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# Standing of Conservation Organizations to Challenge Federal Administrative Action in Federal Court

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## STANDING OF CONSERVATION ORGANIZATIONS TO CHALLENGE FEDERAL ADMINISTRATIVE ACTION IN FEDERAL COURT

Recent years have produced a growing concern among the American public regarding the importance of the sound utilization of our natural resources and the potential impact modern technology may have upon our environment. Congress responded to this concern by enacting the National Environmental Policy Act of 1969 (NEPA),<sup>1</sup> which declares that national policy must seek to effect a productive harmony between man and his environment.<sup>2</sup> Title I of the NEPA is directed primarily toward federal administrative agencies, and requires that they review their current policies and regulations to insure that all federal agencies act in conformity with the policies and purposes of the NEPA.<sup>3</sup>

In the past, conservation organizations often attempted to challenge federal administrative action allegedly detrimental to natural resources.<sup>4</sup> At the outset, such organizations were confronted with the contention that they lacked standing to sue in federal court to challenge such governmental action on behalf of the general public interest in natural resources. Since judicial review serves an important function in protecting the public against allegedly illegal administrative action,<sup>5</sup> denial of standing to such groups may effectively curtail the possibility of judicial review altogether.<sup>6</sup> This comment will explore the concept of standing as applicable to suits by conservation organizations to protect the public interest in the nation's natural resources and environment. The discussion will initially focus upon the principles of standing prior to two recent Supreme Court decisions,<sup>7</sup> and then upon the application of those principles by lower courts in suits by conservation groups. Finally, the comment will analyze the two recent Supreme Court decisions and assess their probable impact.

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<sup>1</sup> 42 U.S.C.A. § 4321 et seq.

<sup>2</sup> Id. §§ 4321, 4333.

<sup>3</sup> Id. § 4333.

<sup>4</sup> See cases discussed *infra* at pp. 641-47.

<sup>5</sup> L. Jaffe, *Judicial Control of Administrative Action* 459 (Abr. student ed. 1965).

<sup>6</sup> See *South Hill Neighborhood Ass'n v. Romney*, 421 F.2d 454 (6th Cir. 1969), cert. denied, 397 U.S. 1025 (1970), in which the court denied standing to local organizations which desired to preserve local historic sites. The importance of finding standing in such organizations is illustrated in *Parker v. United States*, 307 F. Supp. 685 (D. Colo. 1964), where the court held that a conservation organization had standing to have a national park declared a national wilderness. If the court had denied standing, the timber on the parklands would have been destroyed, even though the Department of the Interior may have been obligated to designate the area as a national wilderness. This case is discussed in *Keck, Standing to Sue—and Public Timber Resources*, 3 *Natural Resources Lawyer* 444 (1970).

<sup>7</sup> *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970). These cases are discussed *infra* at pp. 647-50.

## I. THE CONCEPT OF STANDING

Standing to sue in federal court has been characterized by the Supreme Court as a "complicated specialty of federal jurisdiction,"<sup>8</sup> has befuddled other courts as "one of the most amorphous concepts in the domain of public law,"<sup>9</sup> and has been criticized by commentators for an artificiality and a complexity that often results in the Supreme Court violating its own standing principles.<sup>10</sup> The nub of the problem lies in the Supreme Court's determination that standing is related to the Article III limitation that federal courts decide only "cases and controversies."<sup>11</sup> In terms of this limitation, standing focuses upon whether the party seeking relief has alleged such a personal stake in the outcome of the litigation that the issue will be presented in an adversary context and in a form capable of judicial resolution.<sup>12</sup>

Since most standing decisions have been directed at solving the problems of individual situations<sup>13</sup> rather than providing future guidance,<sup>14</sup> even the Supreme Court has admitted that generalizations about standing are worthless.<sup>15</sup> However, despite the difficulty of applying such rules, a litigant was said to possess standing if he could show injury to a legal right, that he was a party aggrieved, or that he was a proper party to act as a private attorney general.

The legal right theory finds its strongest application in cases such as *Tennessee Electric Power Co. v. TVA*,<sup>16</sup> in which an electric power company sued to restrain the TVA from generating power in competition with it. Although recognizing the principle that one threatened with direct or special injury by government action may challenge the validity of such action,<sup>17</sup> the Court concluded that such principle is inapplicable

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.<sup>18</sup>

Since no person has a right to be free from lawful competition,<sup>19</sup> the plaintiff lacked standing to challenge the action of the TVA.

The *TVA* decision graphically illustrates the result of applying the "legal right" test. Although the plaintiff alleged that he would suffer

<sup>8</sup> *United States ex rel. Chapman v. FPC*, 345 U.S. 153, 156 (1953).

<sup>9</sup> *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 861 (D.C. Cir. 1970).

<sup>10</sup> 3 K. Davis, *Administrative Law* § 22.01 at 210 (1958).

<sup>11</sup> *Flast v. Cohen*, 392 U.S. 83, 94-98 (1968).

<sup>12</sup> *Id.* at 101; *Baker v. Carr*, 369 U.S. 186, 204 (1962).

<sup>13</sup> *United States ex rel. Chapman v. FPC*, 345 U.S. 153, 156 (1953).

<sup>14</sup> *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 861 (D.C. Cir. 1970).

<sup>15</sup> *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 151 (1970).

<sup>16</sup> 306 U.S. 118 (1939).

<sup>17</sup> *Id.* at 137.

<sup>18</sup> *Id.* at 137-38.

<sup>19</sup> *Id.* at 140.

severe economic injury as a result of the government's competition, plaintiff was denied standing to challenge the lawfulness of that action.<sup>20</sup> The test has been criticized by commentators, and other decisions have raised doubts as to its validity.<sup>21</sup> The harsh results of its application were mitigated by the subsequent formulation of the "party aggrieved" or "legal interest" test.

This test is most clearly elucidated in *FCC v. Sanders Brothers Radio Station*,<sup>22</sup> in which the plaintiff challenged the issuance of a license to a competitor, thereby effectively increasing plaintiff's competition. The plaintiff alleged that Section 402(b) of the Federal Communications Act, which provides that judicial review may be sought "by any other person who is aggrieved or whose interests are adversely affected by any decision of the Commission, . . ."<sup>23</sup> accorded him standing. The Court reviewed the legislative history and policy of the Federal Communications Act and concluded that the Act was intended to protect the public and that it did not create anything in the nature of a property right in the holder of a license.<sup>24</sup> The Court indicated, however, that Congress had some purpose in enacting section 402(b)(2), and that if Congress believed that only a person financially injured possessed a sufficient interest to prosecute an appeal, "it is within the power of Congress to confer such standing."<sup>25</sup> The Court thus concluded that the plaintiff had standing to seek judicial review of the Commission's order.

