# CLOSING THE DOORS OF JUDICIAL REVIEW

by Daniel Muller

## Introduction

The concept of "standing to sue" is an important aspect of the "case or controversy" limitation on federal jurisdiction within Article III of the Constitution. Standing requirements assure that only persons with a direct stake in the outcome of a dispute may invoke the jurisdiction of a court to resolve it.[1] Standing maintains the separation of powers among the branches of government by limiting the involvement of courts in legislative and executive actions.[2] While it applies to every subject matter of litigation, standing has rarely played as decisive a role in shaping a body of law as in the environmental field. According to one author, "the expansion of standing...has made possible the veritable revolutions that have occurred in environmental law" over the past two decades.[3]

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The recent Supreme Court decision Lujan v. National Wildlife Federation, 110 S.Ct. 3177, 20 ELR 20962 (1990) poses a serious threat to the "revolution". Justice Scalia, Lujan's primary author, denied standing to environmental plaintiffs challenging the Bureau of Land Management's (BLM) method of handling public lands. Justice Scalia's denial of standing largely reflects his vision of the limited role of the judiciary in reviewing administrative programs, a job he feels is better performed by the legislative branch. As one commentator noted, "the case offered the chance to disavow (liberal standing cases such as) United States v. Students Challenging Regulatory Agency Procedures (SCRAP I) 412 U.S. 669 (1973), and to set more stringent standards for demonstrating the injury-in-fact requirement of standing. Although the decision shocked many (observers), the Court's ruling reflects a trend in lower courts requiring plaintiffs alleging injury to environmental interests in public lands to establish a direct connection between the use of the lands and the governmental action challenged."[4] The decision raises serious questions regarding the shape of future environmental litigation. Indeed, the environmental citizen suit movement is entering the most difficult phase in its brief history.[5]

## Standing To Bring Suit: A Primer

Standing requirements can be crudely simplified as follows: Article III demands that a plaintiff establish an actual injury, caused by the agency action challenged, and redressable by a favorable decision.[6] Further, prudential considerations dictate that a plaintiff must assert her own legal interests rather than those of a third party. The plaintiff's complaint must fall within the "zone of interests" to be protected by the statutory or constitutional guarantee in question. Finally, the interests must be specific, not "abstract questions of wide public significance" which amount to "generalized grievances" most appropriately addressed by legislators.[7]

Congress may eliminate prudential requirements altogether and confer standing by statute, subject only to the injury-in-fact requirement of Article III. It has frequently done so, particularly in environmental statutes, through "citizen suit" provisions.[8] However, because the statutes allegedly violated by the BLM in Lujan do not contain citizen suit provisions of their own, the plaintiff environmental organization relied on the general statutory standing provisions of the Administrative Procedure Act (APA).[9] To have standing, §10(a) of the APA requires a plaintiff to show that (1) there is a final agency action, and (2) the action injures or

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threatens to injure the plaintiff. Thus, the APA may potentially grant standing to plaintiffs for violations of environmental statutes that do not have citizen suit provisions, from the National Environmental Policy Act (NEPA) of 1969 to the Mining Law of 1872.[10]

Before 1970, courts generally conferred standing only to those who could show harm to their economic interests. Beginning in the early 1970s with Sierra Club v. Morton[11], however, the Supreme Court recognized that non-economic, widely-shared injury to environmental, recreational, and aesthetic interests could be sufficient to support standing. In Morton, the plaintiff environmental organization challenged the U.S. Forest Service's proposal to allow ski resort development in the Mineral King Valley of California's pristine Sequoia National Forest. Interpreting Article III's "case or controversy" requirement, the Supreme Court concluded that, while injury to the forest was likely, and perhaps illegal, standing to sue should be denied to these plaintiffs because the "injury in fact" prong requires more than an injury to a merely cognizable interest. Rather, the party seeking review must be among the injured. To be among the injured, the Court required that Sierra Club members actually use the resources in question. Sierra Club failed to allege such use.[12]

