

1993

A Slash-and-Burn Expedition Through the Law of Environmental Standing - *Lujan v. Defenders of Wildlife*

Donald Strong Higley II

Follow this and additional works at: <https://scholarship.law.campbell.edu/clr>



Part of the [Environmental Law Commons](#)

Recommended Citation

Donald Strong Higley II, *A Slash-and-Burn Expedition Through the Law of Environmental Standing - Lujan v. Defenders of Wildlife*, 15 CAMPBELL L. REV. 347 (1993).

This Note is brought to you for free and open access by Scholarly Repository @ Campbell University School of Law. It has been accepted for inclusion in Campbell Law Review by an authorized editor of Scholarly Repository @ Campbell University School of Law.

A SLASH-AND-BURN EXPEDITION THROUGH THE LAW OF ENVIRONMENTAL STANDING — *Lujan v. Defenders of Wildlife*

INTRODUCTION

In June 1992, at the historic Earth Summit in Brazil, Chief Executive George Bush of the United States of America alienated environmentalists around the world by refusing to sign a biodiversity treaty aimed at protecting the world's endangered species.¹ Contemporaneously, the United States Supreme Court, with its decision in *Lujan v. Defenders of Wildlife*,² refused to hear the merits of a case concerning the proper enforcement of the Endangered Species Act³ partially because the Court felt that it is the exclusive function of the executive branch to "take care that the laws be faithfully executed."⁴ The plaintiffs in the case, believing that the executive branch had in fact failed to take care that environmental legislation was enforced, were predictably outraged.⁵ Environmentalists and commentators contended that the conservative Court, led by Justice Antonin Scalia, was using the doctrine of standing to keep environmental activists out of court.⁶

1. Director of the Environmental Protection Agency, William Reilly, assessed world reaction: "The decision [not to sign] was the subject of intense controversy and criticism . . . we never recovered from it". *EPA Chief Says He Was Sabotaged in Rio; Earth Summit: Reilly Blames the White House for Undermining Its Delegation at the U.N. Conference in June*, L.A. TIMES, August 2, 1992, at A1.

2. 112 S. Ct. 2130 (1992).

3. 16 U.S.C. § 1531 (1988).

4. *Lujan*, 112 S. Ct. at 2145 (quoting U.S. CONST. art. II, § 3).

5. As Brian O'Neill, counsel opposing the government in the *Lujan* case put it, "This is disaster. It says that the Administration can thumb its nose at Congress, and it makes it nearly impossible to get into court to do anything about it." David G. Savage, *Court Upholds Bush Wildlife Policy Limits*, L.A. TIMES, June 13, 1992, at A1. Partisan advocates were not alone in voicing this concern. The dissent in *Lujan* called the decision "an invitation to executive lawlessness." *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2157 (1992) (Blackmun, J., dissenting).

6. See, e.g., Ruth Marcus, *Justices Make it Harder to Press Environmental Enforcement Cases*, THE WASH. POST, June 13, 1992, at A4 ("It's going to make it very, very difficult for citizens to get any kind of relief in court when the government decides to destroy the environment . . . This opinion, at its core, is just

Standing is the legal term referring to the primary doctrine by which the courts answer the simple question: Who may sue in federal court?⁷ Though the question is clear and straightforward, the answer to it depends upon the interpretation of a huge agglomeration of Supreme Court opinions⁸ and a voluminous collection of academic comment and criticism.⁹ This Note will not attempt to synthesize the enormous spectrum of standing jurisprudence, nor will it join in the obligatory, frantic forecasts of environmental disaster at the hands of an unresponsive government that will inevitably stem from the *Lujan* decision. This Note will evaluate the effect of *Lujan* on standing doctrine with a focus on its settlement of unanswered questions remaining after the Supreme Court's penultimate standing case in the area of environmental law, *Lujan v. National Wildlife Federation*.¹⁰

The *Lujan* decision will be assessed firstly, by summarizing the decision in the Case section of this Note. Secondly, the Background section will explore the history of standing litigation with a focus on cases with factual similarities to *Lujan*. This exploration will include an analysis of the effect of the *National Wildlife Federation* [hereinafter *NWF*] case, thus demonstrating standing doctrine as it stood when *Lujan* was decided. Thirdly, in the Analysis section, three key aspects of the *Lujan* majority opinion will be analyzed, along with the dissenting and concurring opinions. This analysis will lead to the realization that the era of liberal grants of standing to environmental plaintiffs has come to an end, but will also identify a glimmer of hope for potential environmental litigants. Finally, the Conclusion section will identify questions remaining to be resolved after *Lujan*.

hostile to any kind of environmental lawsuit.") (quoting Brian O'Neill).

7. Other doctrines limiting access to the federal courts, lumped with standing under the rubric "justiciability," include ripeness, mootness, and the political question doctrine. Of these, standing is probably the most important. Cf. *Allen v. Wright*, 468 U.S. 737, 750 (1984) ("The Art. III doctrine that requires a litigant to have 'standing' to invoke the power of a federal court is perhaps the most important of these doctrines.").

8. Over 500 Supreme Court opinions have been written concerning the doctrine of standing. See KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 24:1, at 208 (2d ed. 1978). Since 1970 the Court has written 74 opinions significant to the law of standing, an average of six per year. *Id.*

9. See *Id.* § 24:2, at 211 (noting that between 1970 and 1983 600 articles on "Standing to Sue" were listed in the Index to Legal Periodicals).

10. 110 S. Ct. 3177.

THE CASE

Congress enacted the Endangered Species Act,¹¹ to provide for the protection of endangered or threatened species.¹² Responsibilities under the Act are divided between the Secretary of the Interior and the Secretary of Commerce.¹³ Section 7(a)(2) of the Act requires every federal agency to consult with the relevant Secretary to ensure that any action funded by the agency is not threatening the existence of an endangered species.¹⁴ Initially, the Secretary of the Interior and the Secretary of Commerce promulgated a joint regulation interpreting section 7(a)(2) to require consultation when federal agencies authorized, funded or carried out projects in foreign nations.¹⁵ After reconsideration, and a change of administration, a new rule was promulgated interpreting section 7(a)(2) to require consultation only for federal agency action taken in the United States or on the high seas.¹⁶

Shortly thereafter, Defenders of Wildlife (hereinafter Defenders), an organization dedicated to wildlife conservation, filed suit against the Secretary of Labor seeking a declaratory judgment that the 1986 regulation was in error as to the scope of section 7(a)(2) and an injunction requiring the restoration of the original rule extending section 7(a)(2)'s coverage to its original interpretation (i.e. worldwide).¹⁷ Defenders' evidence included sworn affidavits and deposition testimony that two of its members had visited sites of federally funded development projects overseas for the purpose of observing and studying endangered species.¹⁸

11. 16 U.S.C. § 1531 (1988) [hereinafter ESA or the Act].

12. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2135 (1992).

13. *Id.*

14. *Id.* (citing 16 U.S.C. § 1536(a)(2) (1988)).

15. *Id.* at 2135 (citing 43 Fed. Reg. 874 (1978)).

16. *Id.* (citing 51 Fed. Reg. 19926 (1986)). The original rule was promulgated under the Jimmy Carter administration. The 1986 reinterpretation occurred under Ronald Reagan.

17. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2135 (1992).

18. The two members who submitted affidavits, Joyce M. Kelly and Amy Skilbred, were wildlife biologists. Ms. Kelly had travelled to Egypt and Israel to view the Eurasian Peregrine Falcon and the Nile crocodile, two species allegedly threatened by the Aswan Dam project overseen by the U.S. Bureau of Reclamation. Ms. Skilbred had been to Sri Lanka to study wildlife habitat threatened by the U.S. Agency for International Development's Mahaweli Dam project. Both women professed a desire to return to these sites, though neither had made specific plans. See Brief for the Respondents at 17, 18, *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992) (No. 90 - 1424).

The district court granted the Secretary's motion to dismiss for lack of standing.¹⁹ The United States Court of Appeals for the Eighth Circuit reversed and remanded, holding that Defenders had standing.²⁰ On remand, the Secretary moved for summary judgment on the standing issue. The district court denied the motion, holding that the Eighth Circuit had already decided the standing issue, and granted Defender's motion for summary judgment on the merits.²¹ The Eighth Circuit affirmed.²²

The United States Supreme Court, in an opinion written by Justice Scalia, held that Defenders lacked standing to challenge the regulation.²³ The opinion addressed, and modified, four concepts of standing jurisprudence, each of which will be discussed in the Analysis section of this note. Firstly, the Court held that respondents had failed to demonstrate the "injury in fact" required to state a case or controversy under Article III.²⁴ The Court stated that Defenders members' claims that they planned to return to threatened habitats were "simply not enough" to demonstrate a concrete injury.²⁵ Secondly, the Court rejected Defenders' arguments in the alternative that their members were injured in fact by the loss of a species due to loss of vocation or based on the delicate interconnection of the biosphere or based on a particularized interest in the endangered animal.²⁶ The Court sardonically dismissed these "novel" theories as being "inelegantly styled . . . beyond all reason . . . and pure speculation or fantasy."²⁷ Thirdly, the Court held that respondents had failed to show that promulgation of the old rule would redress their alleged injury.²⁸ Finally, the Court dismissed Defenders' contention that they suffered a "procedural injury" stemming from the ESA's citizen suit provision.²⁹ Relying

19. *Defenders of Wildlife v. Hodel*, 658 F. Supp. 43 (D. Minn. 1987).

