.[25]

B. Constitutional Requirements for Standing

Article III of the United States Constitution limits the federal judicial power to cases or controversies arising under the Constitution and the laws and treaties of the United States.[26] The Supreme Court has interpreted the case-or-controversy requirement to mean that a plaintiff can only invoke the jurisdiction of a federal court when the plaintiff has standing to bring the action.[27] Standing addresses the question of whether a specific person is the proper party to bring a particular matter before the court for adjudication.[28] The standing requirement insures that the adjudication is necessary and there is a concrete dispute between the parties so that the issue is vigorously litigated.[29] If adjudication of the issue is unnecessary, the result is an advisory opinion which is prohibited by article III.[30] If the plaintiff's standing is at issue, a federal court may not exercise its power to decide the case on the merits unless the plaintiff alleges facts sufficient to show the existence of personal stake in the results of the litigation.[31]

The test for determining whether a plaintiff meets the minimum constitutional requirements for standing was articulated by the Supreme Court in *Valley Forge Christian College v. Americans United for Separation of Church and State.*[32] *Valley Forge* identifies three minimum requirements of Constitutional standing which the plaintiff must allege as a minimum to obtain judicial

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25. *Id.*
26. U.S. CONST. art. III, § 2, cl. 1.
27. Warth v. Seldin, 422 U.S. 490, 498-99 (1975).
28. Allen v. Wright, 468 U.S. 737, 752 (1983).
29. Singleton v. Wulff, 428 U.S. 106, 113-14 (1976).
30. Flast v. Cohen, 392 U.S. 83, 96-97 (1968).
31. Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 37 (1976).
32. 454 U.S. 464 (1982).

review.[33] A plaintiff must allege that the plaintiff has either suffered or is imminently threatened with suffering an injury, which is referred to as the injury-in-fact requirement.[34] In addition, the injury suffered must be traceable to the conduct of the defendant and a favorable decision by the court must redress the plaintiff's injury.[35]

1. Injury-in-Fact

The injury-in-fact analysis requires the plaintiff to demonstrate an actual or threatened injury from the action being challenged.[36] An injury-in-fact exists when the injury or threat of injury is real and immediate rather than based upon conjecture or hypothesis.[37] The most indisputable type of injury constituting an injury-in-fact is where the plaintiff has suffered an economic loss or personal injury as the result of a breach of contract or tort.[38] The problem of ascertaining whether there has been a cognizable injury sufficient for standing increases in complexity as the injury becomes more abstract.[39] An abstract injury is one which is so broad and general that it affects the whole public as opposed to being a distinct and palpable injury to a limited class of plaintiffs.[40]

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33. *Id.* at 472. The Court expressed the test as follows:

> [A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," . . . and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision."

Id. (quoting Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979) and Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38, 41 (1976)).

34. *Valley Forge*, 454 U.S. at 472.

35. *Id.*

36. *Id. See generally* K. Wardzinski, *The Doctrine of Standing: Barriers to Judicial Review in the D.C. Circuit*, NAT. RESOURCES & ENV'T, 7 (Fall 1990) (discussing the constitutional standing analysis).

37. City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983).

38. WARDZINSKI, *supra* note 36, at 7.

39. DAVIS, *supra* note 7, at 240.

40. DAVIS, *supra* note 7, at 245. Professor Davis gives several examples of abstract injury which provide no basis for standing, such as challenging the waging of the Vietnam War, failure of the government to control inflation, or the Senate's failure to ratify a nuclear arms treaty. *Id.*

The magnitude of the injury is not determinative of whether it constitutes an injury-in-fact sufficient for standing.[41] The Court uses the injury requirement as a bright line test for standing.[42] The Court will not analyze various gradations of injury to determine whether the harm alleged by the plaintiff is substantial enough to establish injury-in-fact, but rather draws a line between injury and no injury.[43]

In *Sierra Club v. Morton*,[44] the Court rejected the idea that a plaintiff has standing for judicial review based merely upon the plaintiff's interest in the subject matter of the litigation without the plaintiff being among the injured.[45] However, the Court recognized in *Sierra Club* that the meaning of injury-in-fact includes harm to aesthetic well being.[46] The plaintiff organization in *Sierra Club* sued the United States Forest Service regarding its approval of a proposal to construct a private recreational area in the Sequoia National Forest.[47] The Sierra Club argued that its longstanding concern in environmental matters was sufficient for the court to confer standing, and therefore it was not necessary for the organization itself, or any of its members, to allege a specific injury.[48]

While acknowledging that its earlier opinions had broadened the meaning of injury to include widely shared noneconomic harm,[49] the Court in *Sierra Club* stiffly refused to discard the requirement that the party seeking judicial review must have suffered an actual injury.[50] The injury-in-fact test, wrote the Court, is only met when there is harm to a cognizable interest and the party seeking judicial review is among those injured.[51] If no

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41. *Id.* at 240-41.
42. *Id.* at 241.
43. *Id.*
44. 405 U.S. 727 (1972).
45. *Id.* at 734-35.
46. *Id.* at 734.
47. *Id.* at 729-30.
48. *Id.* at 735-36.
49. *See, e.g.*, Data Processing Service v. Camp, 397 U.S. 150, 154 (1969) ("[S]tanding may stem from . . . [noneconomic values] . . . as well as from . . . economic injury.").
50. *Sierra Club*, 405 U.S. at 738.
51. *Id.* at 734-35.

injury were required, judicial review would be available to any organization or individual interested in promoting their own values through the judicial process.[52] Therefore, despite the Sierra Club's history of commitment and interest in the subject matter of the controversy, the Court recognized the injury-in-fact requirement as a bright line test which must be met to establish standing.[53]

One year later, in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP),*[54] the Court held that a plaintiff has standing to bring an action where the plaintiff's alleged injury is to aesthetic and recreational interests.[55] The plaintiffs alleged that a surcharge on interstate railroad freight shipments would discourage the use of recycled materials and thereby inflict aesthetic and recreational harm on them because the local mountains, forests, rivers and streams used by the members for recreational purposes would be adversely affected by expanded resource extraction and by littering.[56]

The *SCRAP* decision probably represents the highwater mark for liberality by the Court in finding standing.[57] The Court assessed the causal link between the complained of act and the alleged injury as not far removed from "an ingenious academic

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52. *Id.* at 740.

53. *Id.* at 740-41. In the book, THE BRETHREN, the authors quote Justice White, before joining the majority, as saying, "Why didn't the Sierra Club have one goddamn member walk through the park and then there would have been standing to sue?" B. WOODWARD & S. ARMSTRONG, THE BRETHREN 192 (1981).

54. 412 U.S. 669 (1973).

55. *Id.* at 690. Various environmental groups brought the action, including Students Challenging Regulatory Agency Procedures (SCRAP) and the Environmental Defense Fund. SCRAP described itself in its amended complaint as "an unincorporated association formed by five law students. . . . Its primary purpose is to enhance the quality of the human environment for its members, and for all citizens." *Id.* at 678.

56. *Id.* at 678. The complaint alleged that each of the SCRAP members used "the forests, rivers, streams, mountains and other natural resources surrounding the Washington metropolitan area and at his legal residence, for camping, hiking, fishing, sightseeing, and other recreational [and] aesthetic purposes." *Id.* The plaintiffs also alleged economic harm from an increase in prices for finished products. *Id.* The Court stated in a footnote that because the environmental interest the plaintiffs were seeking to protect was within the interests to be protected by the National Environmental Protection Act, they had standing under § 10 of the Administrative Procedure Act and it was therefore unnecessary to consider whether the plaintiffs' allegations of economic harm were sufficient to confer standing. *Id.* at 686, n.13.

57. DAVIS, *supra* note 7, at 322.

exercise in the conceivable."[58] Nonetheless, as alleged in the pleadings, the potential impact of environmental damage to the plaintiffs' recreational and aesthetic interests was sufficiently specific and perceptible for the plaintiffs to obtain judicial review.[59] As further evidence of its willingness to open the courthouse doors to environmental plaintiffs, the *SCRAP* Court expressly acknowledged that the harm necessary for a court to find sufficient injury-in-fact might be an "identifiable trifle."[60]

2. *Traceability and Redressability - The Causation Elements*

Even where the plaintiff shows injury-in-fact, a court cannot find that a plaintiff has standing to bring the action unless the injury is traceable to the conduct of the defendant and a favorable decision by the court will result in the harm being redressed.[61] Until recently, traceability and redressability were analyzed by the Court as a single causation component.[62] Traceability requires that the line of causation between the alleged illegal conduct and the plaintiff's injury not be too attenuated for the court to grant review.[63] The redressability question examines whether it is too speculative that a favorable ruling from the court will result in

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58. *SCRAP* at 688. The Court suggested that the defendants should have moved for summary judgment on the standing issue if the plaintiffs' allegations of the causal links were untrue. *Id.* at 689.

59. *Id.* at 689-90.

60. *Id.* at 689, n.14 (quoting K.C. Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 613).

61. Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982).

62. Allen v. Wright, 468 U.S. 737, 753, n.19 (1984). That footnote says in part:

> The "fairly traceable" and "redressability" components of the constitutional standing inquiry were initially articulated by this Court as "two facets of a single causation requirement.". . . To the extent there is a difference, it is that the former examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas the latter examines the causal connection between the alleged injury and the judicial relief requested.

Id. The question regarding whether traceability and redressability are separate independent elements or "facets" of causation perhaps arose from Warth v. Seldin, 422 U.S. 490 (1975), where the Court referred to the requirement that the plaintiffs show that "the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm." *Warth*, 422 U.S. at 505.

63. *Allen*, 468 U.S. at 751-52.

relieving the plaintiff's injury.[64] As with injury-in-fact, the traceability and redressability requirements prevent federal courts from issuing advisory opinions.[65] Thus, a plaintiff who is clearly injured can be denied standing for judicial review if he fails to allege that the defendant caused his injury or fails to allege that a favorable decision by the court will provide a remedy for his injury.[66]

Simon v. Eastern Kentucky Welfare Rights Organization[67] illustrates that a complaint which fails to specifically indicate how the alleged injury was caused by the defendants' actions is vulnerable to a motion to dismiss.[68] The plaintiffs were a group of low income individuals who brought suit against the Secretary of the Treasury and the Commissioner of the Internal Revenue Service.[69] The plaintiffs alleged that by granting favorable tax

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64. *Id.* at 752. Redressability in environmental cases has been found if the defendant is capable of paying civil penalties. Sierra Club v. Simkins, Inc., 847 F.2d 1109, 1113 (4th Cir. 1988). In *Simkins*, a suit brought pursuant to the Citizen Suit Provision of the Clean Water Act, 33 U.S.C. 1365, the Fourth Circuit Court of Appeals concluded that the imposition of civil penalties, payable to the United States Treasury, sufficiently redressed the private plaintiff's harm from the defendant's wrongful act of failing to submit monitoring reports to a federal agency. *Id.* "[T]he judicial relief of civil penalties, even if payable only to the United States Treasury, is causally connected to a citizen-plaintiff's injury. Such penalties can be an important deterrence against future violations." *Id.* Under this view, the third prong of standing under *Valley Forge*, redressability, presumably will always be met in actions under the Clean Water Act if the defendant is capable of paying civil penalties.