Morton was seen by environmentalists as a victory disguised as a defeat; although the plaintiffs had failed to establish use of the threatened resources, the Supreme Court had opened the courts to environmental plaintiffs who could establish such use.[13] Indeed, fishing, hiking, camping, nature studies, and other recreational activities have subsequently been deemed to constitute the sorts of uses Morton envisioned.[14] Similarly, the Supreme Court followed Morton with a generous definition of how close to the affected area a plaintiff's use had to occur. In U.S. v. SCRAP (SCRAP I) (1973) a student group challenged an agency order allowing railroads to collect a surcharge that would negatively affect recycling and induce littering in parks. The Supreme Court held that the plaintiff's allegation that its members used forests, streams, mountains, and other resources for recreation in the Washington, D.C. area was sufficient to confer standing.[15]

Thus, under Morton and SCRAP I, plaintiff's use of an area in the vicinity of the challenged agency action would likely be sufficient to confer standing. In essence, plaintiffs could seek review of executive branch actions of widespread application by alleging injury to a generalized interest shared by all. Morton and SCRAP I inspired the wave of environmental litigation that has occurred over the past two decades; until recently they presented the most important articulation of environmental standing requirements where no citizen suit provision or other explicit statutory grant of standing is available. However, by opening the courts to environmental plaintiffs who can show mere use of an area in the vicinity of an agency action, the Supreme Court exposed many administrative decisions to challenge. According to one author, "the effect of these two cases was to subject almost every major, and minor, federal action to a possible legal challenge, thereby putting federal judges in the position of potentially reviewing most administrative decisions."[16] The separation of powers implications of liberal environmental standing doctrine did not escape Justice Scalia's attention.

## Lujan and Its Implications

Against this backdrop of liberal standing requirements came the Lujan[17] decision. In Lujan, the environmental plaintiffs challenged the validity of the BLM's "land withdrawal review program."[18] Pursuant to the land withdrawal review program, the BLM engaged in a systematic review of federally-owned lands which led to cancellation of protective classifications of the lands, such that a cancellation/reclassification would effectively open up the lands to activities (such as mining) that previously were prohibited or restricted. As a result of this

program, 180 million acres of public lands were opened to such potentially damaging activities. National Wildlife Federation (NWF) alleged that these BLM actions violated NEPA and the Federal Land Policy and Management Act of 1976[19] because the agency failed to adequately consider the environmental impacts of their land withdrawal decisions or to provide appropriate public participation in the decisionmaking process. NWF charged that although Congress intended the program to be a comprehensive review of the legal status of public lands necessary to achieve better land management, the BLM's sole motive was to remove roadblocks to mining and other commercial uses.

At the United States District Court for the District of Columbia BLM challenged NWF's standing and won summary judgment[20], only to be overturned by the appellate court[21]. The court of appeals held that summary judgment was precluded by material issues of fact as to whether affidavits of NWF members had demonstrated injury-in-fact in sufficient detail to grant NWF standing. In short, the district court was required to consider the case on its merits. The Supreme Court granted certiorari and reversed the court of appeals. The Court found that the affidavits of NWF members failed to sufficiently demonstrate that the members' interests were actually affected by the BLM actions. The Court also addressed the issue of final agency action. The majority concluded that the program did not constitute a final agency action for the purposes of judicial review under the APA. In the absence of standing and final agency action, judicial review was unwarranted.[22]

The plaintiffs' claim had been based on the use of land in the vicinity of unspecified portions of large tracts of land upon which government action might occur in the future.[23] In its discussion of standing, the Court reasoned that the two NWF affidavits failed to identify specific lands used by the affiants. This failure made it impossible for the Court to determine whether the affiants used the adversely affected lands. Injury could not be sufficiently established unless the affiant identified use of a specific land subject to the BLM actions at issue, and the court is not free to presume such usage for the purpose of determining standing under the APA. Thus, the majority concluded that the imprecision of the NWF affidavits resulted in failure to establish injury-in-fact.

