ENVIRONMENTAL LAW—STANDING—CITIZEN ENVIRONMENTAL GROUP WHOSE MEMBERS SUFFERED RECREATIONAL AND AESTHETIC HARM ESTABLISH STANDING UNDER THE CLEAN WATER ACT BY SHOWING DEFENDANT'S DISCHARGES CAUSED OR CONTRIBUTED TO THE INJURY—*Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1018 (1991).

The concept of standing, derived from article III of the United States Constitution,[1] limits the power of the judiciary to address only "cases" or "controversies."[2] Standing doctrine, therefore, restricts judicial resolution to cases where the litigants have a personal stake in the outcome.[3] This "personal interest" requirement facilitates a court's adjudicative duties by assuring that the issues will be fully developed and sharpened through the adversarial process.[4] Debate over what constitutes an actual "case" or "controversy" has effectuated the fragmented development of a three part standing test. Courts have been reluctant to

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[1] U.S. CONST. art. III states in pertinent part:

> The Judicial Power shall extend . . . to Controversies to which the United States shall be a Party; — to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States, — between Citizens of the same State claiming Land under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2, cl. 1.

[2] *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 2.12, at 55-56 (2d ed. 1986) [hereinafter Nowak, Rotunda & Young]. *See also* L. TRIBE, CONSTITUTIONAL CHOICES 99 (1985) ("standing . . . is conceived as an application of Article III's 'case or controversy' requirement"); Beers, *Standing and Related Procedural Hurdles in Environmental Litigation*, 1 ENVTL. L. & LITIGATION 65, 66 (1986); Comment, *Justice Scalia: Standing, Environmental Law, and the Supreme Court*, 15 B.C. ENVTL. AFF. L. REV. 135, 136 (1987) (article III standing "restricts courts to hearing only cases or controversies").

[3] Sierra Club v. Morton, 405 U.S. 727, 731-32 (1972); *See* Comment, *supra* note 2, at 136.

[4] Baker v. Carr, 369 U.S. 186, 204 (1962). Justice Brennan conveyed the essence of the standing issue in *Baker* by emphasizing that standing assures "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Id.* Article III additionally ensures that the judiciary will not act as a legislator by addressing abstract questions properly left to the legislative branch pursuant to the separation of powers doctrine. *See* Nowak, Rotunda & Young, *supra* note 2, § 2.12, at 56. *See also* Warth v. Seldin, 422 U.S. 490, 498 (1975) (standing originates in a concern regarding the proper role of the courts in our governmental system); Comment, *supra* note 2, at 139 (standing restrains the judiciary from engaging in government policy debates) (citing 3 H. JOHNSTON, CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486-89 (1891)).

grant a litigant standing unless the party can show an injury in fact which is both fairly traceable to the defendant's conduct and capable of judicial redress.[5]

Standing doctrine has traditionally been ridden with tension and debate. Despite an eagerness to address environmental problems, courts have struggled to apply the standing test to environmental suits within the confines of article III. Thus, although an environmental injury may be widespread and untraceable to a single polluter,[6] courts have relaxed the standing requirements so that these wrongs may be addressed.[7] The result is an inconsistent application of standing doctrine[8] guided

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[5] Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982). Even if the formal requirements of article III standing are satisfied, a court will exercise restraint and refuse to review a case unless it determines that standing is proper in light of certain prudential considerations. *See id.* at 474; Warth v. Seldin, 422 U.S. 490, 499 (1975). *See also* Nowak, Rotunda & Young, *supra*, note 2, § 2.12, at 55-56. There are three prudential considerations upon which courts will deny standing. First, courts will deny standing to plaintiffs alleging a "generalized grievance" shared equally by many persons. *See Warth*, 422 U.S. at 499. Second, standing will not be proper where plaintiffs assert the rights and interests of third parties. *Id.* Third, courts will deny standing where the harm alleged does not "fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' " *Valley Forge*, 454 U.S. at 475 (quoting Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1973)). While these limitations may determine the outcome of the standing analysis, these factors cannot be substituted for the tripartite constitutional test, without which standing cannot exist. *Id.*

The Third Circuit did not address the prudential limitations of standing in Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, 913 F.2d 64 (3rd Cir. 1990), *cert. denied*, 111 S.Ct. 1018 (1991), because the Federal Water Pollution Control Act (FWPCA), under which suit was brought, specifically grants standing to the limits of article III of the Constitution. *See id.* at 70 n.3. Thus, this aspect of standing doctrine will not be discussed in this Note.

[6] Sierra Club v. Morton, 405 U.S. 727, 738 (1972) (aesthetic and recreational injury is a sufficient injury in fact to confer standing); United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 686-87 (1973) (a widely shared interest does not defeat standing).

[7] *See* Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 450 (1970); Scott, *Standing in the Supreme Court — A Functional Analysis*, 86 HARV. L. REV. 645, 645-46 (1973). *Compare* Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153-54 (1970) *with* Kansas City Power & Light Co. v. McKay, 225 F.2d 925 (1955). *See also* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 39 (1976) (injury in fact requirement substantially broadened access to courts). *See infra* notes 54-66 and accompanying text.

[8] Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976) (standing denied where plaintiffs failed to show that relief requested would remedy the alleged injury); *Compare* Warth v. Seldin, 422 U.S. 490 (1975) (standing denied where plaintiff's ability to purchase desired housing depended on financial capability, not on builders ability to construct affordable housing) *with* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (standing granted where plaintiffs specifically alleged that zoning prevented a particular builder from con-

only by result-oriented reasoning.[9]

Recently, the United States Court of Appeals for the Third Circuit demonstrated its willingness to liberally interpret the causation tier of standing in an environmental context.[10] In *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*,[11] the Third Circuit addressed whether individual members of the Public Interest Research Group, Inc. (PIRG), a group concerned with the welfare of the environment, had standing to sue Powell Duffryn Terminals Inc. (PDT), a New Jersey corporation, for emitting pollutants which exceeded the corporation's National Pollutant Discharge Elimination System (NPDES) permit limits.[12] The court applied the three prong test for individual standing and held that PIRG had adequately shown a substantial likelihood that PDT emitted pollutants exceeding permissible levels, which caused and contributed to PIRG's recreational and aesthetic injuries.[13] The court further determined that a judgment in favor of PIRG would redress the alleged harm.[14] Consequently, the court granted standing to PIRG.[15]

PDT operated a chemical storage facility adjacent to the Kill

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structing a planned project); Linda R.S. v. Richard D., 410 U.S. 6 (1973) (standing denied to group of mothers seeking to force fathers to pay child support since relief sought would only jail the fathers and not result in payment of support).

9 Nichol, *Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint*, 69 KY. L. J. 185, 186 (1980). Critics assert that the United States Supreme Court's inconsistent application of standing is a product of manipulation. *Id.* The Court, by allowing its view of the merits to factor into its standing analysis, is able to choose which issues it will address. L. TRIBE, CONSTITUTIONAL CHOICES 99-100 (1985); Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 663-64 (1977); Comment, *supra* note 2, at 137.

10 Comment, *supra* note 2, at 144. *See also* Sierra Club v. Morton, 405 U.S. 727 (1972) (widely shared injury sufficient to confer standing); United States v. SCRAP, 412 U.S. 669 (1973) (standing granted despite widespread harm and tenuous causal relationship); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1977) (standing established by showing a substantial likelihood that defendant caused plaintiff's injuries).

11 913 F.2d 64 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1018 (1991).

12 *Id.* at 73. The court of appeals noted that PIRG members had testified that an oily sheen existed on the Kill Van Kull. *Id.* The court additionally observed that PDT had violated its permit numerous times, discharging oil and grease into the Kill Van Kull. *Id.*

13 *Id.* at 71-73. Historically, causation has been established by showing a "substantial likelihood" that plaintiff's injury was caused by defendant's conduct. Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 74 (1977). *See also* Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (standing granted where substantial likelihood existed that the requested relief would remedy the alleged wrong).

14 913 F.2d at 72.

15 *Id.*

Van Kull, a body of water bordering Bayonne, New Jersey.[16] The facility stored large amounts of liquids for third parties.[17] At the owner's request, the chemicals were transported by tankers along the Kill Van Kull.[18] During the transfer, chemicals leaked from the tankers and polluted the Kill Van Kull.[19] Although PDT was permitted to discharge chemicals into the Kill Van Kull,[20] reports indicated that the leakage consistently exceeded permit restrictions.[21]

On January 27, 1984, PIRG instituted a citizen suit in the United States District Court for the District of New Jersey seeking to enforce PDT's discharge permit as well as civil remedies and injunctive relief.[22] Judge Ackerman found that PIRG had

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16 Student Pub. Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc., 627 F. Supp. 1074, 1079 (D.N.J. 1986)[hereinafter *PIRG I*].

