Pace Environmental Law Review

Volume 15
Issue 1 *Winter 1997*

Article 11

January 1997

Florida Audubon Society v. Bentsen: An Improper Application of Lujan to a Procedural Rights Plaintiff

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Florida Audubon Society v. Bentsen:[1] An Improper Application of *Lujan* to a Procedural Rights Plaintiff

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1. 94 F.3d 658 (D.C. Cir. 1996).

* The author would like to thank his parents and his sister Jennifer for their love, support, and patience throughout his three years in law school. The author would also like to thank Marni B. Belkin and the other members of the PELR who edited this piece.

I. Introduction

In 1972, Supreme Court Justice William O. Douglas suggested: "Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation."[2] Needless to say, twenty-five years have passed and environmental objects are still refused standing on their own. Instead, the doctrine of standing has become stricter, especially when encountered by environmental organizations.[3] This trend toward stricter standing is especially evident in light of the recent decision of the United States Court of Appeals for the District of Columbia in *Florida Audubon Society v. Bentsen* (*Bentsen II*).[4] The *Bentsen II* decision made it "virtually impossible"[5] for environmentalists to bring a procedural rights challenge under the National Environmental Policy Act (NEPA).[6]

Standing is a doctrine which exists to ensure the proper parties are before the court.[7] There are three elements which a party bringing an action must demonstrate to pass the test of standing: injury in fact, causation, and redressability.[8]

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2. Sierra Club v. Morton, 405 U.S. 727, 741-42 (1972) (Douglas, J., dissenting). *See generally* Christopher Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

3. *See* Patti A. Meeks, *Justice Scalia and the Demise of Environmental Law Standing*, 8:2 J. LAND USE & ENVTL. L. 343 (1993).

4. 94 F.3d 658 (D.C. Cir. 1996).

5. *Id.* at 675 (Rogers, J., dissenting). Judge Rogers limited this assertion to cases involving agency rulemaking that has a "diffuse impact." *Id.*

6. National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. §§ 4321-4370d (1994).

7. *See* Flast v. Cohen, 392 U.S. 83, 99-100 (1968).

8. *See infra* notes 25-35 and accompanying text for an explanation of these elements. The standing doctrine also contains prudential limitations, which are "judicially self-imposed limits on the exercise of federal jurisdiction." Allen v. Wright, 468 U.S. 737, 751 (1984). These include:

Plaintiffs bring a procedural rights or procedural injury case when they claim the federal government has harmed an interest of the plaintiffs by violating a procedure required under a federal statute.[9] Significantly lower standards are required of procedural rights plaintiffs to meet the test of standing.[10]

Bentsen II is a procedural rights case.[11] The plaintiffs, an individual and three environmental organizations,[12] challenged the Secretary of the Treasury's failure to follow a procedure required by NEPA.[13] The *Bentsen II* court held that the plaintiffs did not have standing to sue because they failed to demonstrate injury in fact and causation.[14] In footnote four of the opinion, the court adopted a new requirement of procedural rights standing that forces "litigant[s] . . . to establish the nature and likelihood of the environmental injury that it is the purpose of an environmental impact statement to identify."[15] Thus, the *Bentsen II* decision has placed an undue burden on procedural rights plaintiffs.

To fully understand the impact of the *Bentsen II* decision, one must be familiar with the development of the doctrine of standing, the special treatment of procedural rights cases within that doctrine, and the reasoning of the *Bentsen II*

> the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.

Id. Indeed, the issue of standing may be decided on prudential grounds without ever reaching the constitutional requirements. *See* Hazardous Waste Treatment Council v. Thomas, 885 F.2d 918, 921 n.2 (D.C. Cir. 1989).

9. *See, e.g.*, Christopher T. Burt, *Procedural Injury Standing After Lujan v. Defenders of Wildlife*, 62 U. CHI. L. REV. 275, 279 (1995); Brian J. Gatchel, *Informational and Procedural Standing After Lujan v. Defenders of Wildlife* 11 J. LAND USE & ENVTL. L. 75 (1995); Patti A. Meeks, *Justice Scalia and the Demise of Environmental Law Standing*, 8:2 J. LAND USE & ENVTL. L. 343 (1993).

10. *See infra* Parts II.C.1-2.

11. *See generally Bentsen II*, 94 F.3d 658 (D.C. Cir. 1996).

12. The plaintiffs included Diane Jensen, the Florida Audubon Society, the Florida Wildlife Federation, and Friends of the Earth. *See* Florida Audubon Society v. Bentsen (*Bentsen I*), 54 F.3d 873, 875 n.1 (D.C. Cir. 1995).

13. *See infra* Part II.B. for an analysis of NEPA.

14. *Bentsen II*, 94 F.3d at 672.

15. *Id.* (Buckley, J., concurring).

court. Therefore, Part II of this Case Note provides background information on standing in general and on procedural rights standing under NEPA. Part II focuses on the injury in fact requirement as applied to procedural rights cases, because it is primarily within this area of standing that the *Bentsen II* court improperly applied *Lujan v. Defenders of Wildlife* (*Lujan*).[16] Part III discusses the facts, procedural history, and reasoning in *Bentsen II*. Part IV contains a legal analysis of the court's opinion. Finally, Part V concludes that the *Bentsen II* court misapplied the Supreme Court decision in *Lujan*, and should have retained the circuit's prior standing test for procedural rights plaintiffs. Thus, this Case Note does not consider the merits of the plaintiffs' claims, nor whether the plaintiffs demonstrated standing. Rather, this Case Note focuses on the *Bentsen II* court's application and interpretation of the standing doctrine as it applies to causes of action based on NEPA.

II. Background

A. Traditional Standing Requirements

The modern doctrine of standing has emerged from the statement in Article III of the Constitution[17] that the "judicial Power shall extend to all Cases . . . [and] . . . Controversies."[18] The Supreme Court rarely discussed standing in Article III terms prior to 1965.[19] In 1968, the Court analyzed taxpayer standing in *Flast v. Cohen*.[20] There, the Court de-

16. 504 U.S. 555 (1992). *Lujan* is a leading Supreme Court decision concerning the standing of environmental plaintiffs. *See* David Sive, *Environmental Standing*, 10 NAT. RESOURCES & ENV'T 49 (1995). David Sive is Professor of Law at Pace University School of Law and serves as a Faculty Advisor to the Pace Environmental Law Review.

