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STANDING AND SOVEREIGN IMMUNITY: HURDLES FOR ENVIRONMENTAL LITIGANTS

In order for a private individual to invoke the judicial power to determine the validity of government action, he must show that he has sustained or is in immediate danger of sustaining a direct harm as a result of that action. This harm is often referred to as an "injury in fact" as opposed to a more abstract "injury" which might be suffered by the public generally. It is insufficient for a person to claim that he has suffered in a manner common to all members of the public. If a person seeks to restrain public officers from acting in excess of their statutory authority, he must demonstrate to the court an injury or threat to a particular legal right of his own, as distinguished from the public interest in the administration of the law. If the required allegations are not made, federal courts (and most state courts) will find that the person has no standing—no right to litigate the issues—and refuse to hear the case on its merits.

Standing is a nebulous concept which defies simple explanation. It has been defined as the "[d]octrine that in [an] action in [a] federal constitutional court by [a] citizen against a government officer, complaining of alleged unlawful conduct there is no justiciable controversy unless [that] citizen shows that such conduct invades or will invade a private substantive legally protected interest of plaintiff citizen." This "definition," taken from a 1943 circuit court opinion, provides only a skeletal explanation of what standing is and little insight into how the standing concept is used by federal courts as a device for rejecting cases.

The requirement of standing sometimes operates as a self-imposed federal court rule of judicial restraint to avoid deciding "unimportant" issues, while at other times it has been improperly used to enforce the constitutional requirement that the federal judiciary limit its decisions to "cases and controversies." In truth, the rule of standing which denies a plaintiff the right to vindicate constitutional rights of others who have suffered a general "injury"

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1 Ex parte Levitt, 302 U.S. 633 (1938).
3 BLACK'S LAW DICTIONARY (4th ed. 1968) at 1577.
4 Associated Industries v. Ickes, 134 F.2d 694, 700 (2d Cir. 1943).
6 U.S. CONST. art. III, § 2.

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is merely a rule of practice of the federal courts. Many years ago, the U.S. Supreme Court declared:

The requirement of standing is often used to describe the constitutional limitation on the jurisdiction of this Court to "cases and controversies." Apart from the judicial requirement, this court has developed a complementary rule of self-restraint for its own governance (not often clearly distinguished from the constitutional limitation) which ordinarily precludes a person from challenging [the propriety of government action] by invoking the rights of others. The common thread underlying both requirements is that a person cannot challenge [government action] unless he shows that he himself is injured by its operation.7

In a later decision, the Court emphasized that requirements of standing were "not principles ordained by the Constitution, but rather rules of practice" from which exceptions would always be proper "where there are weighty countervailing policies." 8 Unfortunately, it is not always easy to distinguish between a court's use of standing as a constitutional concept as opposed to a rule of practice and, as the U.S. Supreme Court recently declared, "generalizations about standing to sue are largely useless as such."9

STANDING IN THE FEDERAL COURTS: AN OVERVIEW

Historically, taxpayers have not had standing to challenge allegedly unconstitutional federal expenditures. In Frothingham v. Mellon10 the U.S. Supreme Court ruled that taxpayer interest in federal expenditures is too remote, indeterminate, and minute, and that any injury suffered by one person is shared with taxpayers in general. Thus, an individual taxpayer had suffered no direct injury in fact, but merely a general "injury" and had no standing to sue. In this instance, standing was denied as a matter of self-imposed judicial restraint.

Forty-five years later the Court distinguished Frothingham and ruled in Flast v. Cohen11 that a taxpayer may challenge a government expenditure if he alleges it is part of a federal spending program which exceeds specific constitutional limitations. Referring to the constitutional limitations on federal court jurisdiction, the Flast decision held that "the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an

10 262 U.S. 447 (1923).
adversary context and in a form historically viewed as capable of judicial resolution.\textsuperscript{12} Although the issue litigated was quite specialized, the \textit{Flast} decision has contributed greatly to a liberalization of the law of standing as it affects all litigants.

In 1969, the U.S. Supreme Court again considered the problem of standing when it decided \textit{Jenkins v. McKeithen}\textsuperscript{13} and noted that the concept of standing "is surrounded with the same complexities and vagaries that inhere in [the concept of] justiciability" in general.\textsuperscript{14} The Court reiterated the basic, indispensable requirement for standing, laid down in \textit{Baker v. Carr},\textsuperscript{15} that the party seeking relief must allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."\textsuperscript{16} In \textit{Jenkins}, the Court went on to say that "[i]n this sense, the concept of standing focuses on the party seeking relief, rather than on the precise nature of the relief sought."\textsuperscript{17} In other words, in determining the matter of standing a court must focus on \textit{who} may assert certain contentions rather than on \textit{what} the contentions are.

