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ORGANIZATIONAL STANDING IN ENVIRONMENTAL LITIGATION*

INTRODUCTION

The issue of standing to sue has received much literary attention,¹ and many suggestions have been advanced for change in this area of the law.² In the absence of injury to the organization or its members, environmental organizations generally do not have standing to sue in federal court to protect an asserted interest in the environment. In *Sierra Club v. Morton*,³ the Supreme Court held that a group must assert an actual or threatened injury to a natural resource⁴ of which the group or a member thereof avails itself in order to have standing.⁵ This

* This article was awarded second prize by the Inter-American Bar Association at its 1989 conference.

1. See, e.g., Beers, *Standing and Related Procedural Hurdles in Environmental Litigation*, 1 J. ENVTL. L. LITIG. 65 (1986); Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979); Coyle, *Standing of Third Parties to Challenge Administrative Agency Actions*, 76 CALIF. L. REV. 1061 (1988); Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988); Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 WIS. L. REV. 37 (1984); Nichol, *Injury and the Disintegration of Article III*, 74 CALIF. L. REV. 1915 (1986) [hereinafter Nichol I]; Nichol, *Rethinking Standing*, 72 CALIF. L. REV. 68 (1984) [hereinafter Nichol II]; Parker & Stone, *Standing and Public Law Remedies*, 78 COLUM. L. REV. 771 (1978); Roberts, *Fact Pleading, Notice Pleading, and Standing*, 65 CORNELL L. REV. 390 (1980); Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973); Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CALIF. L. REV. 450 (1972); Tribe, *Ways Not to Think About Plastic Trees*, 83 YALE L.J. 1315 (1974); Varat, *Variable Justiciability and the Duke Power Case*, 58 TEX. L. REV. 273 (1980); Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988).

2. See, e.g., Fletcher, *supra* note 1; Nichol I, *supra* note 1; Nichol II, *supra* note 1; Parker & Stone, *supra* note 1; Scott, *supra* note 1; Stone, *supra* note 1; Tribe, *supra* note 1; Varat, *supra* note 1.

3. 405 U.S. 727 (1972).

4. This Comment uses the term "natural resource" to include natural resources as the term was used in *Sierra Club*: to refer to natural areas generally, see *id.*, and, in addition, to include wildlife such as plants and animals.

5. *Sierra Club*, 405 U.S. at 735.

Comment focuses on the allegation of injury as enunciated by the Supreme Court and concludes that this allegation of injury should not be the determinative factor in affording standing to sue.

Environmental organizations should be awarded standing to sue in any situation where the group is asserting a public interest or is attempting to protect the environment. The standing inquiry should focus on the validity and dedication of the organization and not on whether the organization has submitted affidavits from members claiming to have used the resource.⁶ Such standing must be afforded, particularly in light of the environmental disasters and concerns of late.⁷ If these dedicated and knowledgeable organizations are afforded standing to sue, perhaps future environmental disasters will be averted and resources preserved before they are totally depleted. It has been said that affording "legal standing to go to court for the protection of natural objects offers few safeguards" to the environment.⁸ But, there have been too many hurdles created for those who want to protect the environment,⁹ and preservation of the

6. The submission of affidavits from members claiming to have used the resource was required by the *Sierra Club* Court. *Id.* See *infra* notes 34-46 and accompanying text.

7. Dozens of beaches along the east coast of the United States were closed during the summer of 1988 because the waters were filled with sewage and hospital waste such as blood samples and hypodermic needles. It was reported that New York City, on an annual basis, dumps about four million wet tons of sludge out at sea. Dolphins dying, unexplained fish kills, and deformed lobsters being taken out of the Chesapeake Bay are some of the local problems. On a global level, there has been the breakdown of the ozone layer, destruction of rain forests, and the greenhouse effect. Trippett, *Talking About the Weather*, TIME, Aug. 15, 1988, at 20.

8. Emond, *Co-Operation in Nature: A New Foundation for Environmental Law*, 22 OSGOODE HALL L.J. 323, 332 (1984).

9. The Reagan Administration took a view toward natural resources and the environment that was in opposition to the views of prior administrations. President Reagan advocated a diminished governmental role in managing the environment and natural resources. Consequently, there was more emphasis on production and growth, with less emphasis on conservation of resources and protection of the environment. NATURAL RESOURCES AND THE ENVIRONMENT: THE REAGAN APPROACH xi (P. Portney ed. 1984).

Congress acknowledged the inability of the federal government to react to pollution violations when Congress enacted citizen suit provisions in the major anti-pollution statutes. *Environmental Citizen Suits: Confronting the Corporation* 1 (BNA) (1988).

environment is so important that standing should not act as a bar. Standing to sue should be granted to any dedicated organization that can demonstrate a sincere interest in the environment.¹⁰

In Part I, this Comment sets forth the general requirements of federal court standing, including the particular requirements formulated by the Supreme Court in *Sierra Club*, and how these requirements were later challenged.¹¹ The Comment then discusses the consistent application of the *Sierra Club* principles by the federal courts. Part II argues that the *Sierra Club* requirement of alleging use of the resource should be discontinued. Although some claim that the *Sierra Club* decision opened the door for lawsuits by environmental organizations, it is the premise of this Comment that the decision's requirements have led to an unnecessarily rigid standing inquiry. The *Sierra Club* doctrine is nothing more than a request for artfully drawn pleadings. In addition, this Comment analyzes other areas of the law where the right of an organization to sue on behalf of itself, its members, or to protect a certain public interest, has been more readily accepted. Because public policy is implicated in environmental concerns and disputes, the courts should discontinue the *Sierra Club* doctrine. Finally, the point is made that the injury in fact requirement, when applied to this area of the law, presumes that all things in this world were put here for Man's use, since the only legally recognizable injury is an injury to humans.

I. BACKGROUND

A. *Standing to Sue*

Article III of the United States Constitution states that the judicial power of the federal courts shall extend to "cases" or "controversies."¹² The essence of the standing inquiry is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverse-

10. See *infra* Part II-C.

11. *United States v. SCRAP*, 412 U.S. 669 (1973).

12. U.S. CONST. art. III, § 2, cl. 1.

ness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.”¹³ The Supreme Court has determined that the Constitution requires a plaintiff to assert an actual or threatened injury,¹⁴ fairly traceable to the conduct of the defendant,¹⁵ which injury is likely to be redressed by a favorable decision¹⁶ on the merits.¹⁷

In addition to these constitutional requirements, the Court has formulated certain prudential elements. The plaintiff must assert only his or her interest and not the rights of others;¹⁸ furthermore, the Court will not adjudicate “abstract questions of wide public significance”¹⁹ that are, in effect, generalized grievances,²⁰ which can be better addressed by other branches of government.²¹ The plaintiff’s complaint must fall within the “zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”²² These limitations on standing seek to prevent litigation involving questions of broad social import where individualized rights cannot be vindicated.²³

Congress does have the power to extend standing to the full extent of Article III by dispensing with prudential concerns when enacting legislation. In this way, Congress may override

13. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

14. *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 (1973).

15. *Id.*

16. *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976).

17. These constitutional concerns were summed up more recently in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), where the Supreme Court stated:

at 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,” and that the injury “fairly can be traced to the challenged action” and “is likely to be redressed by a favorable decision.”

Id. at 472 (citations omitted).

18. *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

19. *Id.* at 500.

20. *Id.* at 499.

21. *Id.* at 500.

22. *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

23. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979).

any limitations on standing that the Supreme Court has developed over the years, provided that Congress does not go below the Article III threshold.²⁴

In addition to concerns already mentioned, when a federal court plaintiff seeks to compel an agency to enforce a federal statute or regulation, the inquiry for standing is whether the plaintiff is "adversely affected or aggrieved."²⁵ This analysis involves determining whether the plaintiff has suffered injury in fact and whether the injury was one within the zone of interests to be protected by the statute.²⁶

In the specific area of standing to sue by organizations, the Supreme Court has formulated a three-prong test:²⁷ an association has standing to sue on behalf of its members when its members would have standing in their own right; when the interests the association seeks to protect are germane to its purpose; and when neither the claim asserted, nor the relief requested, requires participation of individual members in the lawsuit.²⁸ Again, the standing requirement focuses on injury in fact when looking to a member of the organization.