20. *Defenders of Wildlife v. Hodel*, 851 F.2d 1035 (8th Cir. 1988).

21. *Defenders of Wildlife v. Hodel*, 707 F. Supp. 1082 (D. Minn. 1989).

22. *Defenders of Wildlife v. Lujan*, 911 F.2d 117 (8th Cir. 1990).

23. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2146 (1992).

24. *Id.* at 2136.

25. *Id.* at 2138.

26. *Id.* at 2139.

27. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2139-40 (1992).

28. *Id.* at 2140.

29. *Id.* at 2142. The citizen's suit provision of the ESA provides that "any person may commence a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter." 16 U.S.C. § 1540(g) (1988).

heavily on separation of powers principles, the Court held that a plaintiff claiming a generalized grievance about government does not state an Article III controversy.³⁰ The Court held that, if Congress intended the citizen's suit provision to confer upon all persons the right to enforce the ESA by federal lawsuit, Congress acted unconstitutionally.³¹ Nearly six years after filing its lawsuit, Defenders was precluded from presenting the merits of its claim that the Secretary of the Interior was unlawfully threatening endangered species.

BACKGROUND

Article III of the Federal Constitution does not define the "judicial Power" but does limit the federal courts to hearing "cases" or "controversies".³² Neither "case" nor "controversy" has a plain meaning, and no definition of the terms appears in the Constitution.³³ Despite this fact the courts have used the case or controversy provision of Article III to construct the primary doctrine by which the federal courts determine who will be permitted to sue - the doctrine of standing.³⁴

Justice Antonin Scalia, author of the *Lujan* opinion, has described the standing doctrine as "an answer to the very first question that is . . . rudely asked when one person complains of another's actions: What's it to you?"³⁵ Though simple on the surface,

30. *Lujan*, 112 S. Ct. at 2143.

31. *Id.* at 2143, 2146.

32. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992) (citing U.S. CONST. art. III §§ 1 & 2). Article III provides, in relevant part:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;- to all Cases affecting Ambassadors, other public Ministers and Consuls;- to all cases of Admiralty and maritime Jurisdiction;- 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 Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens and Subjects.

U.S. CONST. art. III at § 2.

33. *Lujan*, 112 S. Ct. at 2136 (noting that "an executive inquiry can bear the name 'case' . . . and a legislative dispute can bear the name 'controversy'").

34. In depth discussions of the doctrine abound. See, e.g., DAVIS, *supra* note 8, §§ 24-36.

35. Justice Antonin Scalia, *The Doctrine of Standing as an Essential Ele-*

"What's it to you?" has been a notoriously complicated question for potential federal court plaintiffs to answer.³⁶ Indeed, the doctrine of standing has been described by the Court as "a word game played by secret rules."³⁷

The rules of standing may be secret, but the words are now very clear:

Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in-fact - an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical[.] Second, there must be a causal connection between the injury and the conduct complained of - the injury has to be fairly

ment of the Separation of Powers, 17 SUFFOLK U.L. REV. 881, 882 (1983).

36. The Supreme Court has labeled the standing doctrine "one of the most amorphous concepts in the entire domain of public law." *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (quoting Hearings on S. 2097 before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 89th Cong. 2d Sess. 465, at 498 (Statement of Paul Freund)). A leading commentator has described the doctrine as "permeated with sophistry." See Davis, *supra* note 8 at 342. Law review criticisms of the doctrine are too numerous to list. For articles particularly relevant to this Note, see: Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974); Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Sean Connelly, *Congressional Authority to Expand the Class of Persons With Standing to Seek Judicial Review of Agency Rulemaking*, 39 ADMIN. L. REV. 139 (1987); David P. Currie, *Misunderstanding Standing*, 1981 SUP. CT. REV. 41 (1981); Kenneth C. Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1969-70); James Dumont, *Beyond Standing: Proposals for Congressional Response to Supreme Court "Standing" Decisions*, 13 VT. L. REV. 675 (1988-89); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988-89); Gene R. Nichol, Jr., *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635 (1985); Gene R. Nichol, Jr., *Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint*, 69 KY. L.J. 185 (1980-81); Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68 (1984); Michael A. Perino, *Justice Scalia: Standing, Environmental Law, and the Supreme Court*, 15 B.C. ENVTL. AFF. L. REV. 135 (1987-88); Jonathan Poisner, *Environmental Values and Judicial Review after Lujan: Two Critiques of the Separation of Powers Theory of Standing*, 18 ECOLOGY L.Q. 335 (1991); Kenneth E. Scott, *Standing in the Supreme Court - A Functional Analysis*, 86 HARV. L. REV. 645 (1972-73); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1974-1975); Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1976-77) [hereinafter Tushnet I]; Mark V. Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698 (1979-80).

37. *Flast v. Cohen*, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting).

traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.³⁸

Though often applied to reach different results,³⁹ these three elements are applied to all standing cases, including environmental litigation.⁴⁰

Thus, the Court has not explicitly enunciated a distinct standard for granting standing to environmental litigants. Despite this fact, case law demonstrates that, until recently, the Court evaluated the standing claims of environmental groups with solicitude.⁴¹ Justice Scalia found the birth of this solicitude in a 1971 opinion interpreting the National Environmental Policy Act,⁴² in which Circuit Judge J. Skelly Wright wrote:

[I]t remains to be seen whether the promise of this legislation will become a reality. Therein lies the judicial role. We must assess claims that one of the agencies charged with its administration has failed to live up to the congressional mandate. Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.⁴³

38. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2137 (1992) (internal quotation marks, footnote and citations omitted).

39. *Compare Lujan*, 112 S. Ct. at 2152 (Blackmun, J., dissenting) ("Article III requires, as an irreducible minimum, that the plaintiff allege (1) an injury that is (2) 'fairly traceable to the defendant's allegedly unlawful conduct' and that is (3) 'likely to be redressed by the requested relief.'") (quoting *Allen v. Wright*, 468 U.S. 737 (1984)) with *Lujan*, 112 S. Ct. at 2136 (majority applying virtually the same test to reach a different result).

40. See *Perino*, *supra* note 36, at 144 ("Standing in environmental litigation follows the same basic analysis used in all standing questions.")

41. See *infra* notes 53-98 and accompanying text. Presumably because standing jurisprudence is so fact-specific and manipulable, commentators have frequently analyzed standing cases in which environmental groups were plaintiffs separately. See, e.g., *Poisner*, *supra* note 36, at 335 (noting that "environmental groups have enjoyed relatively lenient standing scrutiny" and citing *Perino* *supra* note 36, at 144-48); *Abram Chayes*, *The Supreme Court, 1981 Term - Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 57 (1982)).

42. 42 U.S.C. § 4321 (1988).

43. *Calvert Cliffs Coordinating Comm'n v. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971). Judge J. Skelly Wright was a well known defender of the Court's role in actively promoting public policy. See, e.g., J. Skelly Wright, *The Judicial Right and the Rhetoric of Restraint: A Defense of Judicial Activism in an Age of Conservative Judges*, 14 HASTINGS CONST. L. Q. 487 (1986-87).

As Justice Scalia put it, "the judiciary's long love affair with environmental litigation" had begun.⁴⁴ While limiting standing in other areas of the law,⁴⁵ the federal courts of the sixties and seventies relaxed standing requirements for individuals challenging environmentally threatening actions of the federal government.⁴⁶

An exhaustive analysis of this love affair is beyond the scope of this note. An examination of four Supreme Court cases; *Sierra Club v. Morton*,⁴⁷ *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*,⁴⁸ *Duke Power v. Carolina Environmental Study Group, Inc.*,⁴⁹ and *Japan Whaling Association v. American Cetacean Society*⁵⁰ will suffice to demonstrate the outer limits to which the three elements of standing - injury in fact, causation, and redressability - have been stretched.⁵¹ Justice Scalia's opinion in *NWF*,⁵² which dramatically revised standing doctrine as applied to environmental litigation, will then be examined to reveal the doctrine of standing as it existed when *Lujan* reached the Supreme Court.