The significance of the *Sanders* doctrine is that the litigant has standing not because of any legal right, but rather because the interest he asserts is an interest protected by the statute. The private attorney general concept is an extension of the *Sanders* doctrine in that it allows standing to protect public as well as private interests.

The private attorney general concept finds its clearest enunciation in two cases. In *Scripps-Howard Radio, Inc. v. FCC*,<sup>26</sup> plaintiff challenged the issuance of a license to a radio station in another city. Since the new license changed the other station's frequency to the same as that of plaintiff, plaintiff alleged that it would be subject to a loss of listening audience and that a substantial portion of the listening public in the area would be deprived of its only radio service.<sup>27</sup> Although recognizing that the Federal Communications Act did not create new rights,<sup>28</sup> the Court concluded that these private litigants have standing only to protect the public interest, and even though

<sup>20</sup> *Id.* at 147, 152 (Butler, J., dissenting).

<sup>21</sup> 3 K. Davis, *supra* note 10, § 22.04 at 217-18; *Id.* at 52-53 (Supp. 1965) and cases cited therein.

<sup>22</sup> 309 U.S. 470 (1940).

<sup>23</sup> 47 U.S.C. § 402(b)(6) (1964).

<sup>24</sup> 309 U.S. at 475.

<sup>25</sup> *Id.* at 477.

<sup>26</sup> 316 U.S. 4 (1942).

<sup>27</sup> *Id.* at 5.

<sup>28</sup> *Id.* at 14.

a court is called upon to enforce public rights and not the interests of private property [this] does not diminish its power to protect such rights . . . because the rights to be vindicated are those of the public and not of the private litigants.<sup>29</sup>

In *Associated Industries of New York State, Inc. v. Ickes*,<sup>30</sup> the Second Circuit upheld the standing of consumers of coal to challenge an order increasing the minimum price of coal. In an attempt to reconcile the *Sanders* and *Scripps-Howard* cases, the court concluded that just as Congress 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 . . . [so also] Congress can constitutionally enact a statute conferring on any non-official person . . . authority to bring a suit to prevent action by an officer in violation of his statutory powers. . . . Such persons, so authorized, are, so to speak, private Attorney Generals.<sup>31</sup>

What is clear from both the *Scripps-Howard* and *Ickes* decisions is that the plaintiff has standing to assert the public interest and not merely an interest personal to himself. These cases have been cited by lower courts to find standing for conservation groups to challenge government action.<sup>32</sup>

All three tests have not been without criticism or difficulty of application. The distinction between calling something a "legal right" or a "legal interest" that an aggrieved party may assert has been criticized as semantic, since if the litigant has a legally protected interest he may assert in court, it is far more logical to call it a right and avoid a confusion of terms.<sup>33</sup> The private attorney general concept has been subject to debate on the question of whether the plaintiff who asserts the public interest must also be suffering some specific injury to himself.<sup>34</sup> The Supreme Court has not passed upon the issue directly so that the scope of the private attorney general concept remains unclear.<sup>35</sup> Notwithstanding the difficulty in articulating these tests, several decisions have applied these standards to the conservation area.

<sup>29</sup> *Id.* at 14-15.

<sup>30</sup> 134 F.2d 694 (2d Cir. 1943), vacated as moot, 320 U.S. 707 (1943).

<sup>31</sup> 134 F.2d at 704.

<sup>32</sup> See, e.g., *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), cert. denied sub nom. *Consolidated Edison Co. of New York, Inc. v. Scenic Hudson Preservation Conference*, 384 U.S. 941 (1966). This case is discussed *infra* at pp. 641-42.

<sup>33</sup> 3 K. Davis, *supra* note 10, § 22.04 at 222.

<sup>34</sup> See Davis, *Standing: Taxpayers and Others*, 35 U. Chi. L. Rev. 601, 614-16 (1968), for Professor Davis' criticism of Professor Jaffe's position; see Jaffe, *supra* note 5, at 498-500. See also *Flast v. Cohen*, 392 U.S. 83, 120 (1968) (Harlan, J., dissenting).

<sup>35</sup> See Davis, *supra* note 34, at 616.

## II. STANDING IN ENVIRONMENTAL CASES

The most significant lower court decisions upholding standing for conservation groups to sue to protect the public interest have been decided in the Second Circuit. In *Scenic Hudson Preservation Conference v. FPC*,<sup>86</sup> conservation organizations and three New York towns petitioned the court to set aside an order of the Federal Power Commission granting a license to Consolidated Edison of New York. Pursuant to the license, Consolidated Edison had been given permission to construct a hydro-electric station on the west side of the Hudson River at Storm King Mountain near Cornwall, New York.<sup>87</sup> Petitioners alleged jurisdiction pursuant to Section 313(b) of the Federal Power Act which provides:

Any party . . . aggrieved by an order issued by the Commission . . . may obtain a review of such order in the United States court of appeals. . . .<sup>88</sup>

Petitioners alleged that the existence of the power station would adversely affect the conservation and natural beauty of the area, and further, that the FPC had failed to consider the conservational aspects of power development as required by Section 10(a) of the Federal Power Act.<sup>89</sup>

Although that section did not require the FPC to consider conservational aspects, the court concluded that the phrase "for recreational purposes" in section 10(a) "encompassed the conservation of natural resources, the maintenance of natural beauty and the preservation of historic sites."<sup>40</sup> Having found the legally protected interest, the court then addressed itself to the question of standing. Since a statute may create new interests or rights, and thus give standing to one who is otherwise barred,<sup>41</sup> the court concluded that in order to protect the aesthetic, conservational and recreational aspects of power development, those who

by their activities and conduct have exhibited a special interest in such areas, must be . . . "aggrieved" parties under § 313 (b). We hold that the Federal Power Act gives petitioners a legal right to protect their special interests.<sup>42</sup>

What is significant in this decision is that although one plaintiff alleged that his trailways would be flooded by the proposed power

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<sup>86</sup> 354 F.2d 608 (2d Cir. 1965), cert. denied sub nom. Consolidated Edison Co. of New York, Inc. v. Scenic Hudson Preservation Conference, 384 U.S. 941 (1966).

<sup>87</sup> 354 F.2d at 611.