65. CHEMERINSKY, *supra* note 21, at 66.

66. *Allen*, 468 U.S. at 751.

67. 426 U.S. 26 (1976).

68. *Simon*, 426 U.S. at 41, 46. Other notable examples of application of the causation requirement are *Linda R.S. v. Richard D.*, 410 U.S. 614 (1972), and *Warth v. Seldin*, 422 U.S. 490 (1975). In *Linda R.S.*, the mother of an illegitimate child, representing a class of such plaintiffs, challenged a Texas statute which imposed criminal sanctions for a marital father's failure to make child support payments but which did not impose such a penalty when the child had been born out of wedlock. *Linda R.S.*, 410 U.S. at 614-16. The Court concluded that the class of mothers had no standing because their injury, nonsupport for their children, was not the direct result of a failure to prosecute. *Id.* at 618-19. The Court also found that the requested relief would only result in the jailing of the father and would not serve to redress the injury. *Id.* at 618. In *Warth*, the Court denied standing to a group of low-income minority plaintiffs who were seeking to reside in a suburb which had enacted zoning ordinances claimed to be unconstitutional by the plaintiffs. *Warth*, 422 U.S. at 507-08. The Court denied standing on the basis of plaintiffs' failure to show causation because the plaintiffs didn't show that, but for the zoning ordinances, low cost housing would be built which the plaintiffs could afford to purchase. *Id.* at 506-07. Professor Chemerinsky states that *Linda R.S.*, *Warth* and *Simon* "illustrate that the causation-redressability standing requirement is a powerful barrier to federal court review." CHEMERINSKY, *supra* note 21, at 66.

69. *Simon*, 426 U.S. at 32-33.

treatment to hospitals which refused to offer full services to indigents, the defendants were encouraging those hospitals to deny services to the plaintiffs.[70] Although the plaintiffs alleged specific instances on which they had been denied hospital services because of their indigence, and thereby suffered injury, the Court denied the plaintiffs standing because no hospital had been named as a defendant.[71] The Court found the connection between the action challenged by the plaintiffs, the adoption of the revenue ruling, and the plaintiffs' physical injuries to be too attenuated.[72] It was purely speculative, said the Court, whether the plaintiffs' injury was the result of the defendants' act or of an independent action of a third party not before the court.[73]

The Court also found that it was unclear whether the relief requested by the plaintiffs would redress the alleged injury.[74] The plaintiffs sought declaratory judgments that the Secretary of the Treasury and the Commissioner of the Internal Revenue Service had violated the Internal Revenue Code and that a hospital's charitable tax treatment required that the hospital provide full services to persons unable to pay.[75] However, hospitals could elect to not provide services to indigents and thereby reject the favorable tax treatment in order to avoid the undetermined financial drain of providing uncompensated services.[76] In that event, the declaratory judgments sought by the plaintiffs would fail to redress their injury of being denied full medical services at the hospitals.[77] The Court, therefore, held that the plaintiffs did not have standing for judicial review because even though the plaintiffs had alleged injury-in-fact,

70. *Id.* at 33.
71. *Id.* at 41.
72. *Id.* at 40-41.
73. *Id.* at 42-43.
74. *Id.* at 43.
75. *Id.* at 34 n.10.
76. *Id.* at 43.
77. *Id.*

they had failed to establish the other elements of constitutional standing--traceability and redressability.[78]

While the requirements of showing injury-in-fact, traceability, and redressability must be met for a court to confer standing, the court does not have to confer standing if the three elements are established. A federal court may also impose certain nonconstitutional barriers to judicial review based upon reasons of prudence.[79]

C. *Prudential Requirements*

In addition to the three constitutional standing elements expressed in *Valley Forge*, the Court has articulated "prudential" limitations to its exercise of jurisdiction.[80] The Court, in *Allen v. Wright*, identified three additional limitations to the exercise of jurisdiction, which it collectively labeled the prudential component.[81] First, federal courts may not adjudicate a case where a plaintiff is raising the rights of a third party.[82] Second, a plaintiff will be denied standing if he is raising a generalized grievance universally shared by the public, since the political

78. *Id.* at 46. The plaintiffs cited *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), as support for their standing to bring this action. *Simon*, 426 U.S. at 45, n.25. The Court, in a footnote, distinguished *SCRAP* saying that even though that case involved an "attenuated line of causation," the plaintiffs had "nevertheless alleged a specific and perceptible harm" which was traceable to the questioned agency action. *Id.* "But in this case the complaint is insufficient even to survive a motion to dismiss, for it fails to allege an injury that fairly can be traced to petitioners' challenged action." *Id.*

79. CHEMERINSKY, *supra* note 21, at 71-72.

80. Allen v. Wright, 468 U.S. 737, 751 (1984).

81. *Id.*

82. *Id.* at 751. *But see* DAVIS, *supra* note 7, at 260-67. Professor Davis discusses 17 cases in which the Supreme Court found standing where a party was asserting the rights of another. *Id.* Four additional cases are referenced in which the Court has said that one may not assert the rights of others: *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474 (1982); *Gladstone v. Village of Bellwood*, 441 U.S. 91, 100 (1979); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263 (1977); and *Warth v. Seldin*, 422 U.S. 490, 509 (1975). DAVIS, *supra* note 7 at 260-67.

process is designed to address such problems.[83] Finally, the plaintiff will not have standing if his complaint falls outside of the protection, or the "zone of interests," of the law he is invoking.[84]

The purposes of the prudential requirements parallel the objectives of the constitutional standing requirements. The restriction against third party standing, also referred to as *jus tertii* standing, improves the quality of litigation because the third party, whose rights are being raised, is usually the best proponent of his rights.[85] The barrier against parties asserting a generalized grievance is founded upon the grounds of separation of powers.[86] Limiting the role of the judiciary to preventing and remedying specific injuries prevents encroachment into the political branches of the government.[87] The zone of interests standard requires that those who claim standing by invoking the protection of a statute should be the ones the legislature intended to protect by its enactment.[88]

The prudential standing requirements have the effect of barring judicial review in cases where the requirements for constitutional standing have otherwise been met.[89] However, Congress may grant express rights of action by statute which enable parties to overcome any of the prudential standing requirements so that the

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83. *Allen*, 468 U.S. at 751. *See also* CHEMERINSKY, *supra* note 21 at 78. The author describes a generalized grievance as one where plaintiffs sue solely as concerned citizens to compel the government to follow the law or as taxpayers desiring to restrain allegedly illegal governmental expenditures. *Id.* The existence of a generalized grievance is not determined from the number of people affected by the challenged action. *Id.*

84. *Allen*, 468 U.S. at 751. The "zone of interests" requirement was first articulated by the Supreme Court in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). The Court found in that case that a person seeking agency review under the Administrative Procedure Act had standing if he had suffered an injury and "the zone of interests to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 153. *See generally*, DAVIS, *supra* note 7, at 273-80 (criticism of the test for, among other reasons, being applied inconsistently by the Court and for lacking clarity).

85. CHEMERINSKY, *supra* note 21, at 72.

86. *Id.* at 83.

87. *Id.*

88. *Id.* at 86.

89. Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 475 (1982).

plaintiff need only meet the requirements of constitutional standing to bring the action.[90]

A different issue is whether Congress may declare the existence of an injury by statute which was not legally cognizable prior to the statutory enactment.[91] For example, in the context of *Sierra Club v. Morton*, could Congress, without violating the injury-in-fact requirement of article III, enact a statute which declares that the Sierra Club suffers an injury-in-fact whenever there is harm to the environment?[92] The Court has not given a clear answer to this question.[93]

D. Legislative Provisions for Standing

Congress has provided two general means of conferring standing through statutes.[94] First is a general provision for standing contained within the Administrative Procedure Act

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90. Warth v. Seldin, 422 U.S. 490, 501 (1975).

91. *See, e.g.*, Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 212 (1972) (White, J., concurring) (plaintiff's constitutional standing was extended by the Civil Rights Act of 1968).

92. *See supra* notes 44-53 and accompanying text (discussing the Sierra Club's argument for standing in *Sierra Club v. Morton*, 405 U.S. 727 (1972)).

93. Discussion of this issue is beyond the scope of this Note. *See generally* P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 135 (3rd. ed. 1988). After acknowledging that Congress may presumably confer standing by legislation where it would otherwise be barred by prudential standing limitations, the authors state: "The problem is thornier if Congress purports to confer standing in a case in which, absent such legislation, the Court would find no injury under article III. The Court's discussion of this question has not been a model of clarity." *Id. Compare* Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973) ("Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.") *and* Warth v. Seldin, 422 U.S. 490, 500-01 (1975) ("The actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'") *with* Havens Realty Corp. v. Coleman, 455 U.S. 363, 372 (1982) ("[T]he sole requirement for standing to sue under [the Act] is the Art. III minima of injury in fact: that the plaintiff allege that as a result of the defendant's actions he has suffered a 'distinct and palpable injury.'"). For an argument that the plaintiff need not show a "distinct and palpable injury" when standing has been granted by statute, see G. Nichol, *Rethinking Standing*, 72 CAL. L. REV. 68, 84-85 (1984).

94. Statutory standing has been said to be but one of three sources of legal cognizable interests, harm to which may qualify as injury for judicial review. NICHOL, *supra* note 93 at 83. The other two sources are constitutional guarantees against the injury and injuries which are protected against by the common law. For an argument that the injury-in-fact requirement should only apply to the last of these sources as opposed to operating as an overriding standing requirement see NICHOL, *supra* note 93, at 83.

[hereinafter APA] where a plaintiff who meets the requirements of the statute may challenge the actions of an agency of the federal government.[95] The APA provides a means of circumventing the sovereign immunity limitations against suing the federal government.[96]

The second type of statutory standing is where a statute contains within its provisions an express right of action to enforce the substantive portions of the statute. These types of provisions are generally broader than the APA standing provisions in that they provide standing for judicial review of not only the actions of the agency responsible for enforcement of the statute but also for parties to act as private attorney generals[97] to sue private violators of the acts.[98] For example, environmental statutes commonly provide for private citizens to sue both governmental agencies and private parties to enforce compliance with the statutes.[99] The intent of the citizen suit provisions is to empower private citizens to enforce the statutory rights of the community at large, where in the past only the government itself had standing to bring the actions.[100]

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95. Section 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702 (1989). The APA, in another section, authorizes judicial review of agency action except in cases where the pertinent statute precludes such review. 5 U.S.C. § 701(a) (1989).

96. *See* CHEMERINSKY, *supra* note 21, at 473. *See also* Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970) (sovereign immunity has no application in cases where the Administrative Procedure Act is applicable).

97. The concept of "private attorney general" allows a private party plaintiff to pursue an action on behalf of the public if the plaintiff is advancing policies inherent in public interest legislation. BLACK'S LAW DICTIONARY, 129 (6th. ed. 1990).