44. Scalia, *supra* note 35, at 884.

45. See Steven M. MacFarlane, Note, *Lujan v. National Wildlife Federation: Standing, The APA, and The Future of Environmental Litigation*, 54 ALB. L. REV. 863 at n.2, (1989-90) (collecting standing decisions in which the Court constricted standing doctrine including: *Allen v. Wright*, 468 U.S. 737 (1984); *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976); *United States v. Richardson*, 418 U.S. 166 (1974); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982); *Warth v. Seldin*, 422 U.S. 490 (1975)).

46. See MacFarlane Note, *supra* note 45, at 863 n.1 (collecting authority to support the proposition that the court's standing requirements were more lenient in environmental litigation, including: GEORGE C. COGGINS, PUBLIC NATURAL RESOURCES LAW § 6.05(2)(a) (1991); WILLIAM H. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW § 1.6, at 23 (1977); David H. Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 NAT. RESOURCES J. 279, 330 (1982); Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343, 406-07, 411-12 (1989)).

47. 405 U.S. 727 (1972).

48. 412 U.S. 669 (1973).

49. 438 U.S. 59 (1978).

50. 478 U.S. 221 (1986).

51. See, e.g., *National Wildlife Fed'n v. Agricultural Stabilization and Conservation Service*, 901 F.2d 673, 676 (8th Cir. 1990) (citing *Morton* and *SCRAP* as "landmark cases" and applying them liberally to grant standing).

52. 110 S. Ct. 3177 (1990).

A. *Morton*, *SCRAP*, *Duke Power* and *Japan Whaling*

In *Morton*, the Sierra Club [hereinafter the Club], an environmental protection organization similar to Defenders of Wildlife, brought an action in federal court seeking a declaratory judgment and an injunction to restrain federal officials from approving an extensive skiing development in the Mineral King Valley in the Sequoia National Forest.⁵³ The Club sued as a membership organization with "a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country."⁵⁴ The Club asserted its standing under the judicial review provisions of the Administrative Procedure Act [hereinafter APA].⁵⁵ Broadly, the court in *Morton* faced the question: What may amount to an "injury in fact" sufficient to gain access to the federal courts? More narrowly, the court faced two issues that were critical to organizations seeking to vindicate environmental interests in the federal courts. Firstly, could a plaintiff obtain standing without pointing to an injury to an economic interest or property right?⁵⁶ Secondly, could an organization claim standing for itself based on a "special interest" in protecting the environment?⁵⁷

The first issue arose due to the fact that in *Scenic Hudson Preservation Conference v. Federal Power Commission*,⁵⁸ the sec-

53. *Sierra Club v. Morton*, 405 U.S. 727 (1972).

54. *Morton*, 405 U.S. at 730.

55. *Id.* The plaintiffs cited Section 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702 (1989). Section 702 states that "a person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute, is entitled to judicial review thereof." *Id.* In *Association of Data Processing Service Orgs., Inc. v. Camp*, 397 U.S. 150 (1970), the Supreme Court interpreted this provision to require a plaintiff claiming standing under it to meet a two part test requiring, first, "that the challenged action has caused him injury in fact, economic or otherwise" *Id.* at 152, and second, that "the interest sought to be protected by the complainant [be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 153. This "zone of interest" prong of the test is considered prudential, while the injury-in-fact prong is constitutionally based. *Id.* The *Data Processing* decision was roundly criticized. See, e.g., Fletcher, *supra* note 36 at 229 ("More damage to the intellectual structure of standing can be traced to *Data Processing* than to any other single decision"). However, given the Court's approach in *NWF*, the "zone of interest" test is still the proper standing analysis under the APA. See *infra* note 118 and accompanying text.

56. *Morton*, 405 U.S. at 734.

57. *Id.* at 735.

58. 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

ond circuit held that an interest in the environment was judicially cognizable⁵⁹, and the Supreme Court denied certiorari.⁶⁰ This position was agreed with in dictum by *Association of Data Processing Service Organizations v. Camp*,⁶¹ but until *Morton*, the Supreme Court had not expressly spoken on the subject. Though the Sierra Club was ultimately denied standing, the *Morton* court very clearly expanded the category of Article III injuries beyond traditional notions to include interests in the "aesthetics and ecology of a particular geographic area."⁶² The Court's full description of the injury was as follows:

The injury alleged by the Sierra Club will be incurred entirely by reason of the change in the uses to which Mineral King will be put, and the attendant change in the aesthetics and ecology of the area. Thus, in referring to the road to be built through Sequoia National Park, the complaint alleged that the development "would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations." We do not question that this type of harm may amount to an "injury in fact" sufficient to lay the basis for standing under § 10 of the APA. Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.⁶³

Thus, for the first time, the Court explicitly recognized that an aesthetic injury was sufficient to confer standing despite its generalized nature. The Club lost its case, but an important precedent was set.

The second issue arose because the Club had specifically declined to assert the interest of a member, apparently hoping to establish an "organizational standing" rule.⁶⁴ The court rejected this argument, holding that the Club lacked standing because it had failed to allege that either it or its members were directly injured

59. *Id.* at 615-16.

60. *Scenic Hudson*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

61. 397 U.S. 150 (1969).

62. *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).

63. *Id.*

64. *Id.* at 735 n.8.

by the potential ski resort.⁶⁵ Thus, environmental organizations failed to gain "private attorney general status,"⁶⁶ but it was now clear that an intangible aesthetic interest in the environment would be protected by the federal courts.⁶⁷

One year after *Morton*, in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*,⁶⁸ the Supreme Court relaxed the injury in fact requirement of the standing doctrine further, while also relaxing the redressability requirement.⁶⁹ The plaintiffs in *SCRAP* were an unincorporated group of five law students who challenged an Interstate Commerce Commission order approving a surcharge on rail transportation of scrap materials.⁷⁰ Basing their right to sue on the APA,⁷¹ the plaintiffs alleged that the increased cost of using scrap materials would discourage recycling, which in turn would increase litter, which in turn would

65. *Sierra Club v. Morton*, 405 U.S. 727 (1972). The requirements for organizational standing were later clarified in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977). In *Hunt*, the court enunciated a three prong test that must be met by an organization seeking to sue on behalf of its members: "[A]n organization has standing to sue on behalf of its members if: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 343.

66. *Morton*, 405 U.S. at 737.

67. The decision was met with some criticism. See, e.g., *Morton*, 405 U.S. at 742 (Douglas, J., dissenting) (citing Christopher D. Stone, *Should Trees Have Standing? - Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972) and arguing that standing should be conferred on environmental objects to sue for their own preservation). See also Joseph L. Sax, *Standing to Sue - A Critical Review of the Mineral King Decision*, 13 NAT. RESOURCES J. 76 (1973).

68. 412 U.S. 669 (1973).

69. The *SCRAP* and *Duke Power* courts did not divide the causation and redressability requirements into two elements. The *Duke Power* court saw the two prongs as interchangeable. See *Duke Power v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 74 (1978) (defining this step in the standing inquiry as requiring that the "injur[y] 'fairly can be traced to the challenged action of the defendant . . . 'or put otherwise, that the exercise of the Court's remedial powers would redress the claimed injuries" and affirming the district court's finding of a "causal connection") (quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41 (1976)). Though the exact language of the test differs from that used in *Lujan*, the clash in spirit between the two holdings will be apparent. See *infra* notes 174-183 and accompanying text. For ease of reference this aspect of the standing doctrine will be referred to hereinafter as redressability.

70. *SCRAP*, 412 U.S. at 678. The surcharge on scrap materials would increase the cost of using such materials. *Id.* at 676.

71. *Id.* at 685 n.12.

pollute their local parks and recreation areas.⁷² The court ruled that this was a sufficient allegation of injury in fact to survive a motion to dismiss for lack of standing.⁷³ The effect of the *SCRAP* decision on the injury in fact and redressability requirements for standing will demonstrate why it has become known as the high water mark for environmental plaintiffs.⁷⁴

The *SCRAP* Court broadened the injury in fact test in two ways. Firstly, the injury alleged by the students in *SCRAP* could have been alleged by anyone living in United States.⁷⁵ In holding that the generalized nature of the injury did not defeat standing the court said:

[W]e have already made it clear that standing is not to be denied simply because many people suffer the same injury . . . To deny standing to persons who are in fact injured simply because many others are also injured would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion.⁷⁶

72. *Id.* at 678.

73. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 690 (1973). The Court's complete description of *SCRAP*'s injury is as follows:

It [*SCRAP*] claimed that each of its members "suffered economic, recreational and aesthetic harm directly as a result of the adverse environmental impact of the railroad freight structure, as modified by the Commission's actions to date in *Ex Parte* 281." Specifically, *SCRAP* alleged that each of its members was caused to pay more for finished products, that each of its members "[u]ses the forests, rivers, streams, mountains, and other natural resources surrounding the Washington Metropolitan area and at his legal residence, for camping, hiking, fishing, sight-seeing, and other recreational [and] aesthetic purposes," and that these uses have been adversely affected by the increased freight rates, that each of its members breathes the air within the Washington metropolitan area and the area of his legal residence and that this air has suffered increased pollution caused by the modified rate structure, and that each member has been forced to pay increase taxes because of the sums which must be expended to dispose of otherwise reusable waste materials.