In a significant, but relatively unnoticed, passage in Lujan the Supreme Court noted that SCRAP's expansive expression of standing has never since been emulated by the Supreme Court. The Court, in turn, discounted its SCRAP ruling, by limiting it to its facts. It further distinguished SCRAP on procedural grounds; SCRAP involved a motion to dismiss on the pleadings under Federal Rule of Civil Procedure 12(b), which requires less specificity regarding alleged injury, whereas a summary judgment under Rule 56 requires greater specificity.[24]

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Regarding the issue of whether the BLM program constituted a final agency action, as mentioned above, the Court again ruled in the agency's favor. The Court reasoned that agency action taken pursuant to an informal program -- a program which the agency has not set forth in a formal policy -- does not constitute final agency action. Rather, final agency action is limited to action taken pursuant to a specific regulation or order promulgated by the agency. In Justice Scalia's startling words, it was "impossible" for the NWF affidavits to support standing to challenge the entirety of the land-withdrawal review program.[25]

Under this analysis then, agency programs are per se non-reviewable. They can be challenged only on a case-by-case basis, and only when an action resulting from that program can be directly traced to a specific agency regulation or order. According to the Lujan opinion, flaws in agency programs should be redressed by the agency itself or by Congress. The Court described the challenged program as "the continuing (and thus constantly changing) operations of the BLM in reviewing withdrawal revocation applications and the classifications of public lands and developing land use plans as required by the FLPMA."[26]

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Justice Scalia based his rejection of standing upon the assertion that the role of the courts is not to assure that legislative promises become reality. Instead, governmental mischief whose effects are widely distributed is more readily remedied through the political process. Such mischief does not call into play the distinctive function of the courts as guardians against oppression of the few by the many. In sum, NWF had asked the wrong branch of government for help.[27]

However, the standing requirements articulated in Lujan seem inconsistent with previous precedent in environmental law. The Court abandoned SCRAP's "use of land in the vicinity" basis for standing. Yet it may still be possible for environmental organizations to limit the significance of this obstacle by simply asserting use of specific lands in their complaints. The Lujan holding may create a barrier, however, where the environmental organization plaintiff is unable to locate a member who uses the threatened resource, or where the adverse environmental impact is widespread or diffuse.[28] In short, although the Sierra Club v. Morton formula has not been materially changed, recent federal court rulings[29] culminating in Lujan have interpreted the requirements more stringently; there is a new emphasis on specificity.[30]

The Lujan ruling seems counter to congressional intent, as well. The impetus behind federal legislation relating to protection of the environment was the realization that state legislation and the common law were insufficient to address the pressing health risks posed by pollution. Likewise, Congress recognized that the steady destruction and exploitation of public lands threatened the public health and welfare as well as the future of the nation. In response to the latter concerns, Congress enacted NEPA and FLPMA. In accordance with the general congressional intent underlying federal environmental legislation, the federal courts had applied a liberal interpretation of judicial review under the APA. There is nothing in the statutes that supports Lujan's limitation of standing. Indeed, environmental legislation traditionally provides for and encourages public participation and private citizen enforcement.[31]

It is interesting to note that in Justice Blackmun's dissenting opinion, he concludes that the NWF affidavits were adequate to defeat even the higher motion for summary judgment specificity requirements. He based his conclusion on the fact that the "affidavits...were..sufficiently precise to enable the Bureau of Land Management officials to identify the particular termination orders to which the affiants referred." Justice Blackmun found that particularly in light of the well-settled principle that in the summary judgment context, the facts must be viewed in the light most favorable to the party opposing the motion, the evidence was sufficient to raise a genuine issue of fact as to NWF's standing to sue. Justice Blackmun concluded as well that identification of the affected lands by specifically naming the parcels was unnecessary for standing purposes. The affidavits, when read as a whole, clearly identified the lands as those which were newly opened up to increased mining. Thus, contrary to the majority's assertion, the complaints and affidavits did not require the court to presume facts to determine reviewability. Finally, Justice Blackmun believed that the agency actions would indeed lead to increased mining resulting in environmental damage, which would thereby diminish plaintiff's recreational use of the public lands.[32]

The majority's characterization of the BLM program as agency actions which fail to satisfy the APA requirement for final agency action has been criticized as "somewhat myopic and possibly inconsistent with both precedent and the spirit of APA review, particularly with regard to environmental law."[33] Traditionally, the substance of an agency action, not its label, determined the propriety of judicial review.[34] It appears that the majority in Lujan focused on the technicality that BLM actions did not arise from agency-promulgated regulations to defeat the final agency action requirement for judicial review. However, the program clearly constitutes an agency policy from which the terminations and reclassifications flow. These terminations and reclassifications, in turn, led to the threatened injury of which NWF

complained.[35]