17 *Id.* at 1080.

18 *Id.*

19 *Id.* Additional discharges resulted from the condensation of steam in PDT's collection system and tank overflow. *Id.* These discharges were ultimately washed into the Kill Van Kull by rainwater. *Id.*

20 PDT's discharge permit was originally issued to PDT's predecessor in interest, El Dorado Terminals Inc. *Id.* At the time that PDT acquired El Dorado, an injunction issued by the United States District Court for the District of New Jersey required the owner to construct a waste water treatment facility by July 1, 1977. 913 F.2d at 69 (citing United States v. El Dorado Terminals Corp., No. 77-228 (D.N.J. 1977)). Although PDT constructed ditches to channel rainwater, it failed to meet the requirements of the injunction until 1987. *PIRG I*, 627 F. Supp. at 1080.

21 Discharge monitoring reports (DMRs), filed pursuant to the National Pollutant Discharge Elimination System (NPDES), evidenced 369 violations of PDT's 1975, 1981 and 1986 permits. Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc., 720 F. Supp. 1158, 1160 (D.N.J. 1989)[hereinafter *PIRG II*]. The violations included the following effluents:

PARAMETERS	NUMBER OF VIOLATIONS
Total Organic Carbon (TOC)	8
pH	63
Total Suspended Solids (TSS)	66
Bioassay	1
Oil and Grease	48
Hexavalent Chromium	2
Petroleum Hydrocarbons	27
Methylene Chloride	9
Phenol	1
Biochemical Oxygen Demand (BOD)	80
Chemical Oxygen Demand (COD)	81
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Id. at 1161.

22 *PIRG I*, 627 F. Supp. at 1078. PIRG filed its complaint pursuant to section 1365 of the FWPCA which provides in pertinent part:

> Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf—

demonstrated standing to sue on behalf of its members and, accordingly, denied PDT's motion to dismiss.[23] Applying the three part test for individual standing, the judge first determined that PIRG had sufficiently proven an actual injury.[24] Next, Judge Ackerman concluded that the causation prong of the standing test was satisfied merely by showing that PDT violated its permits.[25] Judge Ackerman explained that when there are numerous contributing polluters, a plaintiff is not required to isolate and identify the defendant's liability percentage.[26] Finally, the district judge concluded that a liability judgment against PDT would redress the alleged harm and, concomitantly, benefit the general public by deterring others from polluting the Kill.[27]

> (1) against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a state with respect to such a standard or limitation . . . .

33 U.S.C. § 1365(a)(1) (1982). PIRG alleged that PDT had continually violated Sections 301 and 402 of the FWPCA. PIRG I, 627 F. Supp. at 1078.

23 *Id.* at 1083.

24 *Id.* at 1081-82. The plaintiffs presented documented evidence of the recreational and aesthetic harm to PIRG members resulting from their residence near the Kill Van Kull or their use of the adjacent park. *Id.* The court also reviewed several statements from members of the plaintiff groups. *Id.* For example, Cheryl Cummings, a member of NJPIRG, testified that her enjoyment of the park was diminished by the poor water quality of the Kill. *Id.* at 1081. Additionally, Sheldon Abrams, a member of Friends of the Earth, testified that the water had an "oily sheen" and that his boating and fishing interests have been curtailed because of the pollution. *Id.* at 1082. Andrew Gerbino, also a member of Friends of the Earth, testified that he believed the value of his Staten Island real estate was diminished by the condition of the Kill and Lower New York Bay. *Id.* Gerbino also stated that he no longer walked, watched birds or ate fish from the area due to the poor condition of the water. *Id.*

25 *Id.* at 1083.

26 *Id.* at 1082-83. Judge Ackerman focused his discussion primarily on two prior New Jersey district court decisions. First, citing Student Public Interest Research Group v. AT&T Bell Laboratories, 617 F. Supp. 1190 (D.N.J. 1985), the judge noted that if specific causation were required, enforcement suits would not be instituted unless all polluters discharging into a waterway were joined. *PIRG I*, 627 F. Supp. at 1082-83. Furthermore, Judge Ackerman agreed with the position of Judge Brotman in Student Public Interest Research Group v. Georgia-Pacific Corp., 615 F. Supp. 1419 (D.N.J. 1985), that to require plaintiffs to present a showing of pollution beyond the mere establishment of permit violations would be to "apply a stricter test for standing than for liability itself." *Id.* (quoting *Georgia-Pacific Corp.*, 615 F. Supp. at 1424).

27 *Id.* at 1083. Judge Ackerman observed that Congress intended the statutory sanctions under the FWPCA to provide redress for plaintiffs as well as to deter violators. *Id.* The concept of deterrence includes both specific deterrence, which is to persuade the violator to halt the pollution, and general deterrence, which is to persuade other polluters to take precautions against noncompliance with the law. *Id.* (citing Student Pub. Interest Research Group v. AT&T Bell Laboratories, 617 F. Supp. 1190, 1201 (D.N.J. 1985)).

Finding that PIRG had overcome all procedural hurdles,[28] the district court held a bench trial on the liability issue and granted PIRG's summary judgment motion.[29] Both parties appealed the district court ruling.[30] Subsequently, the United States Court of Appeals for the Third Circuit addressed numerous issues, including whether individual PIRG members had standing that would allow PIRG to assert the members' rights on a representational basis.[31]

The Third Circuit affirmed the district court's ruling on standing.[32] The court of appeals held that citizen environmental groups, whose members suffered injuries resulting from the defendant's pollution, had standing to bring suit on behalf of its members under the Federal Water Pollution Control Act (FWPCA).[33]

In 1970, the United States Supreme Court began to mold the modern approach to standing in *Association of Data Processing*

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28 *Id.* at 1090. After determining that PIRG had standing, the court addressed PDT's challenge that the suit was barred by a three year federal statute of limitations provision applicable to citizen's suits. *Id.* at 1083-85. The court held that a citizen's suit was not barred by the statute of limitations because of the federal policy goals behind the FWPCA. *Id.* at 1084. Judge Ackerman was not willing to render an FWPCA suit ineffective merely because citizens, rather than the Environmental Protection Agency (EPA), initiated suit. *Id.* The judge concluded that because Congress intended citizens to be able to substitute for the EPA if it failed to carry out its enforcement responsibilities, the federal statute of limitations would not apply. *Id.*

29 *Id.* at 1090. The court imputed a standard of strict liability to the FWPCA and found that because defendant PDT failed to comply with its permits, summary judgment in favor of the plaintiffs was proper regardless of any good faith effort or intent by PDT to abide by the stipulations of the permit. *Id.*

30 Public Interest Research Group of New Jersey, Inc., v. Powell Duffryn Terminals Inc., 913 F.2d 64, 68 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1018 (1991).

31 *Id.* at 70.

32 *Id.* at 73.

33 *Id.* The FWPCA was designed to "restore and maintain the chemical, physical and biological integrity of the Nation's waters . . ." by eradicating the emission of pollutants into navigable waters. 33 U.S.C. § 1251(a)(1) (1988). In furtherance of this objective, FWPCA translates this prohibition of unauthorized pollutant discharge into specific requirements for individual dischargers. *Id.* at § 1311(a). Pollutant discharges must be carried out within the parameters set by the NPDES permit issued to the discharger. *Id.* at § 1341(a)(1). Discharges made in compliance with the NPDES permit are considered lawful. *Id.* at § 1342(k). To facilitate permit enforcement, the FWPCA requires permitees to maintain equipment designed to monitor the content of the effluent of the permitees. *Id.* at § 1318(a)(4)(A). Monitoring results must be reported to the EPA via discharge monitoring reports (DMRs) which readily identify noncomplying discharges. 40 C.F.R. §§ 122.4(j), 122.48 (1989). Permit violators may be prosecuted by the EPA for discharging in violation of permit parameters or citizen enforcement actions may be instituted by persons harmed by the violations. 33 U.S.C. § 1365(a) (1988).

Service Organizations, Inc. v. Camp[34] by requiring a plaintiff to establish that he had suffered an injury in fact.[35] In *Camp*, the plaintiff association challenged a ruling by the Comptroller of the Currency (Comptroller) which increased competition between national banks and the plaintiff by allowing the banks to provide data processing services.[36] Writing for the court, Justice Douglas rejected the traditional standing test which required a party to prove that his legal rights were invaded.[37] The Justice emphasized that the standing issue was separate and distinct from the merits of the case, and thus criticized the "legal interest" standing test because it required consideration of the merits.[38]

Alternatively, Justice Douglas asserted that the more appropriate inquiry determined whether the plaintiff alleged an injury in fact.[39] The Court stated that the potential loss of future profits was a definite economic harm and, therefore, satisfied the injury in fact requirement.[40] Justice Douglas concluded that the plaintiff association had article III standing to sue the Comptroller.[41]

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[34] 397 U.S. 150 (1970).

