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## STANDING: WHO SPEAKS FOR THE ENVIRONMENT?

## INTRODUCTION

In the current turmoil of environmental litigation, there are few areas so much in ferment as that known as standing.<sup>1</sup> This concept involves the ability, if not the right, of a person to be heard in a court of law:

The gist of the question of standing is whether the litigant has such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult questions.<sup>2</sup>

The importance of standing is of no small moment:

The first, and perhaps the greatest hurdle in a suit with the federal government is the motion to dismiss for lack of jurisdiction. Because the government puts so much of its litigation effort into such motions, he who defeats one may consider himself to have won a major victory. In fact, establishing the right of the citizen to sue to protect the environment by defeating such motions is of the first priority. Precedents in the field are to be sought after.<sup>3</sup>

The change in the law is so rapid, however, that while this statement was made barely more than a year ago it is already dated. While the problems of standing have not been entirely eliminated,<sup>4</sup> this note will demonstrate that the direction is clear;<sup>5</sup> that the right of the citizen to challenge actions of the federal government in order to protect an environment has gained an established position; and that feasible means exist to provide standing to citizens to challenge action of other citizens on behalf of the public interest in the environment.

<sup>1</sup>Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816 (1969): "Confusion twice confounded reigns in the area of federal jurisdiction described as standing to sue."; Davis, *The Liberalized Law of Standing*, 37 UNIV. OF CHI. L. REV. 450 (1970); Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227 (1966).

<sup>2</sup>*Baker v. Carr*, 369 U.S. 186 (1962).

<sup>3</sup>Note, *Project Rulison Brief*, 55 CORNELL L. REV. 761 (1970) quoting James W. Moorman, *Outline for the Practicing Environmental Lawyer*, presented to the Conference on Law and Environment, September 11-12, 1969, Warrenton, Virginia.

<sup>4</sup>In addition to those discussed *infra*, the *Environmental Law Digest*, (August/September, 1970) lists the following pending cases in which standing is contested: *Alpine Lakes Protection Society v. Hardin* (W.D. Wash.); *Association of Northwest Steelheaders v. Corps of Engineers* (W.D. Wash.); *Environmental Defense Fund v. Corps of Engineers* (D.C. Cir.); *Gandt v. Hardin* (W.D. Mich.); *Ottinger v. Penn Central* (S.D. N.Y.); *Schiller v. Muskegon* (W.D. Mich.); *Sierra Club v. Hardin* (D. Alaska); *Soucise v. Volpe* (D.C. Cir.); *Steward v. Besor* (E.D. Pa.); *Stock v. Ronan* (N.Y. Sup. Ct.); *Texas Committee on Natural Resources v. U.S.* (W.D. Tex.).

<sup>5</sup>The trend is well documented: Davis, *supra* note 1; Reich, *supra* note 1; Davis, *Standing: Taxpayers and Others*, 35 UNIV. OF CHI. L. REV. 601 (1968); Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 UNIV. OF PENN. L. REV. 1033; Sax, *Public Rights in Public Resources; The Citizens Role in Conservation and Development*, in CONTEMPORARY DEVELOPMENTS IN WATER LAW (Johnson and Lewis, eds. 1970); Comment, *Administrative and Judicial Remedies Relating to the Use and Disposition of the Public Land Administered by the Department of the Interior*, 38 UNIV. OF COLO. L. REV. 391 (1966); Note, *Equity and the Federal Surface Geologic Investigations of Montana*, 1971 MICH. L. REV. 1254 (1970).

Causes for confusion in the law of standing have drawn much comment.<sup>6</sup> It is outside the scope of this note to re-examine those forces. This note will be limited to an examination of requirements for representation of the public interest in environmental litigation in two areas: standing to bring suit for judicial review, and standing to challenge the actions of private citizens on behalf of the public. The first, judicial review, finds focus on cases involving the federal government, and the second, on an enabling statute for the states to allow citizen challenge of private conduct that is adverse to the public interest in the environment.

Standing is generally recognized as but one aspect of justiciability.<sup>7</sup> It goes to the qualifications of the plaintiff to bring the suit, and not to the sufficiency of the issues in dispute.<sup>8</sup> It also requires injury suffered by the plaintiff<sup>9</sup> and some nexus between the status of the plaintiff and the conduct challenged.<sup>10</sup>

The last two requirements are most frequently at issue, and are not easily separated in public interest suits. Injury is not confined to economic injury, but has been held to include injury to aesthetic, conservation, and recreational interests.<sup>11</sup> In cases of judicial review, the injury and the required nexus have been satisfied by a showing of "person aggrieved" and "adversely affected" by decisions of administrative agencies.<sup>12</sup> The injury required under this statute has also been described

<sup>6</sup>U.S. ex rel Chapman v. Federal Power Commission, 345 U.S. 153, 156 (1953). In addition to the problems inherent in the concept itself, two others should be noted: Inadequately developed legal theories and poorly prepared factual cases discussed in Note, *Equity and the Eco-System: Can Injunctions Clear the Air?*, *supra* note 5; Reich, *supra* note 1; Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255 (1961); Note, *The Conservationists and the Public Lands*, 68 MICH. L. REV. 1200 (1970).

<sup>7</sup>Flast v. Cohen, 392 U.S. 83, 98 (1968); Lewis, *Constitutional Rights and the Misuse of Standing*, 14 STAN. L. REV. 433 (1962).

<sup>8</sup>Flast v. Cohen, *supra* note 7 at 99: ". . . when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue, and not whether the issue itself is justiciable."

<sup>9</sup>*Id.* at 101; Scanwell Laboratory v. Shaffer, 424 F.2d 859, 872, (D.C. Cir. 1970).

<sup>10</sup>Flast v. Cohen, *supra* note 7 at 102; Jaffe, *Standing to Secure Judicial Reviews Private Actions*, *supra* note 6; Davis, *Standing: Taxpayers and Others*, *supra* note 5. For a clear discussion of the distinctions involved see the dissent to *Barlow v. Collins*, 397 U.S. 159, 168 (1970); and *Association of Data Processing Service Organizations (A.D.P.) v. Camp*, 397 U.S. 150, 168 (1970).

<sup>11</sup>Scenic Hudson Preservation Conference v. Federal Power Commission (F.P.C.), 354 F.2d 609, 615 (2nd Cir. 1965); Environmental Defense Fund (E.D.F.) v. Hardin, 428 F.2d 1093, 1096 (D.C. Cir. 1970); Road Review League, Town of Bedford v. Boyd, 270 F. Supp. 650, 660 (S.D. N.Y. 1967).