<sup>88</sup> 16 U.S.C. § 825f (b) (1964).

<sup>89</sup> Id. § 803(a). This section, however, refers only to "recreational uses" and not conservational values.

<sup>40</sup> 354 F.2d at 614.

<sup>41</sup> Id. at 615.

<sup>42</sup> Id. at 616.

development,<sup>48</sup> the court permitted this plaintiff to challenge not only the feasibility of the plant, but also permitted plaintiff to compel consideration of underground power lines and a device to protect the fish in the Hudson River.<sup>44</sup> The court failed to connect the injury allegedly suffered by this plaintiff with the proposed relief. Quite obviously, neither underground transmission lines nor a fish-protecting device will protect trailways that will be flooded by the construction of the plant. In effect, the court has given this plaintiff a remedy having no connection to the injury he allegedly suffered. Although *Scenic Hudson* has been subject to criticism, its basic holding that conservational values may be protected interests has been followed by other courts.<sup>45</sup> *Scenic Hudson* also illustrates the application of the private attorney general concept and the "party aggrieved" statutes to confer standing upon conservation organizations.

In *Road Review League v. Boyd*,<sup>46</sup> the rationale of the *Scenic Hudson* decision was expanded to include standing to sue under the Administrative Procedure Act (APA).<sup>47</sup> In *Road Review*, a New York town, one civic organization, two wildlife sanctuaries, and certain individuals sued to set aside a proposed highway route determination of the Federal Highway Administrator as arbitrary, capricious and not in accordance with law.<sup>48</sup> Relying upon the judicial review provision of the APA, the court concluded that Section 15(a) of the Federal Highway Act, which sets forth a national policy of protecting the natural beauty and historic sites along a proposed highway route,<sup>49</sup> provided a sufficient basis for the finding that conservation organizations are "aggrieved" by agency action which has allegedly disregarded their interests.<sup>50</sup>

The significance of *Road Review* lies in the court's application of Section 10(a) of the APA. That section 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.<sup>51</sup>

The exact meaning to be given this section has been the subject of extended debate. Professor Davis has concluded that the APA grants the right of judicial review to any person "adversely affected in fact"

<sup>48</sup> *Id.*

<sup>44</sup> *Id.* at 611.

<sup>45</sup> For a criticism, see Davis, *supra* note 34, at 624 n. 72. For cases citing *Scenic Hudson*, see *Road Review League v. Boyd*, 270 F. Supp. 650 (S.D.N.Y. 1967) discussed *infra* at pp. 642-43, and *Environmental Defense Fund v. Hardin*, 428 F.2d 1093, 1097 n. 15 (D.C. Cir. 1970), discussed *infra* at pp. 651-52.

<sup>46</sup> 270 F. Supp. 650 (S.D.N.Y. 1967).

<sup>47</sup> 5 U.S.C. § 702 (Supp. II, 1967).

<sup>48</sup> 270 F. Supp. at 651.

<sup>49</sup> 23 U.S.C. § 138 (Supp. III, 1968).

<sup>50</sup> 270 F. Supp. at 660-61.

<sup>51</sup> 5 U.S.C. § 702 (Supp. II, 1967).

by agency action.<sup>52</sup> Professor Jaffe, on the other hand, has argued that Professor Davis is wrong, and that the APA was meant to reflect existing law at the time of its enactment.<sup>53</sup> Professor Jaffe concludes, therefore, that, as was done in *Sanders*, emphasis should be placed upon the relevant statute to determine if there is a legally protected interest. The legislative history is confusing, but courts have generally taken the Jaffe approach of placing greater emphasis upon the relevant statute and the interest asserted by the plaintiff.<sup>54</sup> Although the Supreme Court has not resolved the issue, it has stated that the judicial review provisions of the APA should be broadly construed, and judicial review should not be denied unless Congress has explicitly made clear such an intent.<sup>55</sup>

Whatever the outcome of the debate, by reasoning that the APA should be interpreted in a manner similar to the "person aggrieved" provision that was utilized in *Scenic Hudson*,<sup>56</sup> the *Road Review* rationale provides a basis for standing in any situation in which the plaintiff alleges that the interest he asserts was intended to be protected by Congress. As such, the *Road Review* rationale supports a finding of standing based upon broad policy declarations.<sup>57</sup>

An even more recent case in the Second Circuit that has applied the principles of both *Scenic Hudson* and *Road Review* is *Citizens Committee for the Hudson Valley v. Volpe*.<sup>58</sup> In *Volpe*, the Sierra Club and others sought to set aside a permit issued by the Corps of Engineers that would have permitted the State of New York to dredge and fill a portion of the Hudson River for construction of a proposed highway.<sup>59</sup> Petitioners asserted jurisdiction under the APA, and alleged that the Corps of Engineers had violated Section 9 of the Rivers and Harbors Act,<sup>60</sup> and Section 6(g) of the Department of Transportation Act<sup>61</sup> in issuing the permits. The district court had interpreted these two provisions as requiring the Corps of Engineers to obtain approval from the Secretary of Transportation where construction of a bridge, causeway or dike is contemplated.<sup>62</sup> The district court found that a fill was a

<sup>52</sup> 3 K. Davis, *supra* note 10, § 22.02 at 211-12.

<sup>53</sup> Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 Harv. L. Rev. 255, 288 (1961).

<sup>54</sup> See Comment, 84 Harv. L. Rev. 177, 180 n. 20 (1970) and cases therein cited.

<sup>55</sup> *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967).

<sup>56</sup> 270 F. Supp. at 660-61.

<sup>57</sup> See *Norwalk Congress of Racial Equality v. Norwalk Redevelopment Agency*, 395 F.2d 920, 934 (2d Cir. 1968) in which the court upheld the standing of a local community organization to sue to compel the defendant to provide adequate housing for persons displaced from an urban renewal project since the court believed that Congress intended to protect displaced persons when it enacted the Federal Housing Act.

<sup>58</sup> 425 F.2d 97 (2d Cir. 1970), cert. denied, 400 U.S. 949 (1970).

<sup>59</sup> 425 F.2d at 99-100.

<sup>60</sup> 33 U.S.C. § 401 (1964).

<sup>61</sup> 49 U.S.C. § 1655 (g) (Supp. IV, 1969) which transferred jurisdiction over bridges and causeways from the Department of the Army to the Department of Transportation.

