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Refracting the Spectrum of Clean Water Act Standing in Light of Lujan v. Defenders of Wildlife

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There is an inherent tension between constitutional standing doctrine and the citizens enforcement provisions of various federal environmental statutes. The Supreme Court's articulation of standing doctrine under the Article III "case" or "controversy" requirement imposes requirements of "injury in fact," "causation," and "redressability." These concepts do not neatly translate into citizen enforcement of environmental regulatory schemes. Such statutes are designed to prevent environmental injury before it is necessarily perceptible. They impose requirements on polluters to whom perceptible adverse impacts of pollution may not be directly traceable. And given the large number of potential sources of pollution to any particular environmental resource, relief against any one polluter may not necessarily be sufficient to "redress" the perceptible harms to the environmental resource.

Despite the frequency with which standing issues have made it to the United States Supreme Court, the Court has given remarkably little guidance for application of standing doctrine in the citizen enforcement suit context. All of the Supreme Court's environmental standing decisions have arisen in the context of citizen suits seeking to require compliance with environmental laws by governmental agencies and actors; there is no Supreme Court decision addressing standing doctrine in a case of a citizens enforcement action against a private party. The inquiry is compounded by continued controversy about the extent to which Congress can, by statute, create new legal interests the invasion of which would constitute an "injury in fact" sufficient to support Article III standing.

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Although widely viewed as a retrenchment in standing doctrine,[1] the Supreme Court's most recent standing decision, *Lujan v. Defenders of Wildlife*,[2] has not settled this controversy. Indeed, a majority of the Court in that case specifically endorsed the ability of Congress to create newly recognizable injuries and chains of causation. The Court's opinion in *Defenders of Wildlife* itself recognized a category of "procedural" rights in which the strict requirements of injury, causation, and redressability might not apply.

Nowhere is this tension between Congress' statutory goals and strict application of constitutional standing requirements more pronounced than in the context of citizens enforcement actions under the federal Clean Water Act.[3] The Federal Water Pollution Control amendments of 1972 were enacted specifically to correct the previous statutory regime, which required proof that a discharger's pollutants were causing perceptible harm to a water body that could be causally traced to that discharger's pollution for a prosecution to proceed.

With the Clean Water Act, Congress adopted a system of discharge permits, monitoring reports, effluent limitations, and public review procedures in order to ensure that enforcement could proceed without a showing of measurable harm to the receiving water body or strict causation traceable to a particular violator. And, in its citizen suit provision, Congress made equally clear its intention that, in the absence of state or federal enforcement, citizens should be able to enforce the Act's requirements on the same terms as the government.

1. *See generally* Robert Wiygul, *Gwaltney* Eight Years Later: Proving Jurisdiction and Article III Standing in Clean Water Act Citizen Suits, 8 Tul. Envtl. L. J. 435 (1995); Robert B. June, The Structure of Standing Requirements for Citizen Suits and the Scope of Congressional Power, 24 Envt'l L. 761 (1994); Harold Feld, Saving the Citizen Suit: the Effect of *Lujan v. Defenders of Wildlife* and the Role of Citizens Suits in Environmental Enforcement, 19 Colum. Journal of Env. L. 141 (1994); Harold J. Krent & Ethan G. Shenkman, Of Citizen Suits and Citizen Sunstein, 91 Mich. L. Rev. 1793 (1993); Cass R. Sunstein, What's Standing After *Lujan*? Of Citizen Suits, "Injuries," and Article III, 91 Mich. L. Rev. 163 (1992); Note, Charles S. Abell, Ignoring the Trees for the Forest: How the Citizens Suit Provision of the Clean Water Act Violates the Constitution's Separation of Powers Principle, 81 Va. L. Rev 1957 (1995); Comment, Christopher T. Burt, Mootness and Citizen Suit Civil Penalty Claims Under the Clean Water Act: A Post-*Lujan* Reassessment, 25 Envt'l L. 801 (1995); Comment, Procedural Injury Standing after *Lujan v. Defenders of Wildlife*, 62 U. Chi. L. Rev. 275 (1995).

2. 504 U.S. 555 (1992).

3. Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1387. The Federal Water Pollution Control Act Amendments of 1972 have come to be known generally as the "Clean Water Act," and will be referred to throughout this article as the Clean Water Act in text, and as "CWA" in footnotes.

Despite the 24 year history of the Clean Water Act, some basic standing questions remain unsettled: for example, can a citizen suit be brought to challenge an undisputed permit violation where there is no present or imminent perceptible effect on the receiving water body?[4] Can a citizen suit be enforced against the violation of recordkeeping and reporting requirements imposed under the Clean Water Act, where violations of such requirements do not directly result in additional pollution to the water body?[5] Can a citizen suit be brought against a discharger who has failed to obtain a required permit even if the discharges would have been permissible with a permit?[6] These problems do not fit neatly into an Article III rubric of "injury-in-fact," "causation," and "redressability."

The underlying tension between the Clean Water Act's goals and strict application of Article III standing doctrine, together with the lack of clear guidance from the Supreme Court, has lead to the development of a wide spectrum of approaches to standing doctrine in the lower federal courts in citizens enforcement actions under the Clean Water Act. The potential approaches range from a strict "causation in fact" test at one extreme to the tantalizing possibility of universal citizen standing at the other. This article will examine the various approaches to the application of standing doctrine to Clean Water Act citizen suits, and evaluate the consistency of each of these approaches with the legislative intent of Congress in adopting the Clean Water Act citizen suit provisions. The article will also consider the impact of the Supreme Court's decision in *Lujan v. Defenders of Wildlife* upon the continued validity of the various approaches to Clean Water Act citizens enforcement suits. The article concludes that an approach to citizen suit standing that recognizes the standing of any plaintiff with a genuine, ongoing recreational, aesthetic, or organizational interest in the receiving water body is most consistent with the Congressional intent behind the

4. *Compare* Friends of Earth v. Crown Central Petroleum Corp., U.S. Dist. LEXIS 16338 (E.D. Tex 1995) (standing denied because plaintiffs could point to no imminent injury to wildlife caused by defendant's discharge) *with* Friends of Earth v. Chevron Chem. Co., 900 F. Supp. 67 (E.D. Tex. 1995) (standing upheld even though defendant's contribution was less than .17% of flow to lake); *cf.* Public Interest Research Group of N.J. v. Magnesium Elektron, Inc., U.S. App. LEXIS 20846 (3d Cir. 1997) (vacating judgment in favor of plaintiffs on grounds that plaintiffs had failed to prove actual impact of violations on receiving water body).

5. *P.I.R.G. v. Yates Indust. Inc.*, 757 F. Supp. 438, 443 (D.N.J. 1991).

6. *Cf.* Sierra Club v. Cedar Point Oil Corp., 73 F.3d 546 (5th Cir. 1996) (rejecting defendant's argument that a citizens' suit was unavailable where same discharges would have been permitted under EPA permit guidelines, but affirming denial of injunctive relief).

Clean Water Act and is consistent with the Supreme Court's recognition of "procedural" standing in *Lujan v. Defenders of Wildlife.*

First, this article will review the impetus and purposes for the Clean Water Act of 1972, including its citizen suit provision, particularly as these purposes relate to the elimination of specific harm or causation requirements in enforcement actions under its provisions. Second, this article will briefly review the basic elements of Article III standing requirements as enunciated by the Supreme Court, and the development of Supreme Court standing doctrine in environmental cases leading up to and including the *Defenders of Wildlife* decision. Then the article will survey the various approaches courts have taken in applying Article III standing doctrine to Clean Water Act citizens enforcement suits. Finally, this article will consider the effect of the *Defenders of Wildlife* decision and other Supreme Court standing doctrine on citizens enforcement standing under the Clean Water Act. This review concludes that Supreme Court standing doctrine, including the *Defenders of Wildlife* decision, supports a more inclusive approach to citizens suit standing than that currently prevailing in the courts.

I. THE CLEAN WATER ACT AND ITS CITIZEN SUIT PROVISION

The federal Clean Water Act was enacted in 1972 in response to the worsening pollution of the nation's waterways and dissatisfaction with the failure of its predecessor, the Water Quality Act,[7] to provide effective controls on water pollution. The Clean Water Act declared ambitious goals to make all of the nation's waters fishable and swimmable by 1983, and to eliminate all pollutant discharges to water by 1985:

> The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter
> (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;
> (2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife, and provides for recreation in and on the water be achieved by July 1, 1983. . . .[8]

7. Pub. L. No. 89-234, 79 Stat. 903.
8. CWA § 101(a), 33 U.S.C. § 1251(a)(1994).

The Clean Water Act was adopted out of frustration with the failure of the pre-existing federal Water Quality Act to control water pollution.[9] Under the Water Quality Act, pollution was prohibited only to the extent that it caused a violation of water quality standards in the receiving water bodies.[10] These standards were established by state water quality control boards. The scientific uncertainty of tracing specific environmental impacts to particular concentrations of pollutant discharges made these standards difficult to establish and even more difficult to enforce. Enforcement of this prohibition was extremely problematic, as it was nearly impossible to prove, in any case, that a violation of water quality standards was caused by any one given polluter. Thus, each individual source of water pollution could point its finger at other sources of pollution to the same water body and say that the water body would violate standards even if its own pollution was eliminated.

More fundamentally, the Water Quality Act assumed that the appropriate method of treating water pollution was simply to allow dilution by the receiving water body, as long as that body had assimilative capacity remaining. The Senate Report on the Clean Water Act noted the defects in this approach:

> [B]ecause of the great difficulty associated with establishing reliable and enforceable precise effluent limitations on the basis of a given stream quality, water quality standards, in addition to their deficiencies in relying on the assimilative capacity of receiving waters, often cannot be translated into effluent limitations—dependable in court tests, because of the imprecision of models for water quality and the effects of effluents in most waters.[11]

Due to these difficulties, the Water Quality Act was, as a practical matter, unenforceable and ineffective. During the Senate debate on the Clean Water Act, Senator Muskie noted that in over two decades under the prior enforcement regime, only one enforcement case reached the courts, and that case itself took four years to prose-

9. *See generally* Mark C. Van Putten & Bradley D. Jackson, *The Dilution of the Clean Water Act*, 19 U. Mich. J. Law. Ref. 863 (Summer, 1986); Frank P. Grad, Environmental Law §§ 3.03[1] - [2](a-1)(1995).

10. *Id.*

11. S. Rep. No. 92-414 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668 *and in* 92d Cong. 2d Sess. (1972) at 8, reprinted in Environmental Policy Div., Congressional Research Serv., Library of Congress, 93d Cong. 1st Sess., A Legislative History of the Water Pollution Control Act Amendments of 1972 at 1426 (Comm. Print 1973) (hereinafter cited as 1972 Legislative History).

cute from the initial enforcement conference required under the Water Quality Act to the consent decree.[12]

The 1972 Clean Water Act sought to correct these philosophical and practical defects in the previous water pollution control regime. Philosophically, Congress adopted the principle that "no one has the right to pollute — that pollution continues because of technological limits, not because of any inherent right to use the nation's waterways for the purpose of disposing of wastes."[13] In order to implement this principle practically, the Congress adopted a blanket prohibition on *all* discharges of pollutants, whether or not the discharge caused any demonstrable impact to the receiving water body, except and unless the discharge was authorized by (and in compliance with) a permit issued in accordance with its provisions.

In order to implement the principle that pollution continues *only* to the extent that existing technology makes its control infeasible, the Clean Water Act establishes a system of permits that impose technology-based effluent limitations.[14] These effluent limitations are based on available control technologies for various classes and types of pollutant discharges, and for various industrial processes. In addition, a system of water quality-based effluent limitations was retained, so that any particular discharger is required to comply with the more stringent of the two requirements — water quality-based or technology-based.[15]

The intent of this fundamental change in the approach to regulation of pollutant discharges into the nation's waters was to redefine enforceable water pollution restrictions without reference to measurable impacts on the ecology of the receiving water body. Congress sought, at the same time, to enhance enforcement of the newly implemented pollutant discharge regulatory regime. Unlike the Water Quality Act, the provisions of the Clean Water Act were to be enforceable directly by the federal government in all circum-

12. 117 Cong. Rec. 38799, reprinted in 1972 Legislative History, *supra* note 12, at 1257.

13. 1972 Senate Report at 42, reprinted in 1972 Legislative History, *supra* note 12, at 1425.

14. CWA §§ 301, 33 U.S.C. § 1311 (establishing effluent standards based on best available technology), 304, 33 U.S.C. § 1314 (requiring EPA to establish technology-based effluent standards), 402, 33 U.S.C. § 1342 (providing for permitting scheme for discharges requiring compliance with effluent standards provided in §§ 301, 33 U.S.C. § 1311, and 304, 33 U.S.C. § 1314)(1994).

15. *See* CWA § 302(a), 33 U.S.C. § 1312(a)(1994).

stances.[16] And, like the then recently enacted Clean Air Act, the Clean Water Act provided for citizens enforcement of its prohibitions against unpermitted discharges of pollutants:

> . . . any citizen may commence a civil action on his own behalf —
> (1) against any person . . . who is alleged to be in violation of
> (A) an effluent standard or limitation under this chapter or
> (B) an order issued by the Administrator or the State with respect to such standard or limitation . . . .[17]

The "effluent standard[s] or limitation[s]" that may be enforced by citizens are broadly defined to include any violation of the general prohibition against unpermitted discharge of pollutants, as well as the violation of any permit or condition of a permit issued under the Clean Water Act.[18]

More importantly, for the purpose of standing analysis, "citizen" was defined, for citizens enforcement purposes, to include "a person or persons having an interest which is or may be adversely affected."[19] This provision was intended to grant standing to the limits permitted by the Constitution, as stated in the Supreme Court's decision in *Sierra Club v. Morton*.[20] The Conference Committee report made this intention explicit: "the understanding of the conferees [is] that the conference substitute relating to the definition of the term 'citizen' reflects the decision of the U.S. Supreme Court in the case of Sierra Club v. Morton."[21] During the Senate Debate on the conference bill, Senator Muskie explained this language as follows:

> In the Sierra Club case, the Supreme Court was asked to interpret section 10 of the Administrative Procedures Act — 5 U.S.C. section 702 — which contains wording similar to that of section 505(g) of the conference bill. The Supreme Court emphasized that "the interest alleged to have been injured may reflect aesthetic conservational and recreational as well as economic values . . ."

16. CWA § 309, 33 U.S.C. § 1319 (1994). The Water Quality Act permitted enforcement by the federal government only where water quality of interstate waters fell below established standards, pollutant discharges in one state endangered health or welfare in another state, or where the governor of the state of discharge consented to the enforcement action. 33 U.S.C. § 466g(c)(5), (d)(1), (g) (Supp. I 1965); *see* Van Putten & Jackson, *supra* n.10, at 873 n.41.

17. CWA § 505(a), 33 U.S.C. § 1365(a)(1994).

18. CWA § 505(f), 33 U.S.C. § 1365(f)(1994).

19. CWA § 505(g), 33 U.S.C. § 1365(g)(1994).

20. 405 U.S. 727 (1972), discussed *infra*, text accompanying nn.28-37.

21. S. Conf. Rep. No. 92-1236 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3776, 3823, *and in* 1972 Legislative History, *supra* note 12, at 281, 329.

