

Lujan v. Defenders of Wildlife: THE INJURY IN FACT
COMPONENT OF THE STANDING DOCTRINE

Section 7(a)(2) of the Endangered Species Act of 1973 (Act) requires that agencies consult with the Secretary of the Interior (Secretary) to ensure that their action is not likely to jeopardize the continued existence of any endangered species.¹ In 1978, the Secretary interpreted this language broadly to include federal agency action abroad,² but in 1986 he revised the regulation to require consultation only for action in the United States and on the high seas.³ Defenders of Wildlife, Friends of Animals and Their Environment, and the Humane Society (Defenders) sought review of the Secretary's revised regulation claiming it violated the Act by eliminating the extraterritorial reach of Section 7. They alleged standing on the basis of injury in fact and on the basis of a procedural injury under the Act, supported by affidavits of two members. Affiants claimed they hoped to return someday to foreign countries to observe species threatened with extinction due to agency actions in those countries. The United States District Court for the District of Minnesota dismissed Defenders' claim for lack of standing.⁴ The United States Court of Appeals for the Eighth Circuit reversed and remanded, finding Defenders had alleged sufficient injury in fact to overcome a motion to dismiss and support procedural standing.⁵ On remand and cross motions for summary judgment, the district court ordered the Secretary to rescind the 1986 regulations and to promulgate new regulations reinstating the application of Section 7 to federal agencies' projects in foreign countries.⁶ The Court of

1. 16 U.S.C. § 1536(a)(2) (1988).

2. See 43 Fed. Reg. 874 (1978).

3. 51 Fed. Reg. 19,957 (1986) (codified at 50 C.F.R. § 402.01 (1991)).

4. *Defenders of Wildlife v. Hodel*, 658 F. Supp. 43, 48 (D. Minn. 1987).

5. *Defenders of Wildlife v. Hodel*, 851 F.2d 1035, 1043-44 (8th Cir. 1988).

6. *Defenders of Wildlife v. Hodel*, 707 F. Supp. 1082, 1086 (D. Minn. 1989).

Appeals affirmed.⁷ The Supreme Court granted certiorari on the procedural issue of standing and on the merits. The Court reached only the preliminary issue of standing and held that plaintiffs did not assert sufficient imminent injury to have standing. *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130 (1992).

Article III of the Constitution limits the power of federal courts to actual "cases" and "controversies."⁸ Among the purposes of this requirement is to ensure separation of powers, which includes ensuring that the courts do not intrude into areas committed to other branches of government.⁹ Standing is an aspect of justiciability which assures that the party bringing the suit is the proper party to do so. The party bringing the suit must have a personal stake in its outcome.¹⁰ The Court has repeatedly held that the asserted right to have the government act in accordance with the law is not alone sufficient to confer standing because such a party is simply voicing a general grievance.¹¹

In guaranteeing that the party bringing the action is the proper party, the Court has set out a number of requirements. To establish standing when not challenging a government regulation, the plaintiff must show that (1) he has suffered injury in fact; (2) the injury is traceable to the defendant's actions; and (3) the injury is redressable by the court.¹² When challenging a government regulation under a citizen suit provision, the Court, in the few cases decided thus far involving economic injury, has found that the plaintiff must show at least (1) injury in fact, and (2) that the statute authorizes the plaintiff to bring suit.¹³ Injury in fact requires an invasion of a legally

7. *Defenders of Wildlife v. Lujan*, 911 F.2d 117, 125 (8th Cir. 1990).

8. U.S. CONST. Art. III, § 2.

9. See, e.g., *Allen v. Wright*, 468 U.S. 737, 750 (1984) (citing *Valley Forge Christian College v. Americans for Separation of Church and State, Inc.*, 454 U.S. 464, 471-76 (1982)).

10. See *id.* at 754. See also *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968).

11. See, e.g., *United States v. Richardson*, 418 U.S. 166, 194 (1973).

12. *Allen*, 468 U.S. at 751 (citing *Valley Forge*, 454 U.S. at 472).