17. *See* Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, 'Injuries,' and Article III*, 91 MICH. L. REV. 163, 170-71 (1992) [hereinafter Sunstein].

18. U.S. CONST. art. III, § 2, cl. 1.

19. *See* Sunstein, *supra* note 17, at 169. Professor Sunstein points out that only eight out of 117 Supreme Court discussions on standing in Article III terms occurred prior to 1965, and that no court referred to the phrase "injury in fact" before *Barlow v. Collins*, 397 U.S. 159 (1970). *See* Sunstein, *supra* note 17, at 169.

20. 392 U.S. 83 (1968).

clared: "the question is whether the person whose standing is challenged is a proper party to request adjudication of a particular issue and not whether the issue itself is justiciable."[21] Thereafter, the number of standing cases in the Supreme Court steadily increased every few years.[22] The doctrine was somewhat unclear, and Justice Douglas stated that "[g]eneralizations about standing to sue are largely worthless as such."[23] Finally, however, in *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*,[24] the Supreme Court outlined a three-part test for standing:

> at an irreducible minimum, Art. III requires the party who invokes the court's authority to show that he [1] personally has suffered some actual or threatened injury [2] as a result of the putatively illegal conduct of the defendant . . . and that the injury fairly can be traced to the challenged action and [3] is likely to be redressed by a favorable decision.[25]

The requirement of showing an actual or threatened injury has been explained in more detail by the Court in subsequent decisions. First, the "party seeking review must be himself among the injured."[26] Second, the injury suffered by

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21. *Id.* at 99-100.

22. *See* Sunstein, *supra* note 17, at 169.

23. Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 151 (1970).

24. 454 U.S. 464 (1982).

25. *Id.* at 472 (internal quotation marks omitted) (quoting Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979)); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38, 41 (1976)). *See also* Allen v. Wright, 468 U.S. 737, 751 (1984). In *Allen*, the court applied this three-part test to the plaintiffs' claim that an IRS grant of tax exemptions to racially discriminatory schools caused "their children's diminished ability to receive an education in a racially integrated school." *Id.* at 756. The court concluded that the plaintiffs failed to meet the redressability requirement because they could not show that a judgment in their favor would redress their children's injuries. *Id.* at 758. The court also concluded that this claim did not pass the test of standing because the injury was not fairly traceable to the IRS action, calling the line of causation "attenuated at best." *Id.* at 757.

26. Sierra Club v. Morton, 405 U.S. 727, 735 (1972).

the party must be "distinct and palpable."[27] If the party is attempting to show a *threatened* injury, as opposed to an *actual* injury, that party must demonstrate that the injury is "imminent, not conjectural or hypothetical."[28]

Likewise, the Supreme Court has made efforts to explain the second element of the standing test, causation.[29] The injury must be caused by the defendant's conduct; it cannot be the "result of the independent action of some third party not before the court."[30] In addition, the injury must not be attenuated.[31] "[T]he indirectness of the injury . . . may make it substantially more difficult to meet the minimum requirement of Art. III."[32]

The third requirement of standing is that the injury is likely to be redressed by a favorable decision.[33] The Court has noted that this requirement serves several of the implicit policies embodied in Article III.[34] "It tends to assure that the legal questions presented to the court will be resolved . . . in a concrete factual context conducive to a realistic appreciation of the consequence of judicial action."[35] But more recently, the significance of redressability has been called into question.[36] The questions surrounding redressability are especially apparent when it is applied to a cause of action based on environmental statutes, such as NEPA.[37]

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27. *Valley Forge*, 454 U.S. at 475 (internal quotation marks omitted) (quoting Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979)).

28. Whitmore v. Arkansas, 495 U.S. 149, 155 (1990).

29. *See, e.g.*, Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976).

30. *Id.*

31. *See* Allen v. Wright, 468 U.S. 737, 757 (1984).

32. *Id.* at 757-58 (quoting Warth v. Seldin, 422 U.S. 490, 505 (1975)).

33. *See Simon*, 426 U.S. at 38.

34. *See* Flast v. Cohen, 392 U.S. 83, 96 (1968).

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

36. *See* Sunstein, *supra* note 17, at 229. Professor Sunstein states that the redressability inquiry should be "whether the injury that Congress sought to prevent would likely be redressed by a favorable judgment. [We should] characteriz[e] the injury in the way desired by Congress and then [see] if that injury would be removed by a decree in the plaintiff's favor." *Id.* In other words, Professor Sunstein suggests that where redressability is concerned, we should remove the emphasis from the particular plaintiff before the court.

37. *See, e.g., Lujan*, 504 U.S. 555, 573 n.7 (1992).

B. The National Environmental Policy Act[38]

Society first formally recognized "the relationship between the environment and the welfare of human beings . . . twenty-five years ago when Congress passed and President Nixon signed the National Environmental Policy Act (NEPA)."[39] Although the policy statement of NEPA sets lofty substantive goals,[40] it requires the government agencies to act in an essentially procedural manner.[41] Accordingly, the Supreme Court has directed the lower courts to follow the procedural regulations of the law.[42]

NEPA's primary procedural requirement is that all federal agencies must "include in every recommendation or report on proposals for legislation and other 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."[43] This detailed statement is now commonly known as an environmental impact statement (EIS).[44] The EIS has been the basis for many lawsuits since the passage of NEPA, and standing for such claims has often been the subject of litigation.[45] Since NEPA imposes only procedural requirements on governmental agencies, NEPA lawsuits typically challenge shortcomings in EIS preparation procedures.[46] These challenges are termed procedural rights lawsuits.[47]

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38. NEPA §§ 101-209, 42 U.S.C. §§ 4321-47 (1994).

39. Dinah Bear, *The National Environmental Policy Act: Its Origins and Evolutions*, 10 NAT. RESOURCES & ENV'T 3 (1995) [hereinafter Bear].

40. *See* NEPA § 101, 42 U.S.C. § 4331.

41. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978).

42. *See* Bear, *supra* note 39, at 5.

43. NEPA § 102(C), 42 U.S.C. § 4332(C).

44. *See* Bear, *supra* note 39, at 6.