Thus it is clear that the under the language agreed to by the conference, a noneconomic interest in the environment, in clean water, is a sufficient base for a citizen suit under section 505.

Further, every citizen of the United States has a legitimate and established interest in the use and quality of the navigable waters of the United States. Thus, I would presume that a citizen of the United States, regardless of residence, would have an interest as defined in this bill regardless of the location of the waterway and regardless of the issue involved.[22]

The history and context of the 1972 Clean Water Act make clear that Congress intended to substitute a regime of strict liability for discharges of pollution in violation of its provisions for the pre-existing regime where proof of actual injury to a water body was required in order to establish a violation. At the same time, Congress clearly intended this regime to be enforceable by those citizens who used and enjoyed the affected water body aesthetically, recreationally, or for environmental well being. Courts have been struggling since that time with the question whether the "injury-in-fact" requirement of Article III standing requires precisely the kind of proof of actual impact on water quality, traceable to the discharger's own pollution, that Congress meant to eliminate in enacting the Clean Water Act. To understand the context of the development of Clean Water Act citizens enforcement standing law, a brief review of standing doctrine generally, and the Supreme Court's pronouncements on environmental standing in particular, is appropriate.

II. ENVIRONMENTAL STANDING BEFORE *DEFENDERS OF WILDLIFE*

Modern standing doctrine evolved in this century as an aspect of the justiciability of cases in the federal courts created by Article III of the United States Constitution. While other aspects of justiciability, such as mootness, ripeness, and the political question doctrine addressed the issue of *what* claims could be heard in federal court, standing doctrine addressed the question of *who* was entitled to bring a case or controversy to federal court.[23] Early cases

22. Senate Consideration of the Report of The Conference Committee (Oct.4, 1972), 1972 Legislative History, *supra* n.12, at 221.

23. *See* Flast v. Cohen, 392 U.S. 83, 99 (1969) ("The fundamental aspect of standing is that it focuses on the party . . . and not on the issues he wishes to have adjudicated. [T]he question . . . is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable.")

addressed this issue in the context of suits by citizens and taxpayers who sought to challenge the constitutionality of Congressional enactments. As the doctrine developed, the Court broadened its application to include suits challenging agency action, and articulated constitutionally required minima for standing as well as non-constitutional "prudential" limitations.

Although standing doctrine has generally been articulated as an aspect of the Article III Section 2 grant of the judicial power to hear "cases" and "controversies," the Court has also articulated a separation of powers concern throughout its discussion of standing. Under the Court's Article III analysis of justiciability, the grant of authority to the courts to determine "cases" and "controversies" necessarily presupposes a notion that only parties with an appropriate interest in the issues presented for adjudication may seek the court's assistance; in the absence of such an interest, there may not be a genuine case for adjudication by the court, and the court is not assured of sufficient adversity and interest of the parties in thoroughly presenting the issues to the court. In its separation of powers incarnation, the standing requirement is seen as a check on the judicial system; a means of assuring that, by limiting the exercise of the judicial power to genuine individual controversy brought by parties with an individual interest in the subject matter, the exercise of the judicial review function of the courts will not overpower the legislative and executive branches of government.

The current "irreducible minimum" for standing was articulated by the Supreme Court in *Valley Forge Christian College v. Americans United for Separation of Church and State.*[24] In that case, the Court denied standing to an organization of taxpayers complaining that the gift of surplus United States government property to a Christian religious college violated the Establishment Clause of the First Amendment. The Court held that:

> [A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 99 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976). In this manner does Art. III limit the federal judicial power "to those disputes which

24. 454 U.S. 464 (1982).

> confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S.[25]

The Court went on to reject the notion of pure "citizen" standing, holding that the injury to "taxpayers" or "citizens" of a putative violation of the establishment clause was too diffuse and non-particularized to support the individualized injury-in-fact it found to be required by Article III.[26]

The *Valley Forge* Court thus restated what has become the familiar three part test for Article III standing: injury-in-fact, causation, and redressability. This test requires first, that the plaintiff have suffered a discrete, particularized "injury-in-fact" not shared with all citizens generally. Second, the injury must be "fairly traceable" to the conduct complained of on the part of the defendant, that is, there must be some sort of causal relationship between the wrong alleged and the injury suffered. Third, the injury be "redressable" by a favorable decision by the court.

While this test is relatively easy to state, it becomes relatively difficult to apply, especially in the context of environmental standing. Environmental wrongs tend to injure large numbers of people, and might thus be characterized as "generalized grievances" by their very nature. Environmental wrongs may cause impacts and injuries that are not immediately perceptible or objectively quantifiable under a literal interpretation of the term "injury-in-fact." Causation in the tort law sense may be impossible to establish where the contributions of numerous, dispersed polluters combine to cause an environmental injury. Similarly, redressability may become problematic where the elimination or limitation of just one source of pollution will not resolve the overall polluted condition of a particular resource, or where adherence to a particular environmental review procedure may or may not result in a different decision about a proposed federal action with environmental consequences.

Perhaps because of the difficulty posed by these issues, environmental standing cases have played an important role in the development of the Supreme Court application of standing doctrine. As will be seen, the Supreme Court has, at least until the *Defenders of Wildlife* decision, accommodated standing doctrine to address the problems of standing in environmental litigation.

25. *Id.* at 472.
26. *Id.* at 465.

III. Development of Environmental Standing Doctrine in the United States Supreme Court Prior to *Defenders of Wildlife*

The United States Supreme Court has addressed environmental standing in six cases since 1970, from the *Sierra Club v. Morton* case in 1970 through *Lujan v. Defenders of Wildlife* in 1992.[27] Throughout this line of cases run certain common threads: while the Court has not required a high threshold showing of environmental injury to satisfy the "injury-in-fact" requirement, and has explicitly recognized non-traditional injuries such as harm to aesthetic interests as sufficient, the Court has strictly required that the putative litigant demonstrate some physical or geographically proximate relationship with the resource affected. The Court has been markedly unfriendly to litigants who express an abstract interest in environmental ideas and ideals unless this interest is physically anchored to some tangible resource. The Court has also not required a strict showing of tort-style causation to satisfy the "fairly traceable" and "redressability" requirements.

A. *Environmental Injury-In-Fact: The Morton Test Recognizing Nontraditional Harm*

The Supreme Court first addressed environmental standing in *Sierra Club v. Morton,* a case that is probably more significant for its *dicta* and for Justice Douglas' memorable dissent than for its holding. In *Morton,* the Court rejected the Sierra Club's standing under the Administrative Procedure Act to challenge a series of approvals for development of a ski resort on federal lands in the Mineral King area of the Sierra Nevada mountains. Sierra Club had sought to rely solely on its organizational interest in national environmental issues and wilderness preservation generally to assert standing, and specifically disavowed reliance on the interests of any of its members who camped, hiked, or skiied in the area to be affected by the development.[28] The Court, in an opinion written by Justice Stewart, emphatically rejected the notion that "a mere 'interest in a

27. The cases are: *Sierra Club v. Morton, supra,* United States v. SCRAP, 412 U.S. 669 (1973) *supra* note 3; Duke Power Co., v. Carolina Envt'l Study Group, Inc., 438 U.S. 59 (1978); Japan Whaling v. American Cetacean Soc'y, 478 U.S. 221 (1986); Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990) (statutory standing); and *Lujan v. Defenders of Wildlife, supra* note 3.

28. *Morton,* 405 U.S. at 736. The Sierra Club did, however, plead that "[o]ne of the principal purposes of the Sierra Club is to protect and conserve the national resources of the Sierra Nevada Mountains." 405 U.S. at 739 n.8.

problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem" would be sufficient to establish the requisite injury or "aggrievement," at least under the Administrative Procedures Act.[29]

While rejecting the abstract interest in environmental issues as a basis of standing, however, the Court made equally clear that it would recognize environmental standing even in the absence of injury to traditional legal interests, and even where the environmental injury was widely shared. The Court specifically recognized aesthetic interests and "environmental well-being" as constitutionally cognizable interests:

> [T]he complaint alleged that the development "would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations." We do not question that this type of harm may amount to an "injury in fact" sufficient to lay the basis for standing under § 10 of the APA. Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.[30]

Justice Stewart's opinion for the Court then went on to note with approval the judicial trend "toward discarding the notion that an injury that is widely shared is ipso facto not an injury sufficient to provide the basis for judicial review."[31]

Justice Douglas' dissent suggested that the Court should recognize standing to sue in the name of the environmental resource affected.[32] Noting that the courts had traditionally recognized the standing of abstract entities and inanimate objects to sue in their own name, in the form of corporate parties and vessels, Douglas reasoned that environmental resources should themselves have standing:

> So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life. The river for example, is the living symbol of all the

29. *Id.* at 735.

30. *Id.* at 734.

31. *Id.* at 738.

32. For a recent decision recognizing the standing of an endangered species to sue in its own name, *see* Loggerhead Turtle v. The County Council of Volusia County, Florida, 896 F. Supp. 1170 (M.D. Fla. 1995).

> life it sustains or nourishes — fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water — whether it be a fisherman, a canoeist, a zoologist, or a logger — must be able to speak for the values which the river represents and which are threatened with destruction.[33]

Justice Douglas then pointed out that the Sierra Club's uncontested allegation that "one of the principal purposes of the Sierra Club is to protect and conserve the national resources of the Sierra Nevada mountains" was found by the District Court to be a sufficient basis of standing.[34] Justices Blackmun and Brennan also dissented.[35]

Justice Stewart's majority opinion and Justice Douglas' dissent may not be that far apart philosophically. Like the majority, Justice Douglas would require a "meaningful relation" between the individuals seeking to sue and the environmental resource they sought to represent. Justice Douglas did not elaborate on why he felt that the Sierra Club met this "meaningful relation" test in the Mineral King case, but seemed to share with the majority the view that "[t]hose who hike it, fish it, hunt it, camp in it, frequent it, or visit it merely to sit in wonderment are legitimate spokesmen for [an environmental resource], whether they may be few or many."[36]

Despite the Justices' disagreement on the ultimate disposition of the Mineral King standing question, the *Sierra Club* Court seemed to resolve, at least initially, some of the tough issues of environmental standing. The majority and dissent agreed that environmental injuries shared in common, and injuries to intangible interests such as

33. *Morton*, 405 U.S. at 743.

34. *Id.* at 744. Justice Douglas does not elaborate whether he, too, found this allegation sufficient to establish the requisite "meaningful relation" between the putative plaintiff and the resource to be protected. Although it quotes this allegation, Justice Stewart's majority opinion also does not address whether this corporate interest in the preservation of the Sierra Nevada mountains might be sufficient to establish the Sierra Club's standing in its own right.

35. *Morton*, 405 U.S. at 755-60. Justice Blackmun would have either remanded the case to the District Court with instructions to permit Sierra Club to modify its pleading to assert the individual interests of its members in using the Mineral King area, or would have expanded standing doctrine to acknowledge the standing of sufficiently dedicated environmental organizations.

36. *Morton*, 405 U.S. at 744-45; *cf. Morton* ("Nowhere in the pleadings or the affidavits did the Club state that its members use Mineral King for any purpose . . . ."), at 735.

aesthetic values and "environmental well-being" would suffice to establish injury-in-fact for standing purposes. Majority and dissent also both seemed to agree that the standing of individuals seeking to assert the protection of environmental resources would depend on the existence of some sort of "meaningful relation" between the plaintiff (or its members) and the resource affected.

Subsequent decisions of the Court would confirm the *Morton* Court's dicta recognizing harms to "environmental well-being" and aesthetic enjoyment of environmental resources as constitutional "injury-in-fact." In *United States v. Students Challenging Regulatory Agency Procedures*[37] (SCRAP) the Court affirmed a holding that an environmental organization had standing based on its members' allegations that they "use[d] the forests, rivers, streams, mountains, and other natural resources surrounding the Washington Metropolitan area [for] . . . camping, hiking, fishing, sightseeing, and other recreational [and] aesthetic purposes" and a claim that the rail freight rate increases it sought challenging would reduce recycling, increase litter, and increase consumption of natural resources.[38]

Perhaps more significantly (at least as far as environmental injury is concerned), in *Duke Power Company v. Carolina Environmental Study Group, Inc.*,[39] the Court upheld a finding of constitutional standing for a group of residents living in close proximity to planned nuclear generating facilities to challenge the Price Anderson Act.[40] The plaintiffs had claimed that nuclear generating facilities would cause various environmental and economic impacts, including:

> (a) the production of small quantities of non-natural radiation which would invade the air and water; (b) a "sharp increase" in the temperature of two lakes presently used for recreational purposes resulting from the use of the lake waters to produce steam and to cool the reactor; (c) interference with the normal use of the waters of the Catawba River; (d) threatened reduction in property values of land neighboring the power plants; (e) "objectively reasonable" present fear and apprehension "regarding the effect of the increased radioactivity in air, land and water upon [appellees] and their property, and the genetic effects upon their descendants"; and (f) the continual threat of "an accident

37. 412 U.S. 669 (1973).

38. *Id.* at 678.

39. 438 U.S. 59 (1978).

40. 71 Stat. 576, 42 U.S.C. § 2210. The Price Anderson Act limited liability of nuclear power facilities. *Id.* Plaintiffs in the *Duke Power* case challenged this liability limitation on constitutional due process and equal protection grounds.

> resulting in uncontrolled release of large or even small quantities of radioactive material" with no assurance of adequate compensation for the resultant damage.[41]

The Court upheld this finding of sufficient "injury-in-fact," specifically relying on thermal pollution of the lakes and exposure to non-natural radiation:

> It is enough that several of the "immediate" adverse effects were found to harm appellees. Certainly the environmental and aesthetic consequences of the thermal pollution of the two lakes in the vicinity of the disputed power plants is the type of harmful effect which has been deemed adequate in prior cases to satisfy the "injury in fact" standard. *See United States v. SCRAP, supra. Cf. Sierra Club v. Morton*, 405 U.S. 727, 734 (1972). And the emission of non-natural radiation into appellees' environment would also seem a direct and present injury, given our generalized concern about exposure to radiation and the apprehension flowing from the uncertainty about the health and genetic consequences of even small emissions like those concededly emitted by nuclear power plants.[42]

The *Duke Power* Court's reliance on "exposure to non-natural radiation" and the effects of thermal pollution on lakes is telling. The Court did not require the plaintiffs to prove, even as a matter of scientific possibility, that the levels of "non-natural" radiation they would be exposed to would cause any increased risk of illness to them; it was sufficient that the exposure was "non-natural" and was a matter of scientific uncertainty. The *Duke* Court also did not require that the injury claimed by the plaintiffs be the same as that addressed by their substantive claim; after all, the *Duke Power* plaintiffs were asserting an essentially economic substantive claim (deprivation of the right to recover full compensation for injuries in the event of a nuclear accident), not a claim for environmental protection.[43] In addition, the *Duke Power* standing holding was based on four days of factual hearings on the standing issue,[44] so, unlike *Morton* and *SCRAP*, the standing issue in *Duke Power* was presented on a fully developed factual record and not at the pleading stage.

41. *Duke Power Company*, 438 U.S. at 73 (quoting district court opinion, 431 F. Supp. 203, 209 (W.D.N.C. 1977).

42. *Id.* at 73-74.