B. *Sierra Club v. Morton*

Prior to *Sierra Club v. Morton*,²⁹ there was uncertainty as to whether an environmental organization had standing to sue to protect public interests in the absence of some injury to itself. "There is some doubt as to the extent of the right of conservation organizations and societies to maintain actions to protect public interests in environmental matters."³⁰ Some courts allowed such organizations to sue,³¹ while other courts did not.³²

24. *Warth*, 422 U.S. at 501.

25. Administrative Procedure Act, 5 U.S.C. § 702 (1976). This section provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." *Id.*

26. *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972).

27. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977).

28. *Id.* at 343.

29. 405 U.S. 727 (1972).

30. 61A AM. JUR. 2D *Pollution Control* § 500 (1981).

31. *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232 (4th Cir. 1971) (nonprofit corporation dedicated to preserving natural, scenic,

In *Sierra Club*, an organization concerned with the conservation and maintenance of this country's forests and parks filed suit against the Secretary of the Interior to challenge a plan that would allow Walt Disney Enterprises to build an extensive skiing development in the Mineral King Valley, which is part of the Sequoia National Forest. Sierra Club sought relief

and historic areas in West Virginia highlands had standing to challenge the administration of the area as well as the mining and logging activities in the area); *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970) (association devoted to environmental protection allowed to represent consumers' interest in restricting use of DDT in environment); *Environmental Defense Fund, Inc. v. United States Dep't of Health, Educ. and Welfare*, 428 F.2d 1083 (D.C. Cir. 1970) (no challenge by defendant to standing where environmental organization was proposing zero tolerance levels on DDT residues); *Citizens Comm. for Hudson Valley v. Volpe*, 425 F.2d 97 (2d Cir.) (national conservation organization with substantial population in area had standing to challenge expressway), *cert. denied*, 400 U.S. 949 (1970); *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608 (2d Cir. 1965) (conservation organization challenged granting of license to build a hydroelectric plant), *cert. denied*, 384 U.S. 941 (1966); *Natural Resources Defense Council, Inc. v. Grant*, 341 F. Supp. 356 (E.D.N.C. 1972) (injury to conservational values sufficient to establish standing); *Kalur v. Resor*, 335 F. Supp. 1 (D.D.C. 1971) (conservationists challenging issuance of dredge and fill permits had standing because injuries stemmed from aesthetic and environmental concerns for the rivers and streams); *Cape May County Chapter, Inc., Izaak Walton League of Am. v. Macchia*, 329 F. Supp. 504 (D.N.J. 1971) (renowned environmental group had standing to challenge dredge and fill operations because group would proceed in an adversarial manner); *Pennsylvania Env'tl. Council, Inc. v. Bartlett*, 315 F. Supp. 238 (M.D. Pa. 1970) (conservation organization formed to protect and conserve aesthetic qualities and recreational value of area of dispute had standing to sue to protect aesthetic, conservational, and recreational interests), *aff'd*, 454 F.2d 613 (3d Cir. 1971); *Environmental Defense Fund, Inc. v. Corps of Eng'rs of United States Army*, 324 F. Supp. 878 (D.D.C. 1971) (organization seeking to preserve and enhance environment had standing because of activities toward that end); *Izaak Walton League of Am. v. St. Clair*, 313 F. Supp. 1312 (D. Minn. 1970) (standing because organization had aesthetic, conservational, and recreational interest in area of dispute and would present case in an adversarial context).

32. *Alameda Conservation Ass'n v. California*, 437 F.2d 1087 (9th Cir.) (non-profit corporation did not assert any of its rights or properties were being infringed or threatened), *cert. denied*, 402 U.S. 908 (1971); *South Hill Neighborhood Ass'n v. Romney*, 421 F.2d 454 (6th Cir. 1969) (nonprofit corporation interested in preservation of historical buildings had no standing to contest demolition of historic buildings where it did not own buildings), *cert. denied*, 397 U.S. 1025 (1970); *National Audubon Soc'y, Inc. v. Johnson*, 317 F. Supp. 1330 (S.D. Tex. 1970) (non-profit corporation dedicated to preservation, conservation, and improvement of wildlife did not show particular injury to it).

under the Administrative Procedure Act (APA).³³ The Supreme Court held that a party has standing to seek judicial review under the APA only if he can show that he, himself, has suffered, or will suffer, injury.³⁴ However, the Court did note that this injury need not be economic and commented that “[a]esthetic 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.”³⁵ But, because Sierra Club did not claim that any of its members actually had hiked in the Mineral King Valley, the Court, by a four-to-three vote,³⁶ found that Sierra Club had not asserted an individualized harm to itself or its members and, therefore, lacked standing to sue.³⁷

In his dissenting opinion, Justice Douglas made an eloquent plea to allow “environmental issues to be litigated . . . in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage.”³⁸ Pointing out that “[i]nanimate objects are sometimes parties in litigation,”³⁹ Justice Douglas stated that “[t]hose who have [an] intimate relation with the inanimate object about to be injured, polluted, or otherwise despoiled are its legitimate spokesmen.”⁴⁰ But, even though Justice Douglas sought to reach a different result than the majority, implicit in his reasoning was the idea that the plaintiffs

33. 5 U.S.C. § 702 (1976). *See supra* note 25.

34. *Sierra Club*, 405 U.S. at 733.

35. *Id.* at 734. *But see infra* note 121.

36. Justice Stewart delivered the opinion of the Court; Justices Powell and Rehnquist took no part in the consideration or decision of the case; and Justices Douglas, Brennan, and Blackmun filed dissenting opinions.

37. *Sierra Club*, 405 U.S. at 735 (“Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents.”).

38. *Id.* at 741 (Douglas, J., dissenting).

39. *Id.* at 742 (e.g., ships and corporations).

40. *Id.* at 745.

asserting the claim must have made use of the natural resources.⁴¹

Also dissenting from the majority, Justice Blackmun argued that traditional concepts of standing should be relaxed "in order to enable an organization such as the Sierra Club, possessed, as it is, of pertinent, bona fide, and well-recognized attributes and purposes in the area of environment, to litigate environmental issues."⁴² He felt that to allow standing in this situation would not be such a quantum leap from the Court's standing decisions in *Association of Data Processing Service Organizations, Inc. v. Camp*⁴³ and *Barlow v. Collins*.⁴⁴ Justice Blackmun also argued that the Court only had to "recognize the interest of one who has a provable, sincere, dedicated, and established status."⁴⁵

41. "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." *Id.* at 743. Justice Douglas further stated that "those who hike the Appalachian Trail . . . and camp or sleep there, or run the Allgash . . . or climb the Guadalupe . . . or who canoe and portage the Quetico Superior . . . certainly should have standing to defend those natural wonders before courts or agencies, though they live 3,000 miles away." *Id.* at 751-52.

42. *Id.* at 757 (Blackmun, J., dissenting).

43. 397 U.S. 150 (1970). The Court held that plaintiffs, organizations that provided data processing services, had standing to challenge the Comptroller of the Currency's ruling that national banks could make their data processing services available to other banks and to bank customers. *Id.* at 157-58. The Court based its decision on the fact that the statute involved brought competitors, such as the plaintiffs here, within the zone of interests protected by the statute. *Id.* at 156.

44. 397 U.S. 159 (1970). The Court held that plaintiffs, tenant farmers receiving benefits from the federal government under the Food and Agriculture Act, had standing to challenge an amendment to Department of Agriculture regulations. *Id.* As in *Data Processing*, the Court found that plaintiffs were within the zone of interests protected by the Act. *Id.*

In *Sierra Club*, Justice Blackmun said that *Data Processing* was a progressive decision and that such a decision allowing standing in this case would not be any more progressive. *Sierra Club*, 405 U.S. at 757 (Blackmun, J., dissenting). Justice Blackmun seemed to be saying that the law must advance with society's needs. Here, there was a need to protect Mineral King, and, based on that need, he would have found that *Sierra Club* had standing.