45. *See, e.g.,* Douglas County v. Babbitt, 48 F.3d 1495 (9th Cir. 1995); Sabine River Auth. v. United States Dep't of Interior, 951 F.2d 669 (5th Cir. 1992).

46. *See id.*

47. *See supra* note 9 and accompanying text.

C. Procedural Injury Under NEPA

1. Before *Lujan v. Defenders of Wildlife*

Prior to *Lujan*, the Supreme Court had never mentioned the term procedural injury.[48] However, the Court had recognized that Congress "may enact statutes creating legal rights, the invasion of which create standing, even though no injury would exist without the statute."[49] A violation of such legal rights (such as a failure to prepare an EIS) results in a procedural injury, and this injury satisfies the injury in fact requirement of standing.[50] The procedural injury does not, however, *replace* the injury in fact requirement. Rather, courts have generally required that, in addition to the procedural injury, plaintiffs must demonstrate a geographical nexus to the area that may be affected by the governmental action.[51]

The term geographical nexus was first used by a court considering standing for a procedural injury in *City of Davis v. Coleman*.[52] In *Davis*, the court considered a case involving the failure of a government body to prepare an EIS.[53] The court reviewed the district court's determination that plaintiffs lacked standing, and reversed the lower court, stating:

> The procedural injury implicit in agency failure to prepare an EIS . . . is itself a sufficient 'injury in fact' to support standing, provided this injury is alleged by a plaintiff having a *sufficient geographical nexus* to the site of the challenged project that he may be expected to suffer whatever environmental consequences the project may have.[54]

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48. Search of WESTLAW, SCT Library (Sept. 26, 1997).

49. Linda R. S. v. Richard D., 410 U.S. 614 n.3 (1973) (involving the discriminatory application of a Texas criminal statute). *See also* Hardin v. Kentucky Utils. Co., 390 U.S. 1, 6 (1968) (involving a dispute as to whether the Tennessee Valley Authority could properly make its electric power available in a certain section of Tennessee).

50. *See* Brandon D. Smith, *Lujan v. Defenders of the Wildlife: A Slash and Burn Expedition Through the Law of Environmental Standing*, 28 U.S.F. L. REV. 859, 880 (1994).

51. *See, e.g.*, City of Davis v. Coleman, 521 F.2d 661, 671 (9th Cir. 1975).

52. *Id.*

53. *Id.* at 666.

54. *Id.* at 671 (emphasis added).

A purpose of defining injury in fact as a procedural injury plus a geographical nexus was explained by the *Davis* court:

> Were we to agree with the district court that a NEPA plaintiff's standing depends on 'proof' that the challenged federal project will have particular environmental effects, we would in essence be requiring that the plaintiff conduct the same environmental investigation that he seeks in his suit to compel the agency to undertake. Compliance with NEPA is a primary duty of every federal agency; fulfillment of this vital responsibility should not depend on the vigilance and limited resources of environmental plaintiffs. It is the federal agency, not environmental action groups or local government, which is required by NEPA to produce an EIS.[55]

A showing of a geographical nexus also meets the prudential requirement that the injury must not be common to all members of the public.[56] In *Davis*, the court held that to suffer an injury within the context of NEPA, a litigant must: (1) show that the failure to prepare an EIS "creates a risk that serious environmental impacts will be overlooked,"[57] and (2) have a "sufficient geographical nexus to the site of the challenged project that he may be expected to suffer whatever environmental consequences the project may have."[58]

Following its *Davis* opinion, the Ninth Circuit considered a similar issue in *Oregon Environmental Council v. Kunzman*.[59] There, the plaintiffs brought suit to enjoin the

55. *Davis*, 521 F.2d at 670-71 (footnote omitted). *See also Bentsen II*, 94 F.3d 658, 672 (D.C. Cir. 1996) (Buckley, J., concurring) ("the court now requires that a litigant be able to establish the nature and likelihood of the environmental injury that it is the purpose of an environmental impact statement to identify").

56. *See* United States v. AVX Corp., 962 F.2d 108, 119-20 (1st Cir. 1992). *See also* Warth v. Seldin, 422 U.S. 490, 499 (1975) ("when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction").

57. *Davis*, 521 F.2d at 670.

58. *Id.* at 671. This two-part test is what the court of appeals applied in *Bentsen I*, 54 F.3d 873, 877 (1995), and what the dissent relied on in *Bentsen II*, 94 F.3d at 674.

59. 817 F.2d 484 (9th Cir. 1987).

Department of Agriculture from spraying for gypsy moths.[60] The court held that the geographical nexus existed for the plaintiffs' members because they resided "in a state with an actual gypsy moth problem and thus may challenge a nationwide EIS that is applicable to them."[61] The next year, the same court held that plaintiffs' members who "live[d] within a five-mile radius" of the proposed federal action demonstrated a "sufficient geographical nexus," and therefore met the injury element of standing.[62] Finally, in 1992, the Ninth Circuit held that because several of the plaintiff environmental organization's members "[were] accustomed to visit[ing] and enjoy[ing]" specific areas within the proposed affected area, they satisfied the geographical nexus requirement.[63]

Several other circuits have recognized the need for plaintiffs to demonstrate a geographical nexus as an element of a procedural injury. In *City of Evanston v. Regional Transportation Authority*,[64] the Seventh Circuit held that the plaintiffs failed to demonstrate standing under NEPA because they did "not sufficiently allege where they live[d] in relation to the property."[65] The Fifth Circuit cited the *Davis* court's requirement of a geographical nexus in *Sabine River Authority v. United States Department of Interior*,[66] holding that the plaintiffs had demonstrated standing to challenge the United States Fish and Wildlife Service's failure to comply with

60. *See id.* at 489.

61. *Id.* at 491.

62. Animal Lovers Volunteer Ass'n v. Carlucci, Nos. 86-6428, 86-6679, 1988 WL 63741, at *1 (9th Cir. 1988) (involving the United States Fish and Wildlife Service's failure to prepare an EIS). *See also* Friends of the Earth v. United States Navy, 841 F.2d 927, 931-32 (9th Cir. 1988).