<sup>12</sup>E.D.F. v. Hardin, *supra* note 11 at 1097: "Like other consumers, those who consume—however unwittingly—the pesticide residues permitted by the Secretary [Secretary of Agriculture] to accumulate in the environment are 'persons aggrieved by agency action within the meaning of a relevant statute.'" The footnote to this language states: "That is the test of standing conferred by the A.P.A. [Administrative Procedures Act] 5 U.S.C. § 702 (Supp. V. 1969). It is equivalent to the requirement that the complainants interests fall within the zone of interest sought to be protected by the statute." The note cites *Barlow v. Collins*, *supra* note 10 and *A.D.P. v. Camp*, *supra* note 7; *Abbott Laboratories v. Gardner*, 387 U.S. 138 (1967). See note 38 *infra* for text of 5 U.S.C. § 702.

as an invasion of a "legal interest," as a "legally protected interest," and as a "legal wrong."<sup>13</sup> And this language can also be descriptive of the required nexus.

Where the plaintiff sues as a representative of the public interest in an environment, the injury to the plaintiff need not be greater than that to the public generally.<sup>14</sup> And in certain situations a plaintiff will be granted standing not because of the injury to himself that he alleges, but because of his capacity to represent those whose rights he asserts, and the recognized nexus between the rights asserted and the conduct challenged. This occurs where plaintiff radio stations challenge Federal Communication Commission (F.C.C.) licensing decisions;<sup>15</sup> where competitors are allowed to represent the public;<sup>16</sup> where a plaintiff asserts the

<sup>13</sup>*Perkins v. Lukens*, 310 U.S. 113, 125 (1940); *Harrison-Halsted Community Group v. Housing and Home Finance Agency*, 310 F.2d 99 (7th Cir. 1962) denied standing to a group of homeowners protesting an urban renewal project on the ground that the plaintiffs had no legal right that had been invaded. *Dicta* in *Scanwell Laboratory v. Thomas*, *supra* note 9 at 472 presents a detailed argument that the legal interest test should be rejected in favor of a single test, "injury in fact." *Accord*, dissent to *Barlow v. Collins*, *supra* note 10 at 168.

<sup>14</sup>*E.D.F. v. Hardin*, *supra* note 11 at 1096. This action was brought against the Secretary of Agriculture by five conservation organizations to suspend and cancel registration of D.D.T. The court, under 7 U.S.C. § 135 (d) (1964) granting the right of review to "any persons who will be adversely affected by an order" granted standing: "The zone of interests sought to be protected by the statute included not only the economic interest of the registrant but also the public interest in safety. Thus petitioners have standing if they allege sufficient injury in fact to create a constitutionally justiciable issue." At 1097: "Consumers of regulated products and services have standing to protect the public interest in the proper consideration of a regulatory system enacted for their benefit," and "The consumers interest in environmental protection may properly be represented by a membership organization with a national interest in the problem."

<sup>15</sup>Standing under the Federal Communication Act has its own history: In *Commission v. Sanders Radio Station*, 309 U.S. 470 (1940) the plaintiff was granted standing even though he had "no right" as an injured competitor, but only that of protecting the public. In *Scripps Howard Radio v. F.C.C.*, 316 U.S. 4 (1942) the plaintiff was granted standing as an aggrieved person only as a representative of the public. And in *Office of Communication of the Church of Christ v. F.C.C.* (Federal Communication Commission), 359 F.2d 994, 1002 (D.C. Cir. 1966) Warren E. Burger, J.: "Since the concept of standing is a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding, we can see no reason to exclude those with such an obvious and acute concern as the listening audience," granting a competing radio station standing as the representative of the listening audience.

<sup>16</sup>Consumer representatives, too, have recognized standing: *Associated Industries of New York v. Ickes*, 134 F.2d 694, 704 vacated as moot 320 U.S. 707 (1943): "While Congress can constitutionally authorize no one in the absence of an actual justiciable controversy, to bring a suit for the judicial determination either of the constitutionality of a statute or the scope of powers conferred by a statute upon a government officer, it can constitutionally authorize one of its own officials, such as the Attorney General, to bring a proceeding to prevent another official from acting in violation of his statutory powers; for then an actual controversy exists, and the Attorney General can properly be vested with authority, in such a controversy, to vindicate the interest of the public or the government. Instead of designating the Attorney General, or some other public officer, to bring such proceedings, the Congress can constitutionally enact a statute conferring on any non-official person, or on a designated group of non-official persons, authority to bring a suit to prevent action by an officer in violation of his statutory powers; for then, in like manner, there is an actual controversy, and there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a

rights of others under the First Amendment to the Constitution;<sup>17</sup> and where unique fact situations are controlling.<sup>18</sup>

The United States Supreme Court had long denied the right of a person suing as a federal taxpayer to challenge federal expenditures.<sup>19</sup> That rule was changed in 1968, when the court granted standing to a taxpayer, as taxpayer, to challenge allegedly unconstitutional expenditures under the First Amendment.<sup>20</sup> The court required that the plaintiff challenge a specific constitutional provision, and that he demonstrate a nexus between his status as an injured taxpayer and the allegedly unconstitutional expenditure.<sup>21</sup> That was a significant step toward allowing a citizen to sue, but it can best be perceived as a step in judicial evolution that began in England where "even a stranger" was allowed to challenge governmental conduct.<sup>22</sup> The development in the United States first recognized a taxpayer's right to challenge municipal expenditures<sup>23</sup> and then to challenge state expenditures.<sup>24</sup> Both had been upheld by the Supreme Court,<sup>25</sup> providing ground upon which this next step was taken—to allow a taxpayer to challenge federal expenditures. Further, the Supreme Court had long recognized the concept of the public interest as providing basis for standing,<sup>26</sup> and had made early suggestions as to the

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controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are so to speak, private Attorney Generals." *Accord*, *Read v. Ewing*, 205 F.2d 630, 631 (2nd Cir. 1953); *Hardin v. Kentucky Utilities*, 390 U.S. 1 (1968); *E.D.F. v. Hardin*, *supra* note 11 at 1097.

<sup>17</sup>*Sedler, Standing to Assert Constitutional Jus Tertii*, 71 YALE L.J. 599 (1962); *Abington School Dist. v. Schempp* 374 U.S. 203 (1963); *Allen v. State Board of Electors*, 393 U.S. 544 (1969); *Board of Education v. Allen*, 392 U.S. 236 (1968). *Contra*, *Tileston v. Ullman*, 318 U.S. 44 (1943).

<sup>18</sup>A miscellaneous category is necessary: *Gonzales v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964). Plaintiff challenged his disbarment from bidding on government contracts. The court, in an opinion by Warren E. Burger, J. held that the plaintiff had no right to bid, but nevertheless had standing to contest his disbarment; *Jenkins v. McKeithen*, 395 U.S. 411 (1969). Standing was granted without a showing of injury or even immediate threat to the plaintiff, but only to those subject to action by a state investigative commission; *Superior Oil v. Udall*, 409 F.2d 1115 (D.C. Cir. 1969). Standing was granted without discussion to a second low bidder to challenge a federal contract award to the low bidder; *Scanwell Laboratory v. Thomas*, *supra* note 9. The second low bidder was granted standing as a party aggrieved under the Administrative Procedures Act to challenge the contract award to the lowest bidder.