More recently, in 1970, the U.S. Supreme Court again faced the problem of standing in two cases decided the same day, \textit{Association of Data Processing Service Organizations v. Camp}\textsuperscript{18} and \textit{Barlow v. Collins},\textsuperscript{19} and promulgated a new two-step test for standing: 1. Does the plaintiff allege "that the challenged action has caused him injury in fact, economic or otherwise"?\textsuperscript{20} 2. If such injury is alleged, does "the interest sought to be protected by the complainant [lie] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question"?\textsuperscript{21}

The "zone of interest" requirement of this latest standing "test" is clearly out of step with earlier decisions of the Court and at odds with the entire concept of standing. The fact that a litigant alleges injury in fact under a federal statute due to actions of a government

\textsuperscript{12} \textit{Id.} at 101.
\textsuperscript{13} 395 U.S. 411 (1969). The opinion was shared by only three justices; two concurred in the result and three dissented.
\textsuperscript{14} \textit{Id.} at 423.
\textsuperscript{15} 369 U.S. 186 (1962).
\textsuperscript{16} \textit{Id.} at 204.
\textsuperscript{17} 395 U.S. at 423.
\textsuperscript{18} 397 U.S. 150 (1970).
\textsuperscript{19} 397 U.S. 159 (1970).
\textsuperscript{21} \textit{Id.} at 153.
agency or official is sufficient to satisfy the traditional standing test. A "zone of interest" requirement for standing which goes beyond this operates as a new rule of self-imposed judicial restraint rather than as an obligation of the "cases and controversies" constitutional limitation. Justice Brennan, joined by Justice White, argued vigorously against the "zone of interest" step\textsuperscript{22} because in applying such a test a court must scrutinize relevant statutory materials "not to determine standing but to determine an aspect of reviewability, that is, whether Congress meant to deny or to allow judicial review of the agency action at the instance of the plaintiff."\textsuperscript{23} Since this well-reasoned dissent has not yet been followed by the Court, the "zone of interest" test remains part of the law of standing today.

As administrative law expert Professor Kenneth Culp Davis noted several years ago:

A plaintiff who seeks to challenge governmental action has standing if a legal right of the plaintiff is at stake. When a legal right of the plaintiff is not at stake, a plaintiff sometimes has standing and sometimes lacks standing. Circular reasoning is very common, for one of the questions asked in order to determine whether a plaintiff has standing is whether a plaintiff has a legal right, but the question whether a plaintiff has a legal right is the final conclusion, for if the plaintiff has standing his interest is a legally-protected interest, and that is what is meant by a legal right.\textsuperscript{24}

It is no wonder that the concept of standing is regarded as one of the most amorphous concepts in the field of law. U.S. Supreme Court decisions which seem to promulgate new rules and guidelines are of more practical use in clarifying earlier decisions than in providing substantive rules to be followed by prospective litigants. The Court itself refers to the standing concept as a "complicated specialty of federal jurisdiction."\textsuperscript{25}

Fortunately, most state courts treat standing in a less complex manner. Professor Davis claims that this distinction occurs because federal courts have evolved a law of standing too complicated for them to apply consistently, while state courts usually have perceived the merits of the simple proposition that those adversely affected in fact should be allowed to challenge that action which has injured them.\textsuperscript{26}

\textsuperscript{22} Barlow v. Collins, 397 U.S. 159, 167 et seq. (1970). [This dissent covers both the Data Processing and Barlow cases.] See L. Jaffe, Standing Again, 84 HARV. L. REV. 633 (1971), for Prof. Jaffe's comments on these two most recent cases.


\textsuperscript{24} 3 K. Davis, Administrative Law Treatise 217 (1958) [hereinafter cited as 3 K. Davis]; see generally 3 K. Davis § 22; L. Jaffe, Judicial Control of Administrative Action 459-545 (1965).

\textsuperscript{25} U.S. ex rel. Chapman v. FPC, 345 U.S. 153, 156 (1953).

\textsuperscript{26} 3 K. Davis, 291-92 nn.2 & 3.
The opinion written by Judge Tamm in *Scanwell Laboratories, Inc. v. Shaffer*
provides a fine review of the problem of standing wherein the court concludes that when Congress lays down guidelines to be used in carrying out its mandate in some specific area, a procedure should exist whereby those injured by arbitrary and capricious action of some government agency or official in ignoring those guidelines may "vindicate their very real interests, while at the same time furthering the public interest." Anyone who must face the standing barrier would agree that such a procedure *should* exist, but, too often, standing has been denied litigants because federal courts have found no such procedure.

**STANDING FOR THE ENVIRONMENTAL LITIGANT**

It is easy to see that an environmental litigant, injured by some governmental agency decision, who files a class action in federal court could easily find himself in the unfortunate position of Mrs. Frothingham if the U.S. Supreme Court had not chosen to expand and liberalize the law of standing in recent years. Even now, a challenged agency or official will undoubtedly raise the standing issue along with the traditional claim of sovereign immunity.