45. *Sierra Club*, 405 U.S. at 757-58 (Blackmun, J., dissenting). Also dissenting was Justice Brennan, who felt that the plaintiffs had standing for the reasons stated by Justice Blackmun. *Id.* at 755 (Brennan, J., dissenting).

C. *SCRAP*

It would appear that, in *Sierra Club*,⁴⁶ the Supreme Court had boiled down the injury requirement of standing to an inquiry into whether the complainant had alleged use of the natural resource that complainant was attempting to protect. This notion was confirmed approximately one year later by the Court's decision in *United States v. SCRAP*.⁴⁷

In *SCRAP*, a group of law school students formed an association and challenged freight rates as set by the Interstate Commerce Commission. The students alleged they were injured in fact by freight rate increases because they, as users of forests, rivers, mountains, and other natural resources, "suffered economic, recreational and aesthetic harm directly as a result of the adverse environmental impact of the railroad freight structure."⁴⁸ *SCRAP* claimed that each of its members was caused to pay more for finished products and that the rate structure would "discourage the use of 'recyclable' materials and promote the use of new raw materials that compete with scrap, thereby adversely affecting the environment by encouraging unwarranted mining, lumbering, and other extractive activities."⁴⁹ The Supreme Court found that the plaintiffs had standing to sue because their pleadings sufficiently alleged that they were "adversely affected" or "aggrieved" within the meaning of section 10 of the Administrative Procedure Act.⁵⁰ *Sierra Club* was distinguished since the plaintiffs there had not made a specific allegation of injury whereas, in *SCRAP*, the plaintiffs claimed that the challenged action "would directly harm them in their use of the natural resources."⁵¹ The Court went on to say:

Unlike the specific and geographically limited federal action of which the petitioner complained in *Sierra Club*, the challenged agency action in this case is applicable to substantially all of the Nation's railroads, and thus allegedly has an adverse environmental impact on all

46. 405 U.S. 727 (1972).

47. 412 U.S. 669 (1973).

48. *Id.* at 678.

49. *Id.* at 676.

50. *Id.* at 685.

51. *Id.* at 687.

the natural resources of the country. Rather than a limited group of persons who used a picturesque valley in California, all persons who utilize the scenic resources of the country, and indeed all who breathe its air, could claim harm similar to that alleged by the environmental groups here.⁵²

Consistent with his dissent in *Sierra Club*, Justice Blackmun issued a concurring opinion, in which Justice Brennan joined, stating that plaintiffs had standing to sue based on their allegations of harm to the environment "as responsible and sincere representatives of environmental interests."⁵³

D. Application of the Sierra Club Doctrine

The Supreme Court has heard very few cases in the environmental area where the plaintiff's standing has been challenged. But, when it has had occasion to deal with this issue, it consistently has applied its requirements from *Sierra Club*,⁵⁴ as evidenced in *SCRAP*.⁵⁵ Further, the federal courts of appeals have followed the *Sierra Club* requirement that environmental organizations have standing to sue but only when use of the

52. *Id.*

53. *Id.* at 699 (Blackmun, J., concurring). Justice Douglas issued a dissenting opinion for reasons unrelated to the standing inquiry. On the issue of standing, Justice Douglas stated that, while he did agree that the plaintiffs had standing, he "would not require the [plaintiffs], in their individual capacity, to prove injury in fact." *Id.* at 703 (Douglas, J., dissenting).

54. See *supra* notes 26, 29, 34-37, and accompanying text.

55. See *supra* notes 50-52 and accompanying text.

In *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986), the Court held environmental organizations had standing to challenge the lack of enforcement of international whaling quotas by the United States, where the organizations asserted injury by alleging that whale watching and studying of whales by their members would be affected adversely by continued killing of whales.

In an earlier decision, *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59 (1978), the Court allowed suit by citizen groups and individuals who were living near the proposed sites of nuclear power plants. The Court found that the possibility of adverse consequences to lakes near power plants was sufficient to constitute "injury in fact." *Id.* at 60. This case was severely criticized by Varat, *supra* note 1, at 279. Professor Varat stated that the Court applied the doctrine of standing so unrealistically that it "might as well have been nonexistent," and that the Court "found justiciable a case satisfying the doctrine no better than others it had turned away." *Id.*

natural resource by organization members has resulted in, or would result in, injury.⁵⁶

In comparing cases that appear to be facially similar, the determination of standing has been based on the sufficiency of the affidavits regarding the plaintiff's *alleged* use of the resource that was the subject of the lawsuit. Thus, application of *Sierra Club* principles has resulted in a finding of standing to sue where plaintiff alleged that its members would observe animal corpses and environmental degradation;⁵⁷ where members used areas throughout the country for hiking, bird watching, and fishing;⁵⁸ where members engaged in other recreational activities;⁵⁹ or where they used waters for environmental,

56. See *infra* notes 57-64.

57. In *Humane Soc'y of the United States v. Hodel*, 840 F.2d 45 (D.C. Cir. 1988), an organization had standing to challenge the decision of the Fish and Wildlife Service to allow expanded hunting in wildlife refuges. The injury alleged was that of the members having to observe animal corpses and environmental degradation, in addition to the depletion of the supply of wildlife that members sought to view in the refuge. *Id.* at 52.

In a similar vein, in *Animal Protection Inst. of Am. v. Hodel*, 860 F.2d 920 (9th Cir. 1988), where the organization claimed "that the improper removal and injury of wild horses and burros [would] cause irreparable injury to its members who use and enjoy the public lands that the equids inhabit," *id.* at 923, the court found that the organization had standing to challenge the Bureau of Land Management's practices with regard to these wild horses and burros. *Id.* at 924.

58. In *No GWEN Alliance of Lane County, Inc. v. Aldridge*, 855 F.2d 1380 (9th Cir. 1988), the plaintiff organization challenged the erection of towers by the United States Air Force. Standing was based on members' use for recreation, including hiking, bird watching, and fishing, of areas that were the potential sites for the planned towers. *Id.* at 1383.

59. In *National Wildlife Fed'n v. Hodel*, 839 F.2d 694 (D.C. Cir. 1988), the organization had standing to sue where it had filed affidavits from two members whose use of the area under dispute had been impaired by mine operators' failure to restore wildlife habitat. The organization challenged surface mining regulations and, at the request of the court of appeals for affidavits specifying injury, filed 70 affidavits from members, totalling over 1,600 pages. *Id.* at 715. In a prior case in that circuit, *National Wildlife Fed'n v. Burford*, 835 F.2d 305 (D.C. Cir. 1987), *remanded*, 699 F. Supp. 327 (D.D.C. 1988), *rev'd*, 878 F.2d 422 (D.C. Cir. 1989), *cert. granted sub nom.* *Lujani v. National Wildlife Fed'n*, 110 S. Ct. 834 (1990), the court also found standing for an organization where the organization had alleged that its 4.5 million members and supporters across the country used, and wished to continue to use, land of the subject controversy for hiking, camping, fishing, and other recreational activities. *Id.* at 305. But, for the incongruous holding on remand, see *infra* notes 65-66, 128-30 and accompanying text. In *Alaska Fish and Wildlife Fed'n and Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933 (9th Cir. 1987),

scientific, aesthetic, economic, or recreational activities.⁶⁰ In contrast, standing was not found where a group failed to spec-

cert. denied, 485 U.S. 988 (1988), plaintiff had standing to challenge agreements permitting hunting because the members of the organization had used the resources in question to photograph or observe wildlife and because the decrease in the number of species of migratory birds was detrimental to the environment. *Id.* at 935.