43. *Id.* at 68. Indeed, the *Duke Power* Court specifically rejected the assertion that plaintiffs be required to establish the "nexus" between the injury claimed and the constitutional provision allegedly violated as was required of those asserting taxpayer standing. *Id.* at 78-81; *see* Flast v. Cohen, 392 U.S. 83 (1968).

44. *Duke Power*, 438 U.S. at 72.

Two other Supreme Court decisions, although not directly bearing on Article III standing, warrant mention. The Supreme Court again upheld environmental standing in *Japan Whaling Association v. American Cetacean Society*,[45] where the Court stated, in a footnote, that an organization whose members engaged in whale watching and the study of whales had alleged a sufficient "injury-in-fact" to challenge the Secretary of Commerce's failure to sanction Japan for violating the International Whaling Commission quotas.[46] Then in 1990, in *Lujan v. National Wildlife Federation*,[47] the Supreme Court issued its first ruling since *Morton* denying environmental standing, although it did so as a matter of statutory standing under the Administrative Procedure Act rather than as a matter of constitutional standing under Article III.

In *National Wildlife Federation*, the Court found that the National Wildlife Federation had failed adequately to allege that its members were "among those injured" where the affidavits submitted in support of standing established only that its members used small portions of vast areas opened up for mineral development by challenged "withdrawal" determinations by the United States Forest Service.[48] The plaintiff asserted that its members used federal lands for recreation "in the vicinity of" the National Forest lands that had been opened to mineral development, but failed to assert that the individual members actually used any portion of the lands actually opened for development within the vast national forest areas identified (2.5 million acres and 5.5 million acres).[49] According to the Court, the NWF plaintiffs had failed to show that they used the actual environmental resources that would be affected by the challenged determination, and thus failed to establish that their asserted injuries fell within the "zone of interests" protected by the statute, as required for a judicial review action under the Administrative Procedure Act.[50]

Thus, the NWF plaintiffs, like the Sierra Club in *Sierra Club v. Morton*, had failed to show that they were themselves "among those injured" by the challenged action. This line of Supreme Court cases dealing with standing "injury" can be broken down into two

45. 478 U.S. 221 (1986).
46. *Id.* at 286 n.4.
47. 497 U.S. 871 (1990).
48. *Id.* at 886-887.
49. *Id.* at 885-887.
50. *Id.* at 882-883, 888.

threads — the first dealing with the kinds (and degree) of environmental injuries that the Court will recognize as sufficient to confer Article III (or statutory) standing, and the second dealing with the relationship between the putative plaintiff and the resource affected. The Supreme Court has been quite willing to recognize non-traditional injuries, such as injury to aesthetic or recreational interests, and even uncertain injuries, such as the exposure to unnatural radiation in *Duke Power*. The Court has, however, strictly required the putative plaintiff to establish its "meaningful relationship" to the environmental resource affected, and has insisted that this relationship be concrete, and not abstract. Thus, an abstract interest in an environmental *issue* has uniformly been rejected, as have interests in vast regions without identification of the use of the specific area affected by the decision challenged.

B. *Causation and Redressability: SCRAP and Duke Power.*

The causation and redressability elements of standing are related. Establishment of the causal relationship between the conduct complained of and the constitutional injury complained of will often subsume the determination of whether a Court order enjoining such conduct will provide relief to the plaintiff. The Court has not, however, at least up to the *Defenders of Wildlife* decision, required a showing of strict tort causation in the sense that the complained of conduct be the but-for cause of the plaintiff's harm. To the contrary, the Court has been willing to accept quite attenuated theories of causation, at least at the pleading stage.

Thus, in *SCRAP*, the Court accepted plaintiffs' allegation that the challenged increase in freight rates would increase the cost of transporting recycled materials, thus discouraging recycling, leading to increased consumption of raw materials as well as increased litter.[51] Plaintiffs alleged that some of this increased littering, as well as some of the increase in logging and mineral development, would occur in national parks and forests in the Washington, D.C. area, interfering with plaintiffs' members' enjoyment of those resources.[52] Plaintiffs also alleged that the increased use and processing of raw materials would increase pollution of the air breathed by their members.[53] While noting that pleading of causation must be

51. *SCRAP*, 412 U.S. at 688-89.
52. *Id.* at 678, 688.
53. *Id.* at 678.

more than an "ingenious academic exercise in the conceivable," the Court determined that plaintiffs had adequately pleaded specific harms to their members flowing from the rate increase.[54] Significantly, the Court also acknowledged that what suffices at the pleading stage would not necessarily suffice for summary judgment: "If, as the railroads now assert, these allegations were in fact untrue, then the appellants should have moved for summary judgment on the standing issue and demonstrated to the District Court that the allegations were sham and raised no genuine issue of fact."[55]

The Court also accepted a relatively attenuated standing theory in *Duke Power Co.*[56] There, plaintiffs claimed, and the District Court had found, that without the liability limitations of the Price-Anderson Act, nuclear power plants could not economically be constructed in plaintiffs' locality, and plaintiffs would be spared the environmental impacts of local nuclear power plants.[57] The Court found sufficient support for this finding in the testimony of plaintiffs' experts, as well as the testimony presented by nuclear industry proponents during hearings on the Price-Anderson Act.[58] The Court also rejected the defendants' claim that plaintiffs be required to disprove the possibility that, even in the absence of Price-Anderson, nuclear power plants would have been constructed by the federal government instead of private industry.[59]

IV. SUPREME COURT CONSIDERATION OF CLEAN WATER ACT CITIZEN SUIT STANDING

Although the United States Supreme Court has never directly confronted the question of citizen suit standing to enforce requirements of the Clean Water Act, *dicta* in two Supreme Court decisions shed light on some of the Court's assumptions about the application of Article III requirements to citizens enforcement suit cases. In the first case, *Middlesex County Sewerage Authority v. National Sea Clammers*,[60] the Court appears to reject the possibility of universal citizens enforcement standing, while in the second case, *Gwaltney of*

54. *Id.* at 688.
55. *Id.* at 689.
56. *Supra*, n.40.
57. *Id.* 438 U.S. at 74-78.
58. *Id.* at 75-77.
59. *Id.* at 77-78.
60. 453 U.S. 1 (1981).

Smithfield v. Chesapeake Bay Foundation,[61] the Court seems to assume that violation of a Clean Water Act is itself the injury-in-fact that supports standing. These decisions are discussed below.

A. *National Sea Clammers*

In *National Sea Clammers*, a coalition of commercial fisherman sued the Middlesex County Sewerage Authority and other polluters seeking damages for injuries to their economic interests resulting from pollution of water in violation of federal law (including, inter alia, the Clean Water Act).[62] The plaintiffs asserted claims under an implied private right of action under the Clean Water Act.[63] The Third Circuit had held that the fishermen plaintiffs were entitled to seek such damages and that an implied private right of action was neither preempted by nor inconsistent with the citizen suit provisions of the Clean Water Act.[64]

In reaching this conclusion, the Third Circuit reasoned that the Clean Water Act citizen suit provision did not preclude a private right of action because the citizen suit provision provided an explicit remedy for those potential plaintiffs who had not suffered any compensable injury that would give rise to a cause of action.[65] Thus, the citizen suit provision, according to the Third Circuit, was meant for those plaintiffs who had not suffered injury from the pollution, while those who had suffered injury could still pursue common law remedies and an implied right of action.[66]

The Supreme Court reversed, holding that there is no private right of action for damages under the Clean Water Act. In doing so, it explicitly rejected the Third Circuit's conclusion that the citizen suit provisions were meant for plaintiffs who had not suffered any injury:

> In fact, it is clear that the citizen-suit provisions apply only to persons who can claim some sort of injury and there is, therefore, no reason to infer the existence of a separate right of action for "injured" plaintiffs. "Citizen" is defined in the citizen-suit section of the FWPCA as "a person or persons having an interest which is or may be adversely affected." § 505(g), 33 U.S.C. § 1365(g). It is clear from the Senate Conference Report that this phrase was

61. 484 U.S. 49 (1987).
62. *Nat'l Sea Clammers*, 453 U.S. at 4-5 & n.6.
63. *Id.* at 12.
64. *Id.* at 9.
65. *Nat'l Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222, 1227 (3d Cir. 1980).
66. *Id.*

> intended by Congress to allow suits by all persons possessing standing under this Court's decision in *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). See S. Conf. Rep. No. 92-1236, p. 146 (1972). This broad category of potential plaintiffs necessarily includes both plaintiffs seeking to enforce these statutes as private attorneys general, whose injuries are "non-economic" and probably non-compensable, and persons like respondents who assert that they have suffered tangible economic injuries because of statutory violations.[67]

B. *Gwaltney of Smithfield*

In *Gwaltney*, the Court addressed primarily the statutory interpretation question of whether a citizen-plaintiff could bring a Clean Water Act suit for wholly past violations of the Act. The Court held that citizens could not so enforce the Act for past violations.[68] It read the use of the present tense in the statutory provision that suit may be commenced against any person "who is alleged to be in violation of an effluent standard or limitation"[69] to require a good faith allegation of ongoing violations at the time suit is commenced.[70] It stopped short, however, of requiring *proof* of ongoing violations as a jurisdictional matter.[71]

In explaining this conclusion, the Court implied that ongoing violations were also necessary to establish standing, and that failure to prove an ongoing violation at summary judgment or trial would defeat citizen suit standing:

> Petitioner contends that failure to require proof of allegations under § 505 would permit plaintiffs whose allegations of ongoing violation are reasonable but untrue to maintain suit in federal court even though they lack constitutional standing. Petitioner reasons that if a defendant is in complete compliance with the Act at the time of suit, plaintiffs have suffered no injury remediable by the citizens suit provisions of the Act. Petitioner, however, fails to recognize that our standing cases uniformly recognize that allegations of injury are sufficient to invoke the jurisdiction of a court. . . . This is not to say, however, that such allegations may not be challenged. In *United States v. SCRAP*, 412 U.S. 669, 689 (1973), we noted that if the plaintiffs "allegations [of standing] were in fact untrue, the [defendants] should have moved for summary judgment on the standing issue and demonstrated to

67. *Nat'l Sea Clammers*, 453 U.S. at 16-17.
68. *Gwaltney*, 484 U.S. at 56-63.
69. CWA § 505(a)(1), 33 U.S.C. § 1365(a)(1)(1994).
70. *Gwaltney*, 484 U.S. at 56-60.
71. *Id.* at 64-67.

> the District Court that the allegations were sham and raised no genuine issue of fact." If the defendant fails to make such a showing after the plaintiff offers evidence to support the allegation, the case proceeds to trial on the merits, where the plaintiff must prove the allegations in order to prevail.[72]

Justice Scalia's concurring opinion (joined by Justices O'Connor and Stevens), made the point more explicitly: in the view of these Justices, there could be no injury-in-fact once the violation of the Clean Water Act had ceased:

> If it is undisputed that the defendant was in a state of compliance when this suit was filed, the plaintiffs would have been suffering no remediable injury-in-fact that could support suit. The constitutional requirement for such injury is reflected in the statute itself, which defines "citizen" as one who has "an interest which is or may be adversely affected."[73]

This assumption that an ongoing violation is the essence of injury-in-fact for standing purposes in a Clean Water Act citizen suit may ultimately have great significance, for it presumes that the statutory violation is itself the "injury" that justifies court intervention, and not the demonstrable consequences of the violation to the receiving water body. Clearly, the impacts of water pollution do not subside immediately upon the elimination of the source — toxic levels of pollutants, emissions of heavy metals, and biological oxygen demand may continue to destroy habitat, kill fish, or render fish unsuitable for fishing or eating for months, years, or even decades after the discharge of pollution has ceased.[74] If, as Justice Scalia maintains, "injury" exists only as long as the violation continues, then the violation itself must be the presumptive injury, and not its scientifically uncertain consequences to the water body.

V. The *Defenders of Wildlife* Decision

It was against this backdrop of generally receptive environmental standing decisions that the Supreme Court decided the *Lujan v.*

72. *Id.* at 65-66.

73. *Id.* at 70.

74. Consider the impact of PCB discharges by General Electric on the Hudson River. Although these discharges largely ceased by 1976, commercial fishing of most fish in the Hudson River is still banned, and health advisories for recreationally fished Hudson River fish are still in effect due largely to General Electric's emissions. If injury-in-fact consists of the demonstrable *impacts* of the statutory violations on concrete interests, then it is impossible to understand how this injury-in-fact would be lacking for recreational and commercial users of Hudson River fish simply because General Electric stopped pouring more poisons into the river.

Defenders of Wildlife case in 1992. In *Defenders of Wildlife*, the Court reversed the Eighth Circuit Court of Appeals' finding that the Defenders of Wildlife had standing to protect endangered species located in foreign countries from habitat destruction caused by United States financed projects.

Defenders of Wildlife had sued to challenge a change in Department of Interior regulations that removed the Endangered Species Act consultation requirement[75] with respect to United States-financed projects on foreign soil.[76] The District Court had granted summary judgment to the defendant, the Secretary of the Interior, on the grounds that Defenders of Wildlife lacked standing.[77] The Eighth Circuit Court of Appeals reversed, and would have found standing.[78]

Defenders of Wildlife asserted three standing theories. First, it relied on the individual standing of two of its members, one who had in the past visited the habitat of the endangered leopard and Asian elephant in Sri Lanka, and another who had in the past visited the habitat of the endangered Nile crocodile in Egypt.[79] Both of these habitats were threatened by United States Agency for International Development-financed projects.[80] Both of these individuals testified that they intended and hoped to return to these locales in the future and seek to view the endangered species in question, but neither had immediate plans to do so.[81]

Second, Defenders of Wildlife relied on what it called the "ecosystem nexus approach" — the theory that its members who use any part of world ecosystem have a cognizable interest in the whole ecosystem, and suffer an injury when any part of that globally interwoven system is injured.[82]

Third, Defenders of Wildlife relied on what it called the "animal nexus approach" — that people interested in study of the endangered animals have a cognizable interest in protecting the species they are interested in worldwide, even if they have no plans to visit the habitat.[83] Related to this theory, Defenders of Wildlife also re-

75. 16 U.S.C. § 1536(a)(2)(1994).
76. *Defenders of Wildlife*, 504 U.S. at 558-559.
77. Defenders of Wildlife v. Hodel, 658 F. Supp. 43, 47-48 (D. Minn. 1987).
78. Defenders of Wildlife v. Hodel, 851 F.2d 1035 (1988).
79. *Defenders of Wildlife*, 504 U.S. at 563-564.
80. *Id.* at 563-564.
81. *Id.*
82. *Id.* at 565-566.
83. *Id.* at 566.

lied on its members whose interest in the species that were threatened was professional, rather than avocational, in nature.[84]

In addition, Defenders of Wildlife relied on its own organizational interest in the procedures guaranteed by the Endangered Species Act for the preservation of endangered species generally.[85]

In reversing the Eighth Circuit's finding of standing, the Court focused primarily on the same question presented by the *Sierra Club v. Morton* case: that is, whether the plaintiff had adequately demonstrated that it was itself among those injured by the conduct complained of by the defendant.[86] Justice Scalia's sweeping opinion for the majority, however, contains much language that has caused concern for citizen enforcement plaintiffs, and that seems to pull back from the generally accommodating Supreme Court standing doctrine in environmental cases.