13. See, e.g., *Ass'n of Data Processing Service Orgs. v. Camp*, 397 U.S. 150 (1970).

protected interest that is both concrete and particularized,¹⁴ and actual or imminent, not conjectural or hypothetical.¹⁵ The Supreme Court has found economic injuries sufficient to confer standing in both statutory and non-statutory situations.¹⁶ The Court has had difficulty in determining exactly what must be alleged by persons claiming a non-economic injury under a statute.¹⁷

The Court addressed this problem in *Sierra Club v. Morton* by recognizing that the desire to use or observe animal species, even for purely aesthetic purposes, is undeniably a cognizable interest which when injured is sufficient for the purpose of standing.¹⁸ Sierra Club sued under the Administrative Procedure Act (APA)¹⁹ to enjoin the development of a ski area. The club claimed standing because, as a public organization, it had a special interest in the conservation and sound maintenance of national parks.²⁰ The Court found Sierra Club's general public interest claim insufficient to confer standing because it did not show injury in fact.²¹ Although Sierra Club's interest was sufficient, Sierra Club failed to allege that its members actually used the area and were among the injured.²² The Court found that the same injury in fact requirement in statutory challenges involving economic injury applied as well to non-economic injury. It stated that statutory broadening of "the categories of injury

14. See *Allen*, 468 U.S. at 756; *Sierra Club v. Morton*, 405 U.S. 727, 740-41 n.16 (1972).

15. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

16. See *infra* notes 16-35 and accompanying text.

17. *Id.*

18. *Sierra Club*, 405 U.S. at 734.

19. 5 U.S.C. § 702. The APA provides, "[a] person suffering 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." The APA requires (1) injury in fact, and (2) the plaintiff's injury be within the "zone of interests" the act is intended to protect. See, e.g., *Sierra Club*, 405 U.S. at 733.

20. *Sierra Club*, 405 U.S. at 730.

21. *Id.* at 734-35.

22. *Id.*

that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury."²³ Accordingly, environmental plaintiffs must show that members of the plaintiff group use and enjoy the area at issue and have interests that would be negatively affected by the defendant's proposed action.

In *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, the Court broadened the scope of the injury in fact requirement by recognizing intangible injuries to economic, recreational, and aesthetic interests based on environmental degradation.²⁴ In response to a motion to dismiss, the Court held that the injury need not be great, and that even "an identifiable trifle" would be sufficient to substantiate standing.²⁵ Plaintiffs challenged the Interstate Commerce Commission's approval of a freight rate that plaintiffs said would be environmentally unsound since it would discourage the use of recyclable materials.²⁶ Plaintiffs claimed the injury was environmental degradation because the rate increase would lead to more litter and in turn to degradation of natural resources, thus impairing the plaintiffs' ability to enjoy forests, parks, and natural resources.²⁷ The Court held that this was "specific and perceptible harm."²⁸

The Court further clarified its position in *Lujan v. National Wildlife Federation*.²⁹ It held that "the identifiable trifle standard" was applicable only to the motion to dismiss in *SCRAP*, and that a more substantial degree of injury in fact would generally be required to establish standing.³⁰ The

23. *Id.* at 738.

24. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 687-88 (1973).

25. *Id.* at 689 n.14 (citing Kenneth C. Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 613 (1968)).

26. *Id.* at 676.

27. *Id.* at 678.

28. *Id.* at 789.

29. 497 U.S. 871 (1990).

30. *Id.* at 889.

Court, however, reiterated that sufficient injury in fact includes injury to "recreational use and aesthetic enjoyment."³¹ In *Lujan v. NWF*, the district court, upon motion for summary judgment, denied standing to national environmental groups challenging national surface mining regulations under the APA.³² The Court held that respondent's affidavits did not demonstrate actual injury because they did not show with specificity that members were actually affected by the challenged agency decision; they only showed that members used lands "in the vicinity of" the affected lands.³³ The Court did not specify the type of injury necessary to constitute standing.³⁴ It did, however, restrict the right of access to the courts for challenges to broad actions affecting disparately located areas of land.

In *Japan Whaling Association v. American Cetacean Society*, the Court found sufficient injury in a challenge under the APA.³⁵ Plaintiffs' alleged injury was to its members' whale-watching and studying activities which would be adversely affected by continued whale harvesting.³⁶ The Court found that the failure of the Secretary of Commerce to certify to the President that Japan had exceeded the quota of whales permitted to be harvested under international laws, and the resulting injury to a wildlife organization's visual, recreational and aesthetic enjoyment of the whales in their natural

31. *Id.* at 885.