[35] *Id.* at 152.

[36] *Id.* at 151.

[37] *Id.* at 153. The Court explained that, under the legal interest test, standing is nonexistent "unless the right invaded is a legal right, — one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." *Id.* (quoting Tennessee Power Co. v. TVA, 306 U.S. 118, 137-38 (1939)).

[38] *Id. See also* Flast v. Cohen 392 U.S. 83, 99 (1968) ("standing . . . focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated").

[39] *Assciation of Data Processing*, 397 U.S. at 152. The Court indicated that the injury in fact requirement originated in the article III case or controversy limitation. *Id.* at 151-52. *See also* L. TRIBE, *supra* note 2, at 99 ("As applied in the federal courts, the core of standing is the requirement of 'injury in fact' to the claimant, which generally . . . is conceived as an application of Article III's 'case or controversy' requirement") (citations omitted). By restricting courts to address actual disputes, the judiciary is prevented from addressing abstract questions and creating a government by the judiciary. *See* Comment, *supra* note 2, at 139.

[40] *Association of Data Processing*, 397 U.S. at 152. The significance of the Court's injury in fact test is illustrated by the district court's observations regarding the "long and well established line of judicial authority holding that plaintiffs whose only injury is loss due to competition lack standing to maintain legal action to redress their economic injury." Association of Data Processing Service Organizations, Inc. v. Camp, 279 F. Supp. 675, 678 (D. Minn. 1968).

Implicit in the Court's holding was the possibility that potential injuries would sufficiently fulfill the injury in fact requirement. *See Association of Data Processing*, 397 U.S. at 152.

[41] *Id.* at 158. The Court's analysis did not terminate, however, upon a finding of an injury-in-fact. The Supreme Court continued its analysis by considering whether its review was proper in light of certain prudential considerations. *Id.* at 153. The particular prudential consideration set forth in this landmark decision

In dicta, Justice Douglas posited that injury in fact was not limited to economic injury but also included aesthetic, conservational or recreational harm.[42]

It was not until the 1972 decision in *Sierra Club v. Morton*,[43] however, that the Supreme Court affirmatively addressed whether the injury in fact requirement was satisfied by a non-economic injury.[44] In *Sierra Club*, the plaintiff, relying on Section 10 of the Administrative Procedure Act (APA), sought to enjoin the proposed development of a national game refuge known as the Mineral King Valley located in the Sierra Nevada Mountains.[45] Justice Stewart, writing for the majority, concluded that Sierra Club lacked standing because it failed to prove that its members were adversely affected by the challenged action.[46] Justice Stew-

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was whether the "interest sought to be protected by the complainant [was] arguably within the *zone of interests* to be protected or regulated by the statute or constitutional guarantee in question." *Id.* (emphasis added).

42 *Id.* at 154.

43 405 U.S. 727 (1972).

44 *Id.* at 734. Sierra Club intended this litigation to be a test case for standing. *Id.* at 736 n.8. Therefore, it refused to assert its members' interests in the use and enjoyment of the affected area as a basis for standing. *Id.* Relying on the Second Circuit opinion in Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966) (which allowed a special interest to support standing), the Sierra Club alleged a "special interest in the conservation and the sound maintenance of the national parks, game refuges, and forests of the country . . . ." *Sierra Club*, 405 U.S. at 736 n.8.

45 *Id.* at 730, 732. The grant of standing contained in § 10 of the Administrative Procedure Act, 5 U.S.C. § 702 (1971), provides that "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action, within the meaning of a relevant statute, is entitled to judicial review thereof." *Sierra Club*, 405 U.S. at 732-33.

46 *Id.* at 741. The Court noted that plaintiffs only alleged a general interest in the conservation of the environmentally threatened valley, rather than alleging that it or its members would be affected in their activities in the park. *Id.* at 735. The Court, quoting the full text of the complaint filed by Sierra Club, pointed out that the only language referring to Sierra Club's interest in the Disney development was its "special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country" and in the "protect[ion] and conserv[ation of] the national resources of the Sierra Nevada Mountains." *Id.* at 735 n.8. The Court noted that this interest was insufficient to establish standing because general interest in a problem is not the same as being "adversely affected" or "aggrieved" so as to warrant standing. *Id.* at 739. The Court recognized Sierra Club's longstanding commitment toward the preservation of the environment, but declared this dedication to be irrelevant in the context of standing to sue. *See id.* The Court cautioned that if it were to allow such suits by organizations with a mere "special interest," there would never be a basis upon which to deny standing to these groups. *Id.* If the groups are granted standing, the Court continued, then individuals would also be entitled to bring these types of suits. *Id.* at 739-40. The Court concluded that such an expansion of standing doctrine would undermine the goal of standing by "authoriz[ing] judicial review at the behest of organizations or

art stressed that a plaintiff must demonstrate an actual or threatened harm to his use of the affected area[47] and that the assertion of a generalized interest to advance personal values inadequately fulfilled article III objectives.[48] The Court examined Sierra Club's allegations and determined that no club members were personally affected by the defendant's game refuge.[49]

Despite ultimately holding that the plaintiffs did not have standing, the Court clearly broadened the scope of injury sufficient to confer standing by affirming that harm to aesthetic or recreational interests may adequately establish an injury in fact.[50] Recognizing the social import of aesthetics and recreation, the Justice affirmed that claims alleging environmental injury are justiciable.[51] Furthermore, Justice Stewart denounced the notion

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individuals who seek to do no more than vindicate their own value preferences through the judicial process." *Id.* at 740 (footnote omitted).

47 *Id.* at 734-35. The Court interpreted injury in fact to mean an effect on one's use of an area. *See* Sax, *Standing to Sue: A Critical Review of the Mineral King Decision*, 13 NAT. RESOURCES J. 76, 77 (1973) (citing Sierra Club v. Morton, 405 U.S. 727, 735 n.8 (1972)). The merger of "injury in fact" with the distinct concept of "use" suggests that the *Sierra Club* Court did not view standing to be as liberal as suggested by others. *See id.* at 77 n.14.

48 405 U.S. at 739. Although the *Sierra Club* holding limited standing to persons alleging an actual use and injury, the ruling did not effectively limit citizen suits because it simply expanded pleading requirements. *See* Scott, *supra* note 7, at 667; Sax, *supra* note 47, at 76.

49 405 U.S. 727, 735 (1972). In a separate dissent, Justice Douglas opined that standing to litigate environmental issues should be directly conferred on the objects potentially affected by the challenged action. *Id.* at 741-42 (Douglas, J., dissenting). As ships and corporations may sue through fictitious legal personalities, Justice Douglas analogized that forests, trees and streams should have standing to challenge actions that will ultimately result in their destruction. *Id.* at 742-43 (Douglas, J., dissenting). Justice Douglas continued that those persons intimately related to the threatened objects are entitled to act as representatives. *Id.* at 745 (Douglas, J., dissenting). Therefore, the Justice concluded that Sierra Club, as an entity composed of persons who utilize the affected geography, had standing to defend the threatened land on behalf of the park's natural resources. *Id.* at 752 (Douglas, J., dissenting).

50 *Id.* at 734. The Court noted the distinction between expanding the number of categories in which an injury in fact will be found and abandoning the injury in fact element altogether by allowing parties without any real interest to raise a claim. *Id.* at 738. *See also* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 39 (1976).

51 *Sierra Club*, 405 U.S. at 734. For support, the Court cited numerous lower court decisions where a non-economic injury was found to be sufficient to constitute an injury in fact. *Id.* at 738 n.13 (citing Envtl. Defense Fund v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970) (interest in effects of pesticide sufficient to confer standing); Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) (standing established through plaintiff's interest in television programming); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966) (interest in effects of hydroelectric plant sufficient to support standing); Reade v. Ewing, 205 F.2d 630 (2d Cir. 1953) (stand-

that widely shared interests are insufficient to establish standing.[52] Thus, while endorsing the injury in fact requirement, the *Sierra Club* Court significantly eased the burden of establishing the requisite harm.[53]

One year later, in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*,[54] the Court continued to refine the parameters of the injury in fact requirement.[55] In *SCRAP*, a student environmental group (SCRAP) challenged the Interstate Commerce Commission's refusal to suspend railroad rate surcharges.[56] SCRAP asserted that the proposed rate structure would unnecessarily increase raw timber use by impeding the utilization of recyclable materials.[57] SCRAP additionally claimed that it was injured by the increased costs of finished products and increased taxes caused by the continued disposal of non-recyclable goods.[58] Furthermore, SCRAP advanced that its use of the

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ing established by plaintiff's interest in labeling of oleo margarine); Crowther v. Seaborg, 312 F. Supp. 1205 (D. Col. 1970) (interest in atomic blasting sufficient to support standing)).