Id. at 678.

74. See, e.g., Perino, *supra* note 36, at 145; MacFarlane Note, *supra* note 45 at 884-85; James M. Duncan, Note, *Lujan v. National Wildlife Federation: Standing and the Two Million Acre Question*, 23 PAC. L.J. 223, 230 n.57 (1991).

75. See *SCRAP*, 412 U.S. at 687 ("[A]ll persons who utilize the scenic resources of the country, and indeed, all who breathe its air, could claim harm similar to that alleged by the environmental groups here.").

76. *Id.* at 687-88.

Secondly, the Court was willing in *SCRAP* to confer standing based on a comparatively insignificant injury. In rejecting the government's contention that standing should be limited to those plaintiffs significantly affected by agency action, the court quoted Professor Kenneth Davis' statement that "an identifiable trifle is enough for standing."⁷⁷

The attenuated chain of causation upon which *SCRAP* relied is also remarkable. As the opinion phrased it:

[T]he Court was asked to follow a far more attenuated line of causation to the eventual injury of which the appellees complained — a general rate increase would allegedly cause increased use of nonrecyclable commodities as compared to recyclable goods, thus resulting in the need to use more natural resources to produce such goods, some of which resources might be taken from the Washington area, and resulting in more refuse that might be discarded in national parks in the Washington area. The railroads protest that the appellees could never prove that a general increase in rates would have this effect, and they contend that these allegations were a ploy to avoid the need to show some injury in fact.⁷⁸

The Court rejected the railroads' protest, holding not only that potential littering in the Washington, D.C. area constituted a sufficient injury in fact to confer standing, but also that a sufficient likelihood existed that an invalidation of a national rate increase on recyclable materials would redress that injury.⁷⁹

The *Duke Power* case served as a reiteration of the Court's willingness, as in *SCRAP*, to confer standing despite a weak connection between the conduct of the defendant and the remedy sought by the plaintiff.⁸⁰ In *Duke Power*, the plaintiffs, environmental groups and individuals residing near two proposed nuclear power plants, were given standing to attack the constitutionality of the Price-Anderson Act.⁸¹ The Price-Anderson Act limits nuclear

77. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973) (quoting Kenneth Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 613 (1967-68)).

78. *Id.* at 688.

79. *Id.* at 689 - 90. *But cf.* *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177, 3189 (1990) (limiting the holding in *SCRAP* to evaluations of motions to dismiss as opposed to motions for summary judgment).

80. *Duke Power v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59, 72-78 (1978).

81. 42 U.S.C. § 2210 (1988).

power plant owner liability in the event of an accident.⁸² The court granted standing on the theory that, without limited liability, the plants could not be built and the plaintiffs would not be exposed to "the environmental and aesthetic consequences of . . . thermal pollution."⁸³ The defendant in the case argued that the plant would be built without regard to the Act and that the redressability prong of the standing requirement was not met.⁸⁴ The court rejected this argument, accepting the lower court's finding that without the protection of the Act the plants would likely not be built.⁸⁵ Thus the Court demonstrated a willingness to stretch the redressability element to reach the merits in this environmental litigation. As Justice Stevens put it in his concurrence, "It is remarkable that such a series of speculations is considered sufficient . . . to establish . . . standing."⁸⁶

To understand the significance of the *Japan Whaling* decision a rather detailed examination of its facts is necessary. The dispute in *Japan Whaling* arose due to the fact that Congress, in reaction to the International Whaling Commission's (hereinafter IWC) inability to impose sanctions on nations in violation of its whale harvest quotas, passed legislation making the Secretary of Commerce responsible for "certifying" nations in violation of the IWC's quotas.⁸⁷ Upon certification, the Secretary of State was then compelled to order sanctions on the offending nation.⁸⁸ These sanctions consisted of at least a fifty percent reduction in the fish harvest allowable to the offending nation from the United States' "fishery conservation zone".⁸⁹ When Japan violated an ICW whaling quota in 1984, the Secretary of State refused to certify due to an executive agreement made with Japan.⁹⁰ In response, various environmental groups filed suit seeking a writ of mandamus to compel the Secre-

82. *Duke Power*, 438 U.S. at 64-67.

83. *Id.* at 73.

84. *Id.* at 75.

85. *Duke Power v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59, 77 (1978).

86. *Id.* at 103 (Stevens, J., concurring in the judgment). See *infra* notes 174-183 and accompanying text for the modern court's constriction of the redressability test.

87. *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 225-26, (1986) (detailing the enactment of the Pelly Amendment to the Fishermen's Protective Act of 1967, 22 U.S.C. § 1978 (1988) and the Packwood Amendment to the Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1801 (1988)).

88. *Japan Whaling*, 478 U.S. at 226.

89. *Id.*

90. *Id.* at 227, 228.

tary of State to certify Japan.⁹¹ The Supreme Court overturned a lower court decision granting the writ, but the significance of the decision with respect to this Note is the relative ease with which the Supreme Court granted standing.⁹² Indeed, the court did not even address the issue of standing in the text of the opinion but rather dismissed the government's argument that the environmental groups lacked standing in a footnote.⁹³

The court found it "clear" that the environmental groups could avail themselves of a right of action under the APA.⁹⁴ Significantly, the court cited *Sierra Club* and *SCRAP* for the proposition that the adverse effect on the "whale watching and studying" of their members constituted a sufficient injury in fact.⁹⁵ In addition, the fact that the redressability prong of the standing inquiry was not even mentioned⁹⁶ indicated that the court considered the chain of causation between a fifty percent reduction in the American fishing allotted to Japan and redress of the plaintiffs' alleged loss of enjoyment of the whale population sufficient to confer standing. Due to the Court's cursory handling of the standing issue, conclusions as to the exact extent of injury required under this decision are difficult to make. However, the favorable citing of *Morton* and *SCRAP*, along with the ease with which the court granted standing indicate that, as late as 1986, liberal standing for environmental plaintiffs was alive and well in the federal courts.

Thus, after *Japan Whaling*, an environmental organization with a grievance concerning harm to the environment could expect to be granted standing liberally. All that would be required to meet the injury in fact prong of the test would be a trifling, even purely aesthetic, injury to one of its members.⁹⁷ The fact that the injury was a general one, shared by a wide segment of the public would

91. *Id.* at 228. The original plaintiffs in the action were: American Cetacean Society, Animal Protection Institute of America, Animal Welfare Institute, Center for Environmental Education, The Fund for Animals, Greenpeace U.S.A., The Humane Society of the United States, International Fund for Animal Welfare, The Whale Center, Connecticut Cetacean Society, Defenders of Wildlife, Friends of the Earth, and Thomas Garrett, former United States Representative to the IWC. *Id.*

92. *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 240-41 (1986).

93. *Japan Whaling*, 478 U.S. at 230 n.4.

94. *Id.*

95. *Id.*

96. *Id.*

97. *See supra* notes 73-77 and accompanying text.

not deny standing.⁹⁸ And, finally, even the most attenuated link between the remedy sought and redress of the plaintiff's alleged injury would confer standing.⁹⁹ In 1985, with these expectations in mind, the National Wildlife Federation [hereinafter the Federation] successfully protested the Bureau of Land Management's use of public lands in the federal courts.¹⁰⁰

B. *Lujan v. National Wildlife Federation*

In *Lujan v. National Wildlife Federation*,¹⁰¹ the Federation, an environmental organization dedicated to the preservation of animal species, brought suit against the Department of the Interior, the Secretary of the Interior and the director of the Bureau of Land Management [hereinafter, collectively, the Government].¹⁰² The Federation alleged that the Government had violated the Federal Land Policy Management Act [hereinafter FLPMA],¹⁰³ the National Environmental Policy Act of 1969 [hereinafter NEPA]¹⁰⁴ and APA section 10(e).¹⁰⁵ Broadly, the Federation alleged that illegal acts by the Government would result in mining activity on the public lands which would destroy their natural beauty.¹⁰⁶

To challenge these allegedly illegal acts the Federation would have to meet the requirements for standing. First, since neither the FLPMA nor NEPA contained a citizen suit provision, the Federation would be required to meet the zone of interest test from *Association of Data Processing Service Organizations, Inc. v. Camp*.¹⁰⁷ Secondly, as an organization, the Federation would be required to

98. See *supra* note 75 and accompanying text.

99. See *supra* notes 78-86 and accompanying text.

100. *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177 (1990) (detailing the procedural history of the case).

101. *Id.*

102. *Id.* at 3182.

103. 43 U.S.C. §§ 1701-1783 (1988).

104. 42 U.S.C. §§ 4321-4370 (1988).