63. Idaho Conservation League v. Mumma (*Mumma*), 956 F.2d 1508, 1517 (9th Cir. 1992). This decision was handed down one month before *Lujan*. *See id.* at 1508; *Lujan*, 504 U.S. 555 (1992). It should be noted that the injury claimed in *Mumma* was substantially similar to the injury in *Bentsen*, namely, that the plaintiffs' use of the natural areas would be adversely affected by the government action. *Mumma*, 956 F.2d 1508, 1517 (9th Cir. 1992).

64. 825 F.2d 1121 (7th Cir. 1987).

65. *Id.* at 1126. *See also* South E. Lake View Neighbors v. Department of Hous. & Urban Dev., 685 F.2d 1027, 1039 (7th Cir. 1982) (distinguishing City of Davis v. Coleman, 521 F.2d 661 (9th Cir. 1975)).

66. 951 F.2d 669 (5th Cir. 1992).

NEPA.[67] In *City of Los Angeles v. National Highway Traffic Safety Administration*,[68] the D.C. Circuit also adopted the geographical nexus requirement.[69] In *United States v. AVX Corp.*,[70] the First Circuit held that the plaintiff

> bore [the] burden, to the extent its standing was dependent on a claim of procedural harm, to [describe] with fair specificity some concrete *nexus between its members and the harbor area*. Without such a nexus, any procedural harm its members suffered was common to all members of the public and, therefore, did not rise to the level of stating an individualized claim of harm.[71]

Thus, several circuits have recognized the importance of the geographical nexus requirement first described in *Davis*. In 1992, the Supreme Court, too, recognized this importance throughout the Court's opinion in *Lujan v. Defenders of Wildlife*.[72]

2. Procedural Injury Standing According to *Lujan*

Justice Scalia's opinion for the Supreme Court in *Lujan v. Defenders of Wildlife*[73] sparked much debate and discussion,[74] and has been described as a "dramatic opinion . . . which significantly shifts the law of standing."[75] *Lujan* involved a challenge to the Secretary of the Interior's promulgation of a rule interpreting the Endangered Species Act of

67. *Id.* at 674.
68. 912 F.2d 478 (D.C. Cir. 1990).
69. *Id.* at 492-93.
70. 962 F.2d 108 (1st Cir. 1992).
71. *Id.* at 119 (emphasis added).
72. 504 U.S. 555 (1992).
73. *Id.*
74. *See, e.g.*, Sunstein, *supra* note 17; Christopher T. Burt, *Procedural Injury Standing After Lujan v. Defenders of Wildlife*, 62 U. CHI. L. REV. 275 (1995); Brian J. Gatchel, *Informational and Procedural Standing After Lujan v. Defenders of Wildlife*, 11 J. LAND USE & ENVTL. L. 75 (1995); Brandon D. Smith, *Lujan v. Defenders of Wildlife: A Slash-And-Burn Expedition through the Law of Environmental Standing*, 28 U.S.F. L. REV. 859 (1994); Patti A. Meeks, *Justice Scalia and the Demise of Environmental Law Standing*, 8:2 J. LAND USE & ENVTL. L. 343 (1993).
75. Sunstein, *supra* note 17, at 164-65.

1973.[76] Although *Lujan* is not a case based on a procedural injury,[77] the Supreme Court discussed standing for such a case.[78]

Three areas of the *Lujan* decision are helpful in determining the Court's view of procedural injury standing requirements: (1) the discussion of the "irreducible constitutional minimum[s]"[79] of standing; (2) the discussion of procedural rights cases and the reduced standards for meeting the redressability and immediacy (an element of injury);[80] and (3) the geographical nexus requirement.[81]

a. The Irreducible Minimums

The *Lujan* Court stated the traditional requirements of standing,[82] but expanded the definitions of some of those requirements. The first element of standing discussed by the Court was injury in fact.[83] The Court declared an injury in fact to be "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical."[84] The second requirement for standing discussed by the Court was causation.[85] The Court defined causation as "a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant,

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76. *Lujan*, 504 U.S. at 557-58.

77. Indeed, Justice Scalia wrote:

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

Id. at 572.

78. *Id.*

79. *Id.* at 560.

80. *See id.* at 573 n.7. It is interesting to note that Justice Scalia acknowledges reduced standards for the "irreducible constitutional minimums." *Id.*

81. *See id.* at 555-56.

82. *Id.* at 560.

83. *See id.*

84. *Id.* (internal quotation marks omitted) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).

85. *See id.*

and not the result of the independent action of some third party not before the court."[86] The third requirement discussed was that "it must be likely as opposed to merely speculative, that the injury will be redressed by a favorable decision."[87]

b. The Court's Discussion of Procedural Rights Cases

Justice Scalia distinguished the case before the Court from one brought under NEPA for failing to prepare an EIS.[88] In footnote seven, Justice Scalia described the special exception for procedural rights cases:

> There is this much truth to the assertion that 'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.[89]

c. Geographical Nexus

At the end of the hypothetical situation in footnote seven, Justice Scalia distinguished the respondent's argument from the person living adjacent to the dam.[90] Justice Scalia wrote that the respondent's argument sought "standing for persons who have no concrete interests affected [analogous to] persons who live . . . at the other end of the country from the

86. *Lujan*, 504 U.S. at 560 (internal quotation marks omitted) (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)).

87. *Id.* at 561 (internal quotation marks omitted) (quoting *Simon*, 426 U.S. at 38, 43).

88. *See id.* at 572.

89. *Lujan*, 504 U.S. at 573 n.7.

90. *See id.*

dam."[91] Thus, Justice Scalia indicated that proximity to the dam is important. Justice Scalia focused on the geographical nexus requirement again when he wrote: "It is even plausible . . . to think that a person who observes or works with animals of a particular species in the *very area of the world* where that species is threatened by a federal decision is facing [perceptible] harm."[92] Finally, in footnote three, Justice Scalia wrote that the "geographical remoteness" of the respondent's members from [the place of the governmental action] necessarily prevented a finding "that concrete injury to their members was . . . certainly impending."[93] Although the Court did not use the term, it recognized that a showing of a *geographical nexus* creates a concrete interest.[94] Therefore, such a showing would satisfy the standing requirement of injury in fact.[95] This recognition by the Supreme Court established that the geographical nexus requirement is an important element of the standing doctrine for procedural rights cases.