52 *Id.*

53 *See* Scott, *supra* note 7, at 667 ("the more lasting import of the [*Sierra Club*] decision may be its explicit affirmation, if not holding, that harm of a non-economic nature to an individual may constitute injury in fact for standing purposes").

54 412 U.S. 669 (1973).

55 *Id.* at 686-90.

56 *Id.* at 675-76. A railroad seeking a rate increase must provide thirty days notice to the Interstate Commerce Commission ("ICC") prior to effectuating the rate change. *Id.* at 672 n.1 (citation omitted). The ICC may suspend the proposed increase for seven months if an investigation into the lawfulness of the proposed rate structure is deemed to be appropriate. *Id.* at 673 n.2 (citation omitted). At the expiration of the investigatory period, the rate becomes effective unless an invalidating reason is discovered. *Id.* at 673-74. Pursuant to this scheme, many of the nation's railroads sought to institute a 2.5% freight rate increase on five days notice. *Id.* at 674. The ICC denied the request, instructing the railroads to refile the proposal with a 30 day notice. *Id.* at 675. Upon refiling of the surcharge, SCRAP requested that the ICC suspend the rate increase for the permitted time period. *Id.*

57 *Id.* at 676. SCRAP alleged these injuries to the ICC in support of its request to suspend the tariff. *Id.* The ICC found that " 'the involved general increase will have no significant adverse effect on the movement of traffic by railway or on the quality of the human environment . . . .' " *Id.* at 677.

58 *Id.* at 678. The primary argument set forth in SCRAP's complaint alleged that the proposed surcharge was unconstitutional due to the ICC's failure to file an environmental impact statement as required by the National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (1982) (NEPA). *Id.* at 679. NEPA provides in pertinent part that:

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—
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> . . . .

surrounding land was threatened by the unneeded harvesting of raw materials.[59]

Writing for the majority, Justice Stewart asserted that these injuries sufficiently established an injury in fact.[60] The Justice acknowledged that, even though all persons using a parcel of land suffer identical harm, a plaintiff's individual losses constitute an injury in fact.[61] Despite conceding that all persons who breathed the valley air could allege similar harm,[62] Justice Stewart posited that the harm's widespread nature did not defeat the individual standing when the plaintiffs alleged a specific injury resulting from the defendant's conduct.[63] Accordingly, Justice Stewart maintained that the degree of injury is irrelevant.[64] The Justice

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(C) 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 —
(i) the environmental impact of the proposed action,
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
(iii) alternatives to the proposed action,
(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

NEPA, § 102, 42 U.S.C. § 4332 (1982).

59 *SCRAP*, 412 U.S. at 685.

60 *Id.* at 685-87.

61 *Id.* at 686-87. The Court distinguished the facts of the instant case from those present in *Sierra Club*. *See id.* at 687. The Court noted that the alleged harm in *Sierra Club* occurred in a limited geographic region. *Id.* In the instant case, however, substantially all of the country's railroads requested a rate increase which, as plaintiffs assert, adversely impacted the nation's resources. *Id.*

These cases clearly demonstrate the impact of pleading a perceptible harm. Despite the existence of a distinct injury to a limited number of persons and an explicit causal relationship, the *Sierra Club* Court denied standing. *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972). The *SCRAP* Court, however, granted standing to plaintiffs despite the tenuous causation and widespread injury. *SCRAP*, 412 U.S. at 688.

62 *Id.* at 687.

63 *Id.* The Court explained that widespread harm cannot defeat standing since the most injurious governmental actions would then go unchallenged. *Id.* at 688.

64 *Id.* at 689 n.14 (citing Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 613 (1968)). The Court noted with approval the premise of Professor Davis that:

> [t]he basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.

explained that any identifiable injury will confer standing once a party has been adversely affected.[65] Thus, the Court held that SCRAP satisfied the article III injury in fact requirement.[66]

In a subsequent effort to limit judicial access, the Court, in *Simon v. Eastern Kentucky Welfare Rights Organization*,[67] required an explicit causal relationship between the alleged harm and the defendant's conduct and also defined a harm redressible by a favorable court ruling.[68] In *Simon*, indigent plaintiffs challenged an Internal Revenue Service (IRS) ruling which accorded favorable tax status to several hospitals, despite the hospitals' failure to provide medical services to indigent patients.[69] Plain-

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Id. (citing Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 613 (1968)).

65 *Id.* Justice Stewart noted that adversely affected litigants have been provided judicial recourse even when their stake in the resolution was nominal. *Id. See* Baker v. Carr, 369 U.S. 186 (1962) (fraction of a vote at stake); McGowan v. Maryland, 366 U.S. 420 (1961) ($5 fine at stake); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (a $1.50 poll tax at stake).

66 The Court briefly discussed causation, the second prong of the standing analysis. SCRAP, 412 U.S. at 688-89. Justice Stewart recognized that because the injury was "far less direct and perceptible" than the injury in *Sierra Club*, the causation issue remained questionable. *Id.* at 688. The Court stated that the pleading of any perceptible harm sufficiently confers standing. *Id.* The Court stressed that the probability of proof at trial is not to be considered in determining whether standing exists. *Id.* The plaintiff need only allege, not prove, that he has been harmed by an action. *Id.* The Court cautioned, however, that "pleadings must be something more than an ingenious exercise in the conceivable." *Id.* It is the responsibility of the defendant, the Court maintained, to establish the falsity of any allegations and request summary judgment if appropriate. *Id.* at 689. Although defendants have occasionally attempted to disprove plaintiff's allegations such attempts have generally been unsuccessful. *See,* Nat'l Wildlife Fed'n v. Burford, 878 F.2d 422 (D.C. Cir. 1989).

67 426 U.S. 26 (1976).

68 *See id.* at 38 (quoting Warth v. Seldin, 422 U.S. 490 (1975)). In *Warth*, Justice Powell denied standing to a plaintiff group challenging the constitutionality of zoning ordinances which allegedly excluded low to moderate income families. *Warth*, 422 U.S. at 502. The Court required plaintiffs to allege facts establishing that, without the restrictive zoning regulations, there existed a "substantial probability" that plaintiffs would have the ability to purchase real estate in the town. *Id.* at 504. The Court additionally required the plaintiffs to allege facts establishing that the relief requested would enable the plaintiffs to purchase the desired realty. *Id.* The Court found plaintiffs' allegations that the restrictive ordinances prevented third party builders from constructing low to moderate income housing in the area insufficient to establish causation. *Id.* at 505-06. No facts established that, but for the exclusionary zoning ordinances, the construction of affordable housing would have occurred or that petitioners would have been able to afford housing. *Id.* at 506-07. The petitioners' ability to purchase realty in the town depended on the builders' willingness to construct the requisite housing. *Id.* The relief requested, therefore, would not necessarily enable plaintiffs to purchase or rent realty in the desired area. *Id.* at 507. *See also* Linda R.S. v. Richard D., 410 U.S. 614 (1973) (standing denied where the requested remedy would not necessarily alleviate the harm alleged).

69 *Simon*, 426 U.S. at 31. The Internal Revenue Service (IRS) claimed that the

tiffs argued that the IRS ruling encouraged hospitals to deny services to indigent persons.[70]

The United States Supreme Court held that the plaintiffs lacked standing because the deprivation of services was not fairly traceable to the IRS and it was speculative whether a favorable court decision would redress that harm.[71] Emphasizing that no hospital was a named defendant, the Court determined that the alleged harm could have resulted from independent hospital decisions.[72] Moreover, Justice Powell advanced that it was purely speculative whether the Court's remedial powers would redress the alleged harm by providing the desired medical services.[73] Recognizing that hospitals apparently preferred to forego favorable tax status rather than render free services, the Court questioned whether a ruling for the plaintiffs would secure the desired remedy.[74] Adding these two elements to the article III standing test, the Court increased the plaintiff's burden in accessing a legal forum.[75]

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provision of medical services qualified as charitable when such provisions benefitted the community as a whole. *Id.* at 31 n.5. Therefore, the IRS argued, a hospital is entitled to charitable tax status simply by furnishing medical services to a sufficiently large class of persons, despite the fact that indigent care is not provided. *Id.*

70 *Id.* at 33.