98. *See infra* notes 109-125 and accompanying text (discussing private enforcement of environmental statutes). Although a citizen may bring a suit acting as a private attorney general, the injury requirement still exists. In *Middlesex Cty. Sewerage Auth. v. Sea Clammers*, 453 U.S. 1 (1981), the Court stated that "[i]t is clear that the citizen-suit provisions apply only to persons who can claim some sort of injury .... [t]his broad category of potential plaintiffs necessarily includes ... plaintiffs seeking to enforce these statutes as private attorneys general, whose injuries are 'noneconomic.'" *Id.* at 16-17.

99. *See infra* notes 109-125 and accompanying text (discussing the various environmental statutes containing provisions for citizen-suit enforcement).

100. J. MILLER, CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS, 1 (1987) (detailing the history and intent of environmental citizen suit provisions).

1. Standing to Challenge Agency Action

The Administrative Procedure Act, section 10(a), 5 U.S.C. section 702, [hereinafter section 702] provides that "[a] person suffering legal wrong because of agency action,[101] or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[102] The section incorporates the requirement that the plaintiff allege facts sufficient to show the existence of the three constitutional standing elements of injury-in-fact, traceability, and redressability.[103] In addition, the Court has interpreted section 702 to require that the prudential zone of interests test be met as well.[104] The requirement that the injury be within the "zone of interests" of a statute is implicitly codified within section 702 by requiring that the "adverse effect" or "aggrievement" suffered by the plaintiff be "within the meaning of a relevant statute," i.e., be the interests the legislature intended to protect in enacting the statute.[105] This

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101. A reviewable agency action under § 702 is the issuance or denial of any rule, order, license or an equivalent action by an agency of the federal government. 5 U.S.C. § 551(13) (1989).

102. 5 U.S.C. § 702 (1989). Professor Davis says in his treatise that the crucial question about § 702 is "whether the words 'within the meaning of a relevant statute' modify only the words 'aggrieved by agency action' or whether they also modify the words 'adversely affected.'" DAVIS, *supra* note 7, at 216-17 (quoting 5 U.S.C. § 702 (1989)). He cites the legislative history of the section and statements by the Senate and House Committees to interpret the statute to more accurately read "'any person affected in fact by agency action' is entitled to review, and that 'any person . . . aggrieved within the meaning of any statute' is entitled to review." *Id.*

103. *See supra* notes 36-79 and accompanying text (discussing the constitutional elements of standing). The Court has said that the "injury-in-fact" constitutional requirement is incorporated within the statutory requirement of § 702 that a party be "adversely affected" or "aggrieved" in order for a federal court to recognize standing in cases challenging the actions of federal agencies. United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 689, n.14 (1973). In *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976), the Court said that the constitutional standing requirement under § 710 was that the plaintiff make allegations, which, if true, would establish that the plaintiff had been injured in fact *by the action* he sought to have reviewed, which therefore establishes the causation requirement. *Id.* at 38-39. At the time of *Simon*, both traceability and redressability were treated as a single causation component and the Court hadn't clarified that traceability and redressability were separate independent elements. *See* CHEMERINSKY, *supra* note 21, at 64.

104. Data Processing Service v. Camp, 397 U.S. 150, 153 (1969).

105. *Id. See generally* DAVIS, *supra* note 7, at 214-19 (discussing whether the phrase "adversely affected" is qualified by the later words in the statute of "within the meaning of a relevant statute."). Davis contends that the APA should be construed to extend standing to any person suffering "injury in fact" as a result of agency action on the grounds that they are "adversely

element is established when the party invoking the protection of a statute shows that the legislature intended for that party to be included among those protected by the statute.[106]

Section 702 was enacted in 1946, and the first provision for citizen suits within an environmental statute was within the Clean Air Act Amendments of 1970.[107] Therefore, prior to 1970, section 702 was the only means of gaining access to federal courts by citizens challenging agency action regarding environmental issues. Even with the advent of citizen suit provisions, section 702 continues to be widely used because many of the substantive statutes alleged to be violated by the governmental agency contain no citizen suit provisions.[108]

2. *Standing to Enforce Environmental Acts*

Twelve of the major environmental acts contain provisions for citizen suit[109] enforcement.[110] The Clean Air Act amendments of 1970 introduced the citizen suit as an enforcement mechanism

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affected" within the meaning of the statute. *Id* at 219.

106. CHEMERINSKY, *supra* note 21, at 86.

107. Section 304 of the Act, 42 U.S.C. § 7604. *See generally* J. MILLER, *supra* note 100, at 3-6 (providing history of citizen suits in environmental statutes).

108. *See, e.g.*, Lujan v. Nat'l Wildlife Federation, 110 S. Ct. 3177, 3182 (1990) (alleging violations of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1783 (1982), the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (1982), and the Administrative Procedure Act, 5 U.S.C. § 706 (1982)); United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 679 (1973) (alleging violations of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332); and Sierra Club v. Morton, 405 U.S. 727, 730 (1972) (alleging violations of 16 U.S.C. §§ 1, 41, 43, 45c, & 497).

109. Provisions for citizen suits within congressional acts empower citizens, who have an interest which has been adversely affected, to obtain federal judicial review to enforce the substantive portions of the act. J. MILLER, *supra* note 100, at 4. The involvement of the citizenry supplements the government's enforcement resources and also induces the government to act. *Id.*

110. Toxic Substances Control Act § 20, 15 U.S.C. § 2619 (1988); Endangered Species Act § 11(g), 16 U.S.C. § 1540(g) (1988); Surface Mining Control and Reclamation Act § 520, 30 U.S.C. § 1270 (1988); Clean Water Act § 505, 33 U.S.C. § 1365 (1988); Marine Protection, Research, and Sanctuaries Act § 105(g), 33 U.S.C. § 1415(g) (1988); Deepwater Ports Act § 16, 33 U.S.C. § 1515 (1988); Safe Drinking Water Act § 1449, 42 U.S.C. § 300j-8 (1982 & Supp. V 1987); Noise Control Act § 12, 42 U.S.C. 4911 (1988); Resource Conservation and Recovery Act § 7002, 42 U.S.C. § 6972 (1988); Clean Air Act § 304, 42 U.S.C. § 7604 (1988); Comprehensive Environmental Response Compensation and Liability Act § 310, 42 U.S.C. 9659 (1988); and Outer Continental Shelf Lands Act § 23, 43 U.S.C. § 1349(a) (1988).

with the inclusion of section 304.[111] Afterwards, citizen suit provisions were routinely included in new federal environmental statutes and in the major amendments of existing statutes.[112] The purpose of these provisions was to provide a private alternative to government enforcement of environmental legislation.[113]

The citizen-suit provisions are very similar and are modeled after section 304 of the Clean Air Act.[114] Each provides that "any person"[115] may initiate a suit to enforce compliance with the particular act or to require the government to perform a duty mandated by the act.[116] The provisions allow citizens to bring these suits where in the past only the government could enforce the statutes.[117] The citizen suit provisions also allow citizens to sue the administrator of an agency for the administrator's failure to perform discretionary duties under an Act, and in this sense the provisions for citizen suits operate in the same manner as section

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111. J. MILLER, *supra* note 100, at 4.

112. *Id.* at 5-6.

113. *Id.* at 4.

114. *Id.* at 7.

115. Section 505 of the Clean Water Act, 33 U.S.C. § 1365(a) (1988), refers to "citizen" instead of "person." However, § 505(g) defines citizen as "a person or persons having an interest which is or may be adversely affected." *Id.* Section 505 was adopted by Congress on October 18, 1972, almost exactly six months after the Supreme Court decision in *Sierra Club v. Morton*, 405 U.S. 727 (1972). An existing House bill, H.R. 11896, was drafted prior to release of the *Sierra Club* opinion and severely restricted the citizen suit provision by limiting "the right to bring actions to persons directly affected by a violation of the proposed Act or to groups who have participated in the administrative proceedings of a case." S. Conf. Rep. No. 1236, 92nd Cong., 2d Sess. 146 (1972), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 3776, 3823, *and in* 1 Senate Comm. on Public Works, 93d Cong., 1st Sess., *A Legislative History of the Water Pollution Control Act Amendments of 1972*, at 281, 329 (1973) [hereinafter Legislative History]. However, this restrictive language was abandoned in favor of language which defined a citizen as "a person or persons having an interest which is or may be adversely affected." Legislative History, *supra*, at 249-50. This language was based upon § 10(a) of the APA, 5 U.S.C. § 702. The conferees expressly stated that the interpretation given to § 702 by the Court in *Sierra Club* was also that to be given to the standing provision of § 505 of the Clean Water Act. Legislative History, *supra*, at 249-50. It is not clear that the citizen suit provisions of the other environmental statutes should be governed by *Sierra Club*, because Congress made no reference to the *Sierra Club* standard when the other statutes were enacted. J. MILLER, *supra* note 100, at 23.

116. J. MILLER, *supra* note 100, at 7.

117. *Id.* at 3-4.

702.[118] These sections confer jurisdiction on federal district courts to adjudicate the citizen suits without regard to diversity of citizenship or amount in controversy.[119] However, the plaintiffs still must have constitutional standing to bring the action and, at a minimum, must show the three required elements of *Valley Forge*: injury-in-fact, traceability, and redressability.[120] There are several advantages to bringing a suit pursuant to a specific citizen action provision as opposed to section 702. Some of the more contemporary provisions have been interpreted to confer standing to the limit of the Constitution,[121] whereas section 702 imposes the additional prudential "zone of interests" requirement.[122] In addition, some of the statutes provide for an award of attorney fees.[123]

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118. *See* § 505(a)(1) of the Clean Water Act, 33 U.S.C. § 1365(a)(1) (1988) (allowing direct citizen actions against violators of the Act) and § 505(a)(2) of the Act, 33 U.S.C. § 1365(a)(2) (1988) (allowing citizens to sue the Administrator of the Environmental Protection Agency for failing to perform his nondiscretionary duties under the Act).

119. MILLER, *supra* note 100, at 7.

120. *See, e.g.*, Student Pub. Int. Res. Group v. P.D. Oil & Chemical, 913 F.2d 64, 70 (3d Cir. 1990) (court applied only the *Valley Forge* test, 454 U.S. 464, 472 (1982), to confer standing on citizen group bringing suit pursuant to citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365); Defenders of Wildlife v. Hodel, 851 F.2d 1035, 1039 (8th Cir. 1988) (in suit brought pursuant to the citizen suit provision of the Endangered Species Act, 16 U.S.C. § 1540(g), the court held that the plaintiffs need only establish the constitutional requirements for standing summarized in *Valley Forge*); Sierra Club v. Simpkins, Inc., 847 F.2d 1109, 1113 (4th Cir. 1988) (court stated, in analyzing standing of citizen group bringing citizen suit under the Clean Water Act, "[o]f course, Congress' provision for citizen suits does not, in itself, establish article III standing . . ." and proceeded to analyze standing only under *Valley Forge* elements).