32. *See id.* at 885-88.

33. *Id.* at 889.

34. *Id.* at 889. The Court stated that:

although there was room for debate "at the margin" as to how specific the "specific facts" alleged must be under Rule 56(e), the standard is "assuredly not satisfied by averments which state only that one of respondent's members uses unspecified portions of an immense tract of territory, on some portion of which mining activity has occurred or probably will occur by virtue of the governmental action.

Id.

35. 478 U.S. 221, 230 (1986).

36. *Id.*

environment involved sufficient injury to confer standing.³⁷

The purpose of the Endangered Species Act is to limit the extinction of endangered plant and animal species, and to limit the destruction of their habitats caused by economic growth and development.³⁸ It instructs the Secretary to identify and list species that are either endangered or threatened worldwide under enumerated criteria, and to define the critical habitats of these species.³⁹ Federal agencies whose actions affect the listed species or habitats must consult with the Secretary to ensure that their actions are not likely to jeopardize the existence of these species or their habitats.⁴⁰ The Act has a "citizen suit" provision which permits any person to commence a civil suit on his own behalf against the Secretary.⁴¹

In the noted case, Justice Scalia, writing for the majority, began his opinion with a brief discussion of tripartite government, separation of powers, federalism and the role of the courts within our system. He then noted, relying on Federal Rule of Civil Procedure 56(e), that in response to a summary judgment motion, the burden is on the plaintiff to set forth by affidavit or other evidence, specific facts establishing the elements of the case which for the purpose of summary judgment will be taken as true.⁴²

37. *Id.*

38. *See* 16 U.S.C. §§ 1531(b), 1538(c)(1), (c)(2)(D), (d)(1) (1992).

39. 16 U.S.C. §§ 1533(a), (c), 1532(6) and 1536 (1992).

40. 16 U.S.C. § 1536(a)(2) (1992).

41. The citizen suit provision of the Act in relevant part provides, [a]ny 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 (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or . . . (C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.

16 U.S.C. § 1540(g) (1)(a) & (c) (1992).

42. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2135-37 (1992).

Justice Scalia rejected Defenders' first argument. Defenders claimed its injury resulted from lack of consultation with respect to agency-funded activities abroad that increase the rate of extinction of endangered and threatened species.⁴³ The claimed injury was the increased likelihood of diminished opportunities to enjoy viewing endangered species in foreign lands. The Court found that affiants did not demonstrate sufficient injury in fact because they did not show that their harm was actual or imminent.⁴⁴ Relying on *Sierra Club v. Morton*, the Court ruled that to survive a motion for summary judgment, respondents must present in their affidavits proof that (1) the species were in fact being threatened by activities abroad, and (2) that "one or more of [their] members would be 'directly' affected apart from their 'special interest' in the subject."⁴⁵ For the majority, Scalia found the affidavits inadequate to confer standing. The affidavits did not satisfy the second requirement because they contained no facts showing how damage to the species would produce "imminent" injury to the group's members.⁴⁶ Justice Scalia found the members' possible future visits to be "'some day' intentions -- without any description of concrete plans, or indeed even any specification of *when* some day will be" and thus insufficient to establish injury in fact.⁴⁷

The Court declined to adopt two novel standing theories. Instead, it found that at the summary judgment phase, the theories did not meet the required factual showing of perceptible harm. The majority rejected the "ecosystem nexus" theory as inconsistent with *National Wildlife Federation*.⁴⁸ Being ecologically connected to endangered species, like being

43. *Id.* at 2137 (citing Complaint para. 5, App. 13).

44. *Id.* at 2137-38.

45. *Id.*

46. *Id.* at 2138.