The majority's broad language is tempered, somewhat, by the exceptions Justice Scalia himself recognizes, implicitly and explicitly, to the strict "injury-in-fact" and "causation" requirements that he articulates. The holding is also tempered by the terms of the concurring opinion written by Justice Kennedy and joined by Justice Souter, as well as by the dissenting opinion of Justice Marshall (joined by Justice O'Conner), and the concurring opinion of Justice Stevens (who would have found standing but reversed on the merits).

A. *Justice Scalia's Majority Opinion on Injury-in-Fact*

The opinion for the Court rejected each of Defenders of Wildlife's standing theories. In doing so, Justice Scalia's majority opinion restated the "irreducible minimum" of constitutional standing in terms that, at least on their face, seemed to pull back from two decades of environmental standing doctrine.[87] Justice Scalia easily rejected the standing claims of those of Defenders of Wildlife's members who expressed a hope to return at some indefinite time to the threatened habitats of the endangered species in question.[88] To the majority, the likelihood that these plaintiffs would in fact be exposed to the harms caused by the defendant's failure to consult concerning impacts of United States-funded projects in these far-

84. *Id.*
85. *Id.* at 571-572.
86. *Id.* at 562-567.
87. *Id.* at 560-61.
88. *Id.* at 564.

flung areas was too remote and speculative to warrant adjudication of the merits of plaintiffs' claims.[89]

On the facts presented, this holding is not startling, as the Article III sufficiency of the interest of individuals who had visited an environmental resource once in their lives and hoped someday to return is at least a debatable proposition. Even Justice Douglas might question whether such individuals had established the "meaningful relationship" with the environmental resources in question as he would have required in his *Sierra Club v. Morton* dissent.

In reaching this conclusion, however, Justice Scalia's opinion restates the standing requirements in terms more onerous to the environmental plaintiff than previous Supreme Court decisions. Thus, despite prior decisions that recognized standing for intangible interests, such as aesthetic values, and for environmental injuries which were widely shared by many members of the public, Justice Scalia's dictum requires that the claimed injury in fact be "concrete and particularized."[90] Similarly, in rejecting the "ecosystem nexus" theory of standing, Justice Scalia raised the ante for constitutional injury-in-fact. Instead of simply rejecting Defenders of Wildlife's claim that the entire world is one recognizable ecosystem giving any person with an interest in one part of the world ecosystem standing to sue with respect to any other portion of the world ecosystem, the Court phrased its holding in terms of the level of harm required to establish "injury-in-fact":

> To say that the [Endangered Species] 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, that is, persons who use portions of an ecosystem not perceptibly affected by the unlawful action in question.[91]

Justice Scalia thus reads a "perceptible [e]ffect" requirement into the concept of injury-in-fact. This "perceptibility" requirement appears to pull back substantially from such decisions as *Duke Power Company*, which recognized exposure to non-natural radiation as an injury-in-fact without requiring a showing that such exposure would cause a perceptible health effect in the plaintiffs.

Similarly, the majority rejected the "animal nexus" and "vocational nexus" claims, finding a lack of perceptible harm to plaintiffs who had an interest in an animal species but could demonstrate no

89. *Id.*
90. *Id.* at 560.
91. *Id.* at 566.

likely contact with the individuals of that species who might be harmed by the challenged government action.[92] Citing *Japan Whaling Association*, Justice Scalia characterized as "the outermost limits of plausibility" a claim of perceptible harm by an individual interested in study of a species in the same region of the world, in which that species is threatened by the government action challenged, as facing perceptible harm.[93]

As with the plaintiffs who only infrequently visited the area affected, rejection of standing for the "animal nexus" and "vocational nexus" plaintiffs does not represent that much of a departure from the Court's previous standing decisions. Right from the *Sierra Club v. Morton* case, the Court has been unsympathetic to standing based on claims of an interest or expertise in ideas or issues. Rejection of standing based on a vocational or avocational interest in the species, but not in the individual animals physically affected by the challenged conduct, is consistent with the Court's previous approach, which had emphasized the relationship between the plaintiff and the physical resource affected.

B. *Justice Scalia's Plurality Opinion Concerning Redressability*

In addition to finding insufficient injury-in-fact to support Article III standing, Justice Scalia would have rejected Defenders of Wildlife's claims of redressability as well. According to Justice Scalia's opinion, because Defenders of Wildlife chose to attack the Department of Interior's general policy statement instead of individual agency actions funding the challenged activities abroad, there was insufficient certainty that the funding agencies would be bound by a change in the Department of the Interior consultation policy ordered by a court.[94] If the funding agencies did not follow the consultation requirement, a change in the requirement would not have any effect on the projects funded.[95] Similarly, according to Justice Scalia, Defenders of Wildlife had failed to show that withdrawal of United States aid for the challenged projects — which constituted only ten percent of the cost of the Sri Lankan project — would actually result in the abandonment of the projects and avoidance of the feared impacts.[96]

92. *Id.* at 566-67.
93. *Id.*
94. *Id.* at 568-69.
95. *Id.*
96. *Id.* at 580 (Kennedy, J. *concurring*).

This "redressability" portion of Justice Scalia's opinion gained only a four-vote plurality of the Court, however. Justices Kennedy and Souter declined to join this part of the opinion, opining that the injury-in-fact issue was dispositive and that the Court need not reach the issue of redressability.[97]

C. *The Court's Discussion of "Procedural Injury"*

A majority of the Court also rejected the Court of Appeals' finding that the Defenders of Wildlife had established standing based on a purely procedural injury.[98] The Court acknowledged that Congress, in enacting the Endangered Species Act, had authorized "any person" to commence an action to enforce the provisions of the ESA against any other person, including the United States Government, alleged to be in violation of its provisions.[99] But, relying specifically on the separation of powers underpinnings of constitutional standing doctrine, Justice Scalia's opinion emphatically rejected the ability of Congress to define new procedural injuries as being sufficiently substantial to satisfy constitutional standing.[100]

This section of the *Defenders of Wildlife* opinion probably has the greatest importance for the future application of standing doctrine to Congressionally created citizens enforcement actions. In rejecting the concept of a Congressionally created "procedural" right, shared equally by each citizen and equally enforceable by each, the Court saw no difference between allowing "any citizen" to enforce Congressionally created statutory duties of government officials and allowing any citizen a right to require the government to comply with general constitutional requirements. To allow Congress to do so would, according to Justice Scalia, "permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,'"[101] and "would permit the courts, with the permission of Congress, 'to assume a position of authority over the governmental acts of another and co-equal department.'"[102]

But in the course of rejecting such purely procedural rights, the Court's opinion acknowledged some distinctions, and implied

97. *Id.*
98. *Id.* at 571-578.
99. *Id.* at 571-72; *see* 16 U.S.C. § 1540(g).
100. *Id.* at 577 (*quoting* U.S. Const. Art. III, §3).
101. *Id.* at 577 (quoting U.S. Const. Art. II, § 3).
102. *Id.* at 577 (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 489 (1923)).

some others, that may ultimately be the salvation of the citizens enforcement suit. First, the Court explicitly acknowledged that procedural rights can be created and enforced if the citizen-enforcer has some "concrete interest" in the subject matter of the procedure in question.[103] Thus, a person who is about to have a federal facility constructed next door will have standing to enforce the NEPA requirement that an environmental impact statement be prepared first.[104] In recognizing such "procedural" rights, the Court also acknowledged that procedural rights are "special" in at least one respect. According to footnote seven of the *Defenders of Wildlife* opinion, the plaintiff who asserts procedural rights "can assert that right without meeting all the normal standards for redressability and immediacy."[105] Thus, the procedural plaintiff need not show that adherence to the correct procedures would actually result in a more favorable decision to her, or that the challenged action would not nonetheless be taken.

Second, implicit in the relaxed standards for standing of a plaintiff who claims a procedural injury coupled with a "concrete interest" in the subject matter is a relaxed requirement for showing injury-in-fact resulting from the decision challenged. Justice Scalia posits that the individual residing next to a proposed federal facility has standing to challenge the environmental review procedures followed in approving the facility, without stating a requirement that the next-door neighbor establish that the proposed facility will cause her "discrete" and "perceptible" injury.[106] Such an injury is presumed.

More explicitly, the Court recognized the "procedural" standing of an organization specifically organized around the protection of a particular environmental resource, again without a specific showing of "perceptible" injury to the organization or its members. Thus, in distinguishing *Methow Valley Citizens Council v. Regional Forester*,[107] (a case in which the Court had seemed to assume, without discussion, the standing of the plaintiff organization), the Court stated "we did not so much as mention standing [in *Methow*], for the very good reason that the plaintiff was a citizens' council for the area in which

103. *Id.* at 572 n.7.

104. *Id.*

105. *Id.* at 572 n.7.

106. *Id.* at 572 & n.8 (members of neighborhood association would "obviously be concretely affected").

107. 833 F.2d 810 (9th Cir. 1987).

the challenged construction was to occur, so that its members would obviously be affected."[108]

Finally, also in its discussion of Congressionally defined procedural rights, the Court offhandedly dropped a tantalizing suggestion of a distinction that could potentially expand citizens enforcement standing substantially. In holding that "injury-in-fact" on the plaintiff's part remained part of the irreducible minimum of Article III (and separation of powers) standing, the Court suggested that a different rule might apply if the suit were not against the government, but against a private violator of a Congressional act. According to the Court, "it is clear that *in suits against the government, at least,* the concrete injury requirement must remain."[109] This possible distinction is also suggested by the Court's distinction of *qui tam* actions in its discussion of the concrete injury requirement.[110]

Although the Court's rejection of purely procedural injury as a basis for standing has some troubling implications for citizens enforcement standing, Justice Scalia's majority opinion leaves considerable room for the continued vitality of citizens enforcement suits. First, *Defenders of Wildlife* leaves room for Congressionally created citizens' "procedural" standing where the citizens have a concrete interest in the environmental resource at issue. Second, *Defenders of Wildlife* acknowledges a presumption of standing for citizens groups composed of citizens in the area affected by the government action. Finally, *Defenders of Wildlife* suggests the possibility of broader standing where suit is brought not against the government, but against a private actor.

D. *Justice Kennedy's Separate Acknowledgement of Congressional Authority to Articulate New Injuries-in-Fact*

Although joining all but the redressability discussion of Justice Scalia's opinion, Justice Kennedy (joined by Justice Souter) wrote a separate concurrence in order to emphasize his view that standing doctrine must be sensitive to changes and not be limited to common law doctrines of injury. Citing the *American Cetacean Society* de-

108. *Defenders of Wildlife*, 504 U.S. at 573 n.8.

109. *Id.* at 578.

110. *Id.* at 572-73 (discussion of "the unusual case" where Congress has created a concrete private interest by providing for a cash bounty); *see generally* Sunstein, *supra*, note 2, at 170-177 (discussing history of *qui tam* actions) & 232-234 (suggesting system of cash bounties to give private plaintiffs Article III stake in enforcement litigation).

cision, Justice Kennedy suggested that he would not completely foreclose the possibility of an "animal nexus" or "ecosystem nexus" approach to standing on stronger facts. Nor was Congress without the authority to expand the scope of standing. It had simply failed to articulate the proper basis for doing so in the Endangered Species Act citizen suit provision. According to Justice Kennedy:

> In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court's opinion to suggest a contrary view. . . . In exercising this power, however, Congress, at the very least, must identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit. The citizen-suit provision of the Endangered Species Act does not meet these minimum requirements, because while the statute purports to confer a right on "any person . . . to enjoin . . . the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter," it does not of its own force establish that there is an injury in "any person" by virtue of "any violation."[111]

Justice Kennedy, joined by Justice Souter, thus recognizes some Congressional leeway to expand the scope of injury-in-fact, so long as Congress articulates a rationale for defining some class of affected plaintiffs. This principle offers more than a ray of hope for the continued vitality of the citizens' enforcement suit, particularly in the Clean Water Act case, given that the class of "citizens" who can commence a suit is specifically limited to those citizens who "[have] an interest that is or may be adversely affected." As the swing votes for the majority, this position, combined with the positions of the three Justices who would have found standing, represents the majority view of the Court.

E. *Justice Stevens' Concurring Opinion Finding Standing*

Justice Stevens concurred in the judgment only, finding standing but reversing on the merits of the foreign project consultation issue.[112] According to Justice Stevens, the plaintiffs satisfied the concrete interest requirement by having visited the habitats at issue in the past or having a professional or avocational interest in the species in question, without necessarily having to show a future intent

111. *Defenders of Wildlife*, 504 U.S. at 580 (Kennedy, J. *concurring*).
112. *Id.* at 581-89 (Stevens, J. *concurring*).

to revisit the habitat.[113] Stevens likened the nature of plaintiffs' interest to that of one family member in the well-being of another: one need not have a definite future intention to visit one's family member to suffer a loss if injury to that family member should occur.[114] Similarly, Justice Stevens found the "imminence" requirement to be satisfied by the imminence of the harm to the habitat in question, without requiring any imminent intention to return to the habitat.[115] Stevens also found the redressability requirement to be satisfied, as the Executive Branch could be expected to follow an authoritative interpretation of the Endangered Species Act by the Supreme Court.[116]

F. *Justice Blackmun's Dissent*

Justice Blackmun, joined by Justice O'Conner, also would have found that the plaintiffs in *Defenders of Wildlife* had standing.[117] Blackmun found sufficient evidence in the record that the plaintiffs' intention to return to the threatened habitat was genuine to survive a motion for summary judgment, and felt that requiring the plaintiff to identify a date certain for their return was an "empty formality,"[118] akin to requiring a plaintiff claiming a decline in property values to prove the date he intended to sell his property, or an employment discrimination plaintiff to prove the date she would be ready to start work.[119] Justice Blackmun would also accept the ecosystem nexus and animal nexus approaches to standing, recognizing that environmental harms may affect ecosystems spread out across the globe, and that one with a professional interest in a species suffers a loss upon the loss of wild populations of that species.[120] Justice Blackmun rejected the plurality's redressability holding: the funding agencies would be bound by the Court's ruling not only because it would be the last word on the subject, but also would be collaterally estopped because of their virtual participation in the litigation.[121]

113. *Id.* at 583-84.
114. *Id.* at 584 n.2.
115. *Id.* at 582-83.
116. *Id.* at 584-85.
117. *Id.* at 589-606 (Blackmun, J. *dissenting*).
118. *Id.* at 592.
119. *Id.* at 593.
120. *Id.* at 594-95.
121. *Id.* at 595-98.