Though the environmental litigant must be cognizant of the problems which standing may present, the U.S. Supreme Court may have provided guidance through dictum when it declared, regarding the question whether the interest alleged by a litigant is arguably within a federal statute's zone of interests:

> That interest, at times, may reflect "aesthetic, conservational, and recreational" as well as economic values. [Citations omitted.] . . . We mention these non-economic values to emphasize that standing may stem from them as well as from . . . economic injury . . . .

The Court further stated that "[w]here statutes are concerned, the trend is toward enlargement of the class of people who may protest

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28 *Id.* at 864.

Because the court has found a basis of standing to bring a non-class representation action on behalf of a public interest the court is not required to find a class action is maintainable. *The requirement that a party be a member of the class it allegedly represents may not be set aside.* [Emphasis added.] 1 E.R.C. at 1641.

[Note: B.N.A.'s Environment Reporter: Decisions are cited as E.R.C.]
administrative action.\textsuperscript{31} The question remains, who comprises these classes of people who may protest?

The greatest conservation or environmental victory of the 1960’s occurred in the case of \textit{Scenic Hudson Preservation Conference v. FPC.}\textsuperscript{32} This case, decided long before several recent U.S. Supreme Court decisions which have \textit{liberalized} the law of standing, held that the Scenic Hudson Preservation Conference (an unincorporated association consisting of a number of non-profit conservationist organizations) and several towns \textit{each had standing} to challenge a decision of the Federal Power Commission which would have allowed construction of a major hydroelectric project on the west side of the Hudson River at Storm King Mountain in New York. If allowed to proceed, this project would have destroyed the unique aesthetic beauty and historical significance of an area widely regarded as “one of the finest pieces of river scenery in the world.”\textsuperscript{33} In granting standing, the court decided that to insure adequate protection of the public interest in the aesthetic, conservational, and recreational aspects of power development by the Commission, “those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of ‘aggrieved’ parties”\textsuperscript{34} as provided in the Federal Power Act. The court’s ruling required the Federal Power Commission to consider viable alternatives, the impairment of scenic and recreational values, effects on wildlife, and the like before granting a license under the Federal Power Act.

While the principle of \textit{Scenic Hudson} seems quite clear, subsequent cases seem to have been decided on a case by case basis, each one requiring analysis of its relevant facts. This is a result of the difficulty involved in establishing any clear guidelines in this perplexing area of standing for environmental litigants as well as the reluctance of other jurisdictions to follow the lead of the U.S. Court of Appeals for the Second Circuit. One should note that several cases decided before \textit{Data Processing} and \textit{Barlow} speak of a litigant’s “interest” in the environmental issue in question as providing a basis for standing once an injury in fact (an injury affecting an individual or group) is alleged. Such a personal interest in the integrity of the human environment should not be confused with the current “zone of interest” of a relevant statute provision of the current test for standing.

\textsuperscript{31} \textit{Id.} at 154.
\textsuperscript{32} 354 F.2d 608 (2d Cir. 1965), 1 E.R.C. 1084; \textit{cert. denied} 384 U.S. 941 (1966).
\textsuperscript{33} 354 F.2d at 612.
\textsuperscript{34} \textit{Id.} at 616. The court was referring to § 313(b) of the Federal Power Act, 16 U.S.C.A. § 825l(b) (1960).
Following the *Scenic Hudson* precedent, *Road Review League, Town of Bedford v. Boyd* granted standing to a town, a civic association of residents of the town, two wildlife sanctuaries whose property would be taken for the road, and a non-profit organization primarily concerned with community problems involving the location of roads. Although the plaintiffs were not formal parties to any of the administrative proceedings, the court concluded that the terms of the Administrative Procedure Act as it related to sections of the Federal Highway Act were "sufficient under the principle of *Scenic Hudson* to manifest a congressional intent that towns, local civic groups and conservation groups are to be considered 'aggrieved' by agency action which has allegedly disregarded their interests.

More recently, in *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, the court granted standing to a conservation group because it was "a party who has demonstrated a continuing conservation aesthetic interest in the welfare of the Otter Creek Basin." In this case, the plaintiff alleged that the government agency failed to consider aesthetic and conservational purposes set forth in the several congressional acts applicable to the defendant's application for a permit to prospect for coal on federal lands.