60. In *Friends of the Earth v. United States Navy*, 841 F.2d 927 (9th Cir. 1988), the organization's members alleged that they lived in and around the waters at the center of the controversy and used the waters for environmental, scientific, aesthetic, economic, and recreational activities. Based on these facts, the organization was found to have standing. *Id.* at 931. Where an environmental organization challenged drilling on the continental shelf, standing was based on the fact that members of the organization used the continental shelf area and, therefore, could be injured by the proposed action. *Conservation Law Found. of New England, Inc. v. Secretary of the Interior*, 790 F.2d 965, 969 (1st Cir. 1986). In *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57 (2d Cir. 1985), an organization dedicated to the protection and restoration of the Hudson River had standing to bring a citizen suit, under the Federal Water Pollution Control Act, where one organization member stated he passed the river regularly and found pollution there offensive to his aesthetic values. In addition, another member stated that his children swam and fished in the river and his family had picnicked, and would continue to picnic, along the river. *Id.* at 61. In *Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3185 (1989), an environmental organization was found to have standing because it had submitted an affidavit from a member stating that the member regularly hiked along the river that the Sierra Club was attempting to protect from the defendant's failure to comply with its discharge permit. *Id.* at 1112. In *Chesapeake Bay Found. v. American Recovery Co.*, 769 F.2d 207 (4th Cir. 1985), environmental groups brought an action against a corporation alleging that the corporation had violated its effluent discharge permits under the Clean Water Act. The court found allegations satisfied standing requirements when environmental groups' members resided in the vicinity of affected waters and "those members recreated in, on or near, or otherwise use[d] and enjoy[ed] those waters," and that members' health, recreational, aesthetic, and environmental interests had been, were being, or would be adversely affected by the defendant's illegal discharge. *Id.* at 209. In *Save Our Wetlands, Inc. v. Sands*, 711 F.2d 634 (5th Cir. 1983), an environmental organization had standing to challenge the construction of an electric transmission line along the bank of the Mississippi River. The court noted that the organization's president had fished on waters involved in the dispute. *Id.* at 634. In *Rite-Research Improves the Env't, Inc. v. Costle*, 650 F.2d 1312 (5th Cir. 1981), a group sought a declaratory judgment that a proposed research project for sewage disposal was not in conflict with federal, state, and local pollution control laws. The group had standing to challenge the project since the Clean Water Act provisions specifically authorized citizen suits, and members would be adversely affected by pollution of water and contamination of marine life. *Id.* at 1319. The court found that members would be affected in any of their activities or pastimes by the acts proposed by the defendants. *Id.*

ify the land its members used,⁶¹ allege a personal stake in the outcome of the litigation,⁶² identify members who had used the waterways involved in the dispute,⁶³ or show actual or threatened injury to members based on animal abuse.⁶⁴

It can be seen from these decisions that, for seventeen years, the standing inquiry has remained status quo: allege and name a member who uses the resource of the subject controversy, and the group has standing.

In the environmental area, the principles of *Sierra Club* were applied consistently in the lower federal courts until recently. In *National Wildlife Federation v. Burford*,⁶⁵ the National Wildlife Federation, seeking to challenge a federal plan to withdraw certain lands from the preservation system, followed the procedures it had followed many times in the past. As it had done previously, the organization filed affidavits from members who had used the lands in question. Much to its surprise, however, the organization was found to lack standing. This determination was made by the district court upon remand from the court of appeals's affirmance of the district court's initial finding of standing for the National Wildlife

61. *Wilderness Soc'y v. Griles*, 824 F.2d 4 (D.C. Cir. 1987) (no standing where group failed to name specific lands that its members intended to visit or had used and enjoyed).

62. Where an association was attempting to stop the shooting of feral goats on Navy property, the organization lacked standing because it had failed to allege that its members had a personal stake in the outcome of the litigation. *Animal Lovers Volunteer Ass'n v. Weinberger*, 765 F.2d 937 (9th Cir. 1985).

63. In *Sierra Club v. SCM Corp.*, 747 F.2d 99 (2d Cir. 1984), the Sierra Club did not have standing to bring suit under the Clean Water Act where it did not allege injury in fact nor identify any of its members who allegedly suffered injury. *Id.* at 105. The court stated that plaintiff could have established standing if it had identified members who either had used the creek and tributary of the dispute or who would be affected by pollution. *Id.* at 107.

64. In *International Primate Protection League v. Institute for Behavioral Research, Inc.*, 799 F.2d 934 (4th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987), standing was denied to an animal welfare organization seeking to be made guardians of research animals who allegedly had been abused during scientific experiments. *Id.* at 936. The corporation's members had made contributions to the care and upkeep of the animals after the animals were taken from the scientist, but the court found this insufficient to show an actual or threatened personal injury. *Id.* at 938.

65. 699 F. Supp. 327 (D.D.C. 1988), *rev'd*, 878 F.2d 422 (D.C. Cir. 1989), *cert. granted sub nom.* *Lujani v. National Wildlife Fed'n*, 110 S. Ct. 834 (1990).

Federation. The reason for the subsequent denial of standing was that use of just a small area of such a large tract of land was too tenuous a relationship upon which to base standing.⁶⁶ Though the decision was reversed on appeal, the reasoning of the district court judge⁶⁷ illustrates why the standing inquiry currently used by the courts is the wrong inquiry to make. Of even greater importance is the fact that the Supreme Court has decided to grant review in this case.⁶⁸ Given the conservative tendencies of the present Court, one could assume that a reason for granting review of this case would be a desire on the Court's part to develop a more rigorous standing inquiry and to limit environmental organizations' accessibility to the courts.

II. TIME FOR A CHANGE

Justifications for permitting an environmental organization to sue on behalf of a public environmental interest were sufficiently stated by Justices Douglas and Blackmun in *Sierra Club*⁶⁹ and *SCRAP*.⁷⁰ As Justice Douglas stated: "the problem is to make certain that the inanimate objects, which are the very core of America's beauty, have spokesmen before they are destroyed."⁷¹ He reasoned:

The voice of the inanimate object . . . should not be stilled. . . . [This] means that before these priceless bits of Americana (such as a valley, an alpine meadow, a river, or a lake) are forever lost or are so transformed as to be reduced to the eventual rubble of our urban environment, the voice of the existing beneficiaries of these environmental wonders should be heard.⁷²

Similarly, Justice Blackmun acknowledged:

66. *Id.* at 332.

67. See *infra* notes 128-30 and accompanying text. Focus on a decision by a District of Columbia district court judge is appropriate due to the abundance of federal agencies within their jurisdiction. Therefore, even decisions of the lower courts in that circuit are important to environmental litigation. See Comment, *Standing for Environmental Groups: An Overview and Recent Developments in the D.C. Circuit*, 19 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 10289, 10296 (1989).

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

69. 405 U.S. 727 (1972).

70. 412 U.S. 669 (1973).

71. *Sierra Club*, 405 U.S. at 745 (Douglas, J., dissenting).

72. *Id.* at 749-50.

[*Sierra Club*] is not ordinary, run-of-the-mill litigation. The case poses—if only we choose to acknowledge and reach them—significant aspects of a wide, growing, and disturbing problem, that is, the Nation's and the world's deteriorating environment with its resulting ecological disturbances. Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?⁷³

In cases where the public's interest in environmental preservation and quality is being asserted, or where the group is seeking to protect a natural resource, there are several other reasons to discontinue use of the *Sierra Club* holding that mere interest is insufficient to establish standing.

A. *An Exercise in Artfully Drawn Pleadings?*

Reading *Sierra Club* and *SCRAP* together demonstrates that *SCRAP* was nothing more than an exercise in artfully drawn pleadings. The Supreme Court in *Sierra Club* had announced what is constitutionally required to establish standing in cases of environmental disputes by an environmental organization. The plaintiff is required to allege that a member has used the park, and this is exactly what the plaintiffs alleged in *SCRAP*.

Some writers have argued that the standing hurdle is easily surmounted by environmental plaintiffs; plaintiffs must simply provide an affidavit from a member who alleges he has used the area in dispute.⁷⁴ But, it should not be necessary for a

73. *Id.* at 755-56 (Blackmun, J., dissenting).

74. GOVERNMENT INSTITUTES, INC., ENVIRONMENTAL LAW HANDBOOK 45 (8th ed. 1985).

The *Sierra Club* did not allege and show that it or its members would be affected in any of their activities or pastimes by the development. . . . However, this has since proven to be an easy matter to remedy, by the plaintiffs alleging that an aesthetic or other non-economic interest was injured.