<sup>62</sup> 302 F. Supp. 1083, 1087 (S.D.N.Y. 1969).



dike,<sup>68</sup> and that plaintiffs had, under the *Scenic Hudson* and *Road Review* decisions, standing to commence this action.<sup>64</sup>

On appeal, the court upheld the district court's interpretation of the interrelationship between the Rivers and Harbors Act and the Department of Transportation Act,<sup>65</sup> and, therefore, the Corps was in violation of the statute.<sup>66</sup> Although recognizing that the plaintiffs had made no claim that the government action threatened them with direct or personal harm,<sup>67</sup> the court concluded that the petitioners

had standing to assert the public interest in natural resources as private attorney generals . . . and therefore we hold that the public interest in natural 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 interest.<sup>68</sup>

The significance of this decision rests in the fact that the court granted standing despite its finding that the conservation groups were not suffering any personal harm or injury. Although the court's opinion cites *Ickes*, *Sanders*, and *Scripps-Howard*,<sup>69</sup> in those cases the individual plaintiffs themselves were suffering a particular harm.<sup>70</sup> The court's opinion, therefore, is an application of the public action doctrine that has been espoused by Professor Jaffe.<sup>71</sup> The Supreme Court denied certiorari to review the *Volpe* decision,<sup>72</sup> thereby avoiding the issue of whether such suits are permissible. The need for resolution of this issue is demonstrated by a recent decision in the Ninth Circuit that has denied standing to such groups.

### III. SIERRA CLUB V. HICKEL

In *Sierra Club v. Hickel*,<sup>73</sup> the Sierra Club sought a declaratory judgment and preliminary and permanent injunctions that would have enjoined the Secretaries of Agriculture and the Interior from issuing

<sup>63</sup> Id. at 1088-089.

<sup>64</sup> Id. at 1093.

<sup>65</sup> 425 F.2d at 100 n.1.

<sup>66</sup> Id. at 106.

<sup>67</sup> Id. at 102.

<sup>68</sup> Id. at 105.

<sup>69</sup> Id. at 102.

<sup>70</sup> See discussion of *Sanders* supra at p. 639; *Scripps-Howard* supra at pp. 639-40; *Ickes* supra at p. 640.

<sup>71</sup> L. Jaffe, *Judicial Control of Administrative Action* 459 (Abr. student ed. 1965). Under the "public action" concept, a citizen would have standing to obtain judicial review of allegedly illegal administrative action although he is not suffering any injury distinct from the general public.

<sup>72</sup> 400 U.S. 949 (1970).

<sup>73</sup> 433 F.2d 24 (9th Cir. 1970), cert. granted sub nom. *Sierra Club v. Morton*, 39 U.S.L.W. 3359 (U.S. Feb. 23, 1971).

permits to Walt Disney Productions. Pursuant to the permits, Disney had been given permission for the development of a year-round recreational facility in the Mineral King Valley of the Sequoia National Park of California. To facilitate automobile access to the proposed park development, the Disney plan requires the construction of a new highway that would partially cross both the Sequoia National Park and Sequoia National Forest.<sup>74</sup> The Sierra Club contended that the Secretary of Agriculture had exceeded his statutory authority and had acted arbitrarily and capriciously in approving the Disney plan.<sup>75</sup> The Sierra Club further contended that the Secretary of the Interior had also acted illegally in issuing a permit for construction of the highway across the Sequoia National Park.<sup>76</sup> Lastly, the Sierra Club asserted that no authority exists in the Secretary of Agriculture to issue a permit that would permit construction of transmission lines across national park lands.<sup>77</sup>

The district court issued a temporary injunction forbidding the United States from proceeding with the Disney plan.<sup>78</sup> In issuing the injunction, the district court relied upon the *Scenic Hudson* decision to hold that the Sierra Club had standing to sue to protect the public interest in natural resources. On appeal, the Court of Appeals for the Ninth Circuit reversed, holding that neither the Sierra Club nor any of its members possessed a sufficient interest in the outcome of the litigation for standing to be conferred.<sup>79</sup> The court relied in its decision upon the concept of standing enunciated in *Ickes* that

[a federal] court has no jurisdiction, unless the citizen shows that such conduct or threatened conduct invades or will invade a private substantive legally protected interest of the plaintiff citizen; such invaded interests must be either of "recognized" character, at "common law" or a substantive private legally protected interest created by statute.<sup>80</sup>

Applying these principles to the instant case, the court noted that the Sierra Club had not asserted that any of its property or its organizational status would be endangered by the challenged governmental action.<sup>81</sup> The court found, on the contrary, that the only interest alleged to have been invaded was the Club's interest in the conservation and maintenance of the national parks and forests.<sup>82</sup> The court concluded, therefore, that no adversary position existed between the

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<sup>74</sup> Id. at 27.

<sup>75</sup> Id.

<sup>76</sup> Id.

<sup>77</sup> Id.

<sup>78</sup> Unreported. See, O.S. Gray, *Cases and Materials on Environmental Law* 35 (1970) for the full opinion of the district court.

<sup>79</sup> 433 F.2d at 33.

<sup>80</sup> Id. at 28, quoting *Associated Industries v. Ickes*, 134 F.2d 694, 700 (2d Cir. 1943).

<sup>81</sup> Id. at 30.

<sup>82</sup> Id. at 29.

Sierra Club and the Secretaries of Agriculture and the Interior.<sup>83</sup> Consequently, although the Sierra Club does possess an interest insofar as the proposed course of action is displeasing to its members,<sup>84</sup> the court did not believe that

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 a Congressional and constitutional mandate.<sup>85</sup>

The majority did not believe that the recent Supreme Court decision in *Association of Data Processing Service Organizations v. Camp*<sup>86</sup> provided a basis for standing because in that case plaintiff was threatened with direct economic injury as a result of a loss of profits.<sup>87</sup> Standing derived, therefore, from the existence of a direct injury in fact to the plaintiff.<sup>88</sup> The court rejected any reliance upon *Scenic Hudson* since the court believed that there the "party aggrieved" provisions of the Federal Power Act provided the basis for standing, whereas in the present case no such provisions existed.<sup>89</sup> The court distinguished *Road Review* since there the conservation organizations had been joined by persons who would be displaced by the proposed road.<sup>90</sup> The court also rejected *Volpe* and *Parker v. United States*<sup>91</sup> because in those cases residents and users of the area had joined the Sierra Club as plaintiffs, and those individuals possessed the direct and obvious interest necessary to confer standing.<sup>92</sup> To the extent that *Volpe* granted standing within the private attorney general concept, the *Sierra Club* court disagreed since it believed that concept is limited only to those cases in which Congress had specifically enacted a statute conferring standing upon any non-official person to prevent unauthorized official action.<sup>93</sup> Lastly, the court concluded that the APA did not provide a basis for standing since the plaintiff was neither suffering a legal wrong nor was "adversely affected or aggrieved" within the meaning of the relevant statute.<sup>94</sup>

One member of the court dissented from the court's treatment of the question of standing. He believed that the Supreme Court's decision in *Data Processing* supported the principle that the element of legal

<sup>83</sup> Id.