<sup>19</sup>*Massachusetts v. Mellon*, 262 U.S. 447 (1923).

<sup>20</sup>*Flast v. Cohen*, *supra* note 7.

<sup>21</sup>*Id.* at 102.

<sup>22</sup>*Berger, supra* note 1.

<sup>23</sup>*Jaffe, Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961) identified 40 states, including Montana, that allow suits against municipalities; *Comment, Taxpayer's Suits: A Survey and Summary*, 69 YALE L.J. 895 (1960) identified 34 states, including Montana, which allow taxpayers suits against municipal action; *Comment, Standing to Sue and Conservation Values*, *supra*, note 5.

<sup>24</sup>*Jaffe, supra* note 5; *Jaffe, id.* identified 27 states that allow suit against the state, and "another 9 or more where it may be true."

<sup>25</sup>*Everson v. Board of Education*, 330 U.S. 1 (1947); *Cochrane v. Louisiana State Bd. of Educ.*, 281 U.S. 370 (1930); *Hawke v. Smith*, 253 U.S. 221 (1920); *Crampton v. Zabrieski*, 101 U.S. 601 (1879).

<sup>26</sup>*Associated Industries v. Ickes, supra* note 16; *Office of Communication of United Church of Christ v. F.C.C.*, *supra* note 15 at 1002.

requirements of a plaintiff who could represent that interest. Two bases then are supplied: a taxpayer can sue, and there is a representable public interest. The process that followed is a melding of the two to provide citizen representation to protect an environment.

### JUDICIAL REVIEW

Standing to challenge governmental action in order to protect an environment based on non-economic adverse impact on the public interest is now granted, if not routinely, at least often enough to provide material for analysis. A few cases stand out:

In 1965, a group of New York citizens, organized as the Scenic Hudson Preservation Conference, joined with three Hudson River towns (Cortlandt, Putnam Valley, and Yorktown) to challenge the decision of the Federal Power Commission (F.P.C.) to grant a license to Consolidated Edison Company to construct a pumped-storage project atop Storm King Mountain, on the west side of the Hudson River.<sup>27</sup> The Second Circuit Court of Appeals granted standing:

Although a "case" or "controversy" which is otherwise lacking cannot be created by statute, a statute may create new interests or rights and thus give standing to one who would be barred by the lack of "case" or "controversy." The case or controversy requirement of Article III §2 of the Constitution does not require that an aggrieved or adversely affected party have a personal economic interest.<sup>28</sup>

The petitioners sued under the Federal Power Act (F.P.A.).<sup>29</sup> The court held that the Act created enforceable rights in a person adversely affected or aggrieved;<sup>30</sup> that adversely affected or aggrieved did not require personal injury to the plaintiff, but only injury to the public at large;<sup>31</sup> and that the injury to the public need not be economic, but could be recreational, aesthetic, or conservational.<sup>32</sup>

The petitioners were successful in their challenge: the court directed the F.P.C. to take into consideration environmental concerns in their licensing deliberations.<sup>33</sup>

<sup>27</sup>Scenic Hudson Preservation Conference v. F.P.C., *supra* note 11.

<sup>28</sup>*Id.* at 615.

<sup>29</sup>FEDERAL POWER ACT, 16 U.S.C. § 825 (1) (b). "Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee of public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part . . ."

<sup>30</sup>Scenic Hudson Preservation Conference v. F.P.C., *supra* note 11 at 616.

<sup>31</sup>*Id.*; Powelton Civic Home Owners v. H.U.D. (Department of Housing and Urban Development), 284 F. Supp. 809, 826 (1968). "The import of the *Scenic Hudson* case is that neither economic injury nor a specific individual legal right are necessary adjuncts to standing."

<sup>32</sup>Scenic Hudson Preservation Conference v. F.P.C., *supra* note 11 at 615.

<sup>33</sup>*Id.* at 624. It must be noted that a court order against the agency action was not obtained: all that was gained was that the agency must consider non-economic environmental interests in making their determinations.

A second step was taken in a suit initiated by the Citizens Committee for Hudson Valley, the Sierra Club, and the Village of Tarreytown, New York.<sup>34</sup> The Corps of Engineers had begun construction of a dike and causeway to run along the Hudson for several miles, claiming authority to do so had been delegated by Congress.<sup>35</sup> The plaintiffs argued that the delegation of authority omitted "dike" construction and so required Congressional approval.<sup>36</sup>

In its consideration of standing for the Sierra Club, the court (the Second Circuit again) declared:

We hold, therefore, that the public interest in environmental resources—an interest created by statutes affecting the issuance of this permit is a legally protected interest, affording these plaintiffs, as responsible representatives of the public, standing to obtain judicial review of agency action alleged to be in contravention of that public interest.<sup>37</sup>

Standing for review in this case rested solely upon Section 10 of the Administrative Procedures Act (A.P.A.).<sup>38</sup> The Rivers and Harbors Act does not provide for judicial review as does the F.P.A. Nonetheless, federal court jurisdiction to review agency actions, under this holding, is based on the A.P.A.<sup>39</sup> A plaintiff meeting the requirements of the A.P.A. will require no additional statutory aid to obtain judicial review in federal court. Summing up, the court holds:

The rule, therefore, is that if the statutes involved in the controversy are concerned with the protection of natural, historic, and scenic resources, then a congressional intent exists to give standing to groups interested in these factors and who allege that these factors are not being properly considered by the agency.<sup>40</sup>

A third dimension was added in 1967 when the Road Review League, Town of Bedford, New Jersey, a local civic organization and two wild-life sanctuaries<sup>41</sup> brought suit under Section 10 of the A.P.A.<sup>42</sup> and the Federal Highway Act<sup>43</sup> to challenge the proposed location of a highway.<sup>44</sup> The court granted standing: "My decision here can be thought to involve an extension of the Scenic Hudson doctrine. If so it is an extension which I believe to be warranted by the rationale of that decision."<sup>45</sup> The extension? The plaintiffs in Scenic Hudson had appealed as parties to an administrative proceeding and were returned to that agency for

<sup>34</sup>Citizens Committee for Hudson Valley v. Volpe, 425 F.2d 97 (2nd Cir. 1970).

<sup>35</sup>THE RIVERS AND HARBORS ACT OF 1899, § 10, 33 U.S.C. § 403.

<sup>36</sup>THE RIVERS AND HARBORS ACT OF 1899, § 9, 33 U.S.C. § 401.

<sup>37</sup>Citizens Committee for Hudson Valley v. Volpe, *supra* note 34 at 105.

<sup>38</sup>ADMINISTRATIVE PROCEDURES ACT, § 10, 5 U.S.C. § 702 (Supp. IV). A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial relief thereof.

<sup>39</sup>Citizens Committee for Hudson Valley v. Volpe, *supra* note 34 at 101.