In another New York case, decided before *Data Processing and Barlow*, the court inadvertently applied a "zone of interest" test in a positive rather than negative manner. The Citizens Committee for the Hudson River Valley (an unincorporated association of citizens residing near a proposed expressway), the Sierra Club (a non-profit national conservationist organization), and the Village of Tarrytown brought action against the U.S. Secretary of Transportation and others to enjoin construction of an expressway in *Citizens Committee v. Volpe* and were adjudged to have the requisite standing to maintain the litigation. The court ruled that when statutes involved in a controversy are themselves concerned with the protection of natural, historic, and scenic resources (the statute's "zone of interest"), then a "congressional intent exists to give standing to groups interested in these factors and who allege that these factors are not being properly considered by the agency."
In affirming this district court opinion, the circuit court held that the plaintiffs had evidenced the seriousness of their concern with local natural resources by the fact that they organized for the purpose of cogently expressing that concern, that the intensity of their concern was apparent from the great expense and effort they undertook to protect the public interest they believed threatened by the official action of state and federal governments, and that they "proved the genuineness of their concern by demonstrating that they [were] 'willing to shoulder the burdensome and costly process of intervention' in an administrative proceeding."\(^4\) In effect the court ruled that the concern evidenced by the plaintiffs in the local environment was so great that an injury to that environment would cause injury in fact to the Citizens Committee and the others.

In a Colorado district court action, *Crowther v. Seaborg*,\(^4\) a broad grant of standing was made to persons who either owned property in the vicinity of a proposed nuclear detonation site (one "resident" lived over thirty miles from the proposed site) or were merely occasional users of the area. Standing was also granted to a non-profit public benefit organization, dedicated to the preservation of open space in Colorado, to challenge the right of the Atomic Energy Commission to authorize use of the area in question for nuclear testing. Although the petitioners relied upon no specific federal statutes in support of their claims, the court ruled that it need cite no authority in support of the proposition that the law protects interests of persons in their health and safety and that the logical connection between plaintiffs' "status" as property owners and occasional residents in the area of the proposed site and the "threat" to their health and safety provided a sufficient basis for an actual controversy.\(^4\)

The District of Columbia Court of Appeals has held, in *Environmental Defense Fund v. Hardin*,\(^4\) that the consumers' interest in environmental protection may properly be represented by a membership association with an organizational interest in the problem. In this instance, five conservation groups which engaged in activities relating to environmental protection (the Environmental

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\(^4\) 425 F.2d at 103.
\(^4\) 312 F. Supp. 1205 (D. Colo. 1969), 1 E.R.C. 1199; aff'd 415 F.2d 737 (10th Cir. 1969).
\(^4\) 312 F. Supp. at 1215.
Defense Fund, National Audubon Society, Sierra Club, West Michigan Environmental Action Council, and the Izaak Walton League of America, *intervenor*) challenged the U.S. Department of Agriculture's certification of a pesticide, DDT, and requested that its use be suspended.

Other environmental litigants have passed the test of standing in a host of cases throughout the United States, though no common legal principle or theory of statutory construction exists in all of them.\(^4\) Because of these favorable decisions, it should be well established that the law of standing for environmental litigants is at least as broad as has been expressed in the preceding cases. Furthermore, a demonstrated interest in environmental protection and preservation on the part of individuals or organizations should constitute a sufficient personal stake in the outcome of a case for them to suffer "injury in fact" and have standing as "private attorney generals" to challenge activities they feel are detrimental both to their interests and the interests of the general public. If this analysis were so, standing would be readily available for the environmental litigant seeking to challenge governmental action and the problem of standing would have been overcome. Though various environmental organizations have been granted standing and many cases are presently pending which involve environmental issues,\(^4\) the standing barrier remains.


Other cases pending in federal courts where standing is a major issue include: Alpine Lakes Protection Society v. Hardin, Civ. No. 8885 (W.D. Wash. *filed* April 14, 1970) [several environmental groups, including the Sierra Club, seek to void a contract granted by defendants for construction of a heavy duty mining access trail in the Snoqualmie National Forest]; Association of Northwest Steelheaders v. Corps of Eng'rs, Civ. No. 3362 (E.D. Wash. *filed* March 11, 1970) [eight sportsmen and some conservation groups seek a permanent injunction restraining defendants from building two dams on the Snake River]; Stewart v. Resor, Civ. No. 70-551 (E.D. Penn. *filed* Feb. 24, 1970) [groups and individuals, including the Sierra Club, seek a permanent injunction to restrain defendants from interfering with Tinicum Marshes and Wildlife Preserve during construction of Interstate Highway 95]; Ottinger v. Penn. Central,
Recently, the U.S. Court of Appeals for the Ninth Circuit heard *Sierra Club v. Hickel* (now *Sierra Club v. Morton*) and decided that the Sierra Club had no right to be in court in regard to matters concerning the Sierra-Nevada Mountains. This decision has placed the Ninth Circuit squarely in conflict with decisions in several other circuits and has created a confusion which, hopefully, will be resolved when the U.S. Supreme Court hears the case during the 1971 Fall Term. Presently, however, the Sierra Club, which was granted standing nationally to challenge the use of DDT and was granted standing in Colorado to protect a forest and in New York to preserve a scenic-historical area, has no right to be in court in the very area where the club was founded and wherein it carries on its principal activities. Further irony is provided by the fact that the Sierra Club, with the advice of its founder John Muir, actually established some of the present boundary lines of the Sequoia National Park, a portion of which is involved in the *Sierra Club v. Morton* controversy. Of course, there are other cases on record in which standing has been denied to environmental litigants, and it seems reasonable

68 Civ. 2838, 68 Civ. 4353 (S.D.N.Y. filed July 8, 1969) [action by N.Y. State Congressman, sportsman's group, and others to restrain Penn. Central from causing or permitting pollution of the Hudson River by effluents discharged from defendant's rail yards at Harmon, N.Y.—action stayed pending outcome of Penn. Central bankruptcy hearings].