121. *See, e.g.*, Student Pub. Int. Res. Group v. P.D. Oil & Chem., 913 F.2d 64, 70 n.3 (reviewing whether an environmental organization had standing to bring a suit pursuant to § 505 of the Clean Water Act, 33 U.S.C. § 1365(a)). The court said: "In addition to constitutional considerations, there are prudential limitations that may lead a court to deny standing. In this case, we need not consider such prudential limitations since the Act explicitly confers standing to the limits of the constitution." *Id.* The court went on to evaluate standing under the three elements of *Valley Forge*. *Id.*

122. Data Processing Service v. Camp, 397 U.S. 150, 153 (1969).

123. Toxic Substances Control Act § 20, 15 U.S.C. § 2619(c) (1988); Endangered Species Act § 11(g), 16 U.S.C. § 1540(g) (1988); Surface Mining Control and Reclamation Act § 520, 30 U.S.C. § 1270(f) (1988); Clean Water Act § 505, 33 U.S.C. § 1365(d) (1988); Marine Protection, Research, and Sanctuaries Act § 105(g), 33 U.S.C. § 1415(g)(4) (1988); Deepwater Ports Act § 16, 33 U.S.C. § 1515(d) (1988); Safe Drinking Water Act § 1449, 42 U.S.C. § 300j-8 (d) (1982 & Supp. V 1987); Noise Control Act § 12, 42 U.S.C. § 4911(d) (1988); Resource Conservation and Recovery Act § 7002, 42 U.S.C. § 6972(e) (1988); Clean Air Act § 304, 42 U.S.C. § 7604(b) (1988); Comprehensive Environmental Response Compensation and Liability Act § 310, 42 U.S.C. § 9659(f) (1988); and

Each of the provisions for citizen suits under the environmental statutes imposes certain procedural requirements for the filing of such actions. Most require that prior to commencing an action against a violator of an environmental statute, the private citizen must give 60 days notice to the agency, the state in which the alleged violation occurs, and to the alleged violator.[124] A citizen may not sue under most of the statutes if the government has commenced and is prosecuting a violator of the act.[125] In addition to these procedural requirements for filing an action under a citizen-suit provision of an environmental statute, the procedural setting of any case where standing is at issue can be determinative of the outcome upon appeal.

E. Procedural Considerations of Standing

If a plaintiff lacks constitutional standing, a federal court does not have jurisdiction to review the action.[126] If there is a question of the plaintiff's standing upon the face of the complaint, the defendant may move to dismiss the complaint pursuant to Federal Rule of Civil Procedure [hereinafter Fed. R. Civ. P.] 12(b)(1) or 12(b)(6).[127] If the defendant fails to raise the standing defense,

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Outer Continental Shelf Lands Act § 23, 43 U.S.C. § 1349(a) (1988).

124. Toxic Substances Control Act § 20, 15 U.S.C. § 2619(b) (1988); Endangered Species Act § 11(g), 16 U.S.C. § 1540(g) (1988); Surface Mining Control and Reclamation Act § 520, 30 U.S.C. § 1270(b) (1988); Clean Water Act § 505, 33 U.S.C. § 1365(b) (1988); Marine Protection, Research, and Sanctuaries Act § 105(g), 33 U.S.C. § 1415(g) (1988); Deepwater Ports Act § 16, 33 U.S.C. § 1515(b) (1988); Safe Drinking Water Act § 1449, 42 U.S.C. § 300j-8 (b) (1982 & Supp. V 1987); Noise Control Act § 12, 42 U.S.C. § 4911(b) (1988); Resource Conservation and Recovery Act § 7002, 42 U.S.C. § 6972(b) (1988); Clean Air Act § 304, 42 U.S.C. § 7604(b) (1988); Comprehensive Environmental Response Compensation and Liability Act § 310, 42 U.S.C. § 9659(d) (1988); and Outer Continental Shelf Lands Act § 23, 43 U.S.C. § 1349(a) (1988).

125. *See supra* note 124 (listing the applicable statutes).

126. United States v. Storer Broadcasting Co., 351 U.S. 192, 197 (1956). *But see* DAVIS, *supra* note 7, at 294-98 (arguing that in numerous cases the Court has assumed standing to reach the merits rather than deciding standing first to establish jurisdiction).

127. *See* Fed. R. Civ. P. 12(b)(1) and 12(b)(6) (providing that defenses of "lack of jurisdiction over the subject matter" and "failure to state a claim upon which relief can be granted" may be made by motion in response to the complaint).

the court may do so on its own motion at any time.[128] If the court concludes that the plaintiff lacks standing, the court must dismiss the action.[129] In making its decision on a motion to dismiss, the court is to accept all of the material allegations of the complaint as being true and construe the complaint in favor of the party seeking standing.[130]

In the event that the complaint's allegations of standing are sufficient to withstand a motion to dismiss, the defendant may move for summary judgement pursuant to Fed. R. Civ. P. 56 on the grounds that there is no dispute as to material fact and that the defendant is entitled to judgment as a matter of law.[131] When a motion for summary judgment is made for lack of standing, the party adverse to the motion must not rest upon the allegations of the complaint, as with a motion to dismiss, but must set forth specific facts that show a genuine issue of fact as to the plaintiff's standing.[132]

Another procedural issue is whether an organization may represent its members in a lawsuit and thereby constitute an exception to the prudential limitation on third party standing.[133] The Supreme Court has held that an organization may sue for

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128. Fed. R. Civ. P. 12(h)(3) provides: "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." *Id.*

129. *Id.*

130. Warth v. Seldin, 422 U.S. 490, 501 (1975).

131. Fed. R. Civ. P. 56(c) provides in part:

> The judgement sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Id.

132. Fed. R. Civ. P. 56(e) provides in part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Id.

133. *See supra* notes 80-93 and accompanying text (discussing prudential standing requirements and third party standing).

injuries to either itself[134] or its members.[135] However, as stated by the Court in *Sierra Club v. Morton*, an organization's mere interest and concern in environmental issues is not sufficient to meet the injury requirement.[136] Instead, an organization must meet the three part test introduced in *Hunt v. Washington State Apple Advertising Commission*[137] in order to bring suit on behalf of its members.[138] An association has standing to represent its members when: (a) the members have standing to sue in their own right; (b) the interests it seeks to protect are germane to the purpose of the organization; and (c) neither the claim asserted nor the requested relief require the participation of the individual members.[139]

II. BACKGROUND TO THE FEDERAL LAND POLICY MANAGEMENT ACT

The primary issue of substantive law in *Lujan* was whether the Bureau of Land Management [hereinafter BLM], a subdivision of the Department of the Interior, was in violation of federal law in its administration of the Federal Land Policy Management Act [hereinafter FLPMA or the Act].[140] Congress passed FLPMA in 1976[141] in an effort to eliminate the confusion regarding management of public lands.[142] In general, FLPMA establishes

134. NAACP v. Button, 371 U.S. 415, 428 (1963).
135. NAACP v. Alabama, 357 U.S. 449, 460 (1958).
136. Sierra Club v. Morton, 405 U.S. 727, 735 (1972).
137. 432 U.S. 333 (1977).
138. *Id.* at 343.
139. *Id.*
140. Lujan v. Nat'l Wildlife Fed'n, 110 S. Ct. 3177, 3182 (1990).
141. 43 U.S.C. §§ 1701-1783 (1988).
142. *Lujan*, 110 S. Ct. at 3182. For much of the history of the United States, federal land policy was designed to dispose of rather than manage public lands. Brief for Petitioners at 2, *Lujan*, 110 S. Ct. 3177 (1990) (No. 89-640). Late in the nineteenth century and early in the twentieth century, United States citizens were empowered by Congress through various statutes to acquire title and rights in federally owned land. *Lujan*, 110 S. Ct. at 3182. However, Congress also empowered the President to remove public lands from the operation of the statutes and gave the President the right to withdraw public lands from settlement, sale or entry and reserve the lands for various public purposes. *Id.* In addition, the Secretary of the Interior was given authority to classify public lands as either suitable for disposal or for federal retention and management. *Id.* President Franklin Roosevelt

comprehensive rules for managing and preserving federal lands and provides for protection of land in the public domain from private ownership and development.[143] The Act repealed laws which governed the disposal of federal public lands, and established a policy of retaining such lands for multiple use management.[144] The Secretary of the Interior was directed by FLPMA to inventory all public lands and their natural resource potential and to initiate land use planning prior to any change in the use status of the lands.[145] The existing land classifications[146] were subject to the land use planning process and the Secretary was empowered to modify or terminate land classifications consistent with the developed land use plans.[147]

The Secretary was also authorized by FLPMA to "modify, extend or revoke" any land withdrawals,[148] issued by the Department of the Interior prior to the Act so that the land might

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withdrew all unreserved public land from disposal until the land could be classified. *Id.* Congress amended the Taylor Grazing Act in 1936 to authorize the Secretary of the Interior to review and classify land withdrawn by Roosevelt's orders and then to open up the lands so classified as to allow disposal of the land. *Id.* The land was not to be disposed of until classified and opened for entry. *Id.* Under the various laws, management of public lands became chaotic. *Id.* Determining which lands had been withdrawn and how much the withdrawals overlapped each other was difficult. *Id.* It was also difficult to determine the purposes of the withdrawals and what public purposes were allowed. *Id.* The Federal Land Policy Management Act was enacted by Congress as an attempt to resolve the chaos within the government's system of managing federal lands. *Id.* at 3182-83.

143. National Wildlife Fed'n v. Burford, 835 F.2d 305, 307 (D.C. Cir. 1987).

144. *Lujan*, 110 S. Ct. at 3183. Under FLPMA § 103(c), 43 U.S.C. § 1702(c) (1988), "multiple use management" means, inter alia, "the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people." *Id.*

145. 43 U.S.C. § 1702(c) (1988).

146. Land "classifications" is the name given to one of two major processes used by the Department of the Interior for establishing and implementing land use planning for vast amounts of federal lands. 43 U.S.C. § 315f (1988). The other name given to the processes is "withdrawals." *See infra* note 148 (defining "withdrawal"). The Department of the Interior uses the classification process to categorize lands for specific usage and to determine which of public lands administered by the Department of the Interior should be retained in federal ownership and which are suitable for disposal.

147. *Lujan*, 110 S. Ct. at 3183.

148. Land "withdrawals" is the second of two major processes the Department of the Interior uses for establishing and implementing land use planning of federal land. *See supra* note 146 (discussing land "classifications"). Withdrawals remove designated land otherwise in the public domain and thereby exempt it from the application of federal disposal laws. 43 U.S.C. § 1702(j) (1988).

either be sold or returned to multiple use management.[149] The Secretary was specifically directed by FLPMA to review the land withdrawals already in existence in eleven western states and to make recommendations to the President as to which lands should remain withdrawn from disposition, settlement or occupation.[150]

Pursuant to FLPMA, BLM began reviewing thousands of withdrawals and classifications affecting millions of acres of federal lands and altering the designations of the land as deemed necessary according to existing land use regulations.[151] By 1986, BLM had terminated classifications on approximately 160,000,000 acres of federal land and withdrawals had been revoked on some 19,000,000 acres.[152]

III. THE CASE

A. The Facts

In *Lujan v. National Wildlife Federation*,[153] the respondent, the National Wildlife Federation [hereinafter NWF], brought suit against the Department of the Interior, the Secretary of the Interior, and the Director of the BLM [hereinafter, collectively, Government] alleging that the defendants had violated FLPMA, the National Environmental Policy Act of 1969,[154] and APA section 10(e).[155] The NWF deemed the Government's administration of the FLPMA statutory requirements a single federal program which

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149. *Lujan*, 110 S. Ct. at 3183. Explicitly stated within FLPMA was a policy favoring the retention of public lands for multiple use management. FLPMA § 102(a)(1), 43 U.S.C. § 1701(a)(1) (1988).