<sup>40</sup>*Id.* at 105.

<sup>41</sup>Road Review League, Town of Bedford v. Boyd, *supra* note 11.

<sup>42</sup>*See* discussion, *supra* note 38.

<sup>43</sup>FEDERAL HIGHWAY ACT, 23 U.S.C. § 101 et. seq.

<sup>44</sup>Road Review League, Town of Bedford v. Boyd, *supra* note 11 at 653.

<sup>45</sup>*Id.* at 661.

further proceedings;<sup>46</sup> plaintiffs in this case brought an independent action, without having first participated, except for public hearings, in formal agency review.<sup>47</sup>

The Supreme Court has not directly faced the question of standing in environmental litigation, but it has considered the problem of standing in similar contexts: standing was granted to tenant farmers for statutorily created interests<sup>48</sup> and to an injured competitor under the A.P.A. to challenge action of the Comptroller General.<sup>49</sup> In these two cases the court required a showing of injury in fact under the Constitutional requirement for a case or controversy, and in addition, a showing that the "interest sought to be protected is arguably within the zone of interests to be protected by the statute or constitutional guarantee in question."<sup>50</sup> Thus the court specifies two tests: "injury in fact" and "zone of interests."<sup>51</sup>

In another instructive opinion<sup>52</sup> by Warren E. Burger when he sat as Justice on the Washington, D.C. Circuit Court of Appeals, a plaintiff radio station challenged renewal of a radio broadcasting license by the Federal Communications Commission. The present Chief Justice noted: "There is nothing unusual or novel in granting the consuming public standing to challenge administrative actions,"<sup>53</sup> and that "we do not now hold that all the [plaintiffs] have standing to challenge WLBT's renewal—only that the commission must allow standing to one or more to assert claims on behalf of the public."<sup>54</sup>

<sup>46</sup>Scenic Hudson Preservation Conference v. F.P.C., *supra* note 11 at 624.

<sup>47</sup>Road Review League, Town of Bedford v. Boyd, *supra* note 11 at 655.

<sup>48</sup>A.D.P. v. Camp, *supra* note 10.

<sup>49</sup>Barlow v. Collins, *supra* note 10.

<sup>50</sup>A.D.P. v. Camp, *supra* note 10 at 153.

<sup>51</sup>Barlow v. Collins, *supra* note 10 at 164. Dissent to standing treatment in *Barlow v. Collins*, *supra* note 10 at 168. Davis, *supra* note 1 at 456 argues that the zone of interests test articulated in *Barlow v. Collins* would, if applied, have denied standing to the plaintiff in *A.D.P. v. Camp*, *supra* note 10.

<sup>52</sup>Office of Communication of United Church of Christ v. F.C.C., *supra* note 15; National Association of Security Dealers v. Securities & Exch. Com'n, 420 F.2d 83 (D.C. Cir. 1969). In the latter case plaintiffs brought suit to enjoin the S.E.C. from establishing a collective investment fund. In a concurring opinion on standing Warren E. Burger, J. identified three theories upon which to base standing: statutory, public license, and statutory protection. He found five "hybrid variations" some of which are valid, some not: (1) the *Flast v. Cohen* (*supra* note 7) provision for taxpayer challenges of federal expenditures allegedly in violation of specific constitutional limitations; (2) the unique application of the "consumer aggrievement" concept articulated in *Office of Communication of United Church of Christ v. F.C.C.* (*supra* note 15) pursuant to the "person aggrieved" provision of the F.C.A. (Federal Communications Act) 47 U.S.C. § 309 (d) (1964); (3) the discretionary standing theory broached in *Curran v. Clifford* (December 27, 1968), opinion vacated petition for rehearing en banc granted No. 21,040 (D.C. Cir. April 3, 1969); (4) the concept that "aggrievement in fact" is sufficient to give a party standing to challenge action under Section 10 of the A.P.A., 5 U.S.C. § 702; (5) the improper utilization of the "unlawful competition" theory employed by some courts which have granted standing in cases involving recent promulgations by the Comptroller of the Currency. *Saxon v. Georgia Assoc. Of Industrial Inc. Agents*, 399 F.2d 1010 (5th Cir. 1968).

<sup>53</sup>Office of Communication of the United Church of Christ v. F.C.C., *supra* note 15 at 1002.

<sup>54</sup>*Id.* at 1006.



While these statements are in the context of an F.P.C. licensing suit, already noted as a separate category,<sup>55</sup> they are nevertheless indicative of a position not adverse to granting standing to a representative of the public interest, and more importantly, they indicate that the critical problem is not whether the public interest is to be represented, but who is to be granted the right to do so, a problem considered below.

Adding this to the environmental cases discussed above, some points emerge: statutes designed to protect some public interest are being construed to create enforceable non-economic rights.<sup>56</sup> The A.P.A. will provide judicial authority to a federal court to review agency action, even though the agency's enabling legislation lacks a judicial review provision.<sup>57</sup> The question has become "What are the characteristics of a qualified representative of the public interest?"

Before this question can be answered, it is necessary to examine contrary holdings. What was beginning to appear as an even and unbroken chain in the development of the law of standing was shaken by a recent California case. The Ninth Circuit denied standing to the Sierra Club seeking injunctive relief to prevent development of the Mineral King

<sup>55</sup>Supra note 15.

<sup>56</sup>Statutes that have been held to create enforceable public rights include, e.g., The Federal Power Act, supra note 29, and in *Citizens for Allegon County, Inc. v. F.P.C.*, 414 F.2d 1125 (D.C. Cir. 1969); The 1964 Wilderness Act, 16 U.S.C. § 1131 in *Parker v. U.S.*, 309 F. Supp. 593 (D.Colo. 1970); The Federal-Aid Highway Act of 1956, Section 116c, 70 Stat. 385, 23 U.S.C. § 128 in *Nashville I-40 Steering Committee v. Ellington*, 387 F.2d 179 (6th Cir. 1967); Food and Agriculture Act of 1965, 7 U.S.C. § 144 (d) (10) and the Anti-Assignment Act, 31 U.S.C. § 203 in *Barlow v. Collins*, supra note 10; Securities and Exchange Act, 15 U.S.C. § 80 a-42(a) in *National Ass'n of Security Dealers v. S.E.C.*, supra note 52, and in *J. I. Case Co v. Borak*, 377 U.S. 426 (1964); the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 135b (1964) in *E.D.F. v. Hardin*, supra note 11; The Anadromous Fish Act in *Udall v. F.P.C.*, 387 U.S. 428 (1967); The Federal Communications Act, supra note 15; The Rivers and Harbors Act of 1899, supra notes 35 and 37; the Interstate Commerce Act, 49 Stat. 550, 49 U.S.C. § 305(g) in *American Trucking Ass'n Inc. v. U.S.*, 364 U.S. 1 (1960).