71 *Id.* at 42-43.

72 *Id.* at 41-43. The Justice explained that article III prevents courts from addressing injuries that are caused by the actions of third parties not before the Court. *Id.* at 41-42. The Court opined that the injuries alleged by the plaintiffs may have been caused by hospitals that were not parties in the litigation. *Id.* at 42.

73 *Id.* The Court observed that allegations involving indirect injury create difficulties in establishing the traceability and redressibility prongs of article III standing analysis. *Id.* at 44-45. *But see* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1977) (standing granted where alleged injury of thermal pollution indirectly resulted from legislation limiting liability in event of nuclear accident). Distinguishing *SCRAP*, the Court stated that despite an indirect injury with a tenuous causal relationship, a "specific and perceptible harm" was alleged. *Simon*, 426 U.S. at 45 n.25 (citing United States v. SCRAP, 412 U.S. 669, 688-89 (1973)). In *Simon*, the plaintiffs failed to establish a sufficient causal connection between the injury and the challenged conduct due to the speculative inferences necessary to connect the injury to the challenged conduct. *Id.* at 45.

74 *Id.* at 43.

75 *See id.* at 44-45 (citing Warth v. Seldin, 422 U.S. 490, 505 (1975)). The *Simon* opinion reflects the Court's preoccupation with specificity in pleadings. *See* Nichol, *supra* n.9, at 196 (contrary to applicable pleading rules which generally allow the benefit of any inferences contained in the complaint, the *Simon* Court viewed pleadings critically by requiring detailed allegations). *Compare* Warth v. Seldin, 422 U.S. 490 (1975) (standing denied where plaintiffs failed to show that remedy would alleviate the alleged harm) *with* Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (standing granted where plaintiff specifically alleged that zoning prevented a particular builder from constructing a planned project). *But see* Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979) (standing granted to

In 1978, however, the Supreme Court lessened the strict causation standard and granted standing to a plaintiff who could only establish an indirect injury.[76] In *Duke Power Company v. Carolina Environmental Study Group*, a plaintiff environmental group (CESG) challenged the constitutionality of the Price-Anderson Act (Act) which limited nuclear plant operator liability in the event of a nuclear accident.[77] Chief Justice Burger, writing for the majority, required the plaintiffs to demonstrate a "distinct and palpable injury" that was fairly traceable to the defendant's actions.[78] The Chief Justice concluded that CESG's injuries, which consisted of thermal pollution and emission of non-natural radiation, sufficiently established standing.[79]

Addressing the causation prong, Chief Justice Burger posited that article III required a "substantial likelihood" that the requested relief would alleviate the alleged harm.[80] The Chief Justice observed that "but for" the Act's limited liability guarantee, there was a substantial likelihood that the nuclear plant would not have been constructed.[81] Thus, the *Duke* Court's liberalized application of standing in environmental litigation allowed

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challenge racial steering despite a failure to show any specific events of the alleged discriminatory practice).

76 *See* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978) (standing proper where "substantial likelihood" existed that defendant's actions caused plaintiff's injuries).

77 *Id.* at 67. Enacted in 1957, the Price-Anderson Act (Act) was aimed at "protect[ing] the public and . . . encourag[ing] the development of the atomic energy industry" by limiting the liability for a nuclear accident to $500 million plus the available private liability insurance. *Id.* at 64-65 (quoting 42 U.S.C. § 2012 (i)(1988)). Under its present enactment, liability from a single nuclear accident is limited to $560 million, allocated between private insurers, contributions from the licensees operating nuclear plants and the federal government. *Id.* at 67.

Plaintiffs challenged the constitutionality of the Act on the grounds that it constituted arbitrary governmental action in violation of the due process clause of the fifth amendment. *Id.* at 69. Plaintiffs also alleged that, in the event of a nuclear accident, the Act's limitation of liability would functionally result in the taking of the plaintiffs' property without just compensation in violation of the fifth amendment takings clause. *Id.*

78 *Id.* at 72 (citing Warth v. Seldin, 422 U.S. 490, 501 (1975); Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 261 (1977)).

79 *Id.* at 73-74, 77. Interestingly, the Court reasoned that generalized concern and uncertainty concerning the effects of radiation constituted a sufficient injury. *Id.* at 74. The Court thus found that the emission of non-natural radiation was a sufficient injury in fact to support standing. *Id.* at 73-74.

80 *Id.* at 75 n.20. *But see* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976) (indirect injury creates substantial article III difficulties regarding traceability and redressibility).

81 *Id.* at 77. The Court considered testimony presented at the Joint Committee on Atomic Energy in 1956 which addressed the necessity for limited liability. *Id.* at

an indirect injury to satisfy the "traceable" and "redressible" requirements.[82]

The three prong article III standing test was explicitly pronounced by the United States Supreme Court in its 1981 decision, *Valley Forge Christian College v. Americans United for Separation of Church and State*.[83] In *Valley Forge*, plaintiffs alleged that the conveyance of federally owned land to Valley Forge Christian College (VFCC) used tax dollars for religious purposes in violation of the first amendment establishment clause.[84] Writing for the majority, Justice Rehnquist acknowledged that the Court's prior standing decisions lacked definition.[85] Therefore, the Justice succinctly delineated the minimum requirements for invoking the Court's jurisdiction.[86] Justice Rehnquist summarized that a plaintiff must have experienced an actual or threatened injury traceable to the defendant's conduct[87] and capable of judicial redress.[88] Applying this test, Justice Rehnquist concluded that the plaintiffs lacked standing because they failed to allege a specific harm resulting from the challenged action.[89]

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75. Industry spokesmen expressed a "categorical unwillingness" to produce nuclear power without such a limitation. *Id.* (citation omitted).

Chief Justice Burger additionally rejected any mandate requiring plaintiffs to establish a nexus between the alleged injuries and the constitutional challenge to the Act. *Id.* at 78. The requirement that plaintiffs show such a connection stems from *Flast v. Cohen*, 302 U.S. 83 (1968), which addressed taxpayer standing. *Id.* This requirement, however, has never been extended to suits outside the area of taxpayer challenges. *Id.* at 78-79 (citing Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 225 n.15 (1974)).

82 Comment, *supra* note 2, at 147.

83 454 U.S. 464 (1982).

84 *Id.* at 469. Pursuant to the Federal Property and Administrative Services Act of 1949, designed to allow disposition of surplus property, the Department of Health, Education and Welfare gifted the property to Valley Forge Christian College. *Id.* at 466-68. The property was appraised at $577,500. *Id.* at 468.

85 *Id.*; *see also supra* note 9.

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

87 *Id.* (citing Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979)).

88 *Id.* (citing Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38, 41 (1976)).

89 *Id.* at 485-86. Justice Rehnquist also denied standing to the plaintiffs as taxpayers. *Id.* at 482. The Court explained that, under *Flast v. Cohen*, taxpayers are required to establish standing by challenging the constitutionality of a congressional act under the taxing and spending clause. *Id.* at 479 (citing Flast v. Cohen, 392 U.S. 83, 102-03 (1968)). Additionally, the Court noted that taxpayers must show that the challenged action is beyond the power granted by the taxing and spending clause. *Id.* (citing Flast v. Cohen, 392 U.S. 83, 102-03 (1968)). Justice Rehnquist reminded that, in *Valley Forge*, plaintiffs' complaint did not challenge the taxing and spending power, but rather alleged unconstitutional use of their tax dollars. *Id.* at 476. Based on this reasoning, the Court denied standing to plaintiffs as taxpayers. *Id.* at 482.

Explaining the policy purposes of the tripartite standing test, Justice Rehnquist initially pointed out that standing issues should be resolved within their factual contexts to avoid an unbridled development of precedent.[90] Second, Justice Rehnquist advanced that an injury in fact guarantees that courts will not be exploited by concerned bystanders who wish to assert personal interests.[91] Rather, Justice Rehnquist stated that the courts must protect those individuals most likely to be affected by the decision.[92] Finally, the Court acknowledged that standing requirements prevent the judiciary from addressing abstract questions and usurping legislative authority.[93]

It was against this historical context that the United States Court of Appeals for the Third Circuit clarified the article III environmental standing test in *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*[94] The court of appeals required plaintiffs to show an actual injury which was fairly traceable to the defendant's conduct and was redressible by judicial ruling.[95]

The court initially addressed whether the plaintiffs had sufficiently established an injury in fact.[96] The court recognized that standing can be established through an injury to one's aesthetic

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90 *Id.* at 472. The Court specifically noted:

> Because it assures an actual factual setting in which the litigant asserts a claim of injury in fact, a court may decide the case with some confidence that its decision will not pave the way for lawsuits which have some, but not all, of the facts of the case actually decided by the court.