105. *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177 (1990) (citing section 10(e) of the APA, 5 U.S.C. § 706 (1988)).

106. *NWF*, 110 S. Ct. at 3183-84. Specifically, the Federation objected to over one thousand "classification" changes and "withdrawal" revocations. "Classification" is the process by which the Department of the Interior determines which public lands are suitable for disposal. "Withdrawal" is the process by which land is exempted from disposal. See MacFarlane Note, *supra* note 45 at 891-93 (citing 43 U.S.C. § 315A (1988) and 43 U.S.C. § 1702(j) (1988)).

107. 397 U.S. 150 (1970). See also *supra* note 55 (APA standing requirements as they stood when *NWF* was decided).

meet the test from *Hunt v. Washington State Apple Advertising Commission*.¹⁰⁸ Finally, the Federation would be required to allege an injury in fact to a member so as to avoid a decision as in *Morton*.¹⁰⁹ With *SCRAP* and *Morton* as their landmarks,¹¹⁰ respondents were careful to file affidavits by two of its members alleging that they used land "in the vicinity" of threatened land.¹¹¹

When the Court of Appeals for the District of Columbia held that the affidavits were sufficient to confer standing,¹¹² everything seemed in order for the Federation's battle on the merits. Then the Supreme Court granted certiorari.¹¹³ In a five to four decision¹¹⁴ the Supreme Court reversed the Court of Appeals and held that *NWF* lacked standing to challenge the Government.¹¹⁵ The Court first considered *NWF*'s original affidavits and found that they failed to set forth facts specific enough to demonstrate an injury sufficient to confer standing.¹¹⁶ The court examined standing as a matter of interpretation of the APA. It set forth the test for standing under section 702 as requiring plaintiff to first identify the final "agency action that affects him in the specified fashion,"¹¹⁷ and then allege that he has "suffer[ed] a legal wrong" or been "ad-

108. 432 U.S. 333 (1977). See also *supra* note 65 (text of the Hunt test).

109. See *supra* notes 53-67 and accompanying text (discussing the standing requirements of *Sierra Club v. Morton*, 405 U.S. 727 (1972)).

110. *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177, 3189 (1990) (noting that the Federation placed great reliance upon *SCRAP*).

111. *Id.* at 3184. The affidavits were essentially identical. The specific language of one of them is as follows:

My recreational use and aesthetic enjoyment of federal lands, particularly those in the vicinity of South Pass-Green Mountain, Wyoming have been and continue to be adversely affected in fact by the unlawful actions of the Bureau and the Department. In particular, the South Pass-Green Mountain area of Wyoming has been opened to the staking of mining claims and oil and gas leasing, an action which threatens the aesthetic beauty and wildlife habitat potential of these lands.

Id. at 3187.

112. *National Wildlife Fed'n v. Burford*, 878 F.2d 422 (D.C. Cir. 1989).

113. *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 834 (1990).

114. See Duncan Note, *supra* note 74 at 224 n.4 (detailing the change in composition of the court between the *SCRAP* decision and the *NWF* decision). The *NWF* majority was comprised of Chief Justice Rehnquist, and Justices Kennedy, O'Connor, White, and Scalia. Dissenting were Justices Blackmun, Brennan, Stevens and Marshall. *Id.*

115. *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177 (1990).

116. *Id.* at 3188-89.

117. *Id.* at 3185 (citing 5 U.S.C. §§ 551(13), 701(b)(2) (1988)).

versely affected or aggrieved" by the agency action.¹¹⁸ The Court found that under the standards for assessing a motion for summary judgment, the Federation affidavits were insufficient to confer standing.¹¹⁹

The major effect of the court's decision was a narrowing of the potential plaintiffs in an APA-based suit. The key passage in the opinion states that, in order to overcome a motion for summary judgment, averments by an environmental organization that one of its members "uses unspecified portions of an immense tract of territory, on some portions of which mining has occurred or probably will occur by virtue of the governmental action" are not enough to confer standing.¹²⁰ The decision was not surprising,¹²¹ but its significant constriction of the requirements for standing "stunned environmentalists"¹²² and touched off a flood of commentary from student authors across the country.¹²³

118. *Id.* at 3186. Compare *supra* note 55 (text of § 702 APA and the "zone of interest" test from *Data Processing*). The *NWF* court did not cite *Data Processing* but it enunciated essentially the same test. *Id.* Thus, "the plaintiff must establish that the injury of which he complains (his aggrievement or the adverse effect upon him) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Id.*

119. *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177, 3188-89 (1990). The Court also rejected the conclusion of the Court of Appeals that the additional affidavits submitted by the Federation were sufficient to confer standing. *Id.* The Court reasoned that, even if all six affidavits were considered together they could not confer standing to challenge the "entirety of [the] so-called 'land withdrawal review program.'" *Id.* at 3189. The court found that the land review program could not be considered final agency action and that only individual classifications and withdrawals could be considered sufficiently ripe for judicial review. *Id.* at 3189-91. This portion of the opinion, as it deals with the ripeness doctrine, is outside of the scope of this Note. It does, however, demonstrate the recent constriction by the Court of access by environmental litigants to the federal courts. For a more extensive discussion of this thesis see Edward B. Sears, Note, *Lujan v. National Wildlife Federation: Environmental Plaintiffs are Tripped Up on Standing*, 24 CONN. L. REV. 293, 349-52 (1991).

120. *NWF*, 110 S. Ct. at 3189.

121. See *supra* note 114 (concerning the change in composition of the Court). The conservative trend in environmental law decisions was noted in Phillip D. Reed, *Dialogue, The Supreme Court and Environmental Law: A Whole New Ballgame?*, 14 ENVTL. L. REP. (ENVTL. L. INST.) 10,262 (July 1984).

122. Karin Sheldon, *NWF v. Lujan: Justice Scalia Restricts Environmental Standing to Constrain the Courts*, 20 ENVTL. L. REP. (ENVTL. L. INST.) 10,557, 10,557 (December 1990)).

123. See, e.g., Duncan Note, *supra* note 74; Bill J. Hays, Note, *Standing and Environmental Law: Judicial Policy and the Impact of Lujan v. National Wild-*

When certiorari was granted to hear the *NWF* case, an environmental law case in which the lower courts had couched the issue of standing in constitutional terms,¹²⁴ the newly conservative court's view of the constitutional minimum required for standing was expected to be revealed. It was not. In writing for the majority, Justice Scalia carefully avoided constitutional analysis, and, in fact, never mentioned the word "standing" except when summarizing the procedural history of the case.¹²⁵ The decision was based purely on interpretation of the APA.¹²⁶ Specifically, the court said that the issue in the case was whether the two members of the Federation had shown that their interests were "aggrieved" under the meaning of the APA.¹²⁷

Thus, the optimistic environmentalist could view *NWF* as holding that standing under the APA should be more strictly construed,¹²⁸ and not as a statement of the bare constitutional minimum required for standing.¹²⁹ Also, under *NWF*, though *SCRAP* was limited to its facts and to motions to dismiss, it was not overturned.¹³⁰ Thus, it could be argued that the relaxed requirements

life Federation, 39 KAN. L. REV. 997 (1990-91); Poisner Note, *supra* note 36; Sarah A. Robichaud, Note, *Lujan v. National Wildlife Federation: The Supreme Court Tightens the Reins on Standing for Environmental Groups*, 40 CATH. U. L. REV. 443 (1990-91); Sears Note, *supra* note 119; Katherine B. Steuer & Robin L. Juni, Note, *Court Access for Environmental Plaintiffs: Standing Doctrine in Lujan v. National Wildlife Federation*, 15 HARV. ENVTL. L. REV. 187 (1991); Stu Stuller, Note, *Lujan v. National Wildlife Federation*, 62 U. COLO. L. REV. 933 (1991); Michael J. Shinn, Note, *Misusing Procedural Devices to Dismiss an Environmental Lawsuit - Lujan v. National Wildlife Federation*, 110 S. Ct. 3177 (1990), 66 WASH. L. REV. 893 (1991); John Treangen, Note, *Standing: Closing the Doors of Judicial Review*, *Lujan v. National Wildlife Federation*, 36 S.D. L. REV. 136 (1991).

124. *Lujan v. National Wildlife Fed'n*, 878 F.2d 422 (1989).

125. See Stuller Note, *supra* note 123, at 946.

126. *NWF*, 110 S. Ct. at 3185-94.

127. *Id.* at 3187.

128. Justice Scalia had previously indicated his desire to intensify standing requirements under the APA. "I anticipate that the Court's *SCRAP*-era willingness to discern breathlessly broad congressional grants of standing will not endure." See Scalia, *supra* note 35, at 898.

129. See Hays Note, *supra* note 123, at 1040. ("[T]he second general observation that can be made with respect to cases decided in the aftermath of *Lujan* is that the tendency of the courts to restrict their jurisdiction will be less in cases in which standing is based upon a substantive statute and not the APA.")