Id.

It would present no great difficulty for the *Sierra Club* to allege that it represents its members rather than the public and to find among its members users of Mineral King who would regard it as despoiled by development. And now forewarned, other "public interest" organizations will plead in the proper form

Scott, *supra* note 1, at 667.

plaintiff to resort to artfully drawn pleadings⁷⁵ in order to assert and protect an environmental interest. As Justice Brennan said in his dissent in *Warth v. Seldin*:⁷⁶ "To require [plaintiffs] to allege such facts is to require them to prove their case on paper in order to get into court at all, reverting to the form of fact pleading long abjured in the federal courts."⁷⁷

The holding of *Sierra Club* cannot be considered good law when the principle announced in it allows standing for an ad hoc group of law students who sue, as in *SCRAP*, but denies standing to an actual and bona fide environmental organization with a sincere interest in protecting the environment, as in *Sierra Club*.

B. Standing of Organizations in Other Areas of the Law

In other areas of law, organizations assert standing with greater ease. In the area of civil rights, for example, courts have been more liberal in allowing an organization to sue when protecting a public or constitutional interest.

More specifically, in the equal housing area, federal courts, including the Supreme Court, have been quite liberal in finding that an organization has standing to sue. In *Coles v. Havens Realty Corp.*,⁷⁸ a nonprofit organization, HOME, which was formed for the purpose of eliminating unlawful and discriminatory housing practices, brought an action, under the Fair Housing Act,⁷⁹ against a real estate broker who had engaged

[T]his obstacle [of having to allege a concrete injury] was readily surmounted by alleging injury to its members' use of the particular environment. Nonetheless, organizations which make this general allegation must be prepared, if asked, to identify some of its members whose interests are purportedly threatened by the defendants' actions.

Beers, *supra* note 1, at 70.

75. "Lawsuits should be determined on their merits and according to the dictates of justice, rather than in terms of whether or not the averments in the paper pleadings have been artfully drawn." 5 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1286 (1969).

76. 422 U.S. 490 (1975).

77. *Id.* at 528 (Brennan, J., dissenting).

78. 633 F.2d 384 (4th Cir. 1980), *aff'd in part, rev'd in part sub nom.* Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982).

79. 42 U.S.C. §§ 3601, 3604, 3612(a) (1982).

in racial steering. The district court had dismissed the organization's claim,⁸⁰ but the Court of Appeals for the Fourth Circuit reversed and found that the organization had standing based on either a representational capacity, under the *Hunt v. Washington State Apple Advertising Commission*⁸¹ three-prong test,⁸² or in its own right, as an entity whose efforts for equal housing had been frustrated.⁸³ The court noted that HOME had devoted significant resources to prevent practices such as those in which defendant was engaged.⁸⁴ The Supreme Court affirmed the finding of the court of appeals as to HOME's standing.⁸⁵ Because of developments in the litigation, it was unnecessary for the Court to consider whether HOME had standing in a representational capacity. Instead, the Court found that HOME had standing based on direct injury to the organization: its goals were impaired.⁸⁶

The Court's finding that HOME had standing in its own right, as an entity whose goals had been thwarted, supports the proposition that a dedicated and bona fide environmental organization should have standing based on the fact that its goal is to preserve the environment. Therefore, any action taken that is, or will be, adverse to the environment will thwart the organization's goals. Also, the court of appeals thought it important that HOME had devoted significant resources to prevent the type of activity in which the defendant realtor was engaged. Again, this supports the proposition that environmental organizations should have standing to sue if the organization can show it devotes significant resources to protecting the environment.

Similarly, in *Anderson v. Salt Lake City Corp.*,⁸⁷ an organization was found to have standing to challenge the maintenance of a granite monolith engraved with the Ten Command-

80. *Coles*, 633 F.2d at 385.

81. 432 U.S. 333 (1977).

82. See *supra* text accompanying notes 27-28.

83. *Coles*, 633 F.2d at 387.

84. *Id.* at 390.

85. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

86. *Id.* at 378-79.

87. 475 F.2d 29 (10th Cir.), *cert. denied*, 414 U.S. 879 (1973).

ments. Standing was based on both the members' religious beliefs and whether their beliefs had been infringed.⁸⁸

In *O'Hair v. White*,⁸⁹ an organization interested in separation of church and state was found to have standing to challenge a state constitutional provision requiring a prospective public officer or juror to have a belief in a supreme being. Here, the Fifth Circuit Court of Appeals stated that "while it is clear that abstract injury is not enough to establish standing, it is equally clear that actual harm to individual values of an abstract or esoteric nature can provide the basis for standing."⁹⁰ The court found the organization had standing because it had been organized to defend against exactly the kind of harm that had been alleged.⁹¹

Although *Anderson* and *O'Hair* involved first amendment issues and could be distinguished on the basis of fundamental rights, the principles in these cases can, and should be, applied in the area of environmental litigation. As previously stated, in *O'Hair* the court held that "actual harm to individual values of an abstract or esoteric nature can provide the basis for standing."⁹² More important, the reason for which the organization had been formed was precisely to prevent the type of harm that was alleged. Again, this is directly analogous to environmental organizations and the reasons for which they are formed.

88. *Id.* at 31.

89. 675 F.2d 680 (5th Cir. 1982).

90. *Id.* at 687 (citations omitted).

91. *Id.* at 692. In *ACLU v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983), the court of appeals affirmed the district court's finding that plaintiff organization, which had brought suit to require the dismantling of a large, lighted cross on state park property, had standing to sue on the basis that the maintenance of the cross violated the establishment clause. *Id.* at 1107. The court held that state residents who had filed suit were not required to view the cross as a prerequisite to standing. *Id.* n.17. These residents had not even camped in the park but had the right to use the state parks. The court found that an effect on an individual's use and enjoyment of public land is a sufficient non-economic injury to confer standing to challenge governmental actions. *Id.* at 1108. The plaintiffs had standing to sue even though only one of them, whose view was from an airplane, actually had seen the cross prior to the time the suit was filed. *Id.*

92. 675 F.2d at 687.

Even in less visible or far-reaching areas of the law, courts have found that organizations have standing to sue. For example, in *Action Alliance of Senior Citizens of Greater Philadelphia v. Heckler*,⁹³ an organization endeavoring to improve the lives of elderly citizens brought an action against the Secretary of Health and Human Services challenging the agency's implementation of the Age Discrimination Act.⁹⁴ The court of appeals found that, because the organization endeavored, through informational, counseling, referral, and other services, to improve the lives of elderly citizens, it had standing.⁹⁵ There, the plaintiff organization did not have to show that any particular recipient was likely to be aided or injured by the challenged agency action.⁹⁶

Many of the statements made to support a finding of organizational standing in the preceding cases are applicable in the context of environmental concerns. If a court focuses on the purposes for which an organization was formed, then it is entirely appropriate that an environmental organization, formed for the conservation and preservation of the environment, be permitted to sue on behalf of the environment. Although purpose is only one part of the *Hunt* inquiry,⁹⁷ the Supreme Court established, in *Havens*,⁹⁸ that an organization can have standing in its own right when its purpose has been thwarted.⁹⁹ The Court made no mention of the *Hunt* three-prong inquiry in

93. 789 F.2d 931 (D.C. Cir. 1986).

94. 42 U.S.C. § 6101 (1982).

95. *Action Alliance of Senior Citizens*, 789 F.2d at 938.

96. *Id.* at 939 n.9. In *Haitian Refugee Center v. Gracey*, 809 F.2d 794 (D.C. Cir. 1987), the plaintiff organization's "purpose, as set forth in its by-laws, [was] to promote the well-being of Haitian refugees through appropriate programs and activities. . . . [These activities included the] legal representation of Haitian refugees, education regarding legal and civil rights, orientation, acculturation, and social and referral services." *Id.* at 799. The plaintiff was challenging federal action in which boats carrying aliens were interdicted on the high seas and the aliens aboard were returned to the countries from which they came. Although the organization was found to lack standing because it failed to state a first amendment claim, the court found that the organization would have had standing because the challenged action thwarted the purposes for which the organization was formed. *Id.* at 796-97.