150. *Lujan*, 110 S. Ct. at 3183.

151. Petition for Writ of Certiorari at 4, *Lujan*, 110 S. Ct. 3177 (1990).

152. Brief for Petitioners at 11, *Lujan*, 110 S. Ct. 3177 (1990) (No. 89-640).

153. 110 S. Ct. 3177 (1990).

154. 42 U.S.C. §§ 4321-4370 (1982). In particular, NEPA 42 U.S.C. § 4332(2)(c) requires Federal agencies to "include in every recommendation or report on . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . the environmental impact of the proposed action." *Id.*

155. *Lujan*, 110 S. Ct. at 3184 ("[R]espondent alleged that all of the . . . actions were 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' and should therefore be set aside pursuant to § 10(e) of the APA, 5 U.S.C. § 706.").

the NWF designated the "Land Withdrawal Review Program."[156] In question were approximately 1,250 classification changes and withdrawal revocations[157] affecting approximately 180 million acres of federal land.[158] NWF sought to enjoin all 1,250 classification changes made by the BLM on the basis that implementing the Land Withdrawal Review Program was a single agency action which was in violation of federal law.[159] NWF claimed that the Government failed to follow the land use planning process as provided by FLPMA in making the land status decisions.[160] Further allegations within the complaint included charges that land uses considered by the Government focused inordinately on mineral exploitation and development[161] and that the Government failed to provide public notice of the withdrawal and classification decisions and thereby prevented opportunities for public participation.[162]

In general, the NWF averred that the illegal acts of the government in reclassifying withdrawn lands and returning other lands to the public domain would subject the lands to mining activities and destroy their natural beauty.[163] NWF maintained that this action by the government constituted an injury-in-fact to NWF members who used lands which would be affected by the

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156. *Lujan*, 110 S. Ct. at 3183. The Government disputed that the Land Withdrawal Review Program was a "program" and instead referred to it within their Supreme Court brief as "hundreds of executive branch decisions." Brief for Respondent at 2, n.1, *Lujan*, 110 S. Ct. 3177 (1990) (No. 89-640).

157. *Lujan*, 110 S. Ct. at 3189.

158. Brief for Respondent at 2, *Lujan*, 110 S. Ct. 3177 (1990) (No. 89-640).

159. *Lujan*, 110 S. Ct. at 3183-84.

160. *Id.* 43 U.S.C § 1701(a)(2) (1988) provides that: "[T]he national interest will best be realized if the public lands and their resources are periodically and systematically inventoried and their present and future use is projected through a land use planning process." *Id.* Section 202 of FLPMA specifically requires that land use plans "shall be developed for the public lands regardless of whether such lands previously have been classified, withdrawn, set aside, or otherwise designated for one or more uses." 43 U.S.C. § 1712(a) (1988). Governmental regulations define the land use plans required under FLPMA as Resource Management Plans. 43 C.F.R. § 1601.0-5(k) (1989). The Government had completed only nine of more than 100 required Resource Management Plans at the time the lawsuit was filed. Brief for Respondent at 6, *Lujan*, 110 S. Ct. 3177 (1990) (No. 89-640).

161. *Lujan*, 110 S. Ct. at 3184.

162. *Id.* The plaintiffs alleged that the defendants violated 43 U.S.C. §§ 1701(a)(5), 1712(c)(9), 1712(f), and 1739(e) (1988). *Lujan*, 110 S. Ct. at 3184.

163. *Lujan*, 110 S. Ct. at 3183-84.

land withdrawal review program.[164] NWF therefore sought to enjoin the Government from continuing implementation of the program.[165] The NWF appended to its complaint a list of 814 land status actions taken by the Government pursuant to the challenged program to identify the particular agency actions which were the subject of the NWF complaint.[166]

Because neither FLPMA nor NEPA contain citizen suit provisions,[167] NWF claimed a right to judicial review pursuant to section 702.[168] Therefore, to establish standing to bring the suit, NWF had to show that the elements of constitutional standing were present and also that the prudential zone of interests requirement of section 702 was met.[169] NWF sought to meet these requirements by claiming that its members had suffered an injury-in-fact traceable to the government's actions and redressable by the court, and also that the relevant statute, FLPMA, contemplated protecting the interests the NWF claimed were threatened.[170]

In addition, because NWF sought to represent its members, NWF had to meet the test of *Hunt v. Washington State Apple Advertising Commission*[171] to establish the standing of an organization to represent its members.[172] This test requires a showing that the members had standing to sue in their own right, that the interests sought to be protected by the organization are germane to the purpose of the organization, and that the action does not require the participation of the individual members.[173] In support of its standing claim, NWF submitted affidavits of two

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164. *Id.* at 3184.

165. *Id.*

166. Brief for Petitioner at 12, *Lujan*, 110 S. Ct. 3177 (1990) (No. 89-640).

167. *See supra* notes 109-125 and accompanying text (discussing citizen suit provisions of environmental statutes).

168. *Lujan*, 110 S. Ct. at 3185. *See supra* note 102 and accompanying text (stating text of § 702).

169. *See supra* notes 101-108 and accompanying text (discussing standing requirements of § 702).

170. *Lujan*, 110 S. Ct. at 3184.

171. 432 U.S. 333, 343 (1977).

172. *Lujan*, 110 S. Ct. at 3187.

173. *See supra* notes 133-139 and accompanying text (describing the three part test from *Hunt* to ascertain whether an organization has standing to represent its members).

of its members which claimed that the members' recreational use and aesthetic enjoyment of the federal lands would be and had already been adversely affected by the Government's opening up the land for natural resource development without compliance with applicable laws.[174] These affidavits became critical to NWF's claim of standing because, without a claim of injury-in-fact to the interest of a member, NWF would be in the same position as the plaintiff in *Sierra Club v. Morton*[175] and would suffer a dismissal for failing to allege an actual injury.[176]

The two affidavits submitted by NWF claimed that the affiants used land "in the vicinity" of land affected by two of the government actions listed in the appendix.[177] One of these, an affidavit sworn to by Peggy Kay Peterson claimed that she used land "in the vicinity" of the South Pass-Green Mountain area of Wyoming for recreational use and aesthetic enjoyment which would be adversely affected as a result of the Government's actions, thereby injuring her interests.[178] The specific government action, to which Peterson's affidavit referred, opened up an area of approximately 4,500 acres for mining within the two million acre parcel addressed by the BLM's classification change.[179] Initially

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174. *Lujan*, 110 S. Ct. at 3187. The affidavits of the two members were submitted after the preliminary injunction was issued. National Wildlife Fed'n v. Burford, 835 F.2d 305, 313 (D.C. Cir. 1987).

175. 405 U.S. 727 (1972).

176. *See supra* notes 36-53 and accompanying text (discussing *Sierra Club v. Morton*, 405 U.S. 727 (1972), and the injury requirement).

177. *Lujan*, 110 S. Ct. at 3184. The two member affidavits submitted by the NWF were substantially the same and the analysis applied by the Court was identical in each case. *Id.* at 3187-88. This Note, in the interest of brevity, will only discuss the affidavit sworn to by Peggy Kay Peterson. The second affidavit, sworn to by Richard Erman, only differed from Peterson's in that the land claimed to be used by Erman was "in the vicinity of Grand Canyon National Park, the Arizona Strip (Kanab Plateau), and the Kaibab National Forest." *Id.* at 3187. In addition to these two member affidavits, which were submitted to establish NWF's representational standing, NWF also submitted an affidavit from one of its vice-presidents. He claimed that NWF had standing in its own right because the complaint alleged that the Government failed to publish regulations, invite public participation, and to perform an environmental impact statement with respect to the Land Withdrawal Review Program as a whole. *Id.* NWF claimed injury from these actions by the Government because it prevented NWF from informing its members and the general public about "conservation issues" and thereby prevented NWF from fulfilling its mission. *Id.* at 3194.

178. *Id.* at 3187.

179. *Id.* at 3188.

the BLM had withdrawn the two million acre parcel from appropriation under agricultural land laws and from sales.[180] However, with the exception of 2,000 acres which were to remain closed, the balance of the parcel had already been open for mineral leasing and mining under the classification in effect prior to the change.[181]

The district court granted NWF's motion for a preliminary injunction which prohibited any modification or termination in classification of the 180,000,000 acres of public land affected by the Land Withdrawal Review Program.[182] The Court of Appeals for the District of Columbia Circuit affirmed the granting of the injunction.[183] Upon remand, the district court granted the Government's motion for summary judgment for NWF's lack of standing on the basis that the initial affidavits were not specific enough.[184] In particular, the district court found that Peterson's affidavit failed to allege that her use and enjoyment extended to the particular 4,500 acres being reclassified by the government action but instead merely claimed that she used land "in the vicinity."[185] The Court of Appeals reversed the district court, holding that the Peterson affidavit was sufficient to support NWF's standing claim.[186]

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180. Brief for Petitioners at 8, *Lujan*, 110 S. Ct. 3177 (1990) (No. 89-640).

181. *Lujan*, 110 S. Ct. at 3188.

182. National Wildlife Fed'n v. Burford, 676 F. Supp. 271 (D.D.C. 1985). The district court said it had "no problem in holding that defendants' actions in lifting protective land restrictions will irreparably injure plaintiff's members unless enjoined." *Id.* at 278. The court also believed it was likely that NWF would succeed on the merits. *Id.* The only standing issue raised at this point of the proceedings was whether NWF lacked standing regarding its claim that the Government violated FLPMA by failing to submit recommendations to the President and Congress. *Id.* at 277. The district court found that the standing issue was moot because, as part of the same opinion, it had allowed a congressman to intervene as a plaintiff and the congressman was found to have standing. *Id.* at 274-75, 277. The congressman withdrew his separate appeal after the 1989 unanimous Court of Appeals ruling that NWF had standing. Brief for Respondent at 6 n.7, *Lujan*, 110 S. Ct. 3177 (1990) (No. 89-640).

183. National Wildlife Fed'n v. Burford, 835 F.2d 305 (D.C. Cir. 1987).

184. National Wildlife Fed'n v. Burford, 699 F. Supp. 327, 332 (D.D.C. 1989).

185. *Lujan*, 110 S. Ct. at 3188.