51 In “distinguishing” many of the earlier decisions which granted standing to environmental litigants, the Ninth Circuit noted that in every case the environmentalists, who asserted no economic injury, were joined with others who did claim economic loss. Because the Sierra Club asserted no economic injury in the *Hickel* case and did not join with litigants who claimed some economic loss, the court ruled the Club had no standing. This twisted bit of judicial “reasoning” fails to take into consideration the basic fact of pleading which requires each potential litigant to meet the standing barrier individually. A mere aggregation of plaintiffs does not provide them all with sufficient injury to meet a standing test. A local resident or local property owner (which the Ninth Circuit claimed the Sierra Club should have joined with in the suit) would not have standing unless injury were shown. In each environmental case which the Ninth Circuit “distinguished,” standing was granted to the environmental plaintiffs after a careful judicial analysis of *their* claims. Standing was granted the environmentalists because of the claims *they* asserted, not merely because other parties to the action claimed economic loss. If any environmental plaintiff did not have standing, he should have been severed from the case, yet this did not happen.

For further critical analysis of the Ninth Circuit’s decision on standing in the *Hickel* case, see 6 GONZAGA L. REV. 328 (1971).


55 For example Magnaghi v. Volpe, Civ. No. 70-128 (S.D. Fla. dismissed April 30, 1970) [denying standing to an adjacent property owner representing a class who
to assume that there have been numerous cases dismissed on the standing issue at the pleading stage.

In their brief as *amicici curiae* before the U.S. Supreme Court in support of the Sierra Club’s *petition for certiorari* in the *Hickel* case, the Wilderness Society, Izaak Walton League, and Friends of the Earth point out some of the grave problems which might occur if environmentalists lack standing. Because environmental cases often raise issues which either do not involve or only indirectly involve direct users of a particular area, the protection of wilderness areas, the survival of rare and endangered species, and the preservation of wildlife refuges, the integrity of natural rivers and the natural or scenic aspect of landscape all present standing problems to prospective litigants. In situations involving environmental abuses, persons and groups whose purpose is protection and preservation of the environment are the only ones who suffer the “injury in fact” sufficient to undertake litigation.

Those who bring the suits may incidentally be users in that they or their members have walked, watched and beheld the subject of the litigation. However, such use is often incidental to the larger purpose to protect the integrity of the environment. And if the only persons with standing are users no one will have standing where there is no present use (such as a suit to preserve the wilderness) or no use is possible (such as a suit to prevent the chemical poisoning of eagles).[[56]](footnote)

Furthermore, “users” themselves may be unwilling to sue if they are more concerned with possible economic benefits from a proposed action than they are with the resulting environmental loss. Perhaps local and national conservation organizations are the only parties who will “represent the national, as opposed to local, interest by opposing development.”[[57]](footnote)

**Effect of Federal Legislation**

*Administrative Procedure Act*

The whole area of standing was greatly aided by passage of the *Administrative Procedure Act*[[58]](footnote) [hereinafter referred to as APA]. As a result of the APA, “[a] person suffering legal wrong because of agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”[[59]](footnote) Before reaching the merits

sought a permanent injunction prohibiting operation of a jet training airport near Everglades National Park].


[[57]](footnote) *Id.*


in *Scanwell Laboratories, Inc. v. Shaffer*, the Circuit Court of Appeals for the District of Columbia conducted an exhaustive review of the APA's legislative history. The court then held that when a person makes a *prima facie* showing alleging arbitrary and capricious abuses of discretion on the part of an agency or official, that person has standing to sue under section 702 of the APA.

Although section 702 refers to parties "aggrieved" rather than "aggrieved in fact" (analogous to the "injured in fact" test set forth by the U.S. Supreme Court in the *Data Processing* and *Barlow* cases), the legislative history of the APA supports the contention that the words "in fact" were implied, since language to that effect appears in the reports of both the Senate and House Committees. The Senate Report states that "[t]his subsection [*§ 702*] confers a right of review upon any person adversely affected *in fact* by agency action or aggrieved within the meaning of any statute." Though this exact language did not appear in the statute as finally enacted, the U.S. Attorney General stated that the language of the Senate Document was reflective of existing law. Lending further support to the contention that the APA should be liberally interpreted in favor of those who propose to litigate under its terms is the statement of the U.S. Supreme Court in *Barlow v. Collins* that it is "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent that the courts should restrict access to judicial review." It seems clearly the intent of Congress that the APA apply to all situations where a person *aggrieved in fact* seeks judicial review regardless of a lack of legal right or specific statutory language granting judicial review.