130. The court's language was as follows:

The *SCRAP* opinion, whose expansive expression of what would suffice for § 702 review under its particular facts has never since been emulated

for Article III standing that emerged in the seventies had not yet been overturned. The *Lujan* opinion would prove both of these theories wrong.¹³¹

ANALYSIS

A. Discouragement for Environmental Litigants

In *Lujan*, the Court was faced with a case that was factually similar to *NWF*, but, as the suit was brought under the ESA,¹³² the Court would not have the luxury of avoiding constitutional analysis by relying on the APA. Thus, in deciding *Lujan* the court dutifully set out the constitutional requirements for standing, and proceeded to obliterate the Supreme Court's approach to granting standing in environmental litigation.¹³³ This obliteration resulted in the unequivocal end of the era of liberalized environmental standing. The three major fears of environmentalists that arose from *NWF* became reality. First, the opinion severely constricted the injury in fact requirement for constitutional standing.¹³⁴ Secondly, the opinion brought separation of powers theory with full force to hold that Congress cannot create a "procedural injury".¹³⁵ Finally, the relaxed redressability requirement of *Duke Power* may have been overturned.¹³⁶ Each of these developments will be dealt with in turn.

1. Injury in Fact

With its opinion in *Lujan*, the Court shrunk the pool of poten-

by this court, is of no relevance here, since it involved not a Rule 56 motion for summary judgment but a Rule 12(b) motion to dismiss on the pleadings.

NWF, 110 S. Ct. at 3189.

131. See *infra* notes 132-183 and accompanying text.

132. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2135 (1992).

133. *Lujan*, 112 S. Ct. at 2160. (Blackmun, J., dissenting) (calling the decision a "slash-and-burn expedition through the law of environmental standing").

134. *Id.* at 2137-40.

135. *Id.* at 2142-46.

136. *Lujan*, 112 S. Ct. at 2140-42. This portion of the opinion was a plurality. Justices O'Connor and Blackmun dissented from it, finding that there was a substantial likelihood that Defenders' injury would be redressed by a favorable decision. *Id.* at 2154-57. Justice Stevens concurred in the judgment but made it clear that he agreed with the dissent on the issue of redressability. *Id.* at 2149. Justices Kennedy and Souter refused to reach the issue because injury-in-fact had not been proven. *Id.* at 2146.

tial environmental litigants by stressing that the injury-in-fact prong of the standing doctrine requires an "actual or imminent" injury.¹³⁷ The *NWF* decision had made it clear that a plaintiff dissatisfied with government action who wants to seek relief from the federal courts must prove an injury in fact with exacting specificity.¹³⁸ Affidavits alleging use of an area "in the vicinity" of the threatened land would not confer standing.¹³⁹ The "word game" identified in the Harlan dissent in *Flast* was obviously being played.¹⁴⁰ The plaintiff in *Lujan* interpreted the words "in the vicinity" to confer standing.¹⁴¹ The government disagreed, arguing "in the vicinity" was not close enough.¹⁴² The government won the game and commentators agreed that environmental plaintiffs were now required by the United States Constitution to plead their cases with strict geographical specificity.¹⁴³

With *NWF* undoubtedly in mind, the plaintiffs in *Lujan* submitted affidavits identifying specific research projects conducted by members adjacent to specific lands threatened by government action.¹⁴⁴ Additionally, the affiants professed an intent to return to the research areas for further research. The Supreme Court held that this was "simply not enough."¹⁴⁵ The Court held that "some day" intentions without specific allegations of when and how these intentions would be realized could not confer standing.¹⁴⁶ It is now clear that environmental plaintiffs must not only plead with exacting geographical specificity, but also must pinpoint the time of the potential injury. Indeed, in his concurrence, Justice Kennedy suggested that the affiants in *Lujan* should have purchased a plane ticket.¹⁴⁷ In the hypothetical situation in which government action unlawfully threatens to harm the environment in Antarctica, a group such as Defenders of Wildlife will be required to identify the exact site threatened and include a plan for visiting the site. The

137. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2138 (1992).

138. *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177, 3188-89 (1990).

139. *Id.*

140. See *supra* note 37 and accompanying text.

141. *Lujan*, 112 S. Ct. at 2137.

142. *Id.* at 2135.

143. See Steuer & Juni Note, *supra* note 123, at 218; Sears Note, *supra* note 119, at 353.

144. *Lujan v. Defenders of Wildlife*, 911 F.2d 117, 120-21 (8th Cir. 1990).

145. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2138 (1992).

146. *Id.*

147. *Id.* at 2146.

public policy drawbacks of this requirement are obvious and have been argued elsewhere,¹⁴⁸ but after *Lujan*, it is the law. No longer will the "identifiable trifle" suffice for standing.¹⁴⁹

Defenders had also argued that they satisfied the injury in fact prong of the test for standing due to three nexus theories: the "ecosystem nexus" theory, which proposed that, due to the delicate interconnection of the environment, even a distant elimination of an entire species could cause injury; the "animal nexus theory, whereby persons such as Defenders' members, who had a particular interest in preserving a species, were injured by the elimination of that species anywhere in the world; and the "vocational nexus" theory, whereby professional biologists, who make their living observing animals, are injured if the animals disappear, regardless of location.¹⁵⁰ The theories had little foundation in existing standing law, but were grounded in the growing scientific awareness that the effect of the loss of a species can be very wide-ranging.¹⁵¹ Employing his now familiar caustic style,¹⁵² Justice Scalia dismissed these theories summarily. Relying on the fact that "in the vicinity" was not enough to confer standing in *Lujan v. National Wildlife Federation*,¹⁵³ Justice Scalia insisted on a far tighter geographical nexus than that argued for by Defenders.¹⁵⁴

2. Separation of Powers

Not surprisingly, the opinion in *Lujan* has as its foundation the idea that separation of the three branches of the federal government is the basis for the doctrine of standing.¹⁵⁵ Justice Scalia

148. See, e.g., Jeanne A. Compitello, *Organizational Standing In Environmental Litigation*, 6 *TOURO L. REV.* 295, 315-16 (1989-90).

149. See Macfarlane Note, *supra* note 45, at 917.

150. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2139 (1992).

151. *Brief for the Respondents* at page 21 (quoting scientific testimony that "reducing the population in one area affects the population in its entirety, reducing the size of the gene pool and making it much more vulnerable to catastrophic events").

152. *Lujan*, 112 S. Ct. at 2139 ("Respondents' . . . theories are called, *alas*, the 'animal nexus' approach . . . and the 'vocational nexus' approach.") (emphasis added).

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

154. *Lujan*, 112 S. Ct. at 2139-2140.

155. A full analysis of the genesis of separation of powers theory in standing law is beyond the scope of this Note. For Justice Scalia's scholarly exploration of the philosophy of judicial restraint and the doctrine of separation of powers as it relates to standing law, see Antonin Scalia, *Vermont Yankee: The APA, the D.C.*

had long ago expressed his distaste for the Court's pronouncement in *Flast v. Cohen*¹⁵⁶ that standing "does not, by its own force, raise separation of powers problems related to judicial interferences in areas committed to other branches of the Federal Government."¹⁵⁷ Justice Scalia theorized that this language led the courts away from the theory that the duty to refrain from deciding generalized grievances, established in *Frothingham v. Mellon*¹⁵⁸ and *Ex Parte Levitt*,¹⁵⁹ was a constitutional duty based on separation of powers theory.¹⁶⁰ In Justice Scalia's view, cases such as *SCRAP*, *Data Processing* and *Barrow v. Collins*,¹⁶¹ in which the court granted standing to hear generalized grievances, were a departure from the constitutional mandate that the three branches of the federal government must remain separate.¹⁶² *Lujan* was Justice Scalia's chance to return "to earlier traditions"¹⁶³ and he seized it accordingly. The most notable casualty in Justice Scalia's analysis was the theory that Congress could grant standing with "citizen suit" provisions.¹⁶⁴

Circuit and the Supreme Court, 1978 Sup. Ct. Rev. 345 (1978). Scalia's judicial opinions written prior to his ascension to the Supreme Court are analyzed in Sears Note, *supra* note 119, at 323-24. For comment critical of Scalia's views see Poisner, *supra* note 36 (arguing that separation of powers theory inhibits the development and enforcement of public values which are paramount to the enforcement of environmental law). See also Daniel N. Reisman, *Deconstructing Justice Scalia's Separation of Powers Jurisprudence: The Presidential Executive*, 53 ALB. L. REV. 49 (1988-89) (arguing that Scalia's analysis of separation of powers centralizes power in the executive branch). Reisman's view is shared by Justice Blackmun, who took note in his *Lujan* dissent of the majority's "unseemly solicitude for an expansion of power in the executive branch." *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2159 (1992) (Blackmun, J., dissenting).