186. National Wildlife Fed'n v. Burford, 878 F.2d 422, 432-33 (D.C. Cir. 1987). Because the Court of Appeals found the Peterson affidavit to adequately support NWF's assertion of standing, it did not decide whether the Erman or Greenwalt affidavits were specific enough to merit standing. *Id.* at 431 n.13. *See supra* note 176 (detailing the Erman and Greenwalt affidavits). The Court of

B. The Majority Opinion

The United States Supreme Court, in a five to four decision[187] written by Justice Scalia, reversed the Court of Appeals and affirmed the District Court's summary judgment for the Government.[188] Because the case came to the Supreme Court on the Government's motion for summary judgment, the majority identified the proper standard of review to be the standard applicable to Rule 56 of the Federal Rules of Civil Procedure.[189] Thus, the Government's motion for summary judgment would be denied if a material issue of fact was evident from the papers before the Court.[190]

The first question considered by the majority was whether the NWF had representational standing to bring the suit on behalf of its members according to the standard set forth in *Hunt v. Washington State Apple Advertising Commission.*[191] The majority found that the interests sought to be protected in this case, recreational use and aesthetic enjoyment of public lands, were sufficiently related to the purposes of the NWF and that the organization met the requirements of section 702 for standing if Peterson did.[192] The focus of the opinion therefore shifted to the issue of whether Peterson met the standing requirements of section 702.

The majority's next consideration was whether the specific facts alleged in the affidavits raised any genuine issue of fact as to whether the injury claimed by the affiants was the result of an agency action[193] as required under section 702.[194] In effect the

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Appeals also held that it was an abuse of discretion of the district court not to consider four additional affidavits alleging injuries incurred by NWF members submitted after argument on the motion for summary judgment. *National Wildlife Fed'n v. Burford*, 878 F.2d at 433.

187. *See supra* note 8 (detailing how each justice ruled).

188. *Lujan*, 110 S. Ct. at 3194.

189. *Id.* at 3186.

190. *Id.*

191. 432 U.S. 333 (1977). *See supra* notes 133-139 and accompanying text (detailing the test to be applied for representational standing).

192. *Lujan*, 110 S. Ct. at 3187.

193. *See infra* note 101 (defining "agency action").

194. *Lujan*, 110 S. Ct. at 3187.

majority was analyzing whether the alleged injury was traceable to the complained of act.[195] The majority found that the Peterson affidavit, when considered in conjunction with the listing of 814 BLM land status decisions appended to the complaint, was sufficiently particular regarding the agency action which was the subject of the complaint.[196] The geographical description provided in Peterson's affidavit agreed with the description of the two million acre parcel addressed by BLM order W-6228, which was one of the BLM orders referenced in the attachment to the complaint.[197] The parties agreed that BLM order W-6228 was the subject of Peterson's affidavit and therefore the majority found that the particular agency action complained of was ascertainable.[198]

The majority also found that the prudential requirement of section 702, that the injury be within the "zone of interests" of the statute underlying the complaint, was met by Peterson.[199] The majority reasoned that if Peterson's recreational and aesthetic enjoyment were adversely affected from mining activities resulting from the BLM's reclassification of the parcel, such injuries would meet the zone of interests requirement.[200] The majority had no doubt that harm to recreational use and aesthetic enjoyment were among the sorts of interests that Congress designed FLPMA and NEPA to protect.[201]

The only remaining issue, according to the majority, was whether the facts alleged in the affidavits showed that the recreational use and aesthetic enjoyment of Peterson were adversely affected or aggrieved.[202] In essence, the case was reduced to the

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195. *See supra* notes 61-79 and accompanying text (discussing the traceability element of standing).

196. *Lujan*, 110 S. Ct. at 3187. The attachment to the complaint, a listing of 788 [Petitioner's Brief, at 12, alleged 814 decisions] decisions by the Government pursuant to the Land Withdrawal Review Program, included a reference to a Government decision corresponding to the general area described by Peterson which terminated the withdrawal classification of some 4,500 acres in that area. *Lujan*, 110 S. Ct. at 3187.

197. *Lujan*, 110 S. Ct. at 3187.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

question of whether the affidavits supported the existence of an injury-in-fact sufficient to find the irreducible minimum required for constitutional standing.[203]

The majority held that the affidavits submitted by NWF were inadequate to show the requisite injury-in-fact because Peterson's affidavit contained no allegation that her use and enjoyment extended to the particular 4,500 acres affected by the Government's action.[204] Her affidavit, on its face, only contained a bare allegation of injury and failed to express any specific facts to support her allegations.[205] The majority therefore affirmed the District Court's decision to grant the Government's motion for summary judgment on the grounds that the papers before the Court failed to establish that there existed a material issue of fact regarding whether Peterson suffered an injury-in-fact from the reclassification of the two million acre parcel.[206]

The majority explained that it was overruling the Court of Appeals because the lower court erred in its application of the summary judgment standard.[207] The Court of Appeals, in finding that Peterson had alleged sufficient facts to support her claim of injury, reasoned that if Peterson's affidavit was not referring to the 4,500 acres which would be opened up for mining under the BLM reclassification, her allegations were meaningless or perjurious.[208] Peterson's affidavit, according to that court, was, at a minimum, ambiguous regarding whether the 4,500 acres was the same land she used for recreational purposes and aesthetic enjoyment.[209] Thus, the Court of Appeals reasoned that since any factual ambiguity on a motion for summary judgment must be resolved in

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203. *See supra* note 103 ("adversely affected or aggrieved" under § 702 encompasses "injury-in-fact.") The Court of Appeals specifically said the district court rested its denial of standing on NWF's failure to demonstrate the requisite injury-in-fact. National Wildlife Fed'n v. Burford, 878 F.2d 422, 429 (D.C. Cir. 1989).

204. *Lujan*, 110 S. Ct. at 3187-88.

205. *Id.* at 3188.

206. *Id.* at 3189.

207. *Id.* at 3188. *See supra* notes 131-132 and accompanying text (discussing the summary judgment standard).

208. *Lujan*, 110 S. Ct. at 3188.

209. *Id.*

favor of the non-moving party[210] and, since it was possible that Peterson did use the 4,500 acres, there was enough detail in support of standing to raise material issues of fact sufficient to require a trial on the merits.[211]

The majority disagreed.[212] In ruling upon a motion for summary judgment a district court is to resolve issues of factual dispute in favor of the non-moving party when the facts specifically alleged by the non-moving party are contradicted by facts specifically alleged by the moving party.[213] However, in this case, NWF merely replaced the conclusory allegations within its complaint with the conclusory allegations of Peterson's affidavit.[214] The fact that if Peterson's allegations were untrue she would have perjured herself was not sufficient to create a genuine issue for trial, because on a motion for summary judgment the non-moving party must provide probative evidence to support the complaint.[215]

The National Wildlife Federation argued that its standing in this case was less complicated than that in *SCRAP* where the Court found that the plaintiff organization had standing.[216] In *SCRAP*, the plaintiffs' standing was based upon allegations that the plaintiffs use of natural resources widely scattered around the Washington metropolitan area would be harmed by pollution

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210. *Id.*

211. National Wildlife Fed'n v. Burford, 878 F.2d 422, 430 (D.C. Cir. 1989). As an alternative basis for reaching the same conclusion regarding the motion for summary judgment, the Court of Appeals pointed out that the Peterson and Erman affidavits had already been found, in the court's earlier opinion of *National Wildlife Federation v. Burford*, 835 F.2d at 329-30, to provide adequate grounds for NWF to establish irreparable harm when the court was considering whether a preliminary injunction had been properly issued. National Wildlife Fed'n v. Burford, 878 F.2d at 432. The Court of Appeals said that not only had NWF demonstrated specific harm, but, as also required for the issuance of a preliminary injunction, they had carried the burden of persuasion showing a likelihood of success on the merits. *Id.* Therefore the Court of Appeals reasoned that if the affidavits were specific enough to obtain a preliminary injunction, they were also specific enough to withstand a motion for summary judgment. *Id.*

212. *Lujan*, 110 S. Ct. at 3188.

213. *Id.*

214. *Id.* Fed. R. Civ. P. 56(e) requires that, upon a motion for summary judgment, the non-moving party provide affidavits or other evidence to "set forth specific facts showing that there is a genuine issue for trial." *Id. See supra* note 132 (providing text of Fed. R. Civ. P. 56(e)).

215. *Lujan*, 110 S. Ct. at 3188.

216. Brief for Respondent at 37, *Lujan*, 110 S. Ct. 3177 (1990) (No. 89-640).

resulting from higher freight rates.[217] However, the majority found that this case was distinguishable from *SCRAP* because that case was before the Court on a motion to dismiss rather than on a motion for summary judgment.[218] A motion to dismiss, pursuant to Fed. R. Civ. P. 12(b), presumes that the allegations of the complaint embrace specific facts necessary to support the claim; a summary judgment motion, however, does not.[219] Therefore, the Supreme Court reversed the Court of Appeals and affirmed the granting of the Government's motion for summary judgment by the district court.[220]

C. *The Dissenting Opinion*

Justice Blackmun's dissent maintained that the Peterson affidavit, in conjunction with other evidence in the record, was sufficient to at least establish a material issue of fact regarding the existence of an injury-in-fact.[221] The record itself provided abundant evidence that the Government's actions would lead to an increase in mining activity on federal lands and such mining would result in environmental damage sufficient to constitute the requisite injury.[222] The issue therefore, according to Justice Blackmun, was whether Peterson had identified with sufficient precision the particular locations where she had suffered her injuries.[223] While admitting that her affidavit could have been drafted more precisely, the dissent maintained that Peterson's allegations, in the context of the record as a whole, were adequate to defeat a motion for summary judgment.[224] The dissent pointed out that the affidavits

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217. *Id. See supra* notes 54-60 and accompanying text (discussing the *SCRAP* case).

218. *Lujan*, 110 S. Ct. at 3189.

219. *Id.*

220. *Id.* at 3194. The Court also held that it was not an abuse of discretion for the district court to refuse to consider, for standing purposes, four additional affidavits submitted following argument on the summary judgment motion. *Id.* at 3189-93. In addition, the Court held than an affidavit submitted to establish an independent right of the NWF to judicial review was insufficient because it failed to specify facts necessary to survive a motion for summary judgment. *Id.* at 3194.

221. *Id.* at 3195 (Blackmun, J., dissenting).

222. *Id.* at 3194-95 (Blackmun, J., dissenting).

223. *Id.* at 3195 (Blackmun, J., dissenting).

224. *Id.* at 3195-96 (Blackmun, J., dissenting).

were at least sufficient in describing the location to enable the government to identify the particular reclassification decisions referred to by the affiants.[225]

Justice Blackmun made it clear that he believed it was not necessary that the land Peterson recreated on was even within the precise 4,500 acres that was affected by the reclassification decision.[226] He was willing to allow that harm could result to her use and enjoyment of the federal lands in the vicinity of those directly impacted by the Government's decision.[227] He noted that the areas harmed by mining and related activities could extend beyond the precise location where the mining occurred.[228]

In addition, Peterson's affidavit not only alleged a threat of future harm, but also alleged that her use and enjoyment of the federal lands had *already* been adversely affected by the agency action.[229] Peterson was therefore not only speculating that her recreational and aesthetic interests would be harmed in the future by mining activity resulting from the BLM reclassification, but she was specifically alleging that the harm had already occurred resulting in her injury.[230] Therefore, as stated by the Court of Appeals, Peterson's allegations were either meaningless or

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225. *Id.* at 3196 (Blackmun, J., dissenting).