<sup>84</sup> Id. at 33.

<sup>85</sup> Id. at 30.

<sup>86</sup> 397 U.S. 150 (1970).

<sup>87</sup> 433 F.2d at 31.

<sup>88</sup> Id.

<sup>89</sup> Id. at 30.

<sup>90</sup> Id.

<sup>91</sup> 307 F. Supp. 685 (D. Colo. 1969), where the court upheld the standing of a conservation organization to have a national park declared a national wilderness.

<sup>92</sup> 433 F.2d at 33.

<sup>93</sup> Id. at 33 n.9.

<sup>94</sup> Id. at 32.

wrong necessary to confer standing need not be of an economic character, but may also be aesthetic, conservational or recreational in nature.<sup>95</sup> Since the Sierra Club represents thousands of persons who have a deep interest in such matters, he concluded that if the relevant statutes or regulations are being invaded, the Sierra Club has standing to assert that a legal wrong is being inflicted upon it.<sup>96</sup>

The different approaches taken by the courts in *Volpe* and *Sierra Club* illustrate the uncertainty and confusion in the area of standing. In its opinion, the *Sierra Club* court distinguished the *Volpe* decision from the case before it on the basis that in *Volpe* the Sierra Club had been joined by local conservation organizations made up of local residents and users of the area who had the requisite direct and obvious interest in the administrative action.<sup>97</sup> Further, the *Sierra Club* court argued that the *Volpe* decision did not fall within the private attorney general theory because that concept is limited to cases where Congress has specifically enacted a statute conferring standing.<sup>98</sup> Since no such statute existed in *Sierra Club*, the court reasoned that the private attorney general concept was inapplicable.<sup>99</sup>

It is submitted that *Sierra Club's* analysis of the *Volpe* decision is analytically faulty. The essence of the court's analysis is that the presence of a right in the local residents or users of an area inures to the conservation groups who then have standing. Hohfeldian analysis reveals the illogic of such an argument since the presence or absence of a right in one person does not imply the presence or absence of that right in another.<sup>100</sup> Furthermore the court's reliance upon injury in fact as applied to users, a class that includes the whole world, can be applied to find standing not only for the frequent user of an area, but for the once-a-year visitor as well. To the extent that the court believes that users will present an adversary position, it is quite clear that the dissenter is correct in his assertion that the Sierra Club had standing since the Club and its thousands of members will most certainly provide an adverse plaintiff. However, the correctness of the court's conclusion cannot be determined without consideration of the significance of the two recent Supreme Court decisions.

#### IV. THE *Data Processing* AND *Barlow* DECISIONS

In *Association of Data Processing Services Organizations v. Camp*, an association which supplied data processing services to businesses generally, challenged a ruling of the Comptroller of Currency that permitted national banks to make data processing services available to

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<sup>95</sup> Id. at 38.

<sup>96</sup> Id.

<sup>97</sup> Id. at 33.

<sup>98</sup> Id. at 33 n.9.

<sup>99</sup> Id.

<sup>100</sup> See Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *Yale L.J.* 16 (1913) and 26 *Yale L.J.* 710 (1917) for the basis of Hohfeld's philosophy.

other banks and bank customers.<sup>101</sup> The district court dismissed the complaint for lack of standing<sup>102</sup> and the court of appeals affirmed.<sup>103</sup>

In *Barlow v. Collins*,<sup>104</sup> tenant farmers eligible for payments under the Upland Cotton Program of the Food and Agriculture Act of 1965,<sup>105</sup> challenged the validity of an amended regulation issued by the Secretary of Agriculture.<sup>106</sup> Under the prior regulation, the tenant farmers were not permitted to make assignments of the payments they would receive under the program in order to secure the payment in whole or in part of the cash rent for a farm.<sup>107</sup> Under the amended regulation, the tenant farmers were permitted to make such assignments.<sup>108</sup> As a result of the amended regulation, landlords demanded that the tenants assign all their benefits as a condition to obtaining their lease to work the land.<sup>109</sup> Consequently, the tenants were required to purchase all of their farm needs from the landlords, who in turn charged exorbitant prices thereby consuming all of the tenants' profits in debt payments to the landlord.<sup>110</sup> The district court dismissed the complaint for lack of standing since it found that the government action had not invaded any legally protected interest of the plaintiff.<sup>111</sup> In affirming, the Court of Appeals for the Fifth Circuit found not only that the tenants had no legally protected interest, but also that there was no provision "which expressly or implicitly gives petitioners standing to challenge this administrative action."<sup>112</sup> The Supreme Court granted certiorari to review both the *Data Processing*<sup>113</sup> and *Barlow*<sup>114</sup> decisions. In two opinions written by Justice Douglas, the Court vacated the judgments, and remanded both cases for a trial on the merits.<sup>115</sup>

In *Data Processing*, the Court first discussed the question of standing in terms of the Article III limitation on federal court jurisdiction to "cases and controversies." Reiterating the criteria enunciated in *Flast v. Cohen*,<sup>116</sup> the Court concluded that

the question of standing is related only to whether the dis-

<sup>101</sup> 397 U.S. 150, 151 (1970).

<sup>102</sup> 279 F. Supp. 675 (D. Minn. 1968).

<sup>103</sup> 406 F.2d 837 (8th Cir. 1969).

<sup>104</sup> 397 U.S. 159 (1970).

<sup>105</sup> 7 U.S.C. § 1444(d) (Supp. IV, 1969).

<sup>106</sup> 397 U.S. at 160.

<sup>107</sup> 20 Fed. Reg. 6512 (1955). Under 16 U.S.C. § 590h (g) (1964) tenant farmers were permitted to make assignments of the payments they would receive to finance "making a crop." By narrowly limiting the definition of "making a crop," the farmers were excluded from assigning their payments to secure their farm rent.

<sup>108</sup> 7 C.F.R. § 709.3(b) (1970).

<sup>109</sup> 397 U.S. at 163.