Justice Blackmun also wrote extensively concerning Congress' ability to grant procedural rights, and noted that in the modern administrative state, Congress does not simply legislate in the "black and white" of mandates and prohibitions, but in "procedural shades of gray."[122] These procedures, such as the National Environmental Policy Act,[123] as well as the Endangered Species Act, are designed to protect some environmental interest. Justice Blackmun responds to the separation of powers concerns expressed by the majority by pointing out that Congress' choice of enacting procedural requirements as opposed to substantive mandates is designed to maximize executive discretion, and not to aggrandize Congress at the expense of the executive.[124] Blackmun acknowledged that "[t]here may be factual circumstances in which a Congressionally imposed procedural requirement is so insubstantially connected to the prevention of a substantive harm that it cannot be said to work any conceivable injury to an individual litigant."[125] But Justice Blackmun apparently found a sufficient link to potential injury under the ESA procedures to find standing in *Defenders of Wildlife*.[126]

Despite *Defenders of Wildlife's* rejection of standing in the case before it, and despite some sweeping language in Justice Scalia's opinion for the majority, there is substantial common ground between Justices in the majority and in the dissent, and certain support for Congressionally articulated rights that will give rise to injury in fact. Indeed, comparing the concurring opinions of Justice Kennedy (joined by Souter) and Stevens and the dissenting opinion of Blackmun (joined by O'Conner), there is apparent agreement among a majority of the Justices then on the Court for the proposition that Congress may define new injuries as long as it articulates some link to potential injury to an individual litigant, as well as for the proposition that a vocational or avocational interest in an animal species may, under some circumstances give rise to standing without a showing of actual physical exposure to the threatened individuals of the species.

122. *Id.* at 602.

123. 42 U.S.C. §§ 4321-4370(d).

124. *Defenders of Wildlife*, 504 U.S. at 604 (Blackmun, J. *dissenting*).

125. *Id.* at 606.

126. Curiously, Justice Blackmun expressed no opinion on the merits of plaintiffs' claim, or whether he would affirm or reverse on the merits. It is thus not clear whether Blackmun's ultimate position was any different from that of Justice Stevens.

Moreover, even Justice Scalia's opinion for the Court leaves substantial territory left to citizens enforcement standing in its explicit acknowledgement that so-called "procedural" rights may exist and give rise to injury-in-fact without necessarily showing the causal connection otherwise required, and its tantalizing suggestion that suits not against the government are different.

VI. THE SPECTRUM OF APPROACHES TO CLEAN WATER ACT CITIZENS ENFORCEMENT STANDING

The Clean Water Act's citizens enforcement provisions were initially lightly used.[127] However, by the 1980s, several environmental organizations launched programs for the systematic enforcement of Clean Water Act requirements using the citizen suit vehicle,[128] and much of citizens enforcement suit standing doctrine developed in this period — following the Supreme Court's decisions in *Morton* (1972), *SCRAP* (1973), and *Duke Power* (1978), but before the Court's decision in *Lujan v. Defenders of Wildlife* (1992). The range of possible approaches to citizens enforcement standing range from the strictest possible approach, taking the elements of "injury-in-fact" and "causation" literally to require a citizen-plaintiff to establish a scientifically measurable harm to a resource with an equally demonstrable impact upon an individual plaintiff's enjoyment of that resource, to the concept of universal citizens standing, that is, the concept expressed by Senator Muskie that every citizen of the United States, regardless of geographic location, has a shared interest in the integrity of the nation's waters sufficient to create a justiciable case or controversy against a violator of Clean Water Act provisions.

At least prior to *Defenders of Wildlife*, no court had embraced either of these extremes. However, various courts have discussed these approaches in the course of developing their approach to citizen suit standing. These courts have developed additional, intermediate approaches, resulting in a spectrum of citizens enforcement standing doctrine. This spectrum includes, from strictest to most liberal, the "causation-in-fact" approach, the "parameter" approach, the "resource-based" approach, and the "universal standing" approach. These approaches, and the courts'

127. *See* Jeffrey G. Miller, Citizen Suits: Private Enforcement of Federal Pollution Control Laws § 2.3 (Wiley & Sons, 1987).

128. *Id.* at 11-15.

treatment of them both before and after the *Defenders of Wildlife* decision, are discussed below.

A. *The Causation-in-Fact Approach*

As noted, the most stringent possible approach to Clean Water Act enforcement standing would take the Article III requirements of "perceptible injury-in-fact," "causation," and "redressability" at their most literal. Thus, a plaintiff might be required to plead (and, at summary judgment or trial, to offer proof) that pollution of a waterway has scientifically demonstrable impacts that are detrimental to that plaintiff's use of the water body, such as actual mortality rates in fish or other species of recreational value, actual health risks to humans swimming or fishing in the waterway, or actual, observable aesthetic impacts. In addition, and more problematically, the plaintiff could be required to prove that these injuries are "causally related" to the Clean Water Act violations in a "but for cause" sense — that is, that in the absence of the defendant's violations, the observed and proven detrimental impacts would not have occurred. Similarly, in order to meet the strictest possible application of the "redressability" requirement, the plaintiff might be required to prove that the elimination of the defendant's own contribution to pollution of the water body in question would alleviate the specific detrimental impacts of which the plaintiff complains.

Such an approach would pose insurmountable obstacles for many Clean Water Act citizen suits. The Clean Water Act explicitly rejected a regulatory regime in which dilution of pollutants by the receiving water body excused the polluter from compliance in favor of a strict liability regime in which all additions of pollutants to the water body, regardless of impacts, are banned. Under this regime, many clear cut violations of the Clean Water Act will not have scientifically demonstrable impacts on fish or other aquatic organisms. For example, the first industrial or municipal discharger on a pristine lake might commence discharging pollutants without a permit, or in excess of technology-based permit limits, but without any immediately measurable, or even imminently measurable, impact on the aquatic ecosystem due to the initial assimilative capacity of the water body. The Clean Water Act clearly intends to make such violations enforceable immediately, and not only after proof of damage to the ecosystem arises.

Beyond the problem of proving measurable damage to the aquatic ecosystem, the problem of proving actual causation would prove even more insurmountable. Even where a water body is so grossly polluted that the effects of pollution are readily observed and scientifically measured, proof of the source of the particular pollution causing the impacts, or that one particular discharger is the "but-for" cause of the pollution impacts on a water body with many dischargers, may be all but impossible. Precisely these problems of proof in enforcement cases are what led the Congress to reject the Water Quality Act in favor of the Clean Water Act.

This inevitable contradiction between Congress' strict liability regime in enacting the Clean Water Act, and the stated "injury" and "causation" elements of standing doctrine have lead those courts that have considered arguments for this stringent "causation-in-fact" test to reject it. For example, in *Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc.*,[129] the Third Circuit rejected an argument for strict proof of causation, explicitly relying on the purposes of the Clean Water Act as well as Article III:

> Plaintiffs need not show "to a scientific certainty" that the oil they saw came from [defendant's] effluent. This tort-like causation is not required by Article III and is apparently an attempt by [defendant] to negate the strict liability standard of the Act. Since the Act forecloses [defendant] from raising such an argument at the liability stage, [defendant] attempts to raise it under the guise of standing.[130]

Other courts have similarly rejected arguments for strict proof of causation to establish Clean Water Act enforcement standing.[131]

It is obviously not a complete answer to the Article III standing inquiry to state that a requirement of strict proof of causation would negate the *statutory* requirements of strict liability for Clean Water Act violations. *Defenders of Wildlife* suggests that the Constitution imposes some limit on the extent to which Congress, by legislation, may define the outer limits of standing. *Defenders of Wildlife* itself did not directly address the kind of causation and "injury-in-fact" issues that arise in Clean Water Act suits, but its language might be read to support a strict approach to determination of the issues of "injury" and "causation."

129. 913 F.2d 64 (3d Cir. 1990).

130. *Id.* at 73 n.10.

131. *See* P.I.R.G. v. AT&T Bell Labs., 617 F. Supp. 1190 (D.N.J. 1985); Chesapeake Bay Found., Inc. V. Bethlehem Steel Corp., 608 F. Supp. 440 (D. Md. 1985).

B. *The Parameter Approach*

Some of the courts that have rejected arguments for application of a strict "injury" and "causation" approach have adopted a middle ground that, in effect, requires proof of a perceptible injury and then presumes a causal relationship between the injury and the violation as long as there is some plausible connection between the violation and injury. Under this approach, the Clean Water Act citizen-plaintiff must establish that pollution of a water body causes perceptible impacts on her enjoyment of that water body — for example, that visible oil slicks or turbidity in the water offend her aesthetically, or that toxic pollutants have killed fish or wildlife or resulted in health advisories against consumption of fish — that interfere with her regular enjoyment of the water body.

Next, the plaintiff must establish that the *kinds* of impacts identified are caused by the *kinds* of permit violations complained of. Thus, specific permit parameters must be associated with specific kinds of perceptible environmental impacts — that is, violations of oil and grease parameters are related to oil slicks, and violations of toxics standards may be correlated with killing of wildlife or health advisories against fish consumption. To this extent, the "parameter" approach is similar to the strictest "causation-in-fact" test, in that the plaintiff must identify specific environmental harms that have had a perceivable impact on her, and causally relate these impacts to the complained of conduct. The "parameter" approach stops short, however, of requiring proof that it was the defendant's own pollution that in fact caused the plaintiff's injuries, and thus avoids the most serious problem of a strict application of "injury-in-fact" and "causation" requirements of standing doctrine.

The leading case for the "parameter" approach is *P.I.R.G v. Powell Duffryn Terminals, Inc.*[132] In *Powell Duffryn*, the Third Circuit upheld the standing of individual members of an environmental organization, based on their regular use of the affected water body (the Kill Van Kull), and their aesthetic offense at the sight of oil sheens on the water, the brown color of the water, and the bad odors emanating from the water.[133] The defendants submitted expert affidavits asserting that the defendants' discharges could not, to a scientific certainty, affect the water quality of the Kill Van Kull in the vicinity of the park used by the plaintiffs, and that the Kill Van Kull was so

132. 913 F.2d 64 (3d Cir. 1990).
133. *Id.* at 71.

polluted by other sources of pollution that elimination of the defendant's discharges would not perceptibly improve the water quality of the Kill Van Kull anywhere.[134] In other words, the *Powell Duffryn* defendants relied upon precisely the scientific causation arguments that were successfully used to stymie enforcement efforts under the Water Quality Act, and which Congress specifically sought to eliminate by adopting the strict liability scheme of the Clean Water Act.

As noted above, the Third Circuit emphatically rejected this attempt to perform an end run around the Clean Water Act's strict liability scheme under the guise of Article III standing. The court also, however, rejected an approach that would have found any violation of a permit provision presumptively to satisfy the injury and causation requirements.[135] Instead, the court announced the parameter-based approach to Clean Water Act standing:

> Although we agree that a permit exceedence alone is not sufficient to establish the second prong of *Valley Forge*, the facts are sufficient here to trace PIRG's injuries to PDT's discharges.
>
> The requirement that plaintiff's injuries be "fairly traceable" to the defendant's conduct does not mean that plaintiffs must show to a scientific certainty that defendant's effluent, and defendant's effluent alone, caused the precise harm suffered by the plaintiffs. A plaintiff need not prove causation with absolute scientific rigor to defeat a motion for summary judgment. The "fairly traceable" requirement of the *Valley Forge* test is not equivalent to a requirement of tort causation. Cf. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 78, 57 L.Ed. 2d. 595, 98 S.Ct. 2620 (1978).
>
> The standing requirement ensures that parties will not "convert the judicial process into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'" *Valley Forge*, 454 U.S. at 473 (quoting *United States v. SCRAP*, 412 U.S. 669, 687, 37 L.Ed. 2d 254, 93 S.Ct. 2405 (1973)). In order to demonstrate that they are more than "concerned bystanders," plaintiffs need only show that there is a "substantial likelihood" that defendant's conduct caused plaintiffs' harm. *Duke Power Co.*, 438 U.S. at 75 note 20 (1978). In a Clean Water Act case, this likelihood may be established by showing that a defendant has 1) discharged some pollutant in concentrations greater than allowed by its permit 2) into a waterway in which plaintiffs have an interest which is or may be adversely affected by the pollutant

134. *Id.* at 72.

135. *Id.*

> and that 3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.[136]

Significantly, this approach does not require proof that the actual pollutants from the defendant's facility caused the specific harm to the plaintiff. The plaintiff need only establish that the *types* of pollutants emitted by the defendant in excess of its permit limitations caused the *types* of injuries suffered by the plaintiff. Thus, it was sufficient for the plaintiff in *Powell Duffryn* to establish that he suffered aesthetic injuries due to the effect of an oily sheen on the surface of the water of Kill Van Kull, and that Powell Duffryn Terminals was exceeding its permit limitations for oil and grease. Because oil and grease exceedences cause the kind of injury suffered by the plaintiff, there was sufficient causal relation between his injury and his stake in the suit, and the violation complained of to satisfy the causal relationship test.[137]

The *Powell Duffryn* court also considered the "redressability" requirement of standing doctrine. The court found the causal relationship between the defendant's discharges and general pollution conditions sufficient to establish redressability: "If [Powell Duffryn Terminals] complies with its permit, the pollution in the Kill Van Kull will decrease."[138] The court also recognized that the deterrence effect of a civil penalty assessment would support redressability; that is, that the collection of penalties from Powell Duffryn Terminals, as authorized by Clean Water Act section 505, would serve both general and specific deterrence purposes — reducing future pollution of the waterway both by Powell Duffryn and by other would be polluters.[139]

Several other courts have adopted the Powell Duffryn "parameter" based approach, and this approach may fairly be said to be the prevailing test for standing in Clean Water Act cases.[140] The "pa-

136. *Id.*

137. *Id.* at 73.

138. *Id.*

139. *Id.* The Third Circuit cited several other decisions that have also recognized the redressability function served by assessment of civil penalties. *See* Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd., 890 F.2d 690, 695 (4th Cir. 1989); Sierra Club v. Simkins Indus., Inc., 847 F.2d 1109 (4th Cir. 1988), *cert. denied*, 491 U.S. 904 (1989); P.I.R.G. v. AT&T Bell Labs, 617 F. Supp. 1190, 1200-01 (D.N.J. 1985).

140. *See, e.g.*, Save Our Community v. E.P.A., 971 F.2d 1155 (5th Cir. 1992); N.R.D.C. v. Watkins, 954 F.2d 974 (4th Cir. 1992); P.I.R.G. v. Shell Oil Co., 840 F. Supp. 712 (N.D. Cal. 1994); Concerned Area Residents for the Environment v. Southview Farm, 834 F. Supp. 1410 (W.D.N.Y. 1993), *rev'd on other grounds*, 34 F.3d 114 (2d Cir. 1994); *cert. denied*, 115 S. Ct. 1793 (1995).

rameter" based approach provides a workable compromise for application of Article III standing doctrine to Clean Water Act citizen suits, and avoids the worst contradictions that a literal application of the "causation" and "redressability" requirements might bring. It does not, however, provide a completely satisfactory solution to the problem of Clean Water Act citizens enforcement standing. It does not address violations other than permit exceedences or parameter excursions, such as reporting requirements, or failure to obtain a permit in the first place.[141]

By maintaining the requirement of an injury that is objectively perceivable by the plaintiff, the parameter approach still falls short of the Clean Water Act's goals of providing for vigorous enforcement before the effects of pollution have reached the stage that they are observable by the unaided senses. Under the *Powell Duffryn* approach to standing, a permit holder with a plant on an otherwise unpolluted lake or river could violate its permit with impunity until the "assimilative" capacity of the receiving water body was exhausted. A user of the lake or river might not be able to show the kind of injury contemplated by *Powell Duffryn* until the water was seriously polluted, and foul odors, dead fish, or oily sheens might be readily observed. In other words, the Clean Water Act citizens enforcement "medicine" would be unavailable until the patient was dead, or at least grievously ailing. This was not the intent of Congress in specifically rejecting the Water Quality Act approach of non-regulation of water pollution until after the assimilative capacity of the water body was reached.