3. Interpretations of *Lujan* by the Circuit Courts of Appeals

The Ninth Circuit has continued to emphasize the importance of a geographical nexus as part of the injury in fact requirement of procedural rights standing.[96] In *Douglas County v. Babbit*,[97] the court interpreted *Lujan* to require "two essential elements for procedural standing: (1) that he or she is a person who has been accorded a procedural right to protect his or her concrete interests . . . and (2) that the plaintiff has some threatened concrete interest . . . that is the ultimate basis of his or her standing."[98] In footnote five of

91. *Id.*
92. *Id.* at 566 (emphasis added).
93. *Id.* at 567 n.3 (internal quotation marks omitted).
94. *See id.* at 565-66.
95. *See id.*
96. *See supra* notes 52-63 and accompanying text for Ninth Circuit cases prior to *Lujan* which require a geographical nexus.
97. 48 F.3d 1495 (9th Cir. 1995).
98. *Id.* at 1500 (internal quotation marks omitted) (quoting *Lujan*, 504 U.S. at 573 nn.7-8).

that opinion, the *Douglas County* court noted: "The district court was correct to equate the geographic nexus test of past Ninth Circuit cases with the concrete interest test of *Lujan*."[99] Therefore, the Ninth Circuit recognized the Supreme Court's declaration that, in an action brought for failure to prepare an EIS, the party invoking the court's authority must demonstrate a geographical nexus to the area that will be affected by the governmental action.[100]

The D.C. Circuit also continued to apply the geographical nexus test to procedural rights plaintiffs after *Lujan*.[101] In *Bentsen I*,[102] the court found that the plaintiff had established standing.[103] The court relied on *Lujan* to support the geographical nexus aspect of standing.[104] However, that decision was reversed in a rehearing in banc.[105] The result of the rehearing in banc, *Bentsen II*, serves as the basis for this Case Note.

III. *Florida Audubon Society v. Bentsen*

A. Facts and Procedural History

The United States Code allows a tax credit for producers of fuels containing alcohol.[106] Somewhat simplified, the statute allows for a tax credit of sixty cents for every gallon used or produced (or both) by the taxpayer.[107] Certain mixtures of gasoline contain ethanol which is an alcohol.[108] The tax

99. *Id.* at 1501 n.5 (internal quotation marks omitted) (quoting *Lujan*, 504 U.S. at 573 n.8). *See also* Didrickson v. United States Dep't of the Interior, 982 F.2d 1332, 1341 (9th Cir. 1992) (holding that declarants meet the geographical nexus test because, "unlike the declarants in [*Lujan*, the declarants here are] concerned with action harming sea otters in Alaska, where the declarants live and in particular areas that they frequent").

100. *See Douglas County*, 48 F.3d at 1501 n.5.

101. *See Bentsen I*, 54 F.3d 873 (D.C. Cir. 1995).

102. *Id.*

103. *Id.* at 880.

104. *See id.* (citing *Lujan*, 504 U.S. at 562-64).

105. *See Bentsen II*, 94 F.3d at 672.

106. *See* 26 U.S.C. § 40(a) (Supp. 1996).

107. *See id.* § 40(b)(1)(A)-(2)(A) (1986 & Supp. 1996).

108. *See id.* § 40(d)(1)(A).

credit applies to these ethanol mixtures as well as to mixtures containing methanol.[109]

In March of 1990, the Secretary of the Treasury, Lloyd M. Bentsen, expanded this credit by allowing it to apply to ethanol used in the production of ethyl tertiary butyl ether (ETBE).[110] ETBE is a chemical compound that is "blended with gasoline as an octane enhancer."[111] As a finished product, ETBE *does not contain ethanol or methanol*; therefore, the tax credit did not apply to ETBE prior to the Secretary's action.[112]

Some commentators suggested that NEPA required the Internal Revenue Service to prepare an EIS before expanding the tax credit.[113] But the IRS disagreed, believing that the expansion fell within a clause in Treasury Directive 75-02, which contains the Treasury procedures for issuing an EIS.[114] That clause states:

> Bureau actions which are categorically excluded [from requiring environmental impact statements] include . . . Internal Revenue Service functions in the administration of the Internal Revenue Code, such as regulations interpreting, implementing, or clarifying code provisions . . . .[115]

The Secretary determined that the tax credit expansion was a form of "interpreting, implementing, or clarifying"[116] the Code, and was therefore excluded from requiring an EIS.[117] The appellants in *Bentsen I* (Diane Jensen, the Florida Audu-

109. *See id.*
110. *See* 55 Fed. Reg. 8946 (1990).
111. *Id.*
112. *See id.* However, ethanol is one of the substances used in the *production* of ETBE. *See id.*
113. *See id.* at 8947.
114. *See id.*
115. 45 Fed. Reg. 1828, 1830 (1980). Certain regulations implementing NEPA allow government agencies to take some actions which are exempt from EIS preparation. *See* 40 C.F.R. § 1508.4 (1997). It was on the basis of these NEPA regulations that the Secretary issued Treasury Directive 75-02, within which he defined the actions which are exempt from NEPA's requirements. *See* 55 Fed. Reg. at 8947.
116. 45 Fed. Reg. at 1830.
117. *See id.* at 8947.

bon Society, the Florida Wildlife Federation, and the Friends of the Earth) challenged the tax credit expansion by filing a claim against the Secretary and Margaret Richardson, the Commissioner of the Internal Revenue Service.[118] The plaintiffs claimed that the tax credit would increase the production of ethanol, and because ethanol is derived from corn, sugar cane, and sugar beets, the production of those crops would also increase.[119] An increase in crop production would cause certain environmental effects on land that the plaintiffs used,[120] and would affect the plaintiffs' drinking water.[121]

The District Court for the District of Columbia found that the plaintiffs lacked standing and granted summary judgment in favor of the Secretary.[122] In a 2-1 decision, the Court of Appeals reversed, holding that the appellants had met the two-part test for procedural standing because (1) the appellants demonstrated that there was a risk of overlooking serious environmental harm, and (2) the appellants demonstrated a sufficient geographical nexus.[123] A majority of eleven judges on the court of appeals voted in favor of the appellee's suggestion for a rehearing in banc.[124]

The court in banc affirmed the district court's decision that the appellants failed to demonstrate standing.[125] Six judges joined to form the majority, one judge concurred in the

118. *See Bentsen I*, 54 F.3d 873, 875 (1995).