<sup>110</sup> Id.

<sup>111</sup> Unreported.

<sup>112</sup> 398 F.2d 398, 402 (5th Cir. 1968).

<sup>113</sup> 395 U.S. 976 (1969).

<sup>114</sup> Id. at 958.

<sup>115</sup> 397 U.S. 150, 159.

<sup>116</sup> 392 U.S. 83 (1968).

pute sought to be adjudicated will be presented in an adversary context and in a form historically capable of judicial resolution.<sup>117</sup>

The Court then set forth two criteria by which it can be determined whether a litigant has standing to obtain judicial review: first, the litigant must allege that the challenged action will cause him injury in fact, economic or otherwise;<sup>118</sup> second, the interest asserted by the litigant must be arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.<sup>119</sup> In announcing the second criteria, the Court specifically rejected the legal interest test because of the Court's belief that such a test goes to the merits and not to the question of standing.<sup>120</sup>

In applying these two tests to the facts of *Data Processing*, the Court found that petitioners had satisfied the first test of injury in fact since they would suffer economic harm if the Comptroller's ruling were valid.<sup>121</sup> In applying the second test, the Court referred to Section 4 of the Bank Service Corporation Act which provides that "[n]o bank service corporation may engage in any activity other than the performance of bank services for banks."<sup>122</sup> The Court then proceeded to quote from a case in which the Court of Appeals for the First Circuit held that section 4 precluded banks from engaging in non-banking activities.<sup>123</sup> The Court concluded that although it did not wish to "implicate the merits" at that stage, section 4 "arguably brings a competitor within the zone of interests protected by it."<sup>124</sup>

In applying these criteria to the *Barlow* case, the Court found that the farmers had a sufficient personal stake in the outcome of the litigation to satisfy the Article III requirement of adversity.<sup>125</sup> However, the significance of the *Barlow* decision lies in the Court's determination that the interest asserted by the farmers was "clearly within the zone of protected interests."<sup>126</sup> In so holding, the Court referred to three statutory provisions, only one of which had anything to do with the assignment of payments by tenant farmers.<sup>127</sup> With respect to that statute, the Court concluded that the fact that assignments were permitted at all indicated a congressional concern for the tenant farmers'

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<sup>117</sup> 397 U.S. at 151-52.

<sup>118</sup> *Id.* at 152.

<sup>119</sup> *Id.* at 153.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 152.

<sup>122</sup> 12 U.S.C. § 1864 (1964).

<sup>123</sup> 397 U.S. at 155.

<sup>124</sup> *Id.* at 156.

<sup>125</sup> *Id.* at 161.

<sup>126</sup> *Id.*

<sup>127</sup> The statutes referred to were: 7 U.S.C. § 1444(d)(10) and (13) (Supp. IV, 1969), and 16 U.S.C. § 590h(b) (1964). Only 7 U.S.C. § 1444(d)(13), by reference to 16 U.S.C. § 590h(g) (Supp. IV, 1969) has any relation to the right of tenant farmers to assign the payments they receive under the program.

welfare.<sup>128</sup> However, the Court never addressed itself to the specific question presented by the plaintiffs—whether the tenant farmers had a right to be free from the superior bargaining power of the landlords by means of a renewed restriction on their ability to make assignment of the payments due them under the statute.<sup>129</sup> The *Barlow* decision has been subject to criticism because congressional concern for tenant farmers' welfare cannot imply the right of one farmer to sue to challenge an overpayment to another.<sup>130</sup> Such an application of the "zone of interests" test would render it nonsensical.<sup>131</sup> Consequently, the *Barlow* decision leaves unclear the precise significance of this "zone of interests" test.

This uncertainty was criticized by the dissent which maintained that the only requirement for standing is injury in fact.<sup>132</sup> However, the dissent's formulation of the question of reviewability—whether Congress intended to deny judicial review of agency action at the instance of this plaintiff—also requires a consideration of the relevant statute to determine if the plaintiff is within the class of protected persons.<sup>133</sup> The dissent, however, does illuminate the difficulties inherent in the Court's formulation of the requisites for standing.

#### V. IMPACT OF *Data Processing* AND *Barlow* UPON THE CONSERVATION AREA

Since the *Data Processing* and *Barlow* decisions specifically rejected the legal interest test,<sup>134</sup> a court is no longer required to find that the statute intended to protect environmental values, but need only find that such values are "arguably within the zone of interests" protected or regulated by the statute. This avoids the initial considerations confronted by the courts in *Scenic Hudson*, *Road Review*, and *Volpe*. Thus, it would seem logical that conservation and anti-pollution suits have been enhanced by the *Data Processing* and *Barlow* decisions. The vagueness of the test laid down by the Court, however, makes it doubtful that conservation organizations have been aided by these decisions.

As stated, the essence of the Court's test is that the plaintiff must allege that the challenged government action has caused him or will cause him injury in fact to an interest arguably within the "zone of interests to be protected or regulated by statute or constitutional guarantee in question." Although the Court wrote a paragraph to emphasize that standing may stem from injury to non-economic interests, including

<sup>128</sup> 397 U.S. at 165 n.7.

<sup>129</sup> See both the majority and dissenting opinions, 398 F.2d 398, 402-03 (5th Cir. 1968).

<sup>130</sup> See Davis, *The Liberalized Law of Standing*, 37 U. Chi. L. Rev. 450, 456 (1970).

<sup>131</sup> *Id.*

<sup>132</sup> 397 U.S. at 168 (Brennan & White, JJ., dissenting).

<sup>133</sup> *Id.* at 173-74.

<sup>134</sup> 397 U.S. at 153.

injury to "aesthetic, conservational, and recreational" values,<sup>135</sup> recent decisions interpreting the Court's standing test indicate that the lower courts are uncertain as to the exact meaning of the "injury in fact-zone of interests test."

In *Sierra Club*, although the court acknowledged that the significance of the zone of interests test was unclear, the court proceeded to conclude that the zone or interests test was not a test separate or in addition to the injury in fact test.<sup>136</sup> Since the court had previously found that the challenged government action did not threaten the Club's organizational status or property,<sup>137</sup> the court denied standing since there was no element of legal wrong being inflicted upon the plaintiff.<sup>138</sup> The court never considered whether the public interest in preserving the national forest from private development was within the zone of protected interests. In effect, the court merely considered the injury in fact test as applied to the conservation organization, and failed to give any consideration to whether the public interest which plaintiff actually alleged was threatened with injury in fact.