*Sax*, supra note 5 at 151 lists the following as expressing a governmental policy of protection: The Federal Transportation Act, 49 U.S.C. § 1653 (f) (Supp. IV, 1968); The Fish and Wildlife Coordination Act, 16 U.S.C. § 1662(a) (1964); The Colorado River Storage Project Act, 43 U.S.C. § 620b, 620g (1964); The Endangered Species Act, 16 U.S.C. § 688aa(b) (Supp. IV, 1968); The Cape Cod National Seashore Act, 16 U.S.C. § 459 b-6(b) (1) (Supp. 1969); The Housing Act, 42 U.S.C. § 1500c (1964); The Everglades Park Act, 16 U.S.C. § 410c, d (1964).

<sup>57</sup>*Citizens Committee for Hudson Valley v. Volpe*, supra note 34 at 102. "There can be no question at this late date that Congress intended by the Administrative Procedure Act to assure comprehensive review of 'a broad spectrum of administrative actions,' including those made reviewable by specific statutes without adequate review provisions as well as those for which no review is available under any other statute." *Abbott Laboratories v. Gardner* supra note 12; *National Ass'n of Security Dealers v. S.E.C.*, supra note 52 at 96; *Road Review League, Town of Bedford v. Boyd*, supra note 11 at 661; *Powelton Civic Home Owners v. H.U.D.*, supra note 31 at 820; *E.D.F. v. U.S. Dep't of H.E.W.* (Health, Education and Welfare), 428 F.2d 1083, 1086 (D.C. Cir. 1970); S. Rep. No. 752, 79th Cong. 1st Session 26 (1945); H.R. Rep. No. 1980, 79th Cong. 2d Session 41 (1946). *Contra*, *Harrison-Halsted Community Group v. Housing and Home Finance Admin. Agency*, supra note 13 at 104; *Kansas City Power and Light v. McKay*, 225 F.2d 924 (D.C. Cir. 1955); *Pennsylvania R.R. v. Dillon*, 335 F.2d 292, 297 (D.C. Cir. 1964); *Sierra Club v. Hickel*, 433 F.2d 24 (9th Cir. 1970); Note, *Federal Regulations of Air Transportation and Environmental Impact*, 35 UNIV. OF CHI. L. REV. 317.

Valley under licensing decisions of the Department of the Interior.<sup>58</sup> Emphasizing that standing requires injury in fact, though not necessarily economic, the court found that the Sierra Club, a California non-profit conservation organization, did not have sufficient interest in the proposed development to qualify as an injured party.<sup>59</sup> The court held that the A.P.A. does not broaden standing<sup>60</sup> and distinguished the cases relied on by the Sierra Club in support of standing. *Scenic Hudson v. F.P.C.*<sup>61</sup> was distinguished by noting that local plaintiffs had organized and joined to sue, and that the F.P.A. granted judicial review.<sup>62</sup> *Communication Office of the United Church of Christ v. F.C.C.*<sup>63</sup> was distinguished as a consumer case.<sup>64</sup> *Road Review League, Town of Bedford v. Boyd*<sup>65</sup> and *Powelton Civic Homeowners v. H.U.D.*<sup>66</sup> were brought by plaintiffs directly affected by the challenged action.<sup>67</sup> *A.D.P. v. Camp*<sup>68</sup> was a case of a plaintiff with an injury in fact, even with the "zone of interests" language.<sup>69</sup> The court disposed of *Citizens Committee for Hudson Valley v. Volpe*<sup>70</sup> in a footnote, disagreeing with the Second Circuit's holding to the extent that the Sierra Club had standing as a private attorney general.<sup>71</sup> Finally, the court required that there exist:

. . . an element of legal wrong being inflicted upon [the plaintiff] or that [the plaintiff be] adversely affected by agency action or aggrieved within the meaning of a relevant statute.

It is this element which appellee fails to sufficiently allege. . . it does not allege that it is aggrieved or that it is adversely affected.<sup>72</sup>

<sup>58</sup>*Sierra Club v. Hickel*, *supra* note 57.

<sup>59</sup>*Id.* at 30.

<sup>60</sup>*Id.* at 32; *supra* note 57.

<sup>61</sup>Cases cited, *supra* note 11.

<sup>62</sup>*Sierra Club v. Hickel*, *supra* note 57 at 30.

<sup>63</sup>See discussion and cases cited, *supra* note 15.

<sup>64</sup>*Sierra Club v. Hickel*, *supra* note 57 at 30.

<sup>65</sup>Cases cited, *supra* note 11.

<sup>66</sup>Cases cited, *supra* note 31.

<sup>67</sup>*Sierra Club v. Hickel*, *supra* note 57 at 30. The court also distinguished *Citizens Committee for Hudson Valley v. Volpe*, *supra* note 34 and *Parker v. U.S.*, *supra* note 56 as cases where the Sierra Club was joined by organizations of local plaintiffs.

<sup>68</sup>Cases cited, *supra* note 10.

<sup>69</sup>*Sierra Club v. Hickel*, *supra* note 57 at 31. The court submits that the "zone of interests" language does not constitute a new test.

<sup>70</sup>*Citizens Committee for Hudson Valley v. Volpe*, *supra* note 34.

<sup>71</sup>*Sierra Club v. Hickel*, *supra* note 57 at 33, n. 9. ". . . to the extent to which *Citizens Committee for Hudson Valley v. Volpe*, indicates that the Sierra Club has standing within the 'private Attorney Generals' rule, we respectfully disagree. We believe that rule is limited as it states to cases where Congress has enacted a statute 'conferring on any non-official person, or on a group of non-official persons, authority to bring a suit' to prevent unauthorized official action. See *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d at 864. We find no indication in any federal statute that congress has 'conferred' on the Sierra Club or any group like it, authority to bring suits to challenge official action." *Citizens Committee for Hudson Valley v. Volpe*, *supra* note 34 at 103 found that the plaintiffs Sierra Club and Citizens Committee ". . . had evidenced the seriousness of their concern with local natural resources by organizing for the purpose of cogently expressing it, and the intensity of their concern is apparent from the considerable expense and effort they have undertaken in order to protect the public interest . . . In short they have proved the genuineness of their concern by demonstrating that they are 'willing to shoulder the burdensome and costly processes of intervention' in an administrative proceeding." (cite omitted)

<sup>72</sup>*Sierra Club v. Hickel*, *supra* note 57 at 32.