Id.

91 *Id.* at 473 (citing United States v. SCRAP, 412 U.S. 669, 687 (1973)).

92 *Id.* The Court added that:

> The exercise of judicial power, which can so profoundly affect the lives, liberty and property of those to whom it extends, is therefore restricted to litigants who can show "injury in fact" resulting from the action which they seek to have the court adjudicate.

Id.

93 *Id.* at 474 (citing Blair v. United States, 250 U.S. 273, 279 (1919)).

94 913 F.2d 64 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1018 (1991). In applying the *Valley Forge* standing test, the *PIRG* court provided much needed guidance regarding the test's causation tier. *Id.* at 72 n.6 (citation omitted). The *Valley Forge* Court, which concluded that the plaintiffs failed to assert a sufficient injury in fact to confer standing, never reached the causation issue. *See id.* (citing *Valley Forge*, 454 U.S. at 485-86). Furthermore, prior application of the causation requirement provided little guidance. *See* Varat, *Variable Justiciability and the Duke Power Case*, 58 TEX. L. REV. 273, 287 (1980).

95 *PIRG*, 913 F.2d at 72. The court pointed out that it was not necessary to consider traditional prudential limitations which frequently result in the denial of standing since FWPCA specifically accords standing to the extent of the Constitution. *Id.* at 70 n.3. *See supra* note 5.

96 *PIRG*, 913 F.2d at 71.

or recreational enjoyment of a natural resource.[97] The court observed that several PIRG members who previously recreated along the Kill Van Kull shores or in the adjacent park discontinued their activities because of the Kill's diminished condition.[98] Consequently, the court recognized that the injury in fact requirement was satisfied.[99]

The court of appeals next discussed whether the harm to PIRG's members was fairly traceable to or caused by the defendant's alleged violations.[100] Rejecting the district court's reasoning that a permit violation adequately linked the alleged harm to PDT's unlawful action,[101] the appeals court held that a closer causal relationship was necessary to satisfy the second prong of the article III test.[102]

Despite applying a different test, the court held that the plaintiffs established the requisite causal connection.[103] The panel asserted that the plaintiffs must show a substantial likelihood existed that the alleged harm resulted from defendant's conduct.[104] Recognizing that numerous polluters may contribute to a waterway's diminished condition,[105] the court of appeals did not require PIRG to show that PDT singularly caused the plaintiffs' injury.[106] Rather, the court explained that the substantial likelihood prong may be established by showing that the defendant discharged a pollutant exceeding the permitted limits into the waterway which adversely affected and contributed to the

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97 *Id.* (citing Sierra Club v. Morton, 405 U.S. 727, 735 (1972); United States v. SCRAP, 412 U.S. 669, 689 n.14 (1973)). The court acknowledged that even a nominal injury was constitutionally significant. *Id.*

98 *PIRG*, 913 F.2d at 71. *See supra* note 24.

99 *PIRG*, 913 F.2d at 71. The court of appeals, recognizing that any identifiable injury is sufficient to confer standing, stated that the interference with plaintiffs' use and enjoyment of the Kill was significant. *Id.*

100 *Id.* at 71-73.

101 *Id.* at 72.

102 *Id.*

103 *Id.*

104 *Id.* (citing Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 75 n.20 (1978)). The court explained that the presence of a substantial likelihood that defendant's conduct caused plaintiffs' harm ensures that the plaintiffs are not simply concerned bystanders, as article III prohibits. *Id.*.

105 *Id.* at 72 n.8.

106 *Id.* at 72. The court added that plaintiffs are similarly not required to sue every discharger polluting the waterway. *Id.* at 72 n.8. Moreover, the court opined that standing is sufficiently established by showing that the named polluter contributed to the harm alleged. *Id.* The court reminded that the degree of actual harm caused by the polluter is irrelevant to the threshold determination of standing. *Id.* (citing United States v. SCRAP, 412 U.S. 669, 689 n.14 (1973)).

plaintiffs' injuries.[107]

The court of appeals then examined PIRG's alleged injury to determine whether it was caused, at least in part, by PDT's emissions.[108] The court noted that the reports PDT filed with the Environmental Protection Agency (EPA) evidenced grease and oil discharge violations.[109] Considering testimony regarding an oily sheen on the Kill, the court concluded that PIRG sufficiently established a causal relationship between the alleged harm and PDT's illegal discharges.[110]

To complete the standing analysis, the court of appeals concluded that PIRG also satisfied the final prong of the standing test[111] by establishing that a favorable decision would remedy the alleged injury.[112] Acknowledging the FWPCA's underlying statutory objective,[113] the court of appeals stated that injunctive relief would remedy PIRG's injuries by ensuring the cessation of illegal discharges.[114] The court additionally observed that the deterrent effect of the civil penalties assessed against PDT would advance the public interest.[115] Finding that a favorable decision would redress PIRG's injuries, the court granted standing.[116]

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107 *Id.* at 72.

108 *Id.* at 72-73.

109 *Id.* at 73. *See supra* notes 12, 21. The court of appeals noted that plaintiffs are not required to show to a "scientific certainty" that PDT discharged the oil which injured plaintiffs. *PIRG*, 913 F.2d at 73 n.10. The court emphasized that article III does not require "tort-like causation." *Id.* Instead, the court asserted that PDT may negate these allegations by showing that it did not violate its oil and grease permit limitations or by showing that plaintiffs allegations are untrue. *Id.* (citing United States v. SCRAP, 412 U.S. 669, 689 (1973)).

110 *Id.*

111 *Id.* at 73.

112 *Id.*

113 *See supra* note 33.

114 *PIRG*, 913 F.2d at 73. The court added that plaintiffs are not required to show that the favorable decision will return the Kill to a pristine condition. *Id.* Instead, the court explained that plaintiffs are only required to show that their injuries are likely to be redressed by a favorable decision. *Id.* (citing Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 472 (1982)).

115 *Id.*

116 *Id.* After finding that PIRG's members had standing and, therefore, PIRG had standing on a representational basis, the court considered whether a five year statute of limitations applied to citizen suits instituted under the FWPCA. *Id.* at 73-76. The Third Circuit recognized that enforcement actions instituted by the EPA must be commenced within five years of the violation and, thus, that citizen suits, as supplemental aids to EPA enforcement, must function under the same procedural constraints. *See id.* at 74. *See also* Sierra Club v. Chevron, U.S.A., Inc., 834 F.2d 1517, 1522-23 (9th Cir. 1987) (federal statute of limitations applicable when citizens stand "in the shoes" of the EPA); Public Interest Research Group of New Jersey,

In a lengthy concurring opinion, Judge Aldisert expressed

Inc. v. Witco Chemical Corp., 1990 WL 66178 (D.N.J. May 17, 1990) (federal five year statute of limitations applicable to citizen enforcement of FWPCA); Atl. States Legal Found. v. Al Tech Specialty Steel Corp., 635 F. Supp. 284, 287 (N.D.N.Y. 1986) (five year statute of limitations applied to citizen enforcement suit brought under FWPCA); Connecticut Fund for the Env't. v. Job Plating Co., 623 F. Supp. 207, 213 (D. Conn. 1985) (Federal statute of limitations applies to citizen FWPCA suits). *But see* Pub. Interest Research Group of New Jersey, Inc. v. United States Metals Refining Co., 681 F. Supp. 237, 239 (D.N.J. 1987) (no statute of limitations applies to FWPCA citizen suits); Student Pub. Interest Group of New Jersey, Inc. v. AT&T Bell Laboratories, 617 F. Supp. 1190, 1202 (D.N.J. 1985) (no statute of limitations applies to citizen enforcement suits instituted under FWPCA); Student Pub. Interest Research Group of New Jersey, Inc. v. Tenneco Polymers, 602 F. Supp. 1394, 1398-99 (D.N.J. 1985) (state statute of limitations does not apply to citizen suits brought under the FWPCA).

Furthermore, the court of appeals held that the statute of limitations did not commence running until DMRs have been filed with the EPA and the statutory sixty day notice period has expired. *PIRG*, 913 F.2d at 75. This notice period must be provided to the EPA in order to allow it to decide whether to commence the enforcement action or allow plaintiff citizens to proceed. *Id.* The imposition of the five year statute of limitations ultimately barred twelve of the alleged violations. *Id.* at 76 n.17.