C. *Resource-Based Approach*

Other courts have taken an approach more consistent with the wording of the Clean Water Act citizen suit provision, and with its legislative history. Picking up on the focus in *Sierra Club v. Morton* on the regular use of an environmental resource for recreational, aesthetic, or other environmental purposes, these cases recognize standing in any individual who demonstrates an "interest which is or may be adversely affected" by showing regular recreational use of

141. Some courts have found their way around the problem of reporting violations by finding a Congressionally created "informational" right, invasion of which is a separate injury. *See, e.g.*, P.I.R.G. v. Yates Indus. Inc., 757 F. Supp. 438, 443 (D.N.J. 1991). Recognition of Congressionally created "informational" rights as sufficient to create an injury-in-fact to support Article III standing ought to support a broader view of standing for permit violations as well.

the water body, without requiring a showing of specific injury perceivable by the plaintiff or traceable to the defendant, other than the contribution of pollutants to the water body.

This approach to the standing question might be dubbed the "resource-based" approach, as it focuses on the plaintiff's interest in the resource affected by the defendant's contribution of pollutants, and not on specific impacts of pollution. The leading case for this approach is *NRDC v. Outboard Marine Corp.*[142] In *Outboard Marine*, NRDC relied on the standing of its members who lived adjacent to, walked along, and swam in the waters that received Outboard Marine's discharges. NRDC sought to challenge Outboard Marine's exceedence of its discharge limitations for PCBs, but did not submit evidence of any specific harm suffered by its individual members due to PCB pollution. The court rejected Outboard Marine's motion for summary judgment on standing grounds:

> OMC argues those affiants fail to satisfy the standing requirements of such cases as *Morton* by not demonstrating through their affidavits and later depositions that they have personally suffered an injury from OMC's putatively illegal discharges. OMC characterizes NRDC's members as merely concerned about pollution of the affected waterways generally, with their alleged injuries neither fairly traceable to OMC's conduct nor redressable by the relief sought in this case. Understandably, OMC cites no case in which a court has held similar showings insufficient for standing under the Act. Its argument stems from a basic misunderstanding of the type of injury NRDC and its members need to demonstrate. It is enough for NRDC to show its members use the water into which OMC's allegedly illegal discharges flow (*see, e.g., Sierra Club v. SCM Corp.*, 747 F.2d 99, 107 (2d Cir. 1984) (standing could be established by "a concrete indication that Sierra Club or one or more of its members used the Wolcott Creek tributary or would be affected by its pollution")). Such standing is not undermined because NRDC's members have not explicitly said they are harmed by OMC's permit violations. It is enough that they identify harm to their aesthetic or environmental interests from the overall pollution of the waterways. If OMC is proved to be violating the terms of its permit, that alone constitutes injury to those using the affected waters (*see P.I.R.G. v. Georgia Pacific Corp.*, 615 F. Supp. 1419, 1424 (D.N.J. 1985) ("The Clean Water Act presumes unlawful discharges to reduce water quality because definite proof of the proposition is often nearly impossible")).

142. 692 F. Supp. 801 (N.D. Ill. 1988).

> Any requirement that NRDC must prove its members are harmed by discharges specifically traceable to OMC would "virtually emasculate the citizen's suit provision by making it impossible for the plaintiff to demonstrate standing" *Chesapeake Bay Found. v. Bethlehem Steel Corp.*, 608 F. Supp. 440, 446 (D. Md. 1985)). Indeed, such a causation standard would compel a stricter showing for standing than for liability under the Act, where proof of a permit violation is sufficient. (*Georgia Pacific*, 615 F. Supp. at 1424). Thus NRDC demonstrates the necessary link between OMC's activities and the identified injury to NRDC's members as long as it can prove OMC's permit violations. Relatedly it follows that proof of such violations will suffice to couple the redress of NRDC's members' injuries with this Court's enjoining or penalizing of the violations.[143]

Like the approach of both the majority and Justice Douglas's dissent in the *Sierra Club v. Morton* case, the resource-based approach to standing focuses on the relationship of the plaintiff to the resource affected, or potentially affected, by the defendant's conduct, rather than focussing on observable harm to the resource. As the court cogently explains in *OMC*, this approach does the greatest justice to the Clean Water Act's strict liability scheme as well as its grant of standing to "any person having an interest which is or may be adversely affected," and the explicit references in the legislative history to the *Morton* test. Although the *OMC* court's recognition that proof of a permit violation "alone constitutes injury to those using the affected waters" has been explicitly rejected by the Third Circuit in *Powell Duffryn*, the Second Circuit, at least implicitly, and other courts, more explicitly, appear to have adopted the *OMC* resource-based approach.[144]

The *OMC* court's rejection of any requirement that plaintiffs prove an observable impact on the water body or their use and enjoyment of it in order to establish standing is clearly most consistent with the Clean Water Act's strict liability approach to water pollution and the Act's rejection of the water quality-based approach of

143. *Id.* at 807-08.

144. *See* Friends of the Earth v. Consol. Rail Corp., 768 F.2d 57 (2d Cir. 1985); Sierra Club v. SCM Corp., 747 F.2d 99, 107 (2d Cir. 1984)(*dicta*); Atl. States Legal Found. v. Universal Tool, 735 F. Supp. 1404, 1411 (N.D. Ind. 1990); Ark. Wildlife Fed'n v. Bekaert Corp., 791 F. Supp. 769, 775-776 (W.D. Ark. 1992). The Fourth Circuit has also suggested, in dicta, that recreational use of the affected water body was by itself sufficient to satisfy the "injury-in-fact" requirements of standing doctrine. Chesapeake Bay Found. v. American Recovery Co., 769 F.2d 207, 209 (4th Cir. 1985); *see also* Sierra Club v. Simkins Indus., Inc., 847 F.2d 1109, 1112 & n.3, 1113 (4th Cir. 1988) (one member of organization who hiked near impacted water body sufficient to support standing).

the Water Quality Act. But does this test survive Justice Scalia's reasoning in *Defenders of Wildlife* that, in order to be constitutionally cognizable, a claimed Article III injury-in-fact must be "concrete," "particularized," "perceptible," and "tangible"? For reasons explained below, this author believes that the resource-based approach to standing not only survives *Defenders of Wildlife*, but gains support from it.

D. *Universal Standing*

Taken literally, the Clean Water Act's declaration that "any citizen" may commence an action to enforce its prohibitions against water pollution could be read to grant universal enforcement standing, at least as a statutory matter, to any citizen of the United States, regardless of her geographical location or use of the water body affected. Of course, the Clean Water Act's definition of the term "citizen" limits its scope to those persons having an interest "which is or may be adversely affected," and Senator Muskie's explicit reference to the *Morton* decision seems to demand an interpretation that limits enforcement standing to those with some special relationship to the affected water body. Senator Muskie also stated, however, that the standing provision was meant to grant standing to the outer reaches permitted by the Constitution, and he specifically cited the example of a citizen of one state whose interest in enforcement of the environmental laws generally would suffice to allow him to enforce the Clean Water Act even against a violator in a remote state.

Although this legislative history suggests some Congressional intent to grant universal enforcement standing, efforts to invoke such standing have been almost completely unsuccessful in the courts.[145] For example, in *Sierra Club v. SCM Corp.*,[146] the Second Circuit emphatically rejected Sierra Club's effort to rely on its general interest in environmental enforcement (as it had sought to do in *Morton*), and suggested instead that to establish standing Sierra Club had to identify some members who used the water body in question. As noted above, in the *National Sea Clammers* case the United States Supreme Court also rejected the argument that the citizen suit pro-

145. *But see* Metro. Washington Council for Clean Air v. District of Columbia, 511 F.2d 809 (D.C. Cir. 1975).

146. 747 F.2d 99 (2d Cir. 1984).

vision of the Clean Water Act was meant to provide an action for plaintiffs' without injury-in-fact.[147]

Of course, the *Defenders of Wildlife* decision appears to foreclose the constitutional permissibility of a Congressional grant of enforcement standing to persons without injury-in-fact, "in suits against the government, at least." One commentator has declared the concept of citizens enforcement to be dead after *Defenders of Wildlife*.[148] But *Defenders of Wildlife's* implicit reservation of judgment concerning suits *not* against the government — i.e., private enforcement suits against private violators — leaves at least a crack in the door open for private attorneys general to enforce Clean Water Act requirements without proof of individual interest in the water body affected.

VII. *DEFENDERS OF WILDLIFE'S* IMPACT ON CITIZEN SUIT STANDING

Despite *Defenders of Wildlife's* sweeping language, the decision certainly has not settled issues of citizens enforcement standing under the Clean Water Act. Post-*Defenders of Wildlife* standing decisions run a gamut just as wide as the pre-*Defenders of Wildlife* decisions did. Although the strict "causation-in-fact" approach has garnered a little more judicial support since *Defenders of Wildlife* than it enjoyed before, courts have also reaffirmed the parameter approach as well as the resource-based approach to standing subsequent to *Defenders of Wildlife*. The *Defenders of Wildlife* decision has neither tolled the death knell for citizens enforcement litigation, as predicted by some, nor has it promoted clarity or predictability in the standing tests applied to citizens enforcement suits.

A. *Post-Defenders of Wildlife Support for Resource-Based Standing*

At least one decision subsequent to *Defenders of Wildlife* has suggested that recreational and aesthetic use of a receiving water body, combined with the violation of the Clean Water Act's permitting requirement, suffices to establish injury-in-fact for standing purposes, without a showing that the water body has suffered observable pollution impacts. In *Sierra Club v. Cedar Point Oil*,[149] the Fifth Circuit upheld the standing of an environmental organization to challenge un-permitted discharges of water into Galveston Bay by

147. *Nat'l Sea Clammers*, 453 U.S. at 16-17.
148. Sunstein, *supra*, note 2 at 164-166.
149. 73 F.3d 546 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 57 (1996).

an oil well, based on the interests of its members who used Galveston Bay for swimming, canoeing, and bird-watching, and who lived near Galveston Bay. The court's opinion applied a resource based approach to injury-in-fact, focusing primarily on the relationship of plaintiff's members to the water body affected by the discharge rather than on the observable injuries to the water body. The court reasoned:

> Cedar Point makes much of the fact that the affiants expressed "concern" that the discharge of produced water will impair their ability to engage in recreational activities. Such language, Cedar Point argues, stated only an interest in eliminating produced water discharges into Galveston Bay, and not an injury in fact. We find no merit in this contention. Whether the affiants were "concerned" or "believed" or "knew to a moral certainty" that produced water would adversely affect their activities on the bay is a semantic distinction that makes little difference in standing analysis. The requirement that a party demonstrate an injury in fact is designed to limit access to the courts to those "who have a direct stake in the outcome," *Valley Forge Christian College*, 454 U.S. at 473 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 740, 31 L.Ed. 2d 636, 92 S. Ct. 1361 (1972)), as opposed to those who "would convert the judicial process into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'" Id. *quoting *United States v. SCRAP*, 412 U.S. 669, 687, 93 S. Ct. 2405, 37 L.Ed. 2d 254 (1973)). Sierra Club's affiants are concerned, but they are not mere "bystanders." Two of the affiants live near Galveston Bay and all of them use the bay for recreational activities. All of the affiants expressed fear that the discharge of produced water will impair their enjoyment of these activities because these activities are dependent upon good water quality. Clearly, Sierra Club's affiants have a "direct stake" in the outcome of this lawsuit.[150]

This holding is a strong articulation of a resource-based approach to standing. The plaintiff demonstrated its "stake" in the controversy by showing its interest in the waters into which the pollutants were deposited and this stake was injury enough to support standing.[151] The Fifth Circuit did not, however, attempt to square this result with the approach to standing taken by the Supreme Court in *Defenders of Wildlife*. In fact, the *Defenders of Wildlife* decision is not cited or discussed by the *Cedar Point Oil* court.

150. *Id.* at 556.

151. The court did go on, as an alternative holding, to note that at least one of the plaintiff's affiants complained of actual degradation of water quality in Galveston Bay, including discolored water, oil, and grease. *Id.* at 556-557.

B. *Cases Reaffirming the Powell Duffryn Parameter-Based Approach*

Despite its non-literal application of the causation and redressability elements of Article III standing articulated in *Defenders of Wildlife*, several circuits have reaffirmed the *Powell Duffryn* "parameter" based approach to standing. The Third Circuit itself so ruled in *N.R.D.C. v. Texaco.*[152] More recently, the Fifth Circuit cited *Powell Duffryn* approvingly in affirming Clean Water Act enforcement standing for an organization whose members used the affected body of water for recreational activities including swimming, canoeing, and bird watching, and one of whose members claimed to be offended by malodorous and discolored water in the general vicinity of the defendant's discharge.[153]

The Eastern District of Texas has also explicitly applied the *Powell Duffryn* approach to affirm the standing of an organization whose members were recreational users of a body of water several miles downstream from the body of water of the defendant's discharge.[154] In a case brought by Friends of the Earth against Chevron, the District Court rejected the Chevron's argument that because its discharge constituted less that 0.17% of the flow into the lake used by the plaintiff's members, it could not possibly be the cause of pollution impacts observed by the Friends of the Earth's members. The Court quoted *Powell Duffryn's* suggestion that the plaintiff need not prove causation to a scientific certainty. The Dis-

152. 2 F.3d 493 (3d Cir. 1993).

153. *Cedar Point Oil Co.*,73 F.3d 546. Although the *Cedar Point* court purported to apply the *Powell-Duffryn* test to affirm standing based on the claims of the plaintiff's one member who could point to perceptible pollution of the receiving water body, some of the language in this opinion is more consistent with a broader, resource-based approach to standing, as discussed *supra*, text accompanying notes 143-144. The *Cedar Point* decision also holds explicitly that citizens have standing to bring an enforcement action against an unpermitted discharge in violation of the Clean Water Act permitting requirements even where the discharger could have discharged the same amount of pollutants with a permit: "Because Cedar Point does not even have a permit for its discharges of produced water, any discharge exceeds that which is allowable under the CWA." *Id.* at 558. This is an important principle for standing, as the Clean Water Act prohibits any discharge "except in compliance with" its permitting provisions. Under this reasoning, any discharge without a permit, or under a permit whose provisions are otherwise being violated, is an illegal discharge, and pollution injuries of the sort related to the discharge are injuries that support standing, whether or not those discharges exceed the amounts that might have been permissible had the permit been complied with. *See also* Atl. States Legal Found. v. Karg Bros., Inc., 841 F. Supp. 51, 55 (N.D.N.Y. 1994) (holding that violation of pretreatment regulations supports standing on the part of users of river into which sewage pretreatment plant discharges, even though violation did not result in exceedence of any permit parameter by the sewage treatment plant).

154. *Friends of the Earth v. Chevron Chem. Co.*, 900 F. Supp. 67 (E.D. Tex. 1995).

trict Court also relied on the deterrence effect of a penalty judgment to support its finding that the redressability requirement is satisfied.[155] The District of New Jersey, Northern District of Ohio, and District of California have also applied the *Powell Duffryn* test, since *Defenders of Wildlife,* to find standing on the part of users of water bodies downstream from the challenged discharge.[156] In so doing, both the Ohio and California courts distinguished *Defenders of Wildlife* on its facts.