The Sierra Club did allege irreparable harm to the public interest<sup>73</sup> and that "its interest would be vitally affected by the acts hereinafter described and would be aggrieved by those acts of the defendant as hereinafter more fully appears."<sup>74</sup> The plaintiff alleged that it had 78,000 members nationally, and 27,000 in the San Francisco Bay area, near the Mineral King Valley.<sup>75</sup>

In addition to the footnote confrontation with the *Citizens Committee* holding<sup>76</sup> perhaps the most revealing paragraph is this dictum:

We do not believe such club concern without a showing of more direct interest can constitute standing in the legal sense sufficient to challenge the exercise of responsibilities on behalf of all the citizens by two cabinet level officials of the government acting under congressional and Constitutional authority.<sup>77</sup>

Even granting that the Sierra Club did fail to properly allege its standing, there is nevertheless a posture taken in this case contrary to that of the Second Circuit previously discussed.<sup>78</sup>

What, then, are the characteristics of one who would assert the public interest? Certain indicia emerge: in most cases, there are local plaintiffs,<sup>79</sup> not necessarily private persons suing individually, but groups of local citizens, who, in a daily and routine way will be affected by the challenged action. Private persons have also been granted standing to assert environmental issues, but only where joined with organizations.<sup>80</sup> Non-profit national organizations granted standing to assert public environmental rights include the Environmental Defense Fund (E.D.F.) suing as an organization that "seeks to assure the preservation or restoration of environmental quality on behalf of the general public,"<sup>81</sup> and the Sierra Club as an organization with "a history of involvement in the preservation of national scenic and recreational resources,"<sup>82</sup> and as having a "special interest in the conservation and sound maintenance of the national parks and forests."<sup>83</sup>

<sup>73</sup>*Id.*, at 28.

<sup>74</sup>*Id.* at 29.

<sup>75</sup>*Id.*, at 29.

<sup>76</sup>See discussion and cases cited, *supra* note 11.

<sup>77</sup>*Sierra Club v. Hickel*, *supra* note 57 at 30.

<sup>78</sup>After dismissing the case for want of standing, the court went on to discuss the merits. From that discussion it appears that environmental considerations were a significant part in the agency's proceedings, but that, of course, ought not to be of significance in a standing question.

<sup>79</sup>*Scenic Hudson Preservation Conference v. F.P.C.*, *supra* note 11; *Citizens Committee for Hudson Valley v. Volpe*, *supra* note 34; *E.D.F. v. Hardin*, *supra* note 11; *E.D.F. v. H.E.W.*, *supra* note 57. *Contra*, *E.D.F. v. Hoerner-Waldorf*, No. 1694 (D. Mont., August 25, 1970) note, *E.D.F. v. Hoerner-Waldorf: Pollution, Industry and Constitutional Rights*, *infra* at 161.

<sup>80</sup>*E.D.F. v. Hardin*, *supra* note 11; *E.D.F. v. H.E.W.*, *supra* note 57; *Parker v. U.S.*, *supra* note 56.

<sup>81</sup>*E.D.F. v. Hoerner-Waldorf*, *supra* note 79.

<sup>82</sup>*Citizens Committee for Hudson River v. Volpe*, *supra* note 34 at 103.

<sup>83</sup>*Sierra Club v. Hickel*, *supra* note 57 at 29.

Professor Kenneth C. Davis<sup>84</sup> and David Sive,<sup>85</sup> esq. suggest that public interest suits are basically class actions, and that Rule 23 of the Federal Rules of Civil Procedure<sup>86</sup> applies. The Rule 23 requirement that the representative "fairly and adequately protect the interests of the class" is echoed in the discussions of standing. Key language has required that the Plaintiff seeking to assert the public interest in an environment be "a responsible representative,"<sup>87</sup> or that he be an "appropriate representative."<sup>88</sup> Plaintiffs are granted standing as "private attorney generals."<sup>89</sup> Language used has required an "organization interest"<sup>90</sup> in the interest sought to be protected; or an "obvious and acute concern."<sup>91</sup>

In denying standing, the Ninth Circuit sought a "direct interest."<sup>92</sup> The Sixth Circuit, in denying standing to a group of citizens seeking to protect historic buildings,<sup>93</sup> recognized two circumstances conferring standing where the theory is that of a private attorney general. The court described the doctrine:

That persons or groups who by their activities and conduct have exhibited a special interest in areas involved in the suit may be included as parties aggrieved or adversely affected by agency action.<sup>94</sup>

Such a doctrine provides standing under two circumstances: when the plaintiffs are citizens of the area and their direct interests are affected and where the group seeking to represent the citizens has been actively engaged in the administrative process and has thereby shown a special interest in the controversy.<sup>95</sup>

It is clear from these cases that the plaintiff seeking to represent the public interest in an environment, must show that he is suited to the task, by membership, motivation, interest, competence, and conduct; that he has, does, and will act to protect that interest.<sup>96</sup> Whether courts ex-

<sup>84</sup>Davis, *supra* note 5 at 613.

<sup>85</sup>David Sive, *Availability of Injunctive and Declaratory Relief in Private Suits*, a presentation to the *Environmental Law Conference*, Ann Arbor, Michigan, November 13-14, 1970.

<sup>86</sup>FED. R. CIV. P. 23: (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class and (4) the representative parties will fairly and adequately protect the interest of the class.

<sup>87</sup>Citizens Committee for Hudson Valley v. Volpe, *supra* note 34.

<sup>88</sup>Office of Communication of United Church of Christ v. F.C.C., *supra* note 15 at 1006.

<sup>89</sup>Associated Industries v. Ickes, *supra* note 16 at 704.

<sup>90</sup>E.D.F. v. Hardin, *supra* note 11 at 1002.

<sup>91</sup>Office of Communication of the United Church of Christ v. F.C.C., *supra* note 15 at 1002.

<sup>92</sup>Sierra Club v. Hickel, *supra* note 57 at 30.

<sup>93</sup>South Hill v. Romney, 421 F.2d 454 (6th Cir. 1969).

<sup>94</sup>Norwalk Core v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968); Powelton Civic Howeowners v. H.U.D., *supra* note 31.

<sup>95</sup>Scenic Hudson Preservation Conference v. F.P.C., *supra* note 11; Road Review League, Town of Bedford v. Boyd, *supra* note 11.

<sup>96</sup>Turlock and Tippy, *The Wild and Scenic Rivers Act of 1968* 55 CORNELL L. REV. 723, 726 (1970) suggest that the criteria might involve the "... history of the group's involvement in environmental problems, the range and depth of its concerns and activities, and its ability to bring significant new data and alternative proposals to the attention of the decision maker." *South Hill v. Romney*, *supra* note 93.

pressly adopt Rule 23 and class action criteria or not, the cases leave little doubt that, at bottom, these considerations will constitute the key to being granted standing to assert the public interest in an environment.

Standing to challenge agency action to protect an environment, then, has three elements: injury in fact to the interest asserted, a demonstrated nexus between the interest and the conduct challenged and a demonstrated capacity to represent the interest.

### STATUTORY STANDING TO CHALLENGE PRIVATE CONDUCT

The growing number of cases challenging agency action provide a marked contrast to a second area of equally vital concern: that of standing to assert the public interest where the conduct challenged is that of another private person or corporation, and not an agency of government.

The citizen can now sue local government officers.<sup>97</sup> He can challenge local and state government,<sup>98</sup> but he has no access to the acts of other persons where he can allege no private injury greater than that to the public, and sues solely to assert the public interest.