47. *Id.*

48. Under such a theory, any person who uses any part of the "contiguous ecosystem" and who is adversely affected by funded activity has standing, even if the harmful activity takes place a great distance away from the person. *Id.* at 2139.

in the vicinity of public lands opened to exploitation, is not close enough to establish injury in fact.⁴⁹ The majority also rejected the "animal or vocational nexus" approach.⁵⁰ Referring to *Japan Whaling*, the majority conceded that, "[i]t is very clear that the person who observes or works with a particular animal threatened by a federal decision affecting the animal with which he works is facing perceptible harm since the very subject of his interest will no longer exist."⁵¹ However, the Court distinguished the noted case, pointing out that the injured person in *Japan Whaling* was in the area of the world where the species was threatened.⁵²

Finally, the Court rejected the opportunity to extend the scope of the Act's citizen suit provision.⁵³ The Eighth Circuit found that under this provision, any person can sue to enjoin an agency alleged to be violating the statute, notwithstanding his inability to allege any separate concrete injury flowing from that failure.⁵⁴ The majority rejected this interpretation, claiming that such a provision does not automatically confer standing on anyone who sues.⁵⁵ The Court held that Defenders had only a general interest common to all members of the public, and to confer standing to them would be inconsistent with prior jurisprudence.⁵⁶ The Court also rejected Defenders' argument that conferring standing would serve the general purpose of the statute. Defenders argued that the purpose was in part to provide a means to conserve the ecosystems upon which

49. *Id.* (citing *Lujan v. Nat'l. Wildlife Fed'n.*, 497 U.S. 871 (1990)).

50. Under this theory, a suit can be brought by anyone with an interest in studying or seeing endangered animals anywhere on the globe or anyone with a professional interest in such animals. *Id.* at 2139.

51. *Id.*

52. *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2139-40 (1992). The majority noted that distance is not a limiting factor. Injury however in this situation, would require a factual showing that the impact on animals in foreign places would be reflected at plaintiff's location. *Id.* at n.3.

53. *Id.* at 2143.

54. *Defenders of Wildlife v. Lujan*, 911 F.2d 117, 121-22 (8th Cir. 1990).

55. *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2147 (1992) (Kennedy, J., concurring in part and concurring in the judgment).

56. *Id.*

endangered and threatened species depend.⁵⁷ The Court, however, stated that "[t]o say that the Act protects ecosystems is not to say that the Act creates (if it were possible) rights of action in persons who have not been injured in fact."⁵⁸

In addition, the majority provided practical constitutional justification for its holding. It stated that affirming the lower court's holding would "permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take care the laws be faithfully executed.'"⁵⁹ Moreover, the Court found that granting such a right would ignore the case or controversy requirement and threaten the notion of separation of powers.⁶⁰

Justice Scalia, writing for the plurality, said Defenders failed to show redressability for the alleged harm. He stated that even if the Secretary's rules were revised to require consultation for foreign projects, such rules might not be binding on the agencies carrying out the projects in foreign countries, and thus the injury would not be redressed.⁶¹ Scalia did not receive support from Justices Kennedy and Souter on this issue because they felt the issue of redressability should not be addressed in light of the Court's failure to find injury in fact.⁶²

The result in *Lujan* is defensible on the facts given prior jurisprudence. However, on these facts or on any of Defenders' proposed theories, it would have been possible for the Court to find that Defenders' ongoing professional concern for the survival of species threatened by the United States' assistance was sufficient to establish injury in fact and confer standing.

The Court's denial of standing seems least defensible on the issue of the novel standing theories. It would have been possible to extend *Japan Whaling* to parties interested in the preservation of a species in one part of the world that are being

57. *Id.*

58. *Id.* at 2139.

59. *Id.* at 2145 (citing U.S. CONST. art. II § 3).

60. *Id.*

61. *Id.* at 2140-41.

62. *Id.* at 2146 (Kennedy, J., concurring).

threatened by agency action in another part of the world. The Court does not foreclose this possibility, but it requires a "showing that the impact upon animals in those distant places . . . in some fashion be reflected [where the plaintiff resides]."⁶³ Because species do not become extinct overnight, a showing of imminent harm could prove difficult. While the Court's firm reaction is supportable, it could prove to be a mistake for the environment because it will tend to prevent Court enforcement of environmental regulations.