119. *See Bentsen II*, 94 F.3d 658, 662 (D.C. Cir. 1996). In a sworn statement, Ms. Jensen stated that farmers (near the natural areas she uses), who receive state subsidies to leave some land fallow, will develop that land in order to receive the tax credit. *Id.* at 677 (Rogers, J., dissenting).

120. *See Bentsen II*, 94 F.3d at 662. The plaintiffs used natural areas which adjoined the farmland. *See id.*

121. *See id.* at 677-78 (Rogers, J., dissenting). Plaintiff Diane Jensen introduced evidence that the pesticide atrazine is used to treat crops (83% of which are corn crops) in order to increase the yield of those crops. *See id.* at 678. She showed through further evidence that the ETBE tax credit would cause a rise in the use of atrazine. *See id.* Finally, Ms. Jensen introduced evidence that atrazine (which the EPA has classified as a possible human carcinogen) is found in 58% of tap water in the area in which she lives. *See id.*

122. *See id.* at 662.

123. *See Bentsen I*, 64 F.3d at 880.

124. *See* Florida Audubon Soc'y v. Bentsen, 64 F.3d 712 (D.C. Cir. 1995).

125. *See Bentsen II*, 94 F.3d at 672.

result only, and four judges dissented.[126] Since Judge Buckley (in his concurrence) agreed with the dissent that the court should not have adopted a new standing test,[127] the court actually split 6-5 in favor of a new standing test.[128]

B. Holding and Reasoning of the Majority

The majority held that the appellants failed to demonstrate standing on two bases: (1) the appellants did not establish that they had "suffered or will suffer an injury to their particularized interest," and (2) appellants did not demonstrate that "it [was] substantially probable that the promulgation of the tax credit would cause any such injury."[129]

The court stated that the standing requirements for procedural rights plaintiffs are as follows: (1) a particularized injury; (2) the injury must be demonstrable; (3) the injury must be fairly traceable to the act of the agency; and (4) the act must be substantially probable to cause the injury.[130]

First, the court inquired into whether the plaintiffs had demonstrated an injury.[131] Without the support of precedent, the court drew a distinction between a governmental action at a particular location and an action in the form of broad rulemaking, such as the Secretary's expansion of the tax credit.[132] The court declared that the standard for a plaintiff alleging an injury from broad rulemaking is stricter than that of a plaintiff challenging an action at a particular location.[133]

The court stated that the test of injury in fact requires the plaintiff to *demonstrate* that a particularized interest of the plaintiff was injured, and that "everyone else" would not be injured so as to make the injury too general for court ac-

126. *See id.* at 661.
127. *See id.* at 672 (Buckley, J., concurring).
128. *See infra* Part IV.
129. *Bentsen II*, 94 F.3d at 672.
130. *See id.* at 666.
131. *See id.*
132. *See id.* at 667.
133. *See id.*

tion.[134] In a footnote, the court discussed the requirement of a geographical nexus:

> As the 'geographical nexus' test at issue here was in fact intended to ensure that a plaintiff's injury met this first criterion of being particularized and personal, an analysis of that test that does not actually require the plaintiff to *demonstrate* that . . . particularity must be invalid.[135]

In other words, the court interpreted the geographical nexus requirement to include a sub-requirement that the injury to the plaintiff's interest be demonstrable.[136] Thus, for injury in fact, the court required the following: (1) a procedural violation; and (2) a showing of a geographical nexus, which the court defined as (a) an injury that "everyone else" does not suffer (shown through plaintiff's usage of land near the land affected by the action) and (b) a *demonstration* of the injury caused by the governmental act.[137] The court concluded that the appellants did not provide competent evidence that farmers (with land adjacent to the land used by appellants) would increase their crop production as a result of the tax credit.[138] Therefore, the court held that the appellants did not *demonstrate* an injury to their interest, thus failing to meet the new element of the injury in fact test of standing.[139]

C. Concurring Opinion

As noted above, Judge Buckley concurred in the result, but not in the reasoning of the majority. After declaring that the court's opinion "imposes an unduly heavy burden on ap-

134. *See id.* at 667 n.4.

135. *Id.* (emphasis added).

136. In footnote four, the majority requires that the plaintiffs "demonstrate that . . . particularity." *Id.* This language masks what the court is actually requiring. Later in the text of the opinion, the majority states "Appellants . . . have not demonstrated that individual corn or sugar farmers in these areas will affirmatively respond to the tax credit by significantly increasing production." *Id.* at 667. Thus, the court requires the appellants to demonstrate the injury, not just the particularity.

137. *See id.*

138. *See id.* at 668.

139. *See id.*

pellants,"[140] Judge Buckley stated that the court's opinion required the plaintiffs to establish elements that would normally be developed through an EIS.[141] However, he stated that the appellants failed to meet the nexus requirement of procedural rights standing, and thus he concurred in the result.[142] Judge Buckley concluded that "the court has adopted new criteria for the establishment of standing in NEPA cases that will erode the effectiveness of one of the most important environmental measures of the past generation."[143]

D. Dissenting Opinion

Judge Rogers authored the dissenting opinion, and was joined by three other judges.[144] Judge Rogers concluded that the D.C. Circuit's prior two-part standing test for plaintiffs alleging a procedural rights violation under NEPA should have been applied.[145] She also noted Justice Scalia's statement in *Lujan* that procedural rights cases are special.[146] Judge Rogers stated that it is "inherently speculative"[147] as to how the agency would react to an EIS, adding that the majority's test essentially requires appellants to prepare an EIS.[148]

In considering whether the appellants met the requirement of injury in fact, Judge Rogers concluded they had done so, reasoning that the appellants produced "voluminous evidence" that demonstrated a concrete and particularized injury.[149] Judge Rogers argued that the majority's finding that the appellants had not demonstrated an injury in fact was

140. *Id.* at 672 (Buckley, J., concurring).
141. *See id.*
142. *See id.*
143. *Id.*
144. *See id.* Chief Judge Edwards, Judge Wald, and Judge Tatel joined in the dissenting opinion. *Id.*
145. *See id.* at 674 (Rogers, J., dissenting). The two-part test is explained in note 58, *supra*, and accompanying text.
146. *Lujan*, 504 U.S. 555, 572 n.7 (1992).
147. *Bentsen II*, 94 F.3d at 674 (Rogers, J., dissenting).
148. *See id.* at 675.
149. *Id.* at 677.

based on the imminence of that injury.[150] She pointed to Justice Scalia's statement in *Lujan* that a plaintiff in a procedural rights case is not required to meet the normal standard of immediacy.[151] Judge Rogers concluded that the evidence presented by the appellants established "a greater likelihood of a localized impact where Ms. Jensen lives,"[152] and therefore the appellants demonstrated injury in fact.