Nuisance, private and public,<sup>99</sup> and trespass,<sup>100</sup> are available, but the severe restrictions on them limit their effectiveness in many jurisdictions.<sup>101</sup> The traditional limitations of public nuisance may not be necessary, or even desirable, but they still exist.<sup>102</sup>

Another solution is proposed: statutory standing for private citizens to sue on behalf of the public.<sup>103</sup> A suggested statute is appended, taken from a Michigan statute on standing, authored by Professor Joseph Sax. His model is clearly in the tradition of the common law,<sup>104</sup> and is close in form to public nuisance, except for the requirement that a public official bring the suit, and for many jurisdictions, a broader subject matter than presently exists for public nuisance suits.<sup>105</sup>

<sup>97</sup>Comment, *Taxpayer's Suits: A Survey and Summary*, *supra* note 23; Peck, *Standing Requirements for Obtaining Review of Governmental Action in Washington*, 35 WASH. L. REV. 362. In Montana: *McClintock v. City of Great Falls*, 53 Mont. 221, 163 Pac. 99 (1917); *Hill v. Rae*, 52 Mont. 378, 158 Pac. 826 (1916); *Poe v. Sheridan County*, 52 Mont. 279, 157 Pac. 185 (1916); *Chumasero v. Potts*, 2 Mont. 242 (1876), *Sierra Club v. Minnesota Pollution Control Agency and Commission of Conservation*, (Cir. Ct. of Minn., October 3, 1969).

<sup>98</sup>Articles cited, *supra* note 23.

<sup>99</sup>*Wilson, Nuisance as a Modern Mode of Land Use Control*, 46 WASH. L. REV. 47 (1970).

<sup>100</sup>*Renken v. Harvey Aluminum (Incorporated)*, 226 F. Supp. 160 (1963).

<sup>101</sup>*Nelson v. C.C. Plywood*, 154 Mont. 414, 465 P.2d 314 (1970).

<sup>102</sup>*Wilson, supra* note 99 at 114.

<sup>103</sup>Thomas J. Anderson, *Gordon Rockwell Environmental Protection Act of 1970*. Public Act No. 127, Mich. Stats. Ann. § 14.528(201).

<sup>104</sup>JOSEPH L. SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION*, 247-48 (1971).

<sup>105</sup>*Wilson, supra* note 99 at 114.

To date Michigan is the only state that has enacted the statute,<sup>106</sup> but it is under consideration in others,<sup>107</sup> and similar measures have been introduced in the House<sup>108</sup> and Senate<sup>109</sup> of the United States as well.

The necessity of statutory standing is evident from the simple comparison noted between the quantity of cases challenging governmental action, where standing law is being built, and the area of private conduct, where so little exists upon which to build. As the law grows to meet the needs of the citizen and the public in protecting an environment, this step too, must be taken.

The appended statute authorizes suits to challenge conduct allegedly having an adverse impact on an environment.<sup>110</sup> The court is granted jurisdiction to hear and decide the issues,<sup>111</sup> granting relief as justified under the circumstances, whether to abate, limit, or find for the defendant. The courts role in this process is the same as in any other: to resolve conflict by deciding cases brought before it.

In § 2 the Act authorizes three classes of persons to bring suit: the attorney general, local governments, and private citizens. In § 3 the plaintiff is required to make out a prima facie case, and then the burden is placed on the defendant either to rebut, or to make an affirmative defense—to demonstrate that his conduct is in the public interest. There is a provision for a court appointed referee, “disinterested and technically qualified” which may be necessary in complex and protracted cases.<sup>112</sup> There is also provision for costs and attorney’s fees as the court directs.<sup>113</sup>

In § 4 the provisions of the act are integrated into existing administrative procedures, giving the court power to act in emergency situa-

<sup>106</sup>Effective date was October 1, 1970.

<sup>107</sup>SAX, *supra* note 104 at 247 lists 5 states: New York, Massachusetts, Colorado, Pennsylvania, and Tennessee; Note, *Legal Methods for Control of Air Pollution in New York State: An Evaluation*, 34 ALBANY L. REV. 563, 565 (1970); *New York Times*, February 18, 1970 at 1 col. 4.

<sup>108</sup>H.R. 15780, A Bill to Amend the National Environmental Policy Act of 1969 to Confer Standing on Private Persons to Sue for Relief from Pollution, 91st Congress, 2d Session. Introduced February 9, 1970 and referred to the Committee on Merchant Marine and Fisheries; SAX, *supra* note 104 at 247 cites H.R. 16436, introduced March 10, 1970 by Representative Morris Udall, as a bill modeled after the Michigan law, *supra* note 103.

<sup>109</sup>S. 3575, The Environmental Policy Act of 1970, Senators Philip Hart and George McGovern; Proposed amendments to the National Air Quality Act of 1970, S. 4358, 91st Congress, 2d Session, in S. Rep. No. 91-1196, Title III, § 304(a) (1) Citizen Suits, permit citizens to enforce the act (at 64), but does not provide for a common law development (at 30), restricting actions to violations of specified standards, after notification is made to the Secretary of Health, Education and Welfare (at 122). *Trial*, Vol. 6, no. 5 at 6 (August/September 1970).

<sup>110</sup>*Infra*, app. § 2.

<sup>111</sup>*Id.*

<sup>112</sup>*Id.*

<sup>113</sup>*Infra*, app. § 3. Neither the Michigan law, *supra* note 103, nor the model law, *supra* note 104, allow attorney’s fees. H.R. 15780, *supra* note 108 allows for costs and punitive damages. The National Air Quality Standards Act of 1970, *supra* note 109, allows for litigation costs, attorney fees, and expert witness fees.

tions, but allowing for full utilization of administrative regulatory proceedings.<sup>114</sup> The court, does, however, retain jurisdiction, pending final resolution.<sup>115</sup>

The Act in § 5 grants to persons with standing under this act authority to intervene in an agency proceeding.<sup>116</sup>

The statute does not define its terms. Definitions of environmental quality, pollution, public interest, public trust,<sup>117</sup> and natural resources are left to the process of judicial evolution, to be constructed case by case, as the needs of justice between the parties require. The statute does not provide standards for implementation of its provisions, but also leaves that to the courts.<sup>118</sup>

There are, of course, arguments against the statute: it is not needed; it will flood the courts; it will subject industry to harrassment from over-zealous citizens; the courts are not competent to make the required technical determinations; it will result in piecemeal and patchwork standards, when what is needed is code law, uniform, consistent, and unambiguous; it will shift the decision making process for environmental control from the executive to the judicial.