The court of appeals proceeded to the merits of the issue and granted plaintiffs' motion for summary judgment. *Id.* at 76-79. The court first determined that the single operational upset (SOU) defense asserted by PDT did not create a defense to liability but rather related to the calculation of penalties. *Id.* at 76. The court observed that the SOU defense was set out in FWPCA subsections addressing the calculation of penalties and was expressly limited to those subsections. *Id.* The court of appeals interpreted the term "upset" to mean "unusual or extraordinary occurrence" or a "non-routine malfunctioning at an otherwise generally compliant facility." *Id.* at 77 (citing EPA Guidance Interpreting "Single Operational Upset," Addendum B to Brief of Intervenor EPA). The court further acknowledged that PDT was unable to avail itself of the SOU defense since no evidence illustrated that PDT had been operating under extraordinary circumstances. *Id.* The court of appeals refused to accept PDT's argument that it had operated in a state of continual upset for a period of six years. *Id.* Finding that PDT's violations were a result of the defendant's recalcitrance, the court concluded that PDT was not entitled to use the defense and that PIRG was, therefore, entitled to summary disposition. *Id.* at 79.

Lastly, the court of appeals addressed the assessment of penalties. *Id.* at 79-81. The court considered the economic benefit resulting from noncompliance. *Id.* at 79-80. The court rejected PDT's argument that the district court's finding of economic benefit was clearly erroneous. *Id.* at 80. The court approved the lower court's reliance on PDT's own cost projections of hauling its waste off-site to determine the economic benefit which PDT enjoyed. *Id.* The court emphasized that reasonable approximation of benefit can be appropriately considered by the court when assessing penalties, in addition to the seriousness of the violations. *Id.* at 79-80 (citation omitted). The court of appeals additionally upheld the lower court's findings as to the seriousness of the violations. *Id.* The finding itself was based on the number of violations and the degree of the violations which frequently exceeded limitations by 100% to 1000%. *Id.* at 79. Additionally, the discharges contained toxins extremely harmful to plant and marine life. *Id.* The court is directed by the Act to consider numerous factors in determining the appropriate penalty. *Id.* The Act provides in pertinent part:

specific concerns that PIRG did not have standing to bring suit against PDT.[117] Judge Aldisert conceded that PIRG had sufficiently established the injury in fact and redressibility prongs of the *Valley Forge* test.[118] Judge Aldisert questioned, however, PIRG's ability to satisfy the causation tier of the article III test.[119] The senior judge found that the plaintiffs' testimony did not identify any specific harm resulting from PDT's illegal discharges.[120]

Judge Aldisert's concerns stemmed from the Kill Van Kull's general environmental condition.[121] The judge noted that the Kill's highly industrialized waters were polluted from various sources, including two large sewage treatment plants and repeated oil spills.[122] While the judge acknowledged that PDT was

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> In determining the amount of civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violations, any history of such violations, any good-faith efforts to comply with applicable requirements, the economic impact of the penalty on the violation, and other such matters as justice requires.

Id. (citing 33 U.S.C. § 1319(d)(1988)). The court of appeals, however, rejected the lower court's penalty reduction based on the EPA's nonfeasance. *Id.* at 81. The court of appeals noted that the district court supported this reduction by considering PDT's "good-faith attempts to comply with the Act." *Id.* at 80 (citing Pub. Int. Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc., 720 F. Supp. 1158, 1166-67 (D.N.J. 1989)). The court of appeals argued that the district court's basis of good faith directly contradicted the district court's assertion that PDT's actions did not rise "to the level of good faith." *PIRG*, 913 F.2d at 81 (citing PIRG v. Powell Duffryn Terminals Inc., 720 F. Supp. at 1165). Recognizing that no legitimate basis existed to reduce the penalty, the court of appeals declared that the maximum penalty was appropriate. *Id.* Finally, the court of appeals ordered PDT to pay the penalty to the Treasury, rather than establishing a trust fund designed to protect the environment. *Id.* at 82. The court noted that payment to the United States Treasury was consistent with the congressional intent to supplement EPA enforcement with citizen suits. *Id.* The court of appeals, while not ruling out the possibility of a trust fund, emphasized that once the label of penalty is used, the money must be paid to the Treasury. *Id.* The court of appeals lastly limited the lower court's permanent injunction of all future violations to an injunction of all future violations of the existing permit. *Id.* at 83.

117 *Id.* (Aldisert, J., concurring).

118 *Id.* at 85 (Aldisert, J., concurring). For a discussion of the *Valley Forge* test, *see supra* notes 83–93 and accompanying text.

119 *Id.* at 85 (Aldisert, J., concurring).

120 *Id.* at 87 (Aldisert, J., concurring).

121 *Id.* at 86 (Aldisert, J., concurring). Judge Aldisert stated that "[i]f the receiving waters of Powell Duffryn's discharge were crystal clear waters of a sylvan lake or an uncontaminated mountain stream, it would be easy to relate the alleged injury sustained by the member/plaintiffs to the company's discharge." *Id.* (Aldisert, J., concurring).

122 *Id.* (Aldisert, J., concurring). The Kill Van Kull was characterized by Judge Aldisert as "one of the most industrialized waterways in the United States, if not the

an egregious, habitual polluter of the Kill Van Kull,[123] he observed that the once pristine waterway had lost its beauty.[124] Thus, the judge posited that it was difficult to establish a sufficient causal relation between PDT's discharges and the Kill's ravaged condition.[125] Judge Aldisert contended that no plaintiff was able to link a specific injury to any particular PDT conduct.[126] The judge further expressed deep concern that PDT had been held solely responsible for the destruction of the Kill Van Kull, while in reality the heavy traffic, chemical facilities and numerous oil spills significantly contributed to the water condition.[127]

Despite his uncertainty, Judge Aldisert concurred with the

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world." *Id.* The judge noted that, with the exception of Kill Van Kull Park situated two miles from PDT, the entire waterway abuts heavily industrialized realty. *Id.*

123 *Id.* at 85 (Aldisert, J., concurring). Judge Aldisert proposed that Powell Duffryn deliberately violated its permits because, from a financial standpoint, it was more profitable to continue to discharge unlawful quantities of effluents into the water and allow increased profits to absorb the penalties, rather than to operate in accordance with the permits. *Id.*

124 *Id.* at 86 (Aldisert, J., concurring).

125 *Id.* at 87 (Aldisert, J., concurring). The judge noted that the Kill was the site of numerous oil spills. *Id.* at 86 (Aldisert, J., concurring). During January to June 1990, five major oil spills despoiled the water of the Kill. *Id.* (citing Los Angeles Times, June 8, 1990, at A3, col. 1). The spill which occurred in June discharged 260,000 gallons of oil into the water. *Id.* (citing N.Y. Times, June 8, 1990, at A1, col. 5).

126 *Id.* at 87 (Aldisert, J., concurring). Plaintiff Cheryl Cummings testified that her enjoyment of the Kill Van Kull Park was reduced by the condition of the Kill which she characterized as having "a film . . . like a rainbow or sometimes like greenish-yellow." *Id.* (Aldisert, J., concurring) (citing Student Pub. Interest Research Group of New Jersey, Inc. v. P.D. Oil and Chemical Storage, Inc., 627 F. Supp. 1074, 1085 (D.N.J. 1986)). Ms. Cummings also testified at her deposition that she would not have felt able to sign her affidavit or join in this litigation if she had known that the plaintiff group was alleging that PDT's conduct had a direct negative effect on her aesthetic and recreational interests in the Kill. *Id.* at 94 (Aldisert, J., concurring) (aldisert, J., concurring).

Affiant Sheldon Abrams alleged that a "black . . . oily sheen" existed on the water. *Id.* Mr. Abrams further testified that, if the water flowing from the Kill into the New York Bay was cleaner, he would enjoy boating on the Bay to a greater extent. *Id.* Mr. Abrams also stated that he owned no real estate on or near the New York Bay or the Kill Van Kull. *Id.* Mr. Abrams did not recreate along the Kill and described his interests in the Kill as "very generalized." *Id.* Mr. Abrams stated that he had no claim that he was being directly adversely affected by any conduct of PDT. *Id.* at 88 (Aldisert, J., concurring).

Andrew Gerbino testified that his interests were affected by *any pollutant* which entered the Lower New York Bay. *Id.* (Aldisert, J., concurring) (emphasis added). Finally, Mylissa Ven Ditti testified that the foul odor of the Kill diminished her enjoyment of the park. *Id.* PDT is not accused of dumping garbage into or near the Kill. *Id.* Ven Ditti also asserted that she had no interest being affected by the conduct of PDT. *Id.*

127 *Id.* at 89 (Aldisert, J., concurring).

majority and found standing.[128] The judge, influenced by public policy concerns respecting the environment,[129] hesitantly agreed that PIRG's members were injured by the defendant's acts.[130] Judge Aldisert ultimately endorsed a liberal attitude toward standing in the area of environmental law, but was not entirely certain that the court's decision would survive Supreme Court review.[131]

Historically, courts have applied inconsistent standing analyses.[132] In doing so, the courts have used a wide range of tests, typically striving to liberalize standing within the mandates of ar-

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128 *Id.* at 83 (Aldisert, J., concurring).