In *Environmental Defense Fund v. Hardin*,<sup>139</sup> however, the Court of Appeals for the District of Columbia upheld the standing of conservation organizations to obtain judicial review of the Secretary of Agriculture's failure to restrict the permissible uses of DDT as required by the Federal Insecticide, Fungicide, and Rodenticide Act.<sup>140</sup> The court believed that the statute in question reflected the congressional concern for the interest of the public in safety, and, therefore, petitioners had standing if they could show sufficient injury in fact to create a case or controversy as required by the Constitution.<sup>141</sup> By analogizing to cases where consumers had standing to protect the public interest in the proper administration of a regulatory system enacted for their benefit, the court concluded that petitioners had standing to protect the public from the biological harm which would result to man and other life because of the unrestricted use of DDT in the environment.<sup>142</sup>

<sup>135</sup> *Id.* at 154. The court specifically cited both the *Scenic Hudson* and *Sanders* decisions in its discussion of non-economic interests that may be protected by statute.

<sup>136</sup> 433 F.2d at 31.

<sup>137</sup> *Id.* at 30.

<sup>138</sup> *Id.* at 32.

<sup>139</sup> 428 F.2d 1093 (D.C. Cir. 1970).

<sup>140</sup> 7 U.S.C. § 135 et seq. (1964).

<sup>141</sup> 428 F.2d at 1096.

<sup>142</sup> *Id.* at 1096-097. The court cited the following consumer cases: *Citizens for Allegan County, Inc. v. FPC*, 414 F.2d 1125 (D.C. Cir. 1969); *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966), and the decisions in *Ickes*, *Sanders*, and *Scripps-Howard*. However, in both the *Church of Christ* and *Allegan County* cases, petitioners had been denied the right to appear before the hearing of the agency, and sought only judicial review of this denial of the right to a hearing before the agency. Thus, the question was not whether the local organizations had standing to initiate judicial review of agency action, but whether they had standing to appear before the administrative agency. See 359 F.2d at 997; 414 F.2d at 1127. The *Ickes*, *Scripps-Howard*, and *Sanders* cases involved the question of standing to initiate judicial review. The question of who is entitled to administrative review is determined



Therefore, the court concluded that members of the public were "aggrieved persons" within the meaning of the relevant statute.<sup>143</sup> In a footnote, the court stated the belief that the "aggrieved persons" test was equivalent to finding that the complainant's interest is within the zone of protected interests.<sup>144</sup>

The difficulty with such an analysis is that it avoids the issue faced squarely in the *Sierra Club* case, that is, whether the plaintiff individually is in fact injured as opposed to his suffering injury as a member of the general public. Obviously, many statutes enacted by Congress are concerned with public safety and entrust supervisory duties to a federal agency. Therefore, under the *Environmental Defense Fund* decision, since consumers are a class coterminus with whole world, any member of the public is suffering injury in fact if an administrative agency fails to comply with its statutory mandate. As such, the court has effectively permitted the "public action" suit espoused by Professor Jaffe in which the citizen has standing to obtain judicial review of allegedly illegal administrative action although not suffering an injury distinct from the general public.<sup>145</sup> Although the Supreme Court avoided this issue by denying certiorari in the *Volpe* decision, its recent grant of certiorari to review *Sierra Club v. Hickel* suggests that the Court might finally come to grips with this question.<sup>146</sup>

The zone of interests test compels a court to consider difficult questions of statutory interpretation, although the Supreme Court's opinion in *Flast v. Cohen* indicated that the fundamental aspect of standing focuses upon whether the party seeking relief will present the dispute in an adversary context.<sup>147</sup> When a suit challenges the legality of administrative action, the zone of interests test does not present a viable rule for a court to follow. If a court makes an initial determination that the interest asserted does not fall within the zone of interests, then the court must deny standing to the plaintiff and never reach the merits of the controversy. If ultimately, however, the decision is reversed by either a court of appeals or the Supreme Court, the process of adjudication must begin all over again. Thus, valuable judicial time will be lost before the court ever reaches the merits of the controversy.<sup>148</sup>

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by reference to the legislative history of the statute and not to constitutional considerations of standing. Such legislative scrutiny was performed by both the *Church of Christ* court, 359 F.2d at 1000-006, and by the *Allegan County* court, 414 F.2d at 1128 n.4. See 3 K. Davis, *Administrative Law* § 22.08, at 210 (1958).

<sup>143</sup> 428 F.2d at 1097.

<sup>144</sup> 428 F.2d at 1097 n.16.

<sup>145</sup> L. Jaffe, *Judicial Control of Administrative Action* 459, 495-500 (Abr. student ed. 1965). Professor Jaffe wishes to see further development of the concept that citizens can challenge administrative action in federal court although they are not suffering an injury distinct from the public at large.

<sup>146</sup> — U.S. — (1971).

<sup>147</sup> 392 U.S. 83, 101 (1968).

<sup>148</sup> See, e.g., the tortuous history of *Arnold Tours v. Camp*, 408 F.2d 1147 (1st Cir. 1969), vacated, 397 U.S. 1109 (1970). On remand, the First Circuit affirmed its

It is suggested that since "adversity" is the essence of the *Flast* holding, such adversity may be satisfied by applying a modified version of the nexus requirement of *Flast* to the conservation area,<sup>149</sup> thus requiring the plaintiff to establish a logical link between himself and the action he seeks to bring. Such a determination would be made by the court's focusing on the party seeking relief to determine whether the party will present the issues with the necessary adversity. Such a rule directs judicial consideration at the initial stage of the litigation to the proper issue—the adversary quality of the plaintiff and not the issues he seeks to have adjudicated.<sup>150</sup> This approach was followed by the court in *Izaak Walton League of America v. St. Clair*,<sup>151</sup> where the court upheld the standing of a conservation group to protect public lands from private mineral exploitation. The court found standing because it believed that the history of the conservation organization indicated that it would clearly present the case in an adversary context.<sup>152</sup> The decision reflects the ease with which the adversary rule may be applied, since in many cases a local organization will be a more adverse plaintiff than a private individual.<sup>153</sup>

#### CONCLUSION

Although the tests formulated by the Supreme Court in *Data Processing* and *Barlow* may have a liberalizing effect upon the law of standing, the inherent vagueness of the zone of interests test, and the Court's unwillingness to face squarely the public action issue raised by the *Volpe* decision, create doubts as to the exact impact these decisions will have upon the standing of conservation groups to sue on behalf of the public interest in natural resources. Recent decisions interpreting the *Data Processing* and *Barlow* decisions have produced inconsistent results. It has been suggested by one commentator that the issues of reviewability and standing will be merged with the merits issue of whether the plaintiff has a legal interest protected by the statute so that

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previous decision, 428 F.2d 359 (1st Cir. 1970), only to have the Supreme Court, per curiam, reverse and remand a second time. 400 U.S. 45 (1970). As in *Data Processing*, this case challenged the validity of a ruling of the Comptroller of Currency that permitted national banks to provide travel services. In remanding, the Court referred to its decision in *Data Processing* and stated simply: "Nothing in the opinion limited § 4 only to competitors in the data processing field." 400 U.S. at 46. Now, after five decisions, the merits of the controversy will finally be before the court.