97. See *supra* text accompanying notes 27-28.

98. 455 U.S. 363 (1982).

99. *Id.* at 379.

Havens but, instead, focused solely on the purpose of the organization.¹⁰⁰

If standing requirements for organizations can be liberalized in other areas, then such requirements also should be liberalized in the area of environmental protection. The organization's interests in these other areas were of interest to a much smaller group of people, not the public in general. The area of environmental protection, however, affects the entire population.

C. Public Policy Arguments

1. The Importance of Protecting Vital Areas That Are Inaccessible

Perhaps, for most environmental concerns that fall within the continental United States, the requirement that an organization, or its members, made use of the natural resource that the group is attempting to protect is not a hurdle. But, what happens when the group has a legitimate concern over an area that is not readily accessible and, therefore, cannot easily assert that members have availed themselves of the area? In such circumstances, strict adherence to the requirement of alleging use of a natural resource before one can assert a claim to protect that interest likely would preclude any individual or organization from having standing. Such is the case with the state of Alaska and the continent of Antarctica.

In Alaska, clear-cutting of old growth forests and oil drilling are two major environmental problems.¹⁰¹ Old growth forests are being clear-cut at an alarming rate, and the habitats of these forests are being changed so dramatically that they will never return to their original state.¹⁰² The entire ecological balance of the forest is being disturbed.¹⁰³ Additionally, there are proposed plans for oil drilling in new and pristine areas of the

100. *Id.*

101. See *infra* text accompanying notes 102-06.

102. Robbins, *Are Forests Worth More Unspoiled or Developed?*, N.Y. Times, Apr. 10, 1988, § 4, at 4, col. 1; Barron, *Mismanaging Public Lands*, N.Y. Times, Feb. 29, 1988, at A19, col. 1.

103. *Of Time and the Forest*, NATURAL HISTORY, Aug. 1988, at 41.

state.¹⁰⁴ Reports show that environmental damage has resulted from past drilling and that such drilling and damage continues to date.¹⁰⁵ Thus, it is likely that further damage will result from this additional oil drilling.¹⁰⁶

There is no question that these environmental concerns are valid, but, under *Sierra Club* and *SCRAP*, a concerned environmental organization would have no right to challenge these actions unless it, or its members, could claim injury in fact by actually having availed themselves of the forest or the proposed oil drilling site. And, if the requirement is whether a member actually has been to the forest, it is unclear whether it would be sufficient for a member to claim that he had not been there yet but had plans to go and had made his reservations. Furthermore, what if someone planned to go but had not made his reservations yet; would that alone be sufficient to confer standing? The point is that the environmental concern should be addressed and such vital issues should not hinge upon trite inquiry.

In addition, because of the environmental significance of the area and the fear that any use at all will cause harm to the environment,¹⁰⁷ certain areas of this country have been preserved to such an extent that even the general public is not allowed to use the area. When access to such an area is denied, who has standing to challenge adverse environmental action in these areas?¹⁰⁸ According to the Supreme Court, the answer is that no one has standing. This Comment suggests, however, that this answer is unacceptable.

When discussing Antarctica, it is even more apparent that the present standing requirement is too rigid. Antarctica is extremely inaccessible, but it, too, has been the subject of environmental disputes. Recently, there was agreement among

104. N.Y. Times, May 11, 1988, at A1, col. 1; N.Y. Times, Nov. 25, 1986, at A1, col. 1.

105. N.Y. Times, May 11, 1988, at A1, col. 1.

106. Barron, *supra* note 102.

107. THE NATURE CONSERVANCY, *THE PRESERVATION OF NATURAL DIVERSITY: A SURVEY AND RECOMMENDATIONS* 114 (1975).

108. Even though access to some areas is denied, possible adverse environmental action could be the reclassification of the protected area to an unrestricted area or the threat of a global problem such as acid rain.

thirty-three nations, including the United States, that Antarctica would be available for exploitation of oil and mineral resources. This will occur after the end of the informal moratorium agreed to in 1980.¹⁰⁹ Environmental groups are extremely concerned about this agreement since American operations in Antarctica already have caused environmental problems and further damage surely will occur as a result of new exploration and exploitation.¹¹⁰ It should not be a requirement that one of the environmentalists visits Antarctica in order to challenge either an abuse of the agreement or the agreement itself. It is possible to be truly concerned about the future of the continent, though no organization member has been there.

These illustrative practices have had, or will have, a severe global impact on the environment.¹¹¹ The extent of global envi-

109. N.Y. Times, June 8, 1988, at A1, col. 3.

110. N.Y. Times, Aug. 17, 1988, at A13, col. 1.

111. Environmentalists claim that oil drilling in the Arctic National Wildlife Refuge in Alaska and on the continent of Antarctica will break down the fragile ecological systems of the areas. N.Y. Times, Nov. 25, 1986, at 1, col. 1; N.Y. Times, June 8, 1988, at 1, col. 3. The greatest threat to Antarctica lies in the commercial exploitation of its resources. Its rough seas increase the possibility of oil spills during transportation, and oil pollution would threaten animal and marine life such as seals and penguins. THE EARTH REPORT: THE ESSENTIAL GUIDE TO GLOBAL ECOLOGICAL ISSUES 100 (Goldsmith & Hildyard ed. 1988) ("An oil spill on ice would increase its capacity to absorb heat and would cause it to melt, with potentially disastrous consequences. Oil, in such a cold environment, would also take longer to decompose than in temperate areas.").

The clear-cut logging in the Alaska forests will cause not only ecological destruction of those forests, *see supra* notes 102-03 and accompanying text, but deforestation also will have global implications. N.Y. Times, Mar. 14, 1989, at C7, col. 1. Scientists have acknowledged that the average temperature of the earth is rising due to the greenhouse effect. Stevens, *With Cloudy Crystal Balls, Scientists Race to Assess Global Warming*, N.Y. Times, Feb. 7, 1989, at C1, col. 1. Simply explained, "carbon dioxide and other gases combine with water vapor to trap heat inside the earth's atmosphere," thus creating a gradual warming up of the earth and causing a variety of effects (although the precise effects are presently disputed). *Id.* Deforestation also has been acknowledged to contribute to the greenhouse effect. ECKHOLM, DOWN TO EARTH: ENVIRONMENT AND HUMAN NEEDS 155 (1982); THE EARTH REPORT, *supra*, at 62-63. Additionally, forests:

perform irreplaceable ecological services. They assist in the global cycling of water, oxygen, carbon and nitrogen. They lend stability to hydrological systems, often reducing the severity of floods and permitting the recharging of springs, streams, and underground waters. Trees keep soil from washing off mountainsides and sand from blowing off deserts; they keep sediment out of

ronmental degradation that has occurred so far is well documented.¹¹² An all-out effort must be made to reverse the present destructive trends, and standing should be granted to anyone interested in taking such steps.

2. Forced to Resort to Drastic Means

Another public policy reason supporting discontinuance of the *Sierra Club* requirement is that when standing is denied to an organization that has a sincere interest in the environment, the organization and its members may feel compelled to resort to drastic means to accomplish their goal of protecting the environment.

One can look to two specific environmental organizations for proof of this proposition: Greenpeace and Earth First!.¹¹³ Greenpeace members have resorted to activities such as dangling from the Triborough Bridge in New York to block a sludge-dumping barge, handcuffing themselves to the anchor chain of a barge carrying toxic waste, plugging up ocean-dumping pipes, and physically intervening between whalers' harpoons and the whales.¹¹⁴ Earth First!'s primary concern is to protect old growth forests along the west coast of the United States.¹¹⁵ To this end, they have resorted to activities generally referred to as "monkey-wrenching."¹¹⁶ Earth First! members

rivers and reservoirs and help hold topsoil on agricultural fields. Forests house countless plant and animal species of current or potential value to humans. ECKHOLM, *supra*, at 155.