156. *Flast v. Cohen*, 392 U.S. 83 (1969).

157. See Scalia, *supra* note 35, at 897 (quoting *Flast*, 392 U.S. at 100-01).

158. 262 U.S. 447 (1923).

159. 302 U.S. 633 (1937).

160. See Scalia, *supra* note 35, at 898.

161. 397 U.S. 159 (1970).

162. See Scalia, *supra* note 35, at 897.

163. *Id.*

164. See Connelly, *supra* note 36, at 159 (arguing that Congress may grant standing to rulemaking participants whose harm is the "denial of their rulemaking requests by an agency on grounds allegedly contrary to law"). See also *supra* note 29 (text of section 1540(g)). Other federal environmental citizen suit provisions include: Toxic Substances Control Act § 20(a), 15 U.S.C. § 2619(a) (1988); Surface Mining Control and Reclamation Act of 1977 § 520, 30 U.S.C. § 1270 (1988); Deep Seabed Hard Mineral Resources Act § 117, 30 U.S.C. 1427 (1988); Clean Water Act § 505, 33 U.S.C. § 1365 (1988); Marine Protection, Research,

When Congress passed the ESA, they included within it a citizen suit provision.¹⁶⁵ The court of appeals, in *Defenders of Wildlife v. Lujan*,¹⁶⁶ held that Defenders had standing based not only on the affidavits of its members¹⁶⁷ but also on the basis of a "procedural injury" caused by the Secretary of the Interior's alleged failure to comply with § 7(a)(2).¹⁶⁸ The court quoted the statutory language that allows any person to file suit to enjoin any person who is allegedly in violation of the ESA and pointed to the strong Congressional intent to give "endangered species priority over the 'primary missions' of Federal agencies."¹⁶⁹ The court held that § 7(a)(2) requires consultation and the Secretary had allegedly failed to consult, the citizen suit created a right in environmental groups such as Defenders to challenge the Secretary's improper procedure in court.¹⁷⁰

Writing for a majority on this issue,¹⁷¹ Justice Scalia reversed the Court of Appeals. Justice Scalia resurrected *Frothingham* and *Ex Parte Levitt* and held that Congress could not "convert the undifferentiated public interest in executive officers' compliance with

and Sanctuaries Act of 1972 § 105(g), 33 U.S.C. § 1415(g) (1988); Deepwater Port Act of 1974 § 16, 33 U.S.C. § 1515 (1988); Act to Prevent Pollution from Ships § 11, 33 U.S.C. § 1910 (1988); Safe Drinking Water Amendments of 1977 § 1449, 42 U.S.C. § 300j-8 (1988); Noise Control Act of 1972 § 12, 42 U.S.C. § 4911 (1988); Energy Policy and Conservation Act § 335, 42 U.S.C. § 6305 (1988); Resource Conservation and Recovery Act of 1976 § 7002, 42 U.S.C. § 6972 (1988); Clean Air Act § 304, 42 U.S.C. § 7604 (1988); Powerplant and Industrial Fuel Use Act of 1978 § 725, 42 U.S.C. § 8435 (1988); Ocean Thermal Energy Conservation Act of 1980 § 114, 42 U.S.C. § 9124 (1988); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 § 310, 42 U.S.C. § 9659 (1988); Emergency Planning and Community Right-To-Know Act of 1986 § 326, 42 U.S.C. § 11,046 (1988); Outer Continental Shelf Lands Act § 23(a), 43 U.S.C. § 1349(a) (1988); Natural Gas Pipeline Safety Act of 1968 § 19, 49 U.S.C. § 1686 (1988); and Hazardous Liquid Pipeline Safety Act of 1979 § 215, 49 U.S.C. § 2014 (1988). Obviously, Justice Scalia's conclusion that these provisions do not grant standing for a "procedural injury" has wide-reaching implications.

165. *Defenders of Wildlife v. Lujan*, 911 F.2d 117 (1990).

166. 911 F.2d 117 (1990).

167. *Id.* at 121.

168. *Id.*

169. *Id.* at 121-22 (quoting *TVA v. Hill*, 437 U.S. 153 (1978)).

170. *Defenders of Wildlife v. Lujan*, 911 F.2d 117, 121 (1990).

171. See *infra* notes 185-209 and accompanying text (breaking down the decision). But cf. *Lujan*, 112 S. Ct. at 2146-47 (Kennedy, J., concurring) (tempering the harshness of Justice Scalia's opinion by pointing out that the Court "must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition").

the law into an 'individual right' vindicable in the courts."¹⁷² Thus, Justice Scalia clearly laid down a constitutional line of demarcation that would not allow Congress to create a right in the general public to protest an agency action in the courts. If the citizen could not afford the ticket to Sri Lanka required to meet constitutional standing,¹⁷³ the person would be relegated to influencing the Secretary of the Interior with her vote in the Presidential election.

3. Redressability

Finally, Justice Scalia took the opportunity in *Lujan* to suggest that the "redressability" prong of the test should be strictly construed. Recall the tenuous line of causation between the alleged injuries and remedies sought in the *Duke Power* and *SCRAP* cases.¹⁷⁴ In *Duke Power*, the plaintiffs asserted that the Price-Anderson Act injured them in that it limited the liability of nuclear power plant owners, which in turn allowed the power plant owners to build plants, which in turn could pollute the water in the vicinity of the plaintiffs' homes.¹⁷⁵ In *SCRAP*, the plaintiffs asserted that an increase in the transportation costs of scrap metal would cause litter which would pollute parks "in the vicinity" of the plaintiffs' homes.¹⁷⁶ In both of these cases the court found that the conduct of the defendant caused the injury and that the remedy the plaintiffs sought would adequately redress their injury.¹⁷⁷

Despite these precedents, cited favorably as recently as 1986,¹⁷⁸ a plurality of the court in *Lujan*¹⁷⁹ held that an allegation that the Secretary of the Interior had failed to consult with heads of agencies partially funding projects that would decimate the habitats of endangered species did not state an article III injury. The

172. *Lujan*, 112 S. Ct. at 2143-45.

173. *Id.* at 2146. (Kennedy, J., concurring) (suggesting that plaintiffs should have purchased a plane ticket).

174. See *supra* notes 77-86 and accompanying text.

175. *Duke Power v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978).

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

177. See *supra* notes 78-86 and accompanying text.

178. *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 226 n.4 (1986).

179. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2146 (1992). Justices Kennedy and Souter did not reach the issue of redressability. Obviously, then, this portion of the opinion will not control future standing litigation. Still, the movement away from the redressability standards is distinct and worth noting.

prospects for redressability were held by the court to be too weak because the question of whether the heads of the agencies would be bound by the Secretary's consultation regulation was "open".¹⁸⁰ It could be forcefully argued that the question of whether the construction of the nuclear plants in *Duke Power* was affected by limited liability was "open" also. Additionally, the lower court in *Duke Power* had found that limited liability was paramount in enabling the defendants to construct nuclear plants, thus ensuring the requisite causative link, and the Supreme Court deferred to this judgment.¹⁸¹ The lower court in *Lujan* had proclaimed that it was "satisfied that an injunction requiring the Secretary to publish regulations mandating that federal agencies consult on agency actions abroad would result in consultation, which in turn would foreclose the possibility that serious harm to endangered species will be overlooked."¹⁸² Though the lower court findings in *Lujan* and *Duke Power* as to causation seem to be indistinguishable, the *Lujan* plurality refused to defer to the lower court on the issue to causation. Thus, the *Lujan* plurality stands for a tougher standard of redressability and a departure from *Duke Power*. The last link in the chain of liberalized standing law of 1970's may be broken.¹⁸³

B. *Encouragement for Environmental Groups*

The *Lujan* decision was not all bad news for environmentalists. Each written opinion provided encouraging language for non-Hohfeldian environmental plaintiffs,¹⁸⁴ including Justice Scalia's. Each opinion will be examined in turn.

1. *The Scalia Majority*

The encouraging aspect of the Scalia opinion emerges when, in passing, he endorses *Morton's* elevation of an "aesthetic injury" to the article III level: "*Of course*, the desire to use or observe an

180. *Id.* at 2140.

181. *Duke Power v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59, 74 (1978).

182. *Lujan*, 112 S. Ct. at 2141 (quoting *Defenders*, 851 F.2d at 1043-44).

183. *But see Lujan*, 112 S. Ct. at 2146 (Kennedy, J., concurring) (refusing to reach the issue of redressability).