129 *Id.* at 89 (Aldisert, J., concurring). Judge Aldisert suggested that his decision was influenced by the monumental nature of environmental concerns. *Id.*

130 *Id.* (Aldisert, J., concurring).

131 *Id.* at 84 (Aldisert, J., concurring). Despite Judge Aldisert's hope that the United States Supreme Court would maintain its liberal environmental standing requirements, the judge noted a Supreme Court opinion, handed down shortly before the *PIRG* opinion, which provided some insight into the Court's view on environmental standing. *Id.* In *Lujan v. National Wildlife Federation*, 110 S. Ct. 3177 (1990), the National Wildlife Federation claimed a right to judicial review of the Bureau of Land Management's land. *Lujan*, 110 S. Ct. 3177, 3185 (1990). Under the Administrative Procedure Act (APA), a party asserting a claim must show that it has suffered a legal wrong or been affected adversely by some agency action, the Court explained. *Id.* at 3185-86. The Court further stated that the aggrieved party must show by specific facts that his injury falls within the interests to be protected by the statute under which the claim is asserted. *Id.* at 3186.

The Court conceded that the zone of interest tier was met because the plaintiff's recreational and aesthetic interests were intended to be statutorily protected. *Id.* at 3187. The Court, however, questioned whether these interests were actually affected by the review program. *Id.*

In a 5-4 decision, the Court held that averments that one member of the plaintiff organization uses an unspecified portion of a two million acre area, of which some portions have been mined or may be mined as a result of the bureau's actions, are adequate to sustain a summary judgment motion on the standing issue. *Id.* at 3188-89. Conclusory allegations, the Court explained, which are unsupported by the specific facts, fail to create a genuine issue of material fact. *Id.* at 3195.

The Court specifically rejected the *SCRAP* decision as inapposite, noting that such an expansive view of the APA has not been repeated since the *SCRAP* decision. *Id.* at 3189. The Court further distinguished *SCRAP* as unpersuasive because the review at issue in *Lujan* concerned a summary judgment motion rather than a motion on the pleadings, which assumes that general allegations contain facts necessary to support the asserted cause of action. *Id.* (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

Judge Aldisert, therefore, interpreted the *Lujan* decision as an indication that the Supreme Court is not willing to completely relax the requirements for standing in environmental cases. *PIRG*, 913 F.2d at 84 (Aldisert, J., concurring). The senior judge reasoned that if the Court requires a minimum level of specificity "to prove standing under a statute, it follows, *a fortiori*, that the Court requires some stringency in meeting Article III standing." *Id.* (Aldisert, J., concurring).

132 *See supra* note 9.

ticle III. In refining the causation standard set forth in *Duke*,[133] the *PIRG* court clearly displayed its unwillingness to require heightened causation requirements in environmental litigation.[134] By enunciating a liberal causation standard, the court properly allowed citizen groups to enforce NPDES permits and effectuated the FWPCA's intent.[135] Appropriately, the court did not require the plaintiff to name all the alleged polluters as defendants nor definitely establish causation through the pleadings. A contrary holding would have overburdened the plaintiffs and discouraged citizen enforcement of environmental laws.[136] The enunciated standard assures that citizens will generally be able to establish causation.

It is, however, questionable whether the court's causation standard falls within the confines of article III. The causation tier of the standing doctrine essentially ensures that courts address only actual cases or controversies.[137] In the absence of a causal relationship between the alleged injury and the defendant's actions, parties would be able to institute legal action despite the court's inability to remedy the legal invasion. The Third Circuit's application of the *Duke* causation standard illustrates how far a court may challenge article III limits. Although PDT's oil and grease discharges likely contributed to the Kill's oil content, the degree of damage caused directly by PDT was *de minimis* in light of the Kill's perilous condition. The quality of the waterway, however, should not potentially defeat the liability of a dis-

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133 *See supra* notes 76–82 and accompanying text.

134 *See supra* notes 76-82 and accompanying text.

135 *See supra* note 33.

136 Many would find this outcome troubling as citizen enforcement has become an important procedure in light of inadequate governmental diligence. J. BONNIE & T. MCGARITY, THE LAW OF ENVIRONMENTAL PROTECTION, § B.1, at 903 (1984). *See also* Andreen, *Beyond Words of Exhortation: The Congressional Prescription for Vigorous Federal Enforcement of the Clean Water Act*, 55 GEO. WASH. L. REV. 202, 203-04 (1987). Between 1977 and 1982, EPA enforcement of the Clean Water Act dropped 73.1%. *Id.* at 204-05. A 41.5% fall in compliance inspections occurred, accompanied by a 25.5 % decrease in personnel assigned to enforcement of the Clean Water Act. *Id.* During this period of nonenforcement, 82% of NPDES permit holders violated permit parameters at least one time. *Id.* at 205. Twenty-four percent of permit holders were considered to be in "significant noncompliance" during this time period. *Id.* "Significant noncompliance" occurred when the polluter exceeded at least one concentration or quality limit by 50% or more in a period of four consecutive months during the eighteen-month permit period. *Id.* at 205 n. 25 (quoting U.S. General Accounting Office, WASTEWATER DISCHARGERS ARE NOT COMPLYING WITH EPA POLLUTION CONTROL PERMITS 9 (1983)).

137 *See supra* notes 1-4 and accompanying text.

charger who compromised the environment in view of its profit margin.

The Third Circuit has, thus, judicially determined that "identifiable trifles" sufficiently establish causation.[138] Therefore, any polluter may be held accountable despite a seemingly insignificant contribution to the alleged harm.[139] Despite the constitutional import of standing, it has pragmatically evolved into a mere technicality[140] and courts face frequent criticism for its inconsistent application.[141] Many commentators have called for the change or demise of the procedural requirement in environmental litigation.[142] Difficulties accompanying the application of standing may be avoided by imposing strict liability on any discharger violating its permit parameters. Presently increasing concerns for the environment require strict regulation and thorough enforcement of environmentally unsafe behavior. Such action would conclusively grant standing to all citizens against

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138 *See supra* notes 65 and 66.

139 It may be argued that the court simply chose an inappropriate example of causation by using the oil discharges to establish causation.

140 *See* ROGDERS, ENVIRONMENTAL LAW § 1.6, at 24 (1977).

141 *See supra* note 9. The inconsistent application has been criticized as a product of value-laden and result-oriented adjudication by the court. Comment, *supra* note 2, at 137. It is asserted that standing has been manipulated in order to avoid issues, to address desirable issues, to reflect subjective values regarding certain matters or to avoid or address issues based on the merits of the plaintiff's claim. *Id.*

142 *See* Nichol, *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635 (1985); Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1 (1984); Tushnet, *see supra* note 9, at 663; Albert, *Standing to Challenge Administrative Actions: An Inadequate Surrogate for Claims for Relief*, 83 YALE L.J. 425 (1974); Stone, *Should Trees Have Standing? - Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

As the basis of Justice Douglas' dissent in *Sierra Club v. Morton*, Professor Stone calls for the grant of standing to objects of nature. *See* Stone, *supra*, at 456. Although Stone limited his discourse to natural objects, specifically excluding animals from the proposed grant of standing, cases have been instituted in the name of animals. *See, e.g.*, Mt. Graham Red Squirrel v. Yeutter, 930 F.2d 703 (9th Cir. 1991) (Sierra Club instituted suit in name of endangered squirrel alleged to be harmed by challenged construction); Palila v. Hawaii Dept. of Land & Natural Resources, 471 F. Supp. 985 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981) (action instituted in name of endangered bird seeking removal of sheep alleged to be destroying the bird's habitat). Professor Stone proposed that the natural objects actually be granted limited legal rights. *See* Stone, *supra*, at 458. A guardian may then institute legal action in the name of the objects to seek protection of the environment. *Id.* at 465. In this way, the requirements of establishing injury and use would be avoided while fulfilling the case or controversy prerequisites. *Id.* at 466, 471. Stone has been criticized, not only for the practical problems of instituting the concept, but also for assuming that the appointed guardian would assert the environmentalist position. Sagoff, *On Preserving the Natural Environment*, 84 YALE L.J. 205, 221 (1974).

environmental polluters and end the unnecessary and controversial debate.

Alison L. Galer