112. Sancton, *What on Earth Are We Doing?*, TIME, Jan. 2, 1989, at 24.

113. Earth First! is a radical environmental group primarily formed to combat the destruction of old-growth forests on the west coast of the United States. Because they have lost faith in the political process, members take direct, and sometimes illegal, action to stop what they view as environmentally destructive developments. Robbins, *Saboteurs for a Better Environment*, N.Y. Times, July 9, 1989, § 4, at 6, col. 1; Fayhee, *Earth First!, and Foremost: Environmental Saviors or Ecological Terrorists?*, BACKPACKER, Sept. 1988, at 20.

114. For details of such activities, see, e.g., Dykstra, *Institutions: Greenpeace*, ENVIRONMENT, July-Aug. 1986, at 5; Ferško-Weiss, *A Man, a Ship and a Dream to Sail By*, SIERRA, May-June 1988, at 66; King, *Dangling From Bridge For a Cause*, N.Y. Times, Sept. 16, 1988, at B1, col. 5.

115. See *supra* note 113.

116. Monkey-wrenching is the act of destroying private property in the name of a greater environmental good. Fayhee, *supra* note 113, at 20.

have spiked trees about to be cut, destroyed bulldozers, and pulled up survey stakes.¹¹⁷ Members also have blockaded logging roads and conducted sit-ins in eighty-foot-high treetops.¹¹⁸ In the name of environmental protection, they even have gone so far as stealing parts of helicopters and destroying sensitive seismographic equipment.¹¹⁹ Many of these members previously had tried to protect the environment in traditional ways.¹²⁰ The risks that these environmentalists take demonstrate their sincere interest in the environment. Unfortunately, some of these over-zealous environmentalists are approaching the point where they are endangering others or engaging in unlawful activity. Liberalized standing will not necessarily make all of these environmentalists bring their disputes to a courtroom. However, organizations or individuals willing to fight for environmental interests should be *encouraged* to resolve their disputes in a lawful manner, and standing should not act as a deterrent to such resolution.

Contrary to the Court's opinion in *Sierra Club*,¹²¹ a mere interest in a problem by a qualified organization *should be* sufficient to render the organization adversely affected or aggrieved. An organization should be qualified to sue on behalf of an environmental concern in much the same way that a party is qualified to be the representative in a class action suit.¹²² It is not difficult to determine whether an organization is bona

117. *Id.* Tree spiking involves driving a twenty-penny nail into a tree and camouflaging it. The spike does not injure the tree, but renders it worthless as lumber. See Malanowski, *Monkey-wrenching Around*, THE NATION, May 2, 1987, at 569.

118. *Id.* at 568.

119. Kane, *Mother Nature's Army; Guerrilla Warfare Comes to the American Forest*, ESQUIRE, Feb. 1987, at 98.

120. Fayhee, *supra* note 113, at 20; Fersko-Weiss, *supra* note 114, at 66.

121. "[A] mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved.'" 405 U.S. 727, 739 (1972).

122. 7A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1766, at 308-10 (1982).

In order to assess the adequacy of the named representatives, courts have looked to factors such as their honesty, conscientiousness, and other affirmative personal qualities. If the representative displays a lack of credibility regarding the allegations being made or a lack of knowledge or understanding

fide. If one main point of the case or controversy requirement is to ensure that a litigant will litigate vigorously, then an organization willing to spend money to protect an environmental interest surely will have demonstrated its dedication to vigorously pursuing the litigation and, therefore, it should be given standing to pursue the cause of action.

Many commentators claim that the standing inquiry is an idle and unnecessary Article III exercise. "If plaintiff did not have the minimal personal involvement and adverseness which Article III requires, he would not be engaging in the costly pursuit of litigation."¹²³ Some courts even have started to focus on the organization itself to determine whether standing should be granted. In *National Wildlife Federation v. Burford*,¹²⁴ the court looked to the fact that the organization had 4.5 million members.¹²⁵ In *Animal Lovers Volunteer Association v. Weinberger*,¹²⁶ the court stated that the organization lacked "the longevity and indicia of commitment to preventing inhumane behavior which gave standing to Fund for Animals and which

concerning what the suit is about, then the court may conclude that Rule 23(a)(4) is not satisfied.

Id. (footnotes omitted). Rule 23(a)(4) of the Federal Rules of Civil Procedure provides that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if . . . the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4).

123. Scott, *supra* note 1, at 674 ("The idle and whimsical plaintiff, a dilettante who litigates for a lark, is a specter which haunts the legal literature, and not the courtroom.").

Other commentators agree. "Perhaps litigation costs more efficiently screen access to the courts; if the plaintiff does not have the minimal personal involvement and adverseness, it is not likely that he would engage in the costly pursuit of litigation." Parker & Stone, *supra* note 1, at 774-75.

This idea also has been stated by Professor Varat:

It is now commonly remarked that ideologically committed plaintiffs will vigorously conduct their litigation—and it is also true. Insistence on concrete injury or nexus is thus often superfluous in serving this purpose. And while a plaintiff's status or injury may sometimes highlight the interests he is asking the court to protect and may provide information relevant to decision of the legal issues, this is hardly true in all cases.

Varat, *supra* note 1, at 295 (footnote omitted).

124. 835 F.2d 305 (D.C. Cir. 1987); *but see infra* notes 128-30 and accompanying text for this case's outcome on remand.

125. *Id.* at 312-13.

126. 765 F.2d 937 (9th Cir. 1985).

might provide standing to other better known organizations."¹²⁷

These cases indicate that, in making the standing determination, courts are looking at the validity of the organization. This is a step in the right direction. The dedication of the organization should be the fundamental inquiry whenever an organization seeks to protect an environmental interest.

Troublesome, though, is the district court's opinion in *National Wildlife Federation v. Burford* and the Supreme Court's grant of certiorari.¹²⁸ Because it initially found that the organization had standing to challenge the government's action, the district court issued a preliminary injunction. The court of appeals affirmed on the standing issue. On remand, the district court held that the organization did not have standing because the disputed land included 180 million acres and the organization had filed affidavits from only two members alleging use of the lands in question.¹²⁹ Although this finding was reversed on appeal,¹³⁰ the case indicates the need to reform the present inquiry in standing determinations.

As previously mentioned, the Supreme Court has agreed to review the standing issue in this case, and there is a possibility that the Court is looking to limit access to the courts by strengthening the standing inquiry. Perhaps an allegation of injury to an organization that only can claim that two members have used the land it is seeking to protect is too tenuous a relationship on which to base standing when the land involved is millions of acres, as was the case here. But, suppose the group has 1,000 members who have availed themselves of this resource; should the environmental organization have to file affidavits from those 1,000 members? Is use by two members sufficient when the group is looking to protect only 500 acres? Is

127. *Id.* at 939. The Fund for Animals was an organization that previously had sought to enjoin the Navy program of shooting goats that were on Navy property. Those actions resulted in an agreement between Fund for Animals and the Navy. *Id.* at 938.

128. 699 F. Supp. 327 (D.D.C. 1988), *rev'd*, 878 F.2d 422 (D.C. Cir. 1989), *cert. granted sub nom.* Lujani v. National Wildlife Fed'n, 110 S. Ct. 834 (1990). See *supra* notes 65-68 and accompanying text.

129. *Id.* at 332.

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

use by 1,000 members sufficient when the group is looking to protect 10 million acres? In other words, is the standing inquiry going to become a mathematical formula? Obviously, it should not, and this illustrates why the focus should be on the organization itself.

Courts must focus on the organization itself, and, if satisfied that the organization is bona fide and dedicated to environmental protection, the organization should have standing based on this inquiry and the fact that the group has suffered an injury because its goal of protecting the environment has been thwarted.

There are many indicators that should establish an organization as a bona fide environmental organization. The court can look to the organization's stated purpose,¹³¹ expressed in its by-laws. Other indicia include the resources the group has devoted to environmental protection, the organization's past litigation success, the number of members, whether membership extends over several states or even the entire country, and the age and history of the organization.