In conclusion, Lujan will affect the ability of and the manner in which environmental organizations proceed with litigation. The standing requirement set forth in Lujan increases the plaintiffs burden and demands specific pleadings regarding use of the threatened area. Its impact is already apparent.[36] For instance, in People for the Ethical Treatment of Animals v. Department of Health and Human Services,[37] animal rights activists brought suit against federal agencies alleging NEPA violations on the basis of failure to prepare environmental impact statements. The Ninth Circuit affirmed summary judgment in favor of the agencies on the basis that the plaintiff's complaint failed to identify specific areas where the members' uses would be adversely affected. Relying on Lujan, the court stated that "averments which state only that the declarant uses unspecified portions of a large metropolitan area, on some portions of which hazardous substances might be transported or disposed" were insufficient to overcome summary judgment.[38]

Although the Lujan decision's obstacles are surmountable, in that an organization must simply assert use by its members of specific lands subject to the agency action at issue, if no such members can be found or where the agency action is diffuse or widespread, Lujan will present an insurmountable barrier and preclude review. Similarly, the Court's ruling on final agency action is significant. It has rendered any action which does not directly arise out of an agency-promulgated regulation nonreviewable, thus creating a loophole through which agencies can avoid judicial review.[39]

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ENDNOTES

[1] Baker v. Carr, 369 U.S. 186, 204 (1962).

[2] Warth v. Seldin, 422 U.S. 490, 498-99 (1975).

[3] Roger Beers, *Standing and Related Procedural Hurdles in Environmental Litigation*, 1 J. Envtl. L. & Litig. 65, 66 (1986).

[4] Karin Sheldon, *NWF v. Lujan: Justice Scalia Restricts Environmental Standing to Constrain the Courts*, 20 ELR (Envtl.L.Inst.) 10577 (1990).

[5] Marianne Lavelle, "Limits on Lawsuits Over Private Polluters, Too," *National Law Journal*, Dec. 9, 1991, at 32; Sheldon, 20 ELR (Envtl L. Inst.) 10577 (1990). *See also Meeting the Requirements of Standing: A Framework for Environmental Interest Groups*, 14 Hamline L. Rev. 277 (1990); *Court Access for Environmental Plaintiffs: Standing Doctrine in Lujan v. National Wildlife Federation*, 15 Harvard Envtl. L. Rev. 187 (1991); Compitello, *Organizational Standing in Environmental Litigation*, 6 Touro L. Rev. 295 (1990); Poisner, *Environmental Values and Judicial Review After Lujan: Two Critiques of the Separation of Powers Theory of Standing*, 18 Ecology L. Q. 335 (1991); *Standing: Closing the Doors of Judicial Review*, 36 S.D.L.Rev. 136 (1991); *New Restrictions in Environmental Litigation: Standing and Final Agency Action After Lujan v. National Wildlife Federation*, 2 Villanova Envtl.L.J. 227 (1991).

[6] Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982).

[7] *Id.*

[8] *See* Sheldon, *supra* note 4.

[9] 5 U.S.C. §702 *et seq.*

[10] 42 U.S.C. §4321 *et seq.* (1988); 30 U.S.C. §§21-42 (1988); *see also* Sheldon, p. 10577.

[11] 405 U.S. 727 (1972).

[12] 405 U.S. 727, 739 (1972); *see also* Sheldon, *supra* note 4; Beers, *supra* note 3, p.70.

[13] Tom Turner, "In Defense of the Mountains" in Wild By Law: The Sierra Club Legal Defense Fund and the Places It Has Saved, (1990) p.108.

[14] 405 U.S. 727 (1972).

[15] SCRAP I at 685-86.

[16] Denis Binder, in Preview of United States Supreme Court Cases, Issue #5, Jan. 17, 1992, p. 176.

[17] 110 S.Ct. 3177 (1990).

[18] Lujan, 110 S.Ct. at 3177.

[19] 43 U.S.C. §§1701-1784 (1988).