Interestingly, none of these other decisions reaffirming the parameter standing approach discussed *Lujan v. Defenders of Wildlife* or considered whether that decision had changed the constitutional standing requirements applicable to citizens enforcement suits.

C. *"Causation-in-Fact" Test*

A few courts addressing enforcement standing issues since the *Defenders of Wildlife* decision have moved towards demanding stricter proof of a demonstrably perceptible change in the water body (or other environmental resource affected) and the violation complained. For example, in *Friends of Earth v. Crown Cent. Petrol. Corp.*,[157] the Eastern District of Texas rejected a claim of standing by a group of birdwatchers challenging oil and grease discharges to a lake, finding insufficient evidence of an imminent perceptible harm that could be causally related to the violations complained of:

> Greene and the Pilgrims explained that pollution in Lake Palestine could cause extinction of certain species of birds due to the magnification of its toxic effects as it rose through the food chain, the birds being the top predator in the food chain. However, what FOE fails to do is establish that any injury to its members' birdwatching pursuits is imminent. FOE's designated members noticed no reduction in the wildlife population or any adverse conditions to Lake Palestine which might indicate that such a reduction was imminent. FOE presents no evidence of perceptible harm, FOE merely maintains that pollutants could accumulate over time. A possibility that pollutants might eventually accumulate and perhaps cause harm does not constitute an

155. In a later decision, after trial, the *F.O.E. v. Chevron* court ultimately rejected FOE's organizational capacity to represent the individuals identified as its members, as the organization lacked formally defined membership criteria. *Friends of the Earth v. Chevron,* 919 F. Supp. 1042 (E.D. Tex. 1996).

156. *California Pub. Int. Research Group v. Shell Oil Corp.*, 840 F. Supp. 712 (N.D. Cal. 1994) (distinguishing *Lujan*); N.R.D.C. v. Vygen Corp., 803 F. Supp. 97 (N.D. Ohio 1992) (distinguishing *Lujan*); P.I.R.G. v. N.J. Expressway Auth., 822 F. Supp. 174 (1992).

157. No. 6:94 CV 489, 1995 U.S. Dist. LEXIS 16338 (E.D. Tex. Sep. 22, 1995).

> injury that is "certainly impending." *Whitmore v. Arkansas*, 495 U.S. 149, 158, 109 L.Ed. 135, 110 S.Ct. 1717 (1990). "Standing is not an 'ingenious academic exercise in the conceivable,' but . . . requires, at the summary judgment stage, a factual showing of perceptible harm." *Lujan II*, 112 S.Ct at 2139 (citations omitted). FOE has failed to show an actual or imminent injury. Because no injury-in-fact has been established, there can be no representational standing.[158]

This approach seems hard to reconcile with the decision by the same court in *Friends of the Earth v. Chevron Chemical Co.*

More recently, in *Public Interest Research Group of N.J. v. Magnesium Elektron, Inc.*,[159] the Third Circuit vacated a judgment in favor of plaintiffs after trial in a Clean Water Act citizens enforcement case, even though the court had previously affirmed summary judgment in favor of the plaintiffs on the standing issue. The court reasoned that the plaintiffs' failure to contradict testimony of the defendant's trial expert to the effect that the admitted permit violations had no observable negative impact on the receiving water body was a failure of proof on the fundamental jurisdictional issue of standing, and required vacation of the judgment despite the court's earlier ruling. Citing *Lujan*, the court reasoned that Congressional intent to remove the injury element from the Clean Water Act violation could not overcome the "case or controversy" requirements of the Constitution. The Third Circuit also rejected caims that the plaintiffs were injured by the knowledge of the existence of pollution and that the threat of future effects of the identified pollution was too remote to satisfy an "imminent" injury standard.

Although the court recognized its earlier *Powell Duffryn* decision, it distinguished that case on the grounds that the *Powell Duffryn* plaintiffs had at least identified observable impacts of pollution on the receiving water body. Despite uncontradicted testimony that plaintiffs' members were recreational users of the affected water body, the court rejected standing on the grounds that the water was not yet polluted.

The Eastern District of Pennsylvania also seems to have moved towards a "causation-in-fact" approach to standing, at least under the analogous citizen suit provisions of the Clean Air Act. In *Ogden Projects, Inc. v. New Morgan Landfill Company*,[160] that court rejected the standing of an individual plaintiff who sought to challenge the

158. *Id.* at 22-23.
159. U.S. App. LEXIS 20846 (3d Cir. 1997).
160. 911 F. Supp. 863 (E.D. Pa. 1996).

failure of a landfill to obtain a Clean Air Act permit for its emissions of ozone-causing air contaminants. The plaintiff, although residing 85 miles from the facility, did reside and recreate in the same ozone transport region as the facility, as determined by EPA, which region was in non-attainment of air quality standards for ozone. Nevertheless, the court rejected his individual standing, citing his failure to offer proof that it was the defendant's pollutant emissions that caused his air quality impacts:

> The Individual Plaintiffs offer no evidence regarding the magnitude of the diminished air quality nor the specific direct effect, if any, that this diminished air quality will have on their health, environmental, and recreational interests. From the fact that the air quality in the geographical area surrounding the landfill would have been better had Defendant obtained a Part D permit, Individual Plaintiffs summarily conclude that their health, environmental and recreational interests suffer injury, without filling in the blanks.
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> * * *
>
> The Individual Plaintiffs in the case at bar have made no such showing [of how the pollutant discharges impair air quality]. They have not offered evidence establishing how much ozone will be produced by emissions of VOCs from the landfill. . . . In addition, they never established that increased ozone levels would be severe enough to affect their health, recreational, or environmental interests. . . . Instead, the Individual Plaintiffs cursorily rely on general EPA recognition that landfill emissions present human health hazards.
>
> * * *
>
> In short, the individual Plaintiffs are too hasty in drawing a causal connection between VOC emissions from the Morgantown Landfill and the potential injury to their health, environmental and recreational interests. The individual Plaintiffs therefore have not satisfied their burden of proving injury in fact and thus do not have standing to bring this action. If they did have standing on the facts before us, standing would become automatic for anyone living in the Northeast Ozone Transport Region.[161]

The *Ogden* decision has plainly adopted a causation-in-fact approach to standing that would effectively rule out nearly all citizen enforcement suits under the Clean Water Act *and* the Clean Air Act. Despite uncontradicted evidence that plaintiffs resided in a region declared to be in violation of health-based standards for ozone, and that the defendant was illegally contributing ozone-causing pollutants to the same air quality area as plaintiffs' resi-

161. *Id.* at 869-70 (footnote omitted).

dence, the court rejected standing because the plaintiff could not identify any actual health impacts that they had suffered, or that the unhealthy levels of ozone in the air could be attributed to defendant's own ozone emissions (rather than some other source). This is precisely the impossible burden of proof that strict liability statutes such as the Clean Water Act and Clean Air Act sought to avoid.

The Eastern District of Pennsylvania asserted that this result was required by *Defenders of Wildlife.* Other post-*Defenders of Wildlife* courts have not, however, been compelled to contract standing doctrine so narrowly. The courts reaffirming the parameter- and resource-based approaches to enforcement standing have not, however, been able to articulate how these less restrictive standing approaches fit into the doctrinal approach expressed in *Defenders of Wildlife.* Indeed, most of these courts have failed to discuss *Defenders of Wildlife* at all. In fact, as the next section of this article explains, *Defenders of Wildlife* does provide support for the less restrictive resource-based approach to standing in Clean Water Act citizen suit cases.

VIII. INJURY-IN-FACT RIGHTLY UNDERSTOOD: *DEFENDERS OF WILDLIFE'S* SUPPORT FOR PROCEDURAL INJURIES, INFORMATIONAL INJURIES, AND OTHER INTANGIBLE INJURIES-IN-FACT

As can be seen from the review of Clean Water Act standing decisions since *Defenders of Wildlife,* the *Defenders of Wildlife* decision has failed to settle the law of citizens enforcement standing. Those courts that take *Defenders of Wildlife's* description of the tests for standing at their most literal and look for specific, perceptible harms to the plaintiff demonstrably related to the defendant's pollution pose impossibly high standards to establish standing, far beyond what is required to establish liability under the Clean Water Act. Other courts have sought to implement the strict liability scheme of the Clean Water Act and its clear intention that that scheme be enforceable by citizen plaintiffs, but have not satisfactorily explained how an approach that presumes injury (the resource-based approach) or presumes causation (the parameterbased approach) squares with *Defenders of Wildlife's* apparently strict interpretation of injury-in-fact and its suggestion (at least in Justice Scalia's majority opinion) that Congress cannot create a presumed injury-in-fact where constitutional injury-in-fact is lacking.

Stepping back, it is easy enough to distinguish *Defenders of Wildlife* factually from the typical citizens enforcement suit: *Defenders of Wildlife*, after all, rejected standing on the part of individuals who could not definitively state when, if ever, they would return to the vicinity of the environmental resource they sought to protect. The typical citizen suit plaintiff, on the other hand, has no difficulty establishing her regular past and anticipated future use of local environmental resources for fishing, hiking, swimming, drinking, or aesthetic enjoyment. What is more difficult is to reconcile the recognition of the inchoate harms that may form the basis of a Clean Water Act citizen suit with the analytical and semantic framework of *Defenders of Wildlife*, which focuses on "tangible" and "perceptible" injuries, but also recognizes standing based on intangible "procedural" injuries.

The answer lies with a proper understanding of the sorts of injuries that may be considered "tangible" within the rubric of the Supreme Court's standing decisions, as well as with an understanding of the overall scheme of the Clean Water Act, which may be understood to create environmentally protective intangible rights that are every bit as important and worthy of Article III recognition as the "procedural" rights created by NEPA.

When these frameworks are properly understood, Supreme Court standing doctrine clearly supports at least a resource-based approach to standing. The "parameter" approach of *Powell Duffryn* fails to recognize the very real stake of a person who satisfies the *Morton* test for interest in a protected resource, but who cannot demonstrate a preexisting or imminent "perceptible" injury to that resource. *Defenders of Wildlife* provides explicit support for the standing of such an individual plaintiff by recognizing standing of such interested parties to enforce intangibles such as "procedural" rights. Other Supreme Court standing decisions provide at least implicit support for resource-based standing. And, once the plaintiff's interest in enforcing the overall Clean Water Act scheme is recognized, the citizen plaintiff should satisfy requirements of "causation" and "redressability" as well.

A. *Injury-in-Fact: Intangible Interests Tied to Tangible Resources*

Despite the Court's repeated use of the terms "tangible" and "perceptible" to describe the requisite "injury-in-fact" for standing purposes, the Supreme Court has in fact been quite receptive to standing claims based on intangible and imperceptible injuries

throughout the history of environmental standing doctrine, right up to and including the *Defenders of Wildlife* decision. Thus, the *Morton* Court recognized "aesthetic and environmental well-being" as interests whose injury would support standing, despite the inherently intangible nature of these interests.[162] Likewise, in *Duke Power*, the Court recognized that "emission of non-natural radiation into [plaintiffs'] environment would also seem a direct and present injury," based on "our generalized concern about exposure to radiation and apprehension flowing from the uncertainty about the health and genetic consequences of even small emissions."[163] The *Duke Power* Court did not require *proof* that nuclear plant emissions were likely to cause perceptible health impacts on the plaintiffs, or even scientific consensus about its likelihood — a "generalized concern" and "apprehension" were sufficient.[164] Likewise, the Court has explicitly acknowledged Congressionally created informational rights, injury to which constitutes sufficient injury-in-fact, even without more.[165]

Most importantly, Justice Scalia's majority opinion in *Defenders of Wildlife* itself recognized that Congress could create intangible rights, injury to which would support standing, by recognizing that "procedural" rights are special.[166] The key, to Scalia, is that these

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

163. *Duke Power*, 438 U.S. at 74.

164. Keep in mind that the *Duke Power* holding was based on a factual record developed after several days of hearings on the standing issue, so its analysis cannot be explained as a result of the relaxed burden of proof necessary at the pleadings or summary judgment stage.

165. In Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) the Court upheld the standing of minority "testers" to bring enforcement litigation under the Fair Housing Act. Testers are members of protected minority groups who pose as potential home buyers or renters in order to test real estate agents' compliance with non-discrimination laws. Even though these testers were not actually seeking housing (and thus could not claim injury by reason of having been denied housing opportunities), the Supreme Court upheld their claim to standing based on a deprivation of a Congressionally created interest in accurate housing information. Deprivation of this accurate information was sufficient to create injury-in-fact, without more.

166. Justice Scalia also suggested, implicitly, that suits other than those against the government are special. Justice Scalia's emphatic rejection of the possibility of Congressionally created suits in the absence of injury-in-fact had an important qualifier: "in suits against the government, at least." The vast majority of the Supreme Court's standing cases, including *Defenders of Wildlife*, have in fact addressed suits by citizens against various officials and agencies of the executive branch of the federal government. It is in these cases that the separation of powers concerns articulated by Justice Scalia in *Defenders of Wildlife* are implicated most strongly. Relatively few of the Supreme Court's standing cases have considered citizens' standing in enforcement suits against private, non-governmental actors; indeed, none of the Supreme Court's standing decisions has addressed citizens enforcement standing directly. Clearly the separation of powers concerns articulated by Justice Scalia in *Defenders of Wildlife* are not implicated in a suit, like the typical citizens enforcement suit, against a non-govern-

"procedural" rights must be linked to some tangible resource that the procedural right is meant to protect, and the plaintiff, in turn, must demonstrate some sort of protectible interest in that resource sufficient to give him a stake in a controversy about procedural compliance. If the plaintiff demonstrates the sort of relationship that the *Morton* court requires with respect to the resource that may be impacted by the procedure in question, then that plaintiff has standing whether or not he has established that tangible, perceptible injury has followed (or is imminent) as a result of the failure to follow the procedure in question. The plaintiffs in *Defenders of Wildlife* failed not because their interest in the Endangered Species Act consultation requirement was intangible (which it was), but because their interest in the environmental subject that would be protected by that procedure was too remote and "intangible."

Defenders of Wildlife explicitly recognized that the "procedural" system for the protection of environmental resources established by National Environmental Policy Act (NEPA) was "special," at least to the extent that NEPA plaintiffs should be excused from the usual burdens of proving strict causation and redressability.[167] NEPA requires that a federal agency considering a "major federal action sig-

mental actor. Enforcement of Congressionally enacted requirements against the private actor does not involve the courts in assuming a position of authority over a co-equal department, but rather puts the courts in their traditional role of applying statutory requirements to individual litigants.