D. Injury to the Environment Itself

Finally, the requirement that the injury be to a particular individual or group of individuals focuses on the idea that everything on this earth has been put here for Man's use. But, should we not save natural resources for their own sake?¹³²

The *Sierra Club* requirement that a plaintiff organization allege use of a natural resource by the organization or a member, and that an injury results from present or future impairment of this use, shows that Man assumes that the sole purpose of all objects in the environment, be they forest or

131. See *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *Action Alliance of Senior Citizens of Greater Philadelphia v. Heckler*, 789 F.2d 931 (D.C. Cir. 1986); *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir.), *cert. denied*, 414 U.S. 879 (1973).

132. To some extent, this point has been made before. Natural objects should "have a legally recognized worth and dignity in [their] own right, and not merely to serve as a means to benefit 'us.'" Stone, *supra* note 1, at 458. Past "environmental legislation [has protected] nature not for its own sake but in order to preserve its potential value for man." Tribe, *supra* note 1, at 1325.

animal, exist for the use and benefit of Man. Injury, and the right to sue, therefore, attaches because of an injury to Man. Because courts have not recognized that animals, plants, or natural areas are, in themselves, interests to protect, courts have had to strain to find standing for an organization itself, rather than finding that the organization had standing to sue on behalf of the threatened resource. By focusing on cases that involve non-human animals, it is easier to see why this personalized injury requirement is problematic.

In *Japan Whaling Association v. American Cetacean Society*,¹³³ the Supreme Court acknowledged that environmental groups have standing to challenge the government's refusal to issue economic sanctions against Japan for Japan's refusal to comply with an international treaty's mandate to cease whaling. But, standing was premised on the fact that organizations¹³⁴ would suffer injury because whale-watching activities would be curtailed if whales were killed.¹³⁵ Although hundreds of whales are slaughtered by the Japanese in one season,¹³⁶ the Court had to state that it was the environmental organization that had suffered an injury rather than the whales themselves.

Likewise, in *Humane Society of United States v. Hodel*,¹³⁷ an animal protection organization had standing to challenge the National Fish and Wildlife Service's decision to expand hunting in wildlife refuges, but only because the court found that group members would view animal corpses while visiting the refuges.¹³⁸ Similarly, in *National Audubon Society v. Hester*,¹³⁹ an environmental organization had standing to challenge

133. 478 U.S. 221 (1986).

134. The organizations involved in the litigation were the American Cetacean Society, Animal Protection Institute of America, Animal Welfare Institute, Center for Environmental Education, The Fund for Animals, Greenpeace U.S.A., The Humane Society of the United States, International Fund for Animal Welfare, The Whale Center, Connecticut Cetacean Society, Defenders of Wildlife, and Friends of the Earth. *Id.* at 228 n.2. The members of these organizations were involved in the studying and watching of whales. *Id.* at 230-31 n.4.

135. *Id.*

136. N.Y. Times, Feb. 11, 1988, at A1, col. 2.

137. 840 F.2d 45 (D.C. Cir. 1988).

138. *Id.* at 52.

139. 801 F.2d 405 (D.C. Cir. 1986).

a Fish and Wildlife Service decision to place remaining condors in captivity but only because the group's activities in observing and studying the condors would be affected.¹⁴⁰

In other situations, however, where organizations sought to protect animals, courts found plaintiffs lacked standing because the plaintiffs could not personalize the animals' injuries to themselves. Thus, in *Animal Lovers Volunteer Association v. Weinberger*,¹⁴¹ the organization lacked standing to challenge the Navy's shooting of goats on Navy property,¹⁴² and, in *International Primate Protection League v. Institute for Behavioral Research, Inc.*,¹⁴³ the organization lacked standing to have its members appointed as guardians of abused chimpanzees.¹⁴⁴ In these types of cases, who could possibly have standing to make the complaints? Clearly, animals and natural resources cannot assert their own rights. Therefore, these rights never can be protected unless some individual or group can turn an animal's injury into a personalized injury of the members or the group.

The law already recognizes that some things on this planet have a right to be protected for their own sake.¹⁴⁵ The Endan-

140. *See id.* at 407 n.2.

141. 765 F.2d 937 (9th Cir. 1985).

142. *Id.* at 939.

143. 799 F.2d 934 (4th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987).

144. *Id.* at 938.

145. *Endangered Species Act of 1973: Hearings on S.1592 and S.1983 Before the Subcomm. on Environment of the Senate Comm. on Commerce, 93d Cong., 1st Sess. 114-15 (1973)* (statement of Harrison A. Williams, U.S. Senator, N.J., sponsor of S.1983).

In early times, many forms of wildlife were necessary to man's survival. They provided essential items of food and clothing. However, now that we possess the technical knowledge and skill to manufacture and produce many of the items which we once depended upon animals for, their economical value has greatly decreased. Perhaps our wisdom is not yet extensive enough to grasp the full meaning of forever removing various forms of life from our environment. Every living thing has its own unique role in a given ecosystem. Whenever that delicate balance of nature is disturbed, for whatever reason and in whatever way, the entire fragile system begins to disintegrate.

The effect of the loss of a given species of wildlife may not be immediately discernible but something irreplaceable has been lost. That alone, the fact that our wildlife is irreplaceable, should be reason enough to try to save it.

Id.

gered Species Act¹⁴⁶ acknowledges a need to protect animals and plants even beyond their aesthetic value to us. In enacting the legislation, Congress stated that many animals perform vital services in maintaining the balance of nature within their environments.¹⁴⁷ So important is the protection of these animals that the Act allows "any person" to file a petition to have a species added to either the endangered or threatened species list,¹⁴⁸ to obtain judicial review of any decision of the Endangered Species Committee,¹⁴⁹ or to file citizen suits for violations of the Act.¹⁵⁰

It is not the purpose of this Comment to make a statement regarding animal rights or the validity of either side's argument. But, if there is some dispute involving either individual animals or a species as a whole and if courts continue to direct the standing inquiry to the question of whether a human has suffered an injury, it is possible that many of these important issues never will be addressed. The courts should allow both sides to have their day in court. The United States Constitution simply requires that there be a "case" or "controversy," and it seems clear that this requirement is met.

CONCLUSION

The environmental awareness of the 1970's seems to have faded away in the 1980's. Until very recently, the public had been lulled into a false sense of security, and it is now more important than ever that all legitimate environmental concerns be addressed in the courts. When an organization is willing to represent the environment, either for the public interest or for the sake of the environment itself, that organization should be allowed to do so. The organization should not be denied standing because it cannot point to an individualized injury, nor should it be encouraged to prepare artfully drawn but dubious pleadings simply to allege an individualized injury. The fact

146. 16 U.S.C. §§ 1531-1543 (1983).

147. S. REP. NO. 307, 93d Cong., 1st Sess., *reprinted in* 1973 U.S. CODE CONG. & ADMIN. NEWS 2989, 2990.

148. 16 U.S.C. § 1533(b)(3)(A) (1983).

149. *Id.* § 1536(n) (1983).

150. *Id.* § 1540(g) (1983).

that there is a legitimate public concern is sufficient. Since, in other areas of law, organizations have been afforded standing to represent a valid public interest, the area of the environment should be no different. Thus, even though affording a dedicated environmental organization standing to sue in every circumstance would not solve all environmental problems, it, at least, would not act as a bar.

Moreover, we must do away with the notion that everything on this earth is here to serve Man. That can be facilitated by abandoning the injury in fact requirement in the environmental area. To have standing to sue, an organization should not have to personalize an animal or environmental injury. Because the environment itself has suffered, or will suffer, an injury, or because the organization's goal of protecting the environment has been thwarted, that alone should be sufficient grounds to establish standing. This Comment does not advocate an across-the-board relaxation of standing requirements. However, it proposes liberalized standing requirements for bona fide environmental groups who can prove their dedication to protecting the environment. The courts can determine whether the group is dedicated to environmental protection by looking at the organization's stated purpose and goals, devotion of resources, past-litigation success, number of members, age, and the history of the organization.

Enhancing an interested organization's ability to sue will create one more method of combatting the environmental problems we presently encounter.

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