Response to these objections is not too difficult. While an increase in cases can certainly be expected, there is little danger of a flood of litigation when it is remembered that the courts here, as in all other areas of litigation, control the gates: they remain competent to screen the meritorious from the frivolous, the genuine from the vexatious. The law to be developed will be that applied to situations as they arise, in an area not presently conducive to codification because of the variables, the present uncertainties involved, and the overriding need for creative and innovative decisions. The courts are proving their competence in cases of judicial review to hear and decide a great variety of complex environmental issues, not because of their scientific or technical expertise, but because the disputes are of basic and fundamental policy matters, requiring the weighing and balancing of conflicting interests. And finally, no shift of power can reasonably be expected, since this act, insofar as it affects the administrative function, is operative only when the administrative agencies have failed, or have allegedly failed, to act.

<sup>114</sup>*Infra*, app. § 4.

<sup>115</sup>*Id.*

<sup>116</sup>*Infra*, app. § 5. In Montana administrative proceedings and judicial review provisions vary between agencies. The proposed Montana Administrative Procedures Act (M.A.P.A.) would make proceedings and review uniform in most cases. This proposed standing statute will conflict with neither, but will provide more opportunities for participation in agency proceedings than presently exist, as will the proposed M.A.P.A.

<sup>117</sup>The Montana Constitution contains the public trust concept: Article XVII. Public Lands. § 1. All lands of the state that have been or that may hereafter be granted to the state by congress, and all lands acquired by gift or grant or devise, from any person or corporation, shall be public lands of the state, and shall be held in trust for the people . . .

<sup>118</sup>*Infra*, app. § 2.

To put the act in its proper perspective it is important to see it as a rather modest proposal—as a step, and not a very large one at that—toward providing representation in the courts for a public interest. Even so, two more serious questions can be raised: Whether the act will be regarded as substantive state law and so controlling in the federal courts? Whether the standing conferred by the act meets the constitutional requirement for case or controversy?<sup>119</sup> And a third possibility exists: that the courts will recognize suits in environmental protection as class actions, and so provide the needed means to attack private polluters. Consideration of these questions is left for another time.

### CONCLUSION

While the last word on standing to challenge federal agency action has not been spoken, it is clear that the public interest has gained a point of access to the administrative decision-making process. The need to consider environmental issues, asserted by a party having demonstrated its capacity to represent the public, is being met where the problem is judicial review of agency action. It is equally clear that the need is not being met in the area of private conduct affecting the public interest. Statutory standing designed to provide a forum for the public interest can meet that need in a responsible, responsive and adaptive mode.

RICHARD E. McCANN

### APPENDIX

With only minor changes, this is a copy of the statute enacted in Michigan as Public Act No. 127, Environmental Protection. The author of this, and a similar model law, Joseph Sax, describes its purpose as three-fold: "to recognize the public right to a decent environment as an enforceable legal right; to make it enforceable by private citizens suing as members of the public; and to set the stage for the development of a common law of environmental quality."<sup>120</sup>

#### ENVIRONMENTAL PROTECTION

An ACT to provide for action for declaratory and equitable relief for protection of the air, water and other natural resources and the public trust therein; to prescribe the rights, duties and functions of the attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity; and to provide for judicial proceedings relative thereto.

Section 1. Short title. This act shall be known and may be cited as the "Environmental Protection Act."

Section 2. Action in District Court; granting of relief.

(1) The attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may maintain an

<sup>119</sup>Scenic Hudson Preservation Conference v. F.P.C., *supra* note 11 at 615; E.D.F. v. Hardin, *supra* note 11 at 1097; Associated Industries of New York v. Ickes, *supra* note 16.

<sup>120</sup>Sax, *supra* note 104 at 247.



action in the district court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment, or destruction.

(2) In granting relief provided by subsection (1) where there is involved a standard for pollution or for an anti-pollution device or procedure, fixed by rule or otherwise, by an instrumentality or agency of the state or a political subdivision thereof, the court may:

(a) Determine the validity, applicability and reasonableness of the standard.

(b) When a court finds a standard to be deficient, direct the adoption of a standard approved and specified by the court.

(3) If the court has reasonable ground to doubt the solvency of the plaintiff or the plaintiff's ability to pay any cost or judgment which might be rendered against him in an action brought under this act the court may order the plaintiff to post a surety bond or cash not to exceed \$500.00.

### Section 3. Evidentiary showing; principles applicable; master or referee; costs.

(1) When the plaintiff in the action has made a prima facie showing that the conduct of the defendant has, or is likely to pollute, impair or destroy the air, water, or other natural resources or the public trust therein, the defendant may rebut the prima facie showing by the submission of evidence to the contrary. The defendant may also show, by way of affirmative defense, that there is no feasible and prudent alternative to the defendant's conduct and that such conduct is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction. Except as to the affirmative defense, the principles of burden of proof and weight of the evidence generally applicable in civil action in the district courts shall apply to action brought under this act.

(2) The court may appoint a master or referee, who shall be a disinterested person and technically qualified, to take testimony and make a record and a report of his findings to the court in the action.

(3) Costs and reasonable attorney's fees may be apportioned to the parties if the interests of justice require.

### Section 4. Granting of Relief; imposition of conditions.

(1) The court may grant temporary and permanent equitable relief, or may impose conditions on the defendant that are required to protect the air, water and other natural resources or the public trust therein from pollution, impairment, or destruction.

(2) If administrative, licensing or other proceedings are required or available to determine the legality of the defendant's conduct, the court may remit the parties to such proceedings, which proceedings shall be conducted in accord with the provisions of the applicable statutory requirements. In so remitting the court may grant temporary equitable relief where necessary for the public trust therein from pollution, impairment or destruction. In so remitting the court shall retain jurisdiction of the action pending completion thereof for the purpose of determining whether adequate protection from pollution, impairment or destruction has been afforded.

(3) Upon completion of such proceedings, the court shall adjudicate the impact of the defendant's conduct on the air, water or other natural resources and on the public trust therein in accordance with this act. In such adjudication the court may order that additional evidence be taken to the extent necessary to protect the right recognized in this act.

(4) Where, as to any administrative, licensing or other proceeding, judicial review thereof is available, the court originally taking jurisdiction shall maintain jurisdiction for purposes of judicial review.

### Section 5. Administrative or other proceedings; intervention; matters for determination; authorization or approval of conduct; collateral estoppel and res judicata.

(1) Whenever administrative, licensing or other proceedings, and judicial review thereof are available by law, the agency or the court may permit the attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any persons, partnership, corporation, association, organization or other legal entity to intervene as a party on the filing of a pleading

asserting that the proceedings or action for judicial review involves conduct which has, or which is likely to have, the effect of polluting, impairing or destroying the air, water or other natural resources or the public trust therein.

(2) In any such administrative, licensing or other proceedings, and in any judicial review thereof, any alleged pollution, impairment or destruction of the air, water or other natural resources or the public trust therein, shall be determined, and no conduct shall be authorized or approved which does, or is likely to have such effect so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare.

(3) The doctrines of collateral estoppel and res judicata may be applied by the court to prevent multiplicity of suits.

Section 6. This act shall be supplementary to existing administrative and regulatory procedures provided by law.