Section 701 of the APA lists those actions which are not reviewable and includes situations where "statutes preclude judicial review" as well as those where "agency action is committed to agency discretion by law." The U.S. Court of Appeals for the

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60 424 F.2d 859 (D.C. Cir. 1970).
61 *Id.* at 869.
64 *Id.* at 310.
66 *Id.* at 167. Stated previously and elaborated upon in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967), which supports the contention that the APA's "generous review provisions" must be given a "hospitable interpretation." *See also Rusk v. Cort*, 360 U.S. 367, 379-380 (1962).
Sixth Circuit addressed itself to the question of agency discretion in *Knight Newspapers, Inc. v. U.S.*, and ruled:

A court may not review a decision committed to the discretion of an agency pursuant to a permissive type statute, but may do so where the decision was made pursuant to a mandatory type statute even though the latter decision involves some degree of discretion.

Many of the congressional acts which environmentalists call upon in support of their claims of improper agency action contain a list of *mandatory* factors to be considered by the agency prior to its action. Since these factors are sometimes ignored, the challenged agency may become subject to judicial review. In reference to this point, the court in *Citizens Committee v. Volpe* held:

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

The circuit court, in affirming, elaborated upon rights of environmental litigants to invoke review provisions of the APA, holding that there can no longer be any question that Congress intended the APA to guarantee comprehensive review of a “broad spectrum of administrative actions,” which include those made reviewable by specific statutes as well as those actions for which no review is available under any other statute.

Indeed, many other courts have found environmental litigants to be “aggrieved” persons under the terms of the APA, but the

69 395 F.2d 353 (6th Cir. 1968).
70 Id. at 358.


72 302 F. Supp. at 1092 (emphasis added).
74 Environmental Defense Fund v. Hardin, 428 F.2d 1093, 1097 (D.C. Cir. 1970); West Virginia Highlands Conservancy v. Island Creek Coal Co., Civ. No. 70-82E (N.D.
Ninth Circuit held that the Sierra Club was not sufficiently "aggrieved" or "adversely affected" to qualify as a litigant under the APA's generous provisions. The court ruled that "[t]he right to sue does not inure to one who does not possess it, simply because there is no one else willing to assert it."

Fortunately for those groups or individuals who seek preservation and restoration of environmental quality, the Ninth Circuit represents a minority view. However, it is a view that will continue to inhibit protection of the environment within the Ninth Circuit's jurisdiction which includes almost eighty percent of all federally-owned land in the United States. Hopefully, as Professor Davis urges, the U.S. Supreme Court will make a full-scale inquiry into the legislative history of the APA's provisions on standing when it decides the Sierra Club v. Morton case and will rule that the APA applies to all situations where a party who is in fact aggrieved seeks judicial review.

**National Environmental Policy Act**

Section 102 of the National Environmental Policy Act of 1969 (hereinafter referred to as NEPA) requires federal agencies to prepare an environmental impact statement for any "major" agency actions significantly affecting environmental quality. There is strong support for the proposition that this section acts as an amendment to all existing federal legislation to the effect that all "policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act."

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78 Sierra Club v. Hickel, 433 F.2d 24, 32 (9th Cir. 1970).

79 Id.

80 As one might imagine, there are considerable differences of opinion between environmentalists and federal agencies as to what constitutes such a major action that an impact statement must be prepared.

R. Frederic Fisher, a San Francisco attorney who specializes in administrative and conservation law and is a director of the Sierra Club Legal Committee, suggests that environmentalists should present the following argument:

Any time a federal statute grants discretion to a federal agency, either to license a private activity or to embark on a federal project or as to how a federal project should be administered or run or go forward, that discretion must be exercised consistently with NEPA policy to the fullest extent possible. If NEPA does not require this conclusion, what did Congress mean, then, when it said "to the fullest extent possible?" 82

Using such a rationale, it should be possible to secure judicial review of matters committed to agency discretion by law at least to the extent that an agency decision has disregarded any NEPA requirements.

The theory that NEPA leads to substantive conclusions rather than a mere requirement that federal agencies perform cursory environmental studies is given additional support in provisions of the Guidelines for Federal Agencies under the National Environmental Policy Act 83 (issued by the Council on Environmental Quality, the "enforcement agency" created by NEPA). The guidelines require that agencies considering major actions which will significantly affect the environment conduct environmental studies (pursuant to preparation of the NEPA-required impact statement) in such a way as to insure "that adverse effects are avoided and environmental quality is restored or enhanced, to the fullest extent practicable." 84 It is quite possible (since NEPA is presently being strengthened through judicial interpretation) that courts will decide this language imposes a requirement on agencies to necessarily follow the conclusions reached by the studies NEPA forces them to make which have the least adverse effect on the environment.