226. *Id.* Peterson's affidavit alleged that she used federal land "in the vicinity of South Pass-Green Mountain, Wyoming." *Id.* The dissent pointed out that the Government itself had repeatedly referred to the "South Pass-Green Mountain area" in its description of the region opened up for mining activity. *Id.* Therefore, in the context of the record as a whole, there was sufficient evidence that the lands claimed to be used by Peterson would be adversely impacted by the decision to at least create an issue of fact to withstand a motion for summary judgment. *Id.*

227. *Id.*

228. *Id.* at 3196, n.5 (Blackmun, J., dissenting). The Brief for Respondent at 30-31, *Lujan*, 110 S. Ct. 3177 (1990) (No. 89-640), went into considerable detail regarding this point:

> [T]he harm that comes from mining - whether it be for oil, gas, uranium, silver, gold, copper, zinc or agate - is not localized. Landscapes are obscured for great distances; fugitive dust is created and goes where the wind goes; contaminated water flows for miles; blasting violates noise levels, causes wildlife to move, and affects wildlife mating habits over great distances; and cyanide poured over heap leach piles after strip-mining kills fish far downstream. So even if Peterson's affidavit were interpreted to aver injury-in-fact to a person recreating in the "vicinity" of lands being opened to desecration, that would be entirely appropriate.

Id.

229. *Lujan*, 110 S. Ct. at 3196 (Blackmun, J., dissenting). Prior to the district court's issuance of the preliminary injunction, 406 mining claims had been staked for the South Pass-Green Mountain area. *Id.* at 3195 n.1.

230. Brief for Respondent at 32, *Lujan*, 110 S. Ct. 3177 (1990) (No. 89-640).

perjurious if the lands she was referring to were not those harmed pursuant to the questioned termination order.[231]

The dissent therefore concluded that the affidavits were sufficient to establish NWF's standing to bring the lawsuit and survive the motion for summary judgment.[232] In addition, the dissent concluded that the district court abused its discretion in refusing to consider the additional affidavits submitted by NWF after the hearing regarding the summary judgment motion.[233]

IV. LEGAL RAMIFICATIONS

A. *Method of Reviewing Evidence Within the Record*

The majority and dissenting opinions in *Lujan* illustrate two different procedural views of members of the Court regarding how evidence should be reviewed when ruling on motions for summary judgment. The majority opinion refused to draw any inferences from the facts set forth in the record in determining whether there was a factual issue for trial.[234] Although the majority recognized that factual issues in controversy are to be resolved in favor of the non-moving party, it would not presume any missing facts necessary to create the controversy.[235] The dissenting opinion, in contrast, stated the principle that the inferences drawn from the underlying facts contained within evidentiary materials were to be viewed in the light most favorable to the non-moving party.[236]

The majority opinion found, in applying its view of the summary judgment standard, that the Peterson affidavit was inadequate because she had only claimed to use land "in the vicinity" of a 2,000,000 acre parcel addressed by a BLM land classification decision, but of which only 4,500 acres would

231. *Lujan*, 110 S. Ct. at 3196 (Blackmun, J., dissenting).
232. *Id.* at 3194 (Blackmun, J., dissenting).
233. *Id.* (Blackmun, J., dissenting).
234. *Id.* at 3188-89.
235. *Id.*
236. *Lujan*, 110 S. Ct. at 3196 (Blackmun, J., dissenting) (quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)).

actually be opened to mining by the BLM action.[237] There was no showing that Peterson's use extended to the particular 4,500 acres being opened for mining[238] and therefore the affidavit alleged only an injury without specifying that the injury would occur at the location which was the subject of the classification change.[239] However, according to the Government's evidence, with the exception of 2,000 acres which were to remain closed under the change in classification and the 4500 acres which were opened to mining by the BLM decision, the balance of the 2,000,000 acre parcel had already been open for mineral leasing and mining at the time of the reclassification.[240] By combining the Government's evidence with Peterson's allegation that her injury was the opening up of the lands for mining, it is clear that Peterson's affidavit could only have been referring to the 4,500 acres affected by the decision.[241] Although the majority stated that it was unwilling to presume the missing facts necessary to create the controversy,[242] all that was required in this case was to take a very small step in logic. Peterson claimed that opening up an area to mining within a two million acre parcel would injure her interests. Only 6,500 acres out of the total of two million acres hadn't been opened up for mining. The complained of government action was opening up 4,500 acres out of the 6,500 to mining. Therefore, although Peterson didn't expressly state she used the 4,500 acres subject to the classification change, no other reasonable conclusion is apparent from the record.[243]

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237. *Lujan*, 110 S. Ct. at 3187-88.

238. *Id.* at 3188.

239. *Id.* at 3187-88.

240. Brief for Respondent at 28, *Lujan*, 110 S. Ct. 3177 (1990) (No. 89-640).

241. *Lujan*, 110 S. Ct. at 3188; Brief for Respondent at 28, *Lujan*, 110 S. Ct. 3177 (1990) (No. 89-640).

242. *Lujan*, 110 S. Ct. at 3189.

243. The respondent made the argument which is presented here. Brief for Respondent at 28, *Lujan*, 110 S. Ct. 3177 (1990) (No. 89-640). Perhaps what weakened NWF's argument was that an alternative basis for finding injury to Peterson's interests was presented which didn't require the conclusion that Peterson's affidavit referred to the 4,500 acres opened to mining. *Id.* at 30-31. The Brief acknowledged that as an alternative basis for finding Peterson had suffered injury, the Court could look to the fact that harm from mining wasn't localized and that being in the vicinity of land opened to mining would suffice. *Id.* The admission that Peterson's affidavit could have an alternative meaning would seem to support the Government's claim that the affidavit wasn't specific enough.

In contrast, the dissent repeatedly stated its willingness, when ruling upon a motion for summary judgment, to draw inferences favorable to the opponent of the motion in light of all of the evidence within the record.[244] It was not necessary to presume facts in this case, but only to view particular assertions within the affidavit in the light of all of the evidence before the Court.[245] The dissent therefore would have held that the Peterson affidavit was sufficient to withstand a motion for summary judgment.[246]

The majority viewpoint provides warning that affidavits submitted in opposition to motions for summary judgment should not rely upon any inferences to be drawn from the evidence in the record, but should expressly state all of the logical connections between the facts which the party opposed to the motion wishes the court to consider in making its decision.

B. Has Lujan *Changed Constitutional Standing?*

Perhaps the most intriguing question regarding standing from *Lujan* is whether the Court has introduced a new requirement in evaluating whether a plaintiff has suffered an injury-in-fact.[247] The Court in *Sierra Club v. Morton*[248] articulated the requirement that the party seeking judicial review must be among the injured so as to have a personal stake in the controversy.[249] Will the Court

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244. *See, e.g., Lujan* at 3196 (Blackmun, J., dissenting) ("In light of the principle that '[o]n summary judgment the inferences to be drawn from the underlying facts contained in [evidentiary] materials must be viewed in the light most favorable to the party opposing the motion.'") (quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)) (brackets in original)); *id.* at 3194 (Blackmun, J., dissenting) ("the affidavits . . . in conjunction with other record evidence . . . were sufficient to establish the standing . . . to bring this suit."); *id.* at 3195-96 (Blackmun, J., dissenting) ("the allegations contained in the . . . affidavits, in the context of the record as a whole, were adequate to defeat a motion for summary judgment."); and *id.* at 3196 (Blackmun, J., dissenting) ("To read particular assertions within the affidavit, in light of the document as a whole is . . . 'a world apart' from 'presuming' facts that are neither stated nor implied.").

245. *Id.* at 3196 (Blackmun, J., dissenting).

246. *Id.*

247. *See supra* notes 36-60 and accompanying text (discussing the injury-in-fact requirement of constitutional standing).

248. 405 U.S. 727 (1972).

249. *Id.* at 740. *See supra* notes 44-53 and accompanying text (reviewing *Sierra Club v. Morton*, 405 U.S. 727 (1972)).

now require the plaintiff to not only be among the injured, but that the location at which the injury is claimed correspond to the location of the act which is the subject of the complaint?[250] The Court did not make it clear whether the basis of its ruling was that the affidavit failed to allege that the injury occurred within the specific area opened to mining by the BLM decision, or if the basis was Peterson's failure to specifically allege *how* the reclassification would injure her recreational use of land in the vicinity of the 4,500 acres being opened to mining.

The question therefore arises as to what the Peterson affidavit could have alleged which would suffice for NWF to survive the motion for summary judgment. Suppose Peterson had alleged that although the land she used was not opened to mining by the classification change, the land would nonetheless be adversely affected by mining activities on the 4,500 acres, and she provided detail as to how the land and her interests in it would be harmed. Assuming Peterson had made such allegations, if NWF would still not survive the motion for summary judgment, then the Court would have added to injury-in-fact a requirement that the location at which the injury is claimed coincide with the location of the complained-of act.

The dissenting opinion suggests that the majority's decision was based not on Peterson's failure to allege that the injury occurred within the specific area opened to mining by the BLM decision, but that she did not specifically allege how the reclassification would injure her recreational use of land in the vicinity of the 4,500 acres

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250. The district court in *National Wildlife Federation v. Burford*, 699 F. Supp. 327 (D.D.C. 1988), would seem to support making such an argument. *Id.* at 331. In making its decision, the district court cited guidelines from *Wilderness Society v. Griles*, 824 F.2d 4 (D.C. Cir. 1987). *National Wildlife Fed'n v. Burford*, 699 F. Supp. at 331. Remarking that *National Wildlife Federation v. Burford* was similar to *Wilderness Society* because both cases concerned conduct of a third party - developers - whose possible response to government action would injure the plaintiffs, the district court quoted *Wilderness Society:*

> Where the alleged injury involves access to land in a three party case . . . the judgment regarding the likelihood of injury turns on *whether the plaintiff's future conduct will occur in the same location as the third party's response to the challenged governmental action.* Otherwise, the threat of injury would be too amorphous or uncertain.

National Wildlife Fed'n v. Burford, 699 F. Supp. at 331 [emphasis in original] (quoting Wilderness Soc'y v. Griles, 824 F.2d 4, 12 (D.C. Cir. 1987)).

being opened to mining. Rather than basing his argument entirely on the theory that the Peterson affidavit could only be referring to the 4,500 acres being reclassified, Justice Blackmun looked to the ways Peterson's interests could have been injured without her recreational activities taking place directly within that parcel.[251] The dissent pointed out that the harm caused by mining and its related activities extends beyond the precise location where the mining occurs and therefore the opinion argued that it was not necessary that the land Peterson recreated on be within the precise 4,500 acres opened to mining by the reclassification decision.[252]

The Supreme Court Brief submitted by NWF in *Lujan* argued that the Supreme Court had no previous difficulty in construing phrases such as "in the vicinity of" to suffice in establishing a plaintiff's standing.[253] Indeed, in suits brought under the citizen suit provisions to enforce compliance with the Clean Air Act[254] or the Clean Water Act[255] a requirement that the alleged harm constituting the injury-in-fact literally occur in the same location as the alleged wrongful act would lead to absurd results--the plaintiffs would only have standing if they derived their recreational and aesthetic benefits immediately next to the exhaust stack or drain pipe discharging the illegal pollutants. Such an interpretation would render the citizen suit provisions of those Acts worthless and would be directly contrary to the legislative intent of the Acts. Therefore, the understanding of the *Lujan* dissent as to the basis of the

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251. *Lujan*, 110 S. Ct. at 3196 (Blackmun, J., dissenting). *But see supra* note 243 and accompanying text (explaining how presenting an alternative explanation of how Peterson could be injured could have weakened NWF's case).