The Supreme Court's development of standing doctrine has occurred almost entirely in the context of citizen or taxpayer suits seeking to force compliance by the Executive Branch with constitutional or statutory requirements. From *Frothingham v. Mellon*, 262 U.S. 447 (1923), where the plaintiff challenged the constitutionality of federal funding to improve maternity care, through the challenge to the disposition of surplus property by the executive branch in *Valley Forge*, through the challenge to the Price-Anderson Act in *Duke Power* and right up to the challenge to the Department of Interior's endangered species consultation procedure in *Defenders of Wildlife*, each of the Supreme Court's major pronouncements on standing have been made in the context of a plaintiff asking the Court to step in and tell another branch of the federal government what to do. Justice Scalia's offhand suggestion that the injury-in-fact requirement is an irreducible minimum "at least in suits against the government" acknowledges that these separation of powers concerns do not come into play when a private citizen seeks to enforce a congressionally created right against another private person. In such a case, the plaintiff does not ask the court to assert authority over a co-equal branch of government. Rather, the citizen-plaintiff seeks only judicial assertion of authority over other persons within the courts' jurisdiction — the traditional judicial role. This analysis suggests the possibility of Congressionally created enforcement suits *without* injury-in-fact. Full analysis of this possibility is beyond the scope of this article.

167. *Defenders of Wildlife* at 572 & n.7. Although the opinion does not refer explicitly to the National Environmental Policy Act (NEPA), the Court's reference to the "procedural requirement for an environmental impact statement," *id.*, must be read as a reference to the environmental impact statement requirement of NEPA, 42 U.S.C. § 4332(C).

nificantly affecting the quality of the human environment" to prepare an environmental impact statement disclosing and considering the environmental impacts of the action.[168] Justice Scalia's majority opinion recognized that the NEPA plaintiff could never prove that compliance with NEPA's requirements for preparation of an environmental impact statement would necessarily, or even probably, lead to the rejection of the proposed federal action and the preservation of the environmental resource in question. Because these rights would be otherwise unenforceable, Justice Scalia's opinion seemed to recognize a kind of standing by necessity.

The focus of standing inquiry in these circumstances shifts from the identifiable harm that flows directly from the procedural violation (which is purely an abstraction, i.e., the right to have the agency prepare a report disclosing the impacts), to the strength of the plaintiff's tangible interest in the resource that the procedure is designed to protect. Thus, a purely abstract injury (the deprivation of a right to information and public comment) is sufficient "injury-in-fact" as long as the plaintiff demonstrates a sufficiently tangible and ongoing interest in the resource that the procedure would promote, but not guarantee, protection of.

At some level, this distinction between procedural and substantive requirements must blur. Moreover, neither *Defenders of Wildlife* nor any other case articulates any Article III or separation-of-powers rationale for a constitutional distinction between those statutory schemes deemed "procedural" and those deemed "substantive," much less any rationale that would justify *less* Article III enforceability for "substantive" statutory provisions. The question then is, why should not the overall Clean Water Act scheme, which sets up permitting procedures as well as effluent limitations, be considered to create rights in citizen plaintiffs worthy of protection so long as the plaintiffs demonstrate the requisite interest in the resource that would be protected by Clean Water Act procedures?

Certain sections of the Clean Water Act are explicitly procedural, such as the requirement that Clean Water Act permits may be issued only after public notice and an opportunity for public comment.[169] Other sections of the Clean Water Act explicitly create informational rights, such as the requirement that all discharge

168. 42 U.S.C. § 4332(C).

169. CWA §§ 402(a)(1), (b)(3), 33 U.S.C. §§ 1342(a)(1), (b)(3).

monitoring reports filed by a discharger be publicly available.[170] But the entire system of discharge bans, permit requirements, and technology- and water quality-based effluent limitations established by the Clean Water Act may also be viewed as systemic, or "procedural" provisions designed, like NEPA, to accomplish an overall enhancement and improvement in the tangible conditions of water quality, without assuming that a tangible difference will be demonstrable in every case of compliance or non-compliance.[171]

So viewed, citizens enforcement of all aspects of the Clean Water Act permitting program from "substantive" effluent limitations to "procedural" public comment requirements to "informational" rights to discharge monitoring reports satisfies *Defenders of Wildlife's* "procedural" injury-in-fact requirements. It would make no sense that the owner of waterfront property would suffer a cognizable procedural "injury-in-fact" if the chemical plant across the lake were issued a Clean Water Act permit in violation of public notice and comment requirements, but would lack the requisite "injury-in-fact" to enforce the effluent limitations incorporated into that permit absent proof of specific, objectively perceivable damage to the body of water demonstrably resulting from the violation. Certainly, the waterfront property owner's stake in the enforcement of the effluent limitation is every bit as weighty as a constitutional matter as his interest in the procedural protections applicable before the permit is issued. If the underlying interest in the resource affected is sufficient to support constitutional recognition of his stake in seeing that the proper procedures are followed, this interest must also support his interest in seeing that effluent limitations and other permit provisions designed to enhance water quality are also followed.[172]

170. CWA §308(b), 33 U.S.C. § 1318(b).

171. Ironically, in writing about the procedural rights granted by NEPA, and finding that deprivation of NEPA's procedural rights could constitute irreparable harm sufficient to support preliminary injunctive relief, then Judge (now Justice) Breyer used the Clean Water Act as an example of a statute that creates substantive, rather than procedural rights. *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989). As discussed in this article, however, the distinction may not be quite so simple: the Clean Water Act includes explicitly procedural and informational requirements, and its substantive prohibitions are themselves part of an overall statutory scheme designed to enhance protection of the nation's waters much as NEPA set up procedures designed to enhance the nation's environment generally.

172. Most citizens enforcement cases are brought by organizations on behalf of members who establish the requisite interest in the protected resource as individuals under the standards articulated in Hunt v. Washington Apple Advert. Comm'n, 432 U.S. 333 (1977). Efforts to establish organizational standing based on the organization's own interest and expertise in particular environmental *issues* have been uniformly unsuccessful. See Sierra Club v. Morton, 405 U.S. 727 (1972); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992);

The Court's pre-*Defenders of Wildlife* standing doctrine also provides ample support for the enforceability of effluent limitations by citizen plaintiffs without proof of perceptible declines in water quality. As noted, the *Duke Power* Court recognized injury-in-fact based on prospective exposure to non-natural radiation, without requiring proof that the levels of exposure possible were likely to have perceptible health impacts.[173] Similarly, exposure to "non-natural" pollutants in a water body should be sufficient injury-in-fact to downstream users without proof that the levels of pollutants involved are likely to cause perceptible impacts. A demonstrable *change* in the environmental resource is sufficient, provided that the plaintiff establishes her interest in the resource affected.

Sierra Club v. SCM Corp., 747 F.2d 99 (2d Cir. 1984). However, it may yet be possible for an organization to establish an organic organizational interest in a particular environmental resource, and base its standing directly on that interest. The Ninth Circuit has recognized standing to enforce provisions of the Endangered Species Act based on utility corporations' economic interest in maintaining the health of an ecosystem (and thus being free from further restrictions on hydroelectric power use of the resource). Pacific Northwest Generating Coop. v. Brown, 38 F.3d 1058 (9th Cir. 1994). If a corporate economic interest is sufficient to support standing, then it follows that an eleemosynary corporation with a charter that explicitly grants it an interest in preserving a particular environmental resource has a direct interest that is every bit as constitutionally valid as a for-profit corporation's economic interest in a resource.

Many local and regional environmental organizations are in fact chartered for the specific purpose of protecting a particular regional environmental resource, such as the various river, bay, and sound "keeper" organizations. *See generally* Robert F. Kennedy and Steven P. Solow, Environmental Litigation as Clinical Education: A Case Study, 8 J. Envt'l Law & Lit. 319, 324 (1993) (discussing Hudson Riverkeeper organization); *Cronin v. Browner*, 898 F. Supp. 1052 (S.D.N.Y. 1995) (plaintiffs include Delaware Riverkeeper, San Francisco Baykeeper, Puget Soundkeeper, Long Island Soundkeeper, and the Baykeeper for the New York and New Jersey Harbor Estuary). These organizations ought to have standing directly. *Cf.* Friends of the Earth v. Chevron, 919 F. Supp. 1042 (rejecting representational standing, but noting that the plaintiff organization had failed to introduce any evidence of a direct interest in the environmental resource); *Cf. also* Sierra Club v. Morton, *supra*, 405 U.S. at 744 (Douglas, J. *dissenting*) (noting that Sierra Club's charter makes the protection and conservation of the Sierra Nevada Mountains one of the principal purposes of the organization).

173. Several courts have recognized that fear of health impacts due to exposure to environmental hazards is sufficient to support tort recovery, without proof that actual health effects have resulted. *See, e.g.*, Watkins v. Fibreboard Corp., 994 F.2d 253 (5th Cir. 1993); Dartez v. Fibreboard Corp., 765 F.2d 456 (5th Cir. 1985); *In re* Moorenovich, 634 F. Supp. 634 (D. Me. 1986); *see generally*, 4 Gerrard, Environmental Law Practice Guide § 33.02[3] (1996). Such a fear of health impacts should likewise support standing for Article III purposes: certainly, an injury that would support tort recovery in state court (and federal jurisdiction in a diversity case) must satisfy Article III injury-in-fact requirements. *See also* Note, And Justiciability for All?: Future Injury Plaintiffs and the Separation of Powers, 109 Harv. L. Rev. 1066 (1996) (arguing that future injury tort plaintiffs must satisfy Article III standing requirements, and concluding that in most cases, they can).

In one of its very few *dicta* on citizens enforcement standing under the Clean Water Act, the Supreme Court also seems to have recognized that the effluent violation is itself the "injury-in-fact" for standing purposes, and not the perceptible impacts on water quality that may or may not result from a given effluent violation. This is the only way to explain its suggestion in *Gwaltney* that allegations of an ongoing effluent violation constituted the requisite Article III injury-in-fact, and Justice Scalia's explicit statement (in dissent) that "[i]f . . . the defendant was in a state of compliance when this suit was filed, the plaintiffs would have been suffering no remediable injury-in-fact that could support suit."

Defendant's "state of non-compliance" is itself the "injury-in-fact" that supports citizen standing. *Powell Duffryn's* rejection of the claim that the violation itself constitutes the injury is thus unnecessarily restrictive even under Justice Scalia's approach to standing, which, it is fair to say, represents the strictest view of constitutional standing currently held by a Justice of the Supreme Court.[174] The "resource based" approach to standing, which focuses on the plaintiff's tangible relationship to the resource that is put at risk of harm by the defendant's violations, is more consonant with both the legislative intention of the Clean Water Act and current Supreme Court standing doctrine.

B. *Causation and Redressability*

Once the violation of Clean Water Act permit standards, procedural, or informational requirements is itself understood to give rise to injury-in-fact in a plaintiff with a protectable interest in the resource affected by the discharge of pollutants, the elements of "causation" and "redressability" become less problematic. Just as the NEPA plaintiff need not show that NEPA compliance would

174. Needless to say, it seems likely that an approach to citizens enforcement suit standing which recognizes that violation of an effluent standard is per se an injury-in-fact to a plaintiff with sufficient interest in the affected water body would garner the support of a majority of the current Court, given that Justice Kennedy's concurrence in *Lujan* explicitly recognized that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before," Justice Stevens found standing in *Lujan* based on the plaintiffs' intangible professional interests in the species that might be affected, and Justice O'Conner joined Justice Blackmun's dissent that would have found adequate procedural injury-in-fact to support standing. While it may be more difficult to predict the views of Justices Ginsburg and Breyer (who have replaced Justices Blackmun and White on the Court), Justice Breyer's receptivity to the recognition of "irreparable" procedural injury in *Sierra Club v. Marsh* suggests a willingness to recognize non-traditional injury in support of environmental standing.

guarantee protection of the resource of concern from despoilment in order to establish standing, neither must the Clean Water Act citizen plaintiff establish that compliance would restore the waters of interest to their pristine condition, or even affect water quality in any tangible way. It is sufficient, as with so-called "procedural" rights under NEPA, that compliance with the Clean Water Act scheme would, overall, have the tendency to restore, protect, and improve the condition of the waters of interest, as contemplated by the Clean Water Act.

The Clean Water Act violation is "redressable" in that an order of the court requiring compliance extinguishes the procedural, or schematic, injury suffered by the plaintiff. If the violation consists of an exceedence of an effluent limitation, compliance ends the plaintiff's "exposure to non-natural" substances in the water body, to borrow a phrase from the *Duke Power* Court, at least to the extent that the contribution of such substances violates the law. This understanding of the causation element in Clean Water Act citizen suits is implicit in Justice Scalia's dissent in *Gwaltney*, suggesting that cessation of the violation itself ends plaintiff's "injury-in-fact," redressing the injury that is the basis of suit. And, as acknowledged by the Fourth Circuit in the *Gwaltney* remand, assessment of penalties by the court serves to redress plaintiff's injuries by having both a special deterrent affect on future violations by the defendant before the court, as well as the general deterrent effect on other polluters of the same water body who may learn by example.[175]

This approach to citizens enforcement standing is simple to apply and avoids embroiling the courts in the determination of contested issues of expert testimony just to determine jurisdiction to

175. Several commentators have criticized reliance on the deterrence impact of civil penalties to establish redressability. *See* Comment, Mootness and Citizen Suit Civil Penalty Claims under the Clean Water Act: A Post *Lujan* Reassessment, 25 Envt'l L. 801 (1995); Note, Ignoring the Trees for the Forest: How the Citizens Suit Provision of the Clean Water Act Violates the Constitution's Separation of Powers Principle, 81 Va. L. Rev. 1957 (1995). These commentators rely on Linda R.S. v. Richard D., 410 U.S. 614 (1973), a case in which the Supreme Court rejected the standing of a plaintiff to challenge the State's failure to enforce child support laws, finding that the plaintiff's injury (lack of child support) would not be redressed if her ex-husband were thrown in jail. Carried to its logical extreme, however, then no non-economic injury would ever be redressable, as the defendant might always choose to incur contempt sanctions rather than comply with a court's injunctive order. Moreover, the *Linda R.S.* Court stated that its holding was limited to the unique circumstances of a constitutional challenge of a decision not to prosecute, *id.* at 619, and in the absence of a congressionally created grant of standing, *id.* at 617 & n.3. Neither of these factors is present in a Clean Water Act citizens enforcement suit.

hear a citizen suit claim. Instead, the court need only address the sufficiency of the plaintiff's recreational, aesthetic, and environmental interest in the water body that is potentially affected, precisely as contemplated by the Supreme Court in its decisions ranging from *Morton* through footnote seven of *Defenders of Wildlife.* This approach is also clearly intended by Congress in its definition of "citizen" as one "having an interest which is or may be adversely affected," and by explicit reference in the legislative history to the *Morton* test.

IX. Conclusion

Contrary to many predictions, the environmental citizens enforcement suit remains alive and well even after the Supreme Court's decision in *Lujan v. Defenders of Wildlife.* Although the very broadest assertions of standing, without individualized injury, remain problematic after *Defenders of Wildlife,* they are no more so than before *Defenders of Wildlife.* The traditional basis of citizens' enforcement standing — based on individual recreational and aesthetic enjoyment of the resource that might be affected — enjoys additional support from *Defenders of Wildlife's* recognition that "procedural" standing need not be based on strict causation and redressability. Although the courts have yet to pick up on this distinction and adopt an enforcement standing doctrine more consonant with Congress' intended extension of standing to all those who satisfy the *Sierra Club v. Morton* test for interest in an environmental resource, neither has there been a general retrenchment in enforcement standing doctrine. Ultimately, the issue may yet need to be resolved by a Supreme Court that, by its own *dicta,* remains open to some level of Congressionally defined injuries and Congressionally articulated chains of causation.