<sup>149</sup> Under *Flast*, a taxpayer had to show, first, a logical link between his status as a taxpayer and the type of legislative enactment attacked, and second, a logical link between his status as a taxpayer and the precise nature of the constitutional infringement alleged. 392 U.S. 83, 102-03 (1968).

<sup>150</sup> *Id.* at 99.

<sup>151</sup> 313 F. Supp. 1312 (D. Minn. 1970).

<sup>152</sup> *Id.* at 1316.

<sup>153</sup> The decision also reflects lower court confusion as to the precise meaning of the injury in fact-zone of interests test. The court first concluded that the injury in fact test was a non-constitutional requirement. Secondly, the court believed that the injury in fact test was met because the interest asserted was arguably within the zone of interests. See 313 F. Supp. at 1316-317.

standing will be determined by finding the existence of the legal interest and not by application of the Supreme Court's test.<sup>154</sup> It has also been suggested that the courts of appeals will merely restate their previous positions so that the new standing test will have little effect in changing the attitudes of the courts.<sup>155</sup>

Although the zone of interests test is vague, the fact that a court no longer must find the existence of a legal interest, but need only find that the interest is arguably within the zone of interests, tends to suggest that the net effect will be that courts will now find standing where previously they would not have.<sup>156</sup> Consequently, in those cases in which the statute requires the administrative agency to respect local interests and conservation values, a greater likelihood of success exists if the litigants include residents or users of the area sought to be protected. Quite obviously the interest they seek to protect is arguably within the zone of protected interests.

Such a broad reading of statutes is consistent with recent Supreme Court decisions that have stressed the principle that the class of persons to be protected by statute is to be expanded,<sup>157</sup> and statutory protection need not be explicit to confer standing.<sup>158</sup> The Court itself has recently applied these two principles in its *per curiam* reversal of *Arnold Tours v. Camp*,<sup>159</sup> a case it had previously remanded in light of *Data Processing*<sup>160</sup> only to have the First Circuit reinstate its original decision.<sup>161</sup>

This comment has suggested that the Court resolve the conflict suggested by the opposite results reached in *Sierra Club* and *Environmental Defense Fund* by pronouncing a rule that will rest the determination of standing squarely upon the discretionary powers of a district court. Such a rule is judicially pragmatic in that it will avoid the difficulty inherent in the zone of interests test: a court may dismiss a suit for failure to assert an interest within the zone of interests, only to have that decision subsequently reversed because an appellate court

<sup>154</sup> See Pierson, Standing to Seek Judicial Review of Government Contract Awards: Its Origins, Rationale and Effects on the Procurement Process, 12 B.C. Ind. & Com. L. Rev. 1, 23-24 (1970).

<sup>155</sup> See Comment, 84 Harv. L. Rev. 177, 183-84 (1970) and cases discussed therein.

<sup>156</sup> See *Harry H. Price & Sons, Inc. v. Hardin*, 425 F.2d 1137 (5th Cir. 1970), in which the court acknowledges that as a result of the *Data Processing* and *Barlow* decisions it would now find standing in this case although prior to those decisions it would not. Id. at 1140. One can sympathize with the court's reference to the zone of interests test:

It might be suggested that there are principles of law set forth in decided cases which are more easily understood and more readily applied than the above test of standing.

425 F.2d. at 1140.

<sup>157</sup> *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 154 (1970).

<sup>158</sup> *Hardin v. Kentucky Util. Co.*, 390 U.S. 1, 7 n. 7 (1968).

<sup>159</sup> 400 U.S. 45 (1970). This case is discussed at note 148 *supra*.

<sup>160</sup> 397 U.S. 1109 (1970).

<sup>161</sup> 428 F.2d 359 (1st Cir. 1970).

concludes that the interest is within the zone of interests. With the growing complexity of government, the adversary rule would facilitate the judicial role, not only as a restraint on the unconstitutional use of power, but also as a watchdog against illegal or excessive administrative action.<sup>162</sup>

In summary, the effect of recent Supreme Court decisions has been to end the need to find a legal right or a legally protected interest to confer standing. Presently, a litigant need only show injury in fact to an interest arguably within the zone of protected or regulated interests for standing to exist. However, the inherent vagueness of that test raises doubts as to the ease and consistency of its application. Recent decisions tend to suggest that the standing of conservation organizations to protect the public interest may ultimately depend upon the willingness of lower courts to use judicial review liberally to supervise government action.<sup>163</sup>

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<sup>162</sup> See The Federalist No. 78 (A. Hamilton):

There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void.

<sup>163</sup> The importance of judicial receptivity to such suits is evidenced by two recent decisions. In *Alameda Conservation Ass'n. v. California*, \_\_\_ F.2d \_\_\_ (9th Cir. 1971), the Ninth Circuit again denied standing to a conservation organization that had not alleged injury to its property or other rights. In denying standing, the court stated that:

Standing is not established by suit initiated by this association simply because it has as one of its purposes the protection of the "public interest" . . . . Were it otherwise the various clubs, political, economic and social now or yet to be organized could wreck havoc with the administration of government, both federal and state. There are other forums where their voices and their views may be effectively presented, but to have standing to submit a "case or controversy" to a federal court, something more must be shown.

\_\_\_ F.2d at \_\_\_.

In *Environmental Defense Fund, Inc. v. United States Army Corps of Engineers*, however, the District Court for the District of Columbia followed its Court of Appeals decision in *Environmental Defense Fund v. Hardin*, and granted standing to conservation organizations:

[who through] their research and other activities have actively sought to preserve the natural environment . . . will suffer real injury if the anticipated environmental damage occurs.

39 U.S.L.W. 2429 (Feb. 2, 1971).