IV. Analysis of the Majority Opinion

A. The Elements of Standing

The majority discussed what is required by each element of the standing doctrine.[153] In doing so, the majority misinterpreted the guidance of *Lujan* on numerous occasions.

1. Injury in Fact

Most significantly, the court used *Lujan* improperly to support its adoption of a new standard for injury in fact. The court stated that plaintiffs' particularized injuries must be demonstrable,[154] a requirement that it claimed *Lujan* supports.[155] However, nowhere in that section of the *Lujan* opinion does the Supreme Court use the word "demonstrable," nor does it articulate a standard even vaguely similar.[156] Instead of simply adopting the Supreme Court's standard for injury in fact,[157] the court, relying on a 1975 case that did not deal with procedural rights standing,[158] changed the well-estab-

150. *See id.* at 678 (citing Wilderness Soc'y v. Griles, 824 F.2d 4, 18 (D.C. Cir. 1987)).

151. *See id.* (citing *Lujan*, 504 U.S. at 572 n.7).

152. *Id.* at 679.

153. *See id.* at 664-67.

154. *See supra* notes 130 and accompanying text for the *Bentsen II* court's precise holding.

155. *See Bentsen II*, 94 F.3d at 666 (claiming that the *Lujan* court required injuries to be demonstrable).

156. *Lujan*, 504 U.S. at 561.

157. *See Lujan*, 504 U.S. at 560-61.

158. *See* Warth v. Seldin, 422 U.S. 490 (1975) (involving a claim that a zoning ordinance violated civil rights statutes and the plaintiffs' constitutional rights).

lished geographical nexus test by adding the requirement that the injury must be demonstrable.

The *Bentsen* court also discussed the issue of imminence, a sub-requirement of showing injury in fact.[159] In its discussion the court relied on *Lujan*, and stated:

> the *primary focus* of the standing inquiry is not the imminence . . . of the injury to the plaintiff, but whether the plaintiff who has suffered [a] personal and particularized injury has sued a defendant who has caused that injury.[160]

However, that is not an accurate characterization of what Justice Scalia wrote in footnote seven. Justice Scalia declared that the normal standard for imminence *need not be met*.[161] Stating that imminence is not the primary focus is much different than stating that the normal standard for imminence need not be met. Additionally, the court treated the immediacy inquiry as an element of causation, not as an element of injury in fact.[162] Thus, by not acknowledging a reduced standard for immediacy, the *Bentsen II* court allocated too much weight to this element in holding that the appellants did not demonstrate standing. Indeed, this is precisely what Judge Rogers discussed in her dissent.[163]

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159. *See Lujan*, 504 U.S. at 560 (citing Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)) (stating that an injury must be imminent, not conjectural). The word "imminent" is defined as "likely to happen without delay." WEBSTER'S NEW WORLD DICTIONARY 702 (2d College ed. 1982). It should be noted that the D.C. Circuit has held: "the likelihood of injury, whether or not that likelihood depends upon a single event or a chain of events, is properly a concern of the personal injury inquiry, not the causation inquiry . . . ." Wilderness Soc'y v. Griles, 824 F.2d 4, 18 (D.C. Cir. 1987). As noted above, the injury claimed by the appellants in *Bentsen* is one that would occur through a chain of events. The likelihood (imminence) of that injury is therefore not a question of causation. Rather, it is an element of the injury in fact inquiry, and its importance should be de-emphasized according to *Lujan*. *Lujan*, 504 U.S. at 573 n.7. However, the *Bentsen* court concluded that plaintiffs did not support "each step of their attenuated *causal* path." *Bentsen II*, 94 F.3d at 671 (emphasis added). The court should have considered the likelihood of the chain of events as a de-emphasized element of injury in fact, not as an element of causation.

160. *Bentsen II*, 94 F.3d at 664 (emphasis added).

161. *Lujan*, 504 U.S. at 573 n.7 (emphasis added).

162. *See supra* note 155.

163. *See Bentsen II*, 94 F.3d at 678 (Rogers, J., dissenting).

2. Redressability

The court also stated that in footnote seven of *Lujan*, the Supreme Court "expressly declined to examine whether proper execution of the omitted [federal] procedure will likely prompt a modification of the government's action."[164] Again, the court has misstated the content of footnote seven. The Supreme Court did examine this issue, and determined that redressability is an issue that demands less than the normal requirements.[165] The relevant portion of footnote seven states:

> Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam *has standing* to challenge the licensing agency's failure to prepare an environmental impact statement, *even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered*, and even though the dam will not be completed for many years.[166]

However, by not acknowledging a reduced standard for redressability, the *Bentsen II* court allocated too much weight to this element in holding that the appellants did not demonstrate standing.

3. Causation

The *Bentsen II* court adopted a new standard for causation.[167] Even though the *Lujan* Court described the causation inquiry in detail,[168] the *Bentsen II* court did not adopt the language of *Lujan*. Rather, the majority adopted a significantly stricter standard: the action must be "*substantially*

164. *Id.* at 664.
165. *See Lujan*, 504 U.S. at 573 n.7.
166. *Id.* (emphasis added).
167. *Bentsen II*, 94 F.3d at 669.
168. *Lujan* requires "a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (internal quotation marks omitted) (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)).

likely to cause [a] demonstrable increase in risk to [the plaintiffs'] particularized interest."[169]

In creating this stricter standard, the court cited an opinion by the Ninth Circuit.[170] However, the standard in the Ninth Circuit opinion is significantly different than that of *Bentsen II*. Thus, the court's reliance on that standard is improper. In the footnote cited by the *Bentsen II* court, the Ninth Circuit made its standard very clear: "we suggested that causation need only be established with *reasonable probability*. We think that it is *reasonably probable* that the designation of the critical habitat would affect adjoining lands."[171] The standard of reasonably probable is significantly less demanding than the standard of substantially likely. Therefore, the *Bentsen II* court mischaracterized the Ninth Circuit's standard.