252. *Lujan*, 110 S. Ct. at 3196, n.5 (Blackmun, J., dissenting). *See supra* note 228 (detailing how harm from mining is not necessarily limited to a confined area).

253. Brief for Respondent at 31, *Lujan*, 110 S. Ct. 3177 (1990) (No.89-640). The Brief cited *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), as an example. Brief for Respondent at 32. In *Duke*, 40 individuals living "in close proximity" to a proposed nuclear power plant sight were found to have standing to challenge construction of the plant. *Duke Power*, 438 U.S. at 73-74.

254. 42 U.S.C. § 7604 (1988).

255. 33 U.S.C. § 1365 (1988).

majority's decision, the legislative intent of environmental statutes,[256] and Supreme Court precedent all argue against the proposition that the Court intended in *Lujan* to modify the injury-in-fact requirement by adopting a standard that the location of the injury literally coincide with the location of the complained-of act.

The conclusion must therefore be made that the rationale for the Court's decision in *Lujan* was simply that the affidavits were not specific enough regarding the location where Peterson was injured, the nature of her injuries and how those injuries were traceable to the Government's actions. Therefore, *Lujan* serves to warn all plaintiffs, in cases where standing is a possible issue, to be painfully specific in affidavits provided to the court in response to a motion for summary judgment. As a corollary, it suggests that defendants might, as a defensive ploy, move for summary judgment whenever lack of standing is a colorable issue.

C. Is Lujan *a Retreat from SCRAP?*

Perhaps the most chilling aspect of *Lujan* to future environmental plaintiffs is whether the case signals a retreat by the Court from the permissive approach of *SCRAP*. In *SCRAP* the plaintiffs claimed they would be harmed from increased pollution at resources surrounding the Washington Metropolitan area enjoyed by the plaintiffs which would result from higher freight rates for recycled materials.[257] The NWF had argued that if the claimed harm in *SCRAP* was sufficient to establish injury-in-fact and meet the requirements for standing, then certainly Peterson had alleged facts sufficient to demonstrate a specific and concrete injury as well.[258] Peterson swore within her affidavit that the land she used

256. This argument assumes that the parameters for determining whether someone is "adversely affected or aggrieved" under section 702 are the same as for determining injury-in-fact as required for the citizen suit provisions of the Clean Air Act and the Clean Water Act. As commented in note 103, *supra*, the Supreme Court has stated that the "adversely affected or aggrieved" requirement of § 702 is not to be interpreted more restrictively than injury-in-fact.

257. *See supra* notes 54-60 and accompanying text (describing the facts and holding from *SCRAP*).

258. Brief for Respondent at 37, *Lujan*, 110 S. Ct. 3177 (1990) (89-640).

for recreational and aesthetic enjoyment was threatened by opening it up for mineral leasing.[259]

The majority brusquely dismissed NWF's reliance on *SCRAP*.[260] The analogy was not appropriate, wrote Justice Scalia, because *SCRAP* involved a motion to dismiss on the pleadings and not a motion for summary judgment as did *Lujan*.[261] Therefore, *SCRAP* was of no relevance in determining whether Peterson's claims were specific enough to support her claim of injury.[262]

However, the opinion did not stop with merely distinguishing the procedural settings of *SCRAP* and *Lujan*. In dicta, Justice Scalia wrote that the "expansive" approach of *SCRAP* had never since been repeated by the Court.[263] Apparently the "expansive approach" he was referring to in *SCRAP* was the granting of judicial review in an environmental case where the plaintiffs' claimed injury-in-fact was grounded upon a flimsy chain of causation, which consisted of linking railroad rate hikes with increased pollution at natural resources enjoyed by the plaintiffs.[264] Does *Lujan* therefore signal a retreat by the Court from the permissive approach of *SCRAP*? The answer is "maybe."

Justice Scalia was, arguably, simply stating a fact when he wrote that *SCRAP* had not since been emulated by the Court. The plaintiffs in *SCRAP*, as did those in *Lujan*, based their claim of judicial review upon the provisions of section 10(a) of the Administrative Procedure Act, 5 U.S.C. section 702.[265] With the

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259. *Id.*

260. *Lujan*, 110 S. Ct. at 3189. Justice Scalia wrote:

> Respondent places great reliance, as did the Court of Appeals, upon our decision in United States v. Students Challenging Regulatory Agency Procedures (SCRAP) . . . The SCRAP opinion, whose expansive expression of what would suffice for § 702 review under its particular facts has never since been emulated by this Court, is of no relevance here, since it involved not a Rule 56 motion for summary judgment but a Rule 12(b) motion to dismiss on the pleadings.

Id.

261. *Id.*

262. *Id.*

263. *Id.*

264. *See supra* notes 54-60 and accompanying text (discussing the facts and holding of *SCRAP*).

265. United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 685 (1973).

enactment of statutory provisions for citizen enforcement of environmental acts following the *SCRAP* decision, the opportunities for the Court to apply *SCRAP*'s "expansive expression" of what suffices for standing under section 702 have undoubtedly been diminished.[266] If plaintiffs have a choice between the specific citizen suit provisions under the environmental statutes and the general review provisions under section 702 they will undoubtedly choose to proceed under the specific environmental statute. The standing requirements under some of the Acts extend to the limits allowed under article III without imposing any prudential limitations.[267] In contrast, when a party alleges standing pursuant to section 702 an additional determination by a court as to whether the interest which the plaintiff is seeking to protect is within the "zone of interests" to be protected or regulated by the underlying statute is required.[268] In addition, many of the environmental statutes provide for the recovery of attorney fees, which is not addressed within section 702.[269] Even if Justice Scalia's comment is viewed as critical of *SCRAP*'s liberal approach to the injury-in-fact requirement, it doesn't state anything of monumental novelty concerning *SCRAP*. Prior to *Lujan*, the *SCRAP* opinion had already been recognized as an exceptional case because of the attenuation between the act complained of and the claimed injury.[270] *SCRAP* has been criticized as being irreconcilable with other major pronouncements of the Court on standing.[271] Given

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266. *See supra* note 110 and accompanying text (listing the environmental statutes which contain citizen suit provisions).

267. *See, e.g.*, Clean Water Act § 505, 33 U.S.C. § 1365 (1988).

268. Data Processing Service v. Camp, 397 U.S. 150, 153 (1969).

269. *See supra* note 123 (detailing citizen suit provisions within environmental statutes which contain provisions for recovery of attorney fees).

270. *See, e.g.*, Whitmore v. Arkansas, 110 S. Ct. 1717 (1990). In that case, which was decided before *Lujan*, Chief Justice Rehnquist wrote "[p]robably the most attenuated injury conferring article III standing was that asserted by the respondents in *United States v. SCRAP*." *Id.* at 1725. Later in the opinion, the Chief Justice wrote that *SCRAP* "surely went to the very outer limit of the law." *Id. See also* DAVIS, *supra* note 7, at 322.

271. DAVIS, *supra* note 7, at 323. The author states that *SCRAP* is "technically irreconcilable" with *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973); *Warth v. Seldin*, 422 U.S. 490 (1975); and *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). *Id.* In those three cases the Court denied standing.

the unpredictable nature of the Court's past decisions on the subject, it seems likely that *SCRAP* was merely a highwater mark for standing to which the Court isn't likely to return to soon.[272] Therefore, in a sense, the dicta within *Lujan* concerning *SCRAP* may signal a retreat from *SCRAP*'s liberal injury-in-fact requirement, but that signal has already been given in previous opinions and *Lujan* apparently adds nothing new to the alarm.

V. CONCLUSION

In *Lujan v. National Wildlife Federation*[273] the United States Supreme Court required that, to survive summary judgment, the plaintiff must specify the precise basis of the plaintiff's standing to challenge agency action.[274] The Court will not draw inferences from facts stated within the record on a motion for summary judgment in determining whether the party opposing the motion has established an issue as to a material fact.[275] The plaintiff failed to meet its burden of showing the existence of a material issue of fact in *Lujan* because the affiants only alleged the use of lands in the vicinity of those specifically affected by the defendants' actions.

The majority in *Lujan* did not specify whether the affidavits presented by the plaintiff were deficient because they failed to specify how the agency action would adversely affect the affiants' interests or that they were deficient because the affidavits failed to allege that the location at which the injury was claimed corresponded to the location of the act which was the subject of the complaint. If the latter reason was the Court's grounds for finding

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272. *See generally* DAVIS, *supra* note 7, 208-348 (providing a critical view of the Court's standing decisions). In his preliminary overview Professor Davis writes that "[t]he main failure of the law of standing is neither that the judicial doors are in general open too much nor that they are opened too little; the main failure is the inconsistency, unreliability, and inordinate complexity." *Id.* at 208.

273. 110 S. Ct. 3177 (1990).

274. *See supra* notes 203-219 and accompanying text (discussing how the plaintiff failed to sufficiently specify the basis for standing).

275. *See supra* notes 234-246 and accompanying text (discussing the Court's refusal to draw inferences from the record in favor of the party opposing a motion for summary judgment).

the affidavits deficient, then *Lujan* has changed the constitutional standing requirement of injury-in-fact.[276] However, because constitutional standing requirements apply in all cases, requiring direct correspondence between the location of the complained of act and the injury would defy the legislative intent of various citizen suit provisions of environmental statutes and would be contrary to Supreme Court precedent. Therefore, the argument that *Lujan* changes constitutional standing requirements for injury-in-fact should be rejected. Instead *Lujan* should be read as further explanation of the specificity required to withstand a motion for summary judgment.

Lujan might also be interpreted as an indication that the Court is retreating from the apparent liberal standing requirements allowed for environmental plaintiffs in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP).*[277] However, *Lujan* is distinguishable from *SCRAP* because *SCRAP* is limited to motions to dismiss. In addition, *SCRAP* represents a highwater mark as far as the allowance of standing is concerned, to which the Court is unlikely to return to soon.

The *Lujan* decision does illustrate however, by a split Supreme Court reversing a unanimous Court of Appeals, the uncertainty within federal courts in determining whether a plaintiff is properly before the court. Because the Court failed to fully explain the rationale for its decision, *Lujan* provides no further insight regarding application of the standing doctrine. Faced with such uncertainty, particularly when responding to a motion for summary judgment, environmental plaintiffs should take care to specify as precisely as possible the nature of the injury-in-fact, how the injury is traceable to the challenged action of the defendant, and how a favorable decision from the court will redress the harm.

James M. Duncan

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276. *See supra* notes 247-256 and accompanying text (discussing whether *Lujan* has changed constitutional standing).

277. *See supra* notes 257-272 and accompanying text (discussing whether *Lujan* marks a retreat from *SCRAP*).