Significantly, sections 102A, C, and D of NEPA 85 have already become the subjects of successful litigation against noncomplying agencies, 86 and NEPA provisions have been successfully pleaded

85 42 U.S.C.A. §§ 4332(A), (C) & (D) (Supp. 1971).
86 Calvert Cliffs Coordinating Committee, Inc. v. AEC, Nos. 24,839 & 24,871
before one court to provide review of an agency contract entered into before the Act's passage. On the other hand, the court in *Pennsylvania Environmental Council v. Bartlett* concluded that NEPA did not apply to a contract for a federally-funded project signed prior to the passage of NEPA. Section 11 of the *Guidelines* and the intent of NEPA, however, support the conclusion that the Act applies retroactively.

The environmental litigant has at his disposal, therefore, a congressionally-inspired tool in the form of NEPA which will become whatever the courts, agencies, and concerned environmentalists shape it into. The Act has exciting and far-reaching potential for interpretation into an "environmental bill of rights."

**SOVEREIGN IMMUNITY**

Most agency defendants in environmental lawsuits automatically raise the defense that the action is an unconsented-to suit against the sovereign, while challenging the court's jurisdiction over other substantive matters at the same time. The U.S. Supreme Court has held that an appropriate inquiry into the matter of sovereign immunity does not involve questions of the substance of the cause of action at all, since such an inquiry "confuses the doctrine of sovereign immunity with the requirement that the plaintiff state a cause of action." In determining the question of sovereign immunity the court must ask only whether it is deprived of personal jurisdiction over the defendants because of their relationship to the sovereign. The question of personal jurisdiction must be considered thoroughly and carefully, for the U.S. Supreme Court ruled long ago in *U.S. v. Lee* that immunity seems opposed to all the principles upon which the rights of the citizen, when in conflict with acts of the government, must be determined. The Court reasoned that when such conflict occurs, the only legal protection a citizen has for his rights which have been invaded by officers of the government, professing to act in its name, is the review offered by judicial tribunals. The other alternative the citizen has is resistance, which may amount to a crime.

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91 106 U.S. 196 (1882).
92 *Id.* at 218-19.
Typically, an agency or official will file a motion to dismiss upon the ground that the suit is in substance and effect one against the United States, which has not consented to be sued or waived its immunity from suit. The U.S. Supreme Court, however, has declared that there are two well-recognized exceptions to the doctrine that "the sovereign is immune." Those exceptions are (1) action by officers beyond their statutory powers and (2) even though within the scope of their authority, the powers themselves or the manner in which they are exercised are constitutionally void. [Citation omitted.] In either of such cases, the officer's action "can be made the basis of a suit for specific relief against the officer as an individual . . . ." [Citation omitted.]

In following this reasoning, it seems evident that the allowable scope of judicial inquiry into sovereign immunity is limited to the allegations stated upon the face of the complaint itself and that the inquiry must extend only into the jurisdictional basis for the litigation, not into the merits of the cause of action as a whole.

In Carter v. Seamons, the Fifth Circuit Court of Appeals declared that courts have adopted the procedure, for jurisdictional purposes, of accepting at face value the averments of the complaint unless they are so patently inconsequential or frivolous as to afford no possible basis for jurisdiction, thus avoiding a decision on the merits under the guise of resolving preliminary jurisdictional issues. In the Carter case, the court found the claims to be affirmative and explicit and not insubstantial or frivolous. Accepting the plaintiff's contentions as true, merely for jurisdictional purposes, the court ruled that the case, sub judice, was not against the United States, but merely an action to compel a government agency official to perform a clear legal duty. Thus, the defense of sovereign immunity was not allowed.

Basically, court decisions have held that when an administrator is accused of an abuse of discretion or of acting ultra vires, sovereign immunity cannot be raised successfully as a defense, for the person is not acting in behalf of the sovereign, but merely as an individual abusing the powers granted him by the sovereign.

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95 411 F.2d 767 (5th Cir. 1969).
96 Id. at 770.
97 See also Parker v. U.S., 307 F. Supp. 684, 309 F. Supp. 593 (D. Colo. 1970) [holding that an administrator is bound by his agency's own regulations]; Abbott
Another basis for rejection of the defense of sovereign immunity is provided for claims which are based upon jurisdiction under the Administrative Procedure Act. The Fifth Circuit Court of Appeals ruled in Estrada v. Ahrens that when Congress provided judicial review in actions brought by "any person adversely affected or aggrieved by any agency action," it expressly authorized suits which, if ordinary tests were applied, would be barred as unconsented-to suits against the government and that "[t]he Act thereby makes a clear waiver of sovereign immunity in all actions to which it applies." Congress' declaration that judicial review of agency action is available to those aggrieved thereby leads to the inescapable conclusion that there exists a congressional intent to waive the defense of sovereign immunity. Any other interpretation of the Administrative Procedure Act makes its review provisions chimerical.