In support of the stricter standard, the court also cited *Kurtz v. Baker*,[172] a 1987 D.C. Circuit case.[173] *Kurtz* involved a plaintiff seeking a declaratory judgment that "the exclusion of 'non-theists' from the 'guest speaker program' in the Senate and the House" violated the First and Fifth Amendments.[174] The court held that the plaintiff failed to prove that without his exclusion, there was "a 'substantial probability' he would have been able to address" one of the houses of Congress.[175] In other words, the plaintiff failed to prove that "had the court granted the relief he sought, there would have been at least a substantial probability"[176] he would have been able to address Congress. However, this use of substantial probability is part of the redressability inquiry,

169. *Bentsen II*, 94 F.3d at 665.

170. The court cites Douglas County v. Babbitt, 48 F.3d 1495 (9th Cir. 1995). *See supra* note 100 and accompanying text for an explanation of *Douglas County*.

171. *Douglas County*, 48 F.3d at 1501 n.6 (emphasis added) (internal quotation marks omitted).

172. 829 F.2d 1133 (D.C. Cir. 1987).

173. *See Bentsen II*, 94 F.3d at 666.

174. *Kurtz*, 829 F.2d at 1136.

175. *Id.*

176. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264 (1977).

not the causation inquiry. Therefore, the court applied an unduly strict standard for the appellants to show causation.

B. The Practical Effect of the New Standing Requirements

In her dissent, Judge Rogers stated that one of the effects of the court's analysis and conclusion is that "it will be virtually impossible to bring a NEPA challenge to rulemakings with diffuse impacts."[177] The majority responded to this assertion by admitting that such a plaintiff "may have some difficulty meeting this standard, but that difficulty stems from the nature of the plaintiff's claim, which is premised on an alleged injury that is itself difficult to locate . . . ."[178] The question the court's response creates is whether, in light of the statutory language of NEPA, the difficulty encountered by such a plaintiff is a desired result. Of course, it would not be proper for the court to form its legal analysis around the result it desires. However, NEPA requires an EIS for all major federal actions which significantly affect the environment.[179] Certainly, rulemaking may be a major federal action,[180] and that action can have enormous environmental impacts.[181] The result of the *Bentsen* decision is that such actions can go forward unchecked.

Judge Buckley, in his concurrence, and Judge Rogers, in her dissent, both asserted that the court's decision requires the plaintiffs to prepare the EIS themselves in order to have standing.[182] If an EIS were prepared, it would likely attempt to determine to what extent the Secretary's action would cause an increase in the use of atrazine,[183] and an increase in

177. *Bentsen II*, 94 F.3d at 675 (Rogers, J., dissenting).

178. *Id.* at 665.

179. NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(c) (1994).

180. *See, e.g.*, 50 Feg. Reg. 25,473 (1985) (Office of Surface Mining Reclamation and Enforcement determined that proposed rule defining prohibitions for coal mining operations was a major Federal action within the meaning of NEPA, and therefore required the preparation of an EIS).

181. *See id.*

182. *See Bentsen II*, 94 F.3d at 672 (Buckley, J., concurring), 675 (Rogers, J., dissenting) (quoting City of Davis v. Coleman, 521 F.2d 661, 671 (9th Cir. 1975)).

183. *See supra* note 121.

the production of corn, sugar cane, and sugar beets.[184] The EIS would also determine what impact those increases would have on the environment. Thus, by requiring the plaintiffs to "demonstrate"[185] "that individual corn or sugar farmers . . . will affirmatively respond to the tax credit by significantly increasing production,"[186] the court is essentially requiring the plaintiffs to prepare an EIS. However, "[t]o require plaintiffs to show what [the environmental] effects [of a proposed federal action] are, as a prerequisite to requiring that an EIS be performed, seems inconsistent with the basic purpose of NEPA."[187]

Therefore, absent preparing an EIS, plaintiffs challenging a rulemaking with diffuse impacts are unable to maintain standing. In light of the statutory language in NEPA, this is an undesirable result. The *Bentsen* court has taken the recent trend[188] adopted by courts interpreting the standing doctrine more strictly to an unacceptable extreme.

V. Conclusion

The doctrine of standing as applied to procedural rights plaintiffs bringing an action under NEPA has been carefully developed by the courts over the last two decades.[189] Circuit courts have long expressed the need for these plaintiffs to establish a geographical nexus to the affected area.[190] Finally, in 1992, the Supreme Court in *Lujan* also recognized the need for such a requirement.[191] The *Lujan* court provided guidance for courts faced with plaintiffs alleging a failure to prepare an EIS.[192]

The *Bentsen II* court was faced with such a claim, but misapplied *Lujan* in its analysis of all three requirements of

184. *See supra* note 119 and accompanying text.
185. *See supra* notes 131-36 and accompanying text.
186. *Bentsen II*, 94 F.3d at 667.
187. STEPHEN G. BREYER & RICHARD B. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 1107 (2d ed. 1985).
188. *See infra* note 3 and accompanying text.
189. *See infra* Part II.C.
190. *See id.*
191. *Lujan*, 504 U.S. 555 (1992).
192. *See infra* Part II.C.2.b.

standing. The court did not acknowledge the Supreme Court's clear instructions in *Lujan* that the normal requirements of redressability and immediacy need not be met by procedural rights plaintiffs. The *Bentsen II* court adopted a stricter standard for causation than was expressed in *Lujan*. Finally, and most importantly, the *Bentsen II* court created a new element of injury in fact by requiring the injury to be demonstrable. This final blow to procedural rights plaintiffs not only ignores *Lujan's* support for the geographical nexus test, but also "erodes the effectiveness of one of the most important environmental measures of the past generation."[193]

193. *Bentsen II*, 94 F.3d 658, 672 (D.C. Cir. 1996) (Buckley, J., concurring).