The citizen suit issue was correctly resolved given prior jurisprudence. The Act's citizen suit provision does not define the injury for which individuals may bring action, nor does it specify what type of individuals may bring action. Congress realized this shortcoming. In July, 1992 Senator Howard Metzenbaum (D.-Ohio) proposed a bill to amend the Act in response to the *Lujan* holding. The bill guarantees standing to citizens who challenge administration funding policy that supports government projects abroad which threaten endangered species and their habitats.⁶⁴ The proposed amendments also define "injury" and "injured party."⁶⁵

The Court's logic in rejecting standing under the Act's citizen suit provision was faulty. The Court justified its decision on separation of powers principles, asserting that it will prevent enlargement of the legislative branch and keep it from extending beyond its constitutionally delegated role. However, in doing so the Court has enlarged the executive branch at the expense of Congress and public interest groups. As Justice Blackmun, joined by Justice O'Connor, points out, the principal effect of foreclosing judicial enforcement of such procedures is to "transfer power into the hands of the executives at the

63. *Id.* at 2140 n.3.

64. S. RES. 2953, 102d Cong., 2d Sess. (1992) reprinted in 22 ENVTL. L. REP. 20913 (1992).

65. The amendments would grant standing to bring a civil suit under the Act to a person who has by study, visits, or other means demonstrated an aesthetic, educational, historical, professional, recreational, or scientific interest in an endangered or threatened species. Endangered Species Act Amendments of 1992. S. Res. 2953, 102d Cong., 2d Sess. (1992).

expense not of the courts but of Congress from which that power [to grant jurisdiction] originates and emanates."⁶⁶ Thus, the Court is not preserving separation of powers principles; it is denying one branch its constitutionally delegated power.

Allowing citizen suit provisions with an extended notion of injury in fact will provide enforcement where previously there was none. Unless international environmental conservation becomes a priority tenet of United States foreign policy, the Endangered Species Act and other environmental statutes will not be revised to ensure they have the legal teeth their present language purportedly gives them.⁶⁷ The courts could at least temporarily uphold the broad statutory mandates. Without judicial help in the case of section 7, destruction of biological diversity caused by United States agency actions in foreign countries will continue despite the statutes Congress enacts to prevent environmental harms.⁶⁸ The Court is aware of this possibility. In concurrence, Justice Kennedy, joined by Justice Souter, felt compelled to point out that as government programs become more complex and far-reaching, Congress must have the constitutional authority to "define injuries . . . that will give rise to a case or controversy where none existed before."⁶⁹

The Court's decision undoubtedly affects the ability environmental plaintiffs have to sue for enforcement of environmental laws. How significant this effect will be depends upon how difficult it is for environmental plaintiffs to place themselves directly in the path of imminent injury. On one hand, the decision may not be a serious obstacle; rather, it may provide further guidance to environmental plaintiffs on how they should structure their arguments to establish the required injury in fact. The decision may also be construed narrowly to

66. *Defenders*, 112 S.Ct. at 2158 (Blackmun, J., dissenting).

67. See Carol Conyers, *Environmental Statutes that Control U.S. Agency Projects Abroad: The Endangered Species Act and Defenders of Wildlife v. Lujan*, 3 PACE Y.B. INT'L L. 363, 377 (1991).

68. *Id.*

69. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2146-47 (Kennedy, J., dissenting).

apply only to motions for summary judgment.⁷⁰ On the other hand, plaintiffs may now be forced to use the courts only to review specific government actions and not broad policy decisions.⁷¹ Plaintiffs would have standing to seek review only for those agency actions which affect them personally and can be reliably predicted. However, in situations where an accurate prediction is not possible, plaintiffs would be denied access to the courts even if they belong to a subclass that statistically has a high probability of being hurt by the policy.⁷²

The *Lujan* decision is defensible, but not sensible given the deterioration of the earth and its species. Assuming environmental plaintiffs do not clear this new physical presence-imminence hurdle to establish injury in fact, the repercussions of reduced judicial review could be grave for the environment. This decision could be an obstacle to environmental progress and worldwide conservation efforts. Permitting the courts to decide the United States' environmental foreign policy arguably expands the judiciary beyond its constitutionally delegated role of statutory construction. Perhaps the Court should sacrifice rigid line-drawing between the branches of government for the opportunity to give our young environmental legislation a chance to fully develop.

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70. Cf. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992) (granting standing).

71. Robert Gordon, *The U.S. Supreme Court Year in Review, 1991-1992; Standing Up for the Executive*, N.J.L.J., Aug. 24, 1992 at 9, available in LEXIS, Nexis Library.

72. *Id.*