Although the defense of sovereign immunity appears in almost all cases where environmentalists challenge agency action, most courts realize the necessity of making agency decision-makers responsive to challenges by a concerned citizenry and reject agency attempts to hide behind the sovereign's cloak. Hopefully, the thoughts which Justice Douglas expressed in his dissent in Malone v. Bowdoin will attain universal acceptance in the U.S. courts: "Sovereign immunity has become more and more out of date as the powers of the Government and its vast bureaucracy have increased." As rejection of this defense becomes more widespread, we may look for agency decisions which, because of the spectre

89 296 F.2d 690 (5th Cir. 1961).
90 Id. at 698. See also Adams v. Witmer, 271 F.2d 29, 34-35 (9th Cir. 1958); Powelton Civic Home Owners Ass'n v. U.S. Department of HUD, 284 F. Supp. 809, 834 (E.D. Penn. 1968); 3 K. Davis 434-47 n.2; H. Hart and H. Wechsler, The New Sovereign Immunity, 81 HARV. L. REV. 929 (1968).
92 But see Magnaghi v. Volpe, Civ. No. 70-128 (S.D. Fla. dismissed May 7, 1970) [dismissed due to lack of standing as well as sovereign immunity]. Though many courts have held that a waiver of sovereign immunity occurs when a state becomes active in a field subject to federal regulations, see Pennsylvania Environmental Council, Inc. v. Bartlett, 315 F. Supp. 238 (M.D. Penn. 1970) [dismissing the complaint only as to state secretary of highways, several contractors and other instrumentalities of the Commonwealth of Pennsylvania on sovereign immunity grounds].
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of judicial rebuff, are more responsive to the public good rather than to the special interests of a select few. Presently, however, sovereign immunity remains as another threshold barrier to judicial review of agency action which environmentalists must overcome.

CONCLUSION

Recent U.S. Supreme Court decisions have brought litigants a long way from a narrow standing test based primarily on a "legal interest" concept. There is hope that future decisions of the Court will accept the position of Justices Brennan and White that "injury in fact" should be the sole test of a federal court litigant's standing. Until such a decision is made, however, we must stumble through a morass of cases which, while they provide clues as to how to present allegations in support of a right to standing, cannot provide assurance that an environmental litigant will have standing to adjudicate very real injuries to the interests of the group he represents or the public in general. Imposition of the additional "zone of interest" test causes needless confusion.

Professor Davis suggests an alteration of the "zone of interest" test that would make it a useful tool rather than a burden. He suggests that "[a] person whose legitimate interest is injured in fact should have standing unless congressional intent is discernible that the interests he asserts is not to be protected." If the Davis view were adopted, plaintiffs would not be required to plead that they fall within a statute's purview, but the burden would be shifted to the defendant to assert that the statute was not intended to provide review. A "test" thus phrased in positive terms would be well suited to the legislative history of the Administrative Procedure Act and would help to eliminate the type of "forum shopping" which forces a litigant to challenge government agencies in the more favorable jurisdiction of the U.S. Circuit Court of Appeals for the District of Columbia rather than in federal courts within the domain of more rigid or "hostile" circuits, such as the Ninth Circuit.

The object of the law is, or should be, to allow the airing of grievances as it administers justice. Present complexities which surround the amorphous concept of standing create artificial barriers to justice which should be removed. Once a person or group has alleged that his legitimate interest has been injured in fact by improper action of an agency or official, he should be granted

standing to pursue a judicial determination of the merits of his allegation in the federal courts.

One might ask what is a "legitimate interest" of an environmental litigant or how such a person or group may be "injured in fact" when no monetary loss is alleged. A businessman is "injured in fact" when agency action causes him economic loss. Similarly, a local resident or property owner may suffer economic loss when adversely affected by agency decisions. The environmental litigant suffers no such economic damage, yet as an individual or representative of a group with an interest in the protection and preservation of the human environment, he is "injured in fact" when the integrity of our environment is degraded. In truth, the entire nation is "injured" when environmental degradation occurs, but a person or group with an avowed purpose or "interest" in the protection of the environment for the enjoyment of present and future generations suffers most acutely. Justice requires that the environmental litigant be heard in our courts.

In the same interest of justice, the Administrative Procedure Act and judicial decisions should resoundingly defeat the claim of sovereign immunity whenever it is raised as a defense in litigation which alleges illegal agency or official action.

As more and more of our lives and our environment are affected by federal agency decisions, it becomes increasingly important that individuals and groups have the right to appear in court to challenge allegedly illegal agency actions which have caused them injury. The ideal of a bureaucracy which is responsive to the public it serves demands no less. It will not be sufficient in future years to try to rectify today's mistakes; we must act today to assure that the mistakes are not made. Judicial review of government action is one sure method of preventing mistakes.

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