184. For a discussion of the meaning of the term Hohfeldian plaintiff, see Tushnet I, *supra* note 36, at 1708 ("A Hohfeldian plaintiff is one who has the personal and propriety interests of the traditional plaintiff, and [not] the representative and public interests of the plaintiff in the public action.") (quoting *Flast v. Cohen*, 392 U.S. 83, 119 n.5 (1968)).

animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for the purpose of standing".¹⁸⁵

With Justice Scalia serving as the driving force behind a newly conservative Supreme Court's modification of the standing doctrine, commentators had expressed concern that a return to the traditional "legal interest" test from early standing jurisprudence was imminent.¹⁸⁶ This fear was apparently unfounded. Though the Court intensified the particularity with which this "aesthetic injury" must be pleaded,¹⁸⁷ environmentalists could rest at ease, secure in the knowledge that they would not be required to buy a home adjacent to land threatened by government action in order to be heard in court.

2. *Kennedy, Souter and Stevens Concur*

A short concurrence written by Justice Kennedy and joined by Justice Souter is significant in two respects. Firstly, though he agreed with the majority's conclusion that Mss. Kelly and Skilbred did not incur an Article III injury,¹⁸⁸ Justice Kennedy concurred in order to temper the harsh manner in which the majority dismissed Defenders' "ecosystem nexus" theory.¹⁸⁹ Citing *Japan Whaling*, Justice Kennedy said, "I am not willing to foreclose the possibility, however, that in different circumstances a nexus theory similar to those proffered here might support a claim to standing."¹⁹⁰ When viewed with the dissent and Justice Stewart's concurrence this aspect of Justice Kennedy's concurrence indicates that Justice Scalia's harsh view of the "ecosystem nexus" theory is a minority view.

Additionally, Justice Kennedy concurred to temper the breadth of Justice Scalia's rejection of the "procedural injury" theory put forth by Defenders. Postulating that Congress has the power to grant a cause of action to a group of people who did not have one before, Justice Kennedy stated; "Congress must at the very least identify the injury it seeks to vindicate and relate the

185. *Lujan*, 112 S. Ct. at 2137 (emphasis added).

186. See Sears Note, *supra* note 119, at 35.

187. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2138-40 (1992).

188. *Id.* at 2146.

189. See *supra* text accompanying note 27 (quoting Justice Scalia's sardonic language).

190. *Lujan*, 112 S. Ct. at 2146.

injury to the class of persons entitled to bring the suit."¹⁹¹ Thus, if Congress were to enact a statute that identifies failure to consult as an injury and identifies a class of persons entitled to bring suit, for example conservation organizations, a majority of the Court might hold the statute constitutional.¹⁹²

Justice Stevens concurred in the judgment because he disagreed with Defenders on the merits of the case, but made it clear that he did not agree with the majority's assessment of the standing issue.¹⁹³ Justice Stevens engaged in the now familiar "word game" and concluded that the real issue in the case was whether Mss. Kelly and Skilbread were genuinely interested in endangered species.¹⁹⁴ Arguing that their interest was genuine, he concluded that an Article III injury was present.¹⁹⁵

3. *Blackmun and O'Connor Dissent*

The dissent in *Lujan* differed from the majority in two respects. Writing for Justice O'Connor and himself, Justice Blackmun first evaluated the evidence and concluded that Defenders had met their burden of creating a genuine issue of fact both as to injury in fact and as to redressability.¹⁹⁶ He noted the genuine issue of material fact required to survive a motion for summary judgment was "not a heavy burden,"¹⁹⁷ then engaged the majority in a round of Harlan's "word game"¹⁹⁸ and concluded that Defenders had been injured.¹⁹⁹ Additionally, the dissent took exception to

191. *Lujan*, 112 S. Ct. at 2147.

192. This proposition assumes that the dissenters and Justice Stevens would vote with Justice Kennedy on this issue. In light of the vigor of the disagreement with Justice Scalia demonstrated by their opinions on this issue, this seems a safe assumption. See *infra* notes 193-210 and accompanying text.

193. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2148 (1992).

194. *Id.* at 2149.

195. *Id.*

196. *Id.* at 2151.

197. *Id.* at 2152 (citing FED. RULE CIV. PROC. 56(c)).

198. See *supra* note 37 and accompanying text.

199. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2153 (1992). The dissent raised this thought-provoking hypothetical to demonstrate the flaw in the majority's injury standard:

Just to survive summary judgment, for example, a property owner claiming a decline in the value of his property from governmental action might have to specify the exact date he intends to sell his property and show that there is a market for the property, lest it be surmised he might not sell again.

the majority's off-hand dismissal of Defender's ecosystem nexus test.²⁰⁰ The difference in the majority and minority opinions concerning this issue seems to lie in a fundamental difference in how they view the world. It appears that the dissent has been influenced by modern scientific thinking concerning the interconnection of the earth's ecosystem,²⁰¹ while the majority mocks the idea that environmental destruction in one corner of the world could affect the entire earth.²⁰² Fortunately, as noted earlier, the Kennedy concurrence seems responsive to the theory that a plaintiff could sue on an "ecosystem nexus" theory,²⁰³ thus the court would have a five to four majority on this point.

Finally, the dissent takes exception to the breadth of the majority's rejection of a "procedural injury" theory.

It is hoped that over time the Court will acknowledge that some classes of procedural duties are so enmeshed with the prevention of a substantive, concrete harm that an individual plaintiff may be able to demonstrate a sufficient likelihood of injury just through the breach of that procedural duty.²⁰⁴

The dissent argues that Congress can create a statutory procedure so enmeshed with the substantive harm that failure to comply with the procedure creates an injury.²⁰⁵ As this theory is not joined precisely by the Kennedy concurrence it is not as significant.²⁰⁶

The most striking aspect of the dissent may be the fact that Justice O'Connor joins it. Justice O'Connor wrote the opinion in *Allen v. Wright*,²⁰⁷ a case that states that standing should be understood by a "single, basic idea - the idea of separation of powers."²⁰⁸ Justice O'Connor did not write the dissenting opinion, but the fact that she joins it, and thereby endorses language concluding that the majority opinion "reflects an unseemly solicitude for an expansion of power of the executive branch . . . [and] . . . amounts to a slash-and-burn expedition through the law of envi-

Id. (Blackmun, J., dissenting).

200. *Id.* at 2154.

201. *Id.* at 2154 ("Many environmental injuries . . . cause harm distant from the area immediately affected by the challenged action.").

202. *Id.* at 2139-40.

203. See *supra* text accompanying note 190.

204. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2160 (1992).

205. *Id.* at 2160.

206. See *supra* notes 191-92.

207. *Allen v. Wright*, 468 U.S. 737 (1984).

208. *Id.* at 752.

ronmental standing”²⁰⁹ indicates that she is not pleased with the manner in which Justice Scalia has used separation of powers theory to keep environmentalists out of court.

CONCLUSION

“Generalizations about standing are largely worthless as such.”²¹⁰ Any conclusions concerning the law of standing must be made with this famous caveat from Justice Douglas in mind. Yet after *Lujan* it cannot be gainsaid that the federal judiciary’s love affair with environmental litigation is over. Three aspects of the *Lujan* opinion lead to this conclusion.

Firstly, the requirements attached to the injury in fact prong of the test for Article III standing have intensified. The strict geographical nexus added to the injury requirement in *NWF* has been augmented with a strict requirement of imminence. The prudent environmental organization seeking standing in the federal courts to protect an area or species threatened by government action must now identify the area threatened with particularity, allege a relationship between that area and a member, and document plans by that member to continue the relationship with that area.

Secondly, plaintiffs’ attempts to meet the redressability prong of the test for standing may now be more closely scrutinized. The prudent plaintiff must assume that if the Court cannot clearly conclude that the remedy sought will redress the alleged harm the case will not be heard. Thus, at the pleading stage, the plaintiff should not only document the injury, but also carefully document the redressability of the injury.

Finally, separation of powers principles are now inextricably linked to the Article III requirements for standing. Despite academic criticism calling for a contrary rule Justice Scalia has realized his goal of paring Congress’ power to create standing to enforce environmental statutes such as the ESA. A plaintiff frustrated by the newly intense pleading requirements of the standing test cannot temper them by arguing that, in drafting citizen-suit provisions, Congress intended to grant standing to the general public to enforce the relevant statute.

It must be noted, however, that, as always occurs in standing litigation, the *Lujan* case left crucial questions relevant to the doc-

209. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2159-60 (1992) (Blackmun, J., dissenting).

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

trine unanswered. Three such questions stand out. First, do Justice O'Connor's apparent switch and the language in Justice Kennedy's concurrence (refusing to rule out all Congressional attempts to grant standing) support the conclusion that a majority of the court will not agree with Justice Scalia's reactionary views on separation of powers theory as it relates to standing? Second, when Justices Kennedy and Souter do reach the redressability issue will they join in Justice Scalia's strict view of it? And, finally, to what extent can an environmental plaintiff rely on the interconnection of the ecosystem to prove injury given the dissent and concurrences in the *Lujan* case? The answers to these questions will have to wait for the next clash between environmental concerns and judicial restraint that will inevitably occur in the United States Supreme Court.

Donald Strong Higley, II