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THE IMPORTANCE OF STANDING: THE NEED TO PRIORITIZE STANDING REVIEW UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

*Peter Bucklin**

INTRODUCTION

Standing under the National Environmental Policy Act of 1969 ("NEPA")¹ is a confusing issue for courts to apply.² Courts use standing to determine who is an appropriate party to raise "complaints in a judicial forum."³ The confusion stems from the fact that under NEPA, there is no private right of review.⁴ Thus, public

* Brooklyn Law School Class of 1995. The author wishes to thank Brooklyn Law School Professors Jennifer L. Rosato, Roberta Karmel and George W. Johnson III for their valuable assistance in the preparation of this Note.

¹ 42 U.S.C. §§ 4321-4370a (1988 & Supp. II 1990).

² *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (stating that "the concept of 'Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court . . ."). The Court restated this view again in *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). See generally KENNETH C. DAVIS & RICHARD J. PIERCE, JR., 3 ADMINISTRATIVE LAW TREATISE, § 16.1 at 1, 2 (3d ed. 1994) ("[S]tanding law suffers from inconsistency, unreliability, and inordinate complexity As long as the Supreme Court continues to issue complicated and inconsistent decisions on standing, confusion . . . will persist in the circuit and district courts.").

³ Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1549 (1991) ("The doctrine of standing provides [a court] with an opportunity to decide which litigants are appropriate spokespersons for the airing of complaints in a judicial forum.").

⁴ *Public Citizen v. United States Trade Representative*, 5 F.3d 549, 551 (1993), cert. denied, 114 S. Ct. 685 (1994) ("In drafting NEPA, however, Congress did not create a private right of action. Accordingly, Public Citizen must rest its claim for judicial review on the Administrative Procedure Act.").

interest groups ("interest groups")⁵ must bring their NEPA challenges under the Administrative Procedure Act ("APA").⁶ Courts have intertwined APA review requirements with standing considerations, placing the focus on the issue raised by the party instead of whether the party is the proper one to raise the issue.⁷

The U.S. Supreme Court has been inconsistent in its discussions and analyses of standing, failing to provide clear guidance on its application under NEPA.⁸ Following the *Lujan v. National Wildlife Federation*⁹ decision, lower courts have been reviewing APA requirements prior to standing considerations under NEPA challenges. The Court needs to prioritize the standing and APA review inquiry to reflect the logical order that these two components appear to command. Courts should determine whether the party is proper to raise the issue prior to examining the issue raised by the party.

This Note's discussion is based on a series of legal challenges brought by interest groups in *Public Citizen v. Office of the U.S. Trade Representative*.¹⁰ Public Citizen sought to compel the U.S. Trade Representative ("OTR") to prepare Environmental Impact

⁵ This Note will focus on interest group challenges under NEPA because interest groups predominantly raise such challenges.

⁶ 5 U.S.C. §§ 702-704 (1988 & Supp. IV 1992). These sections of the Administrative Procedure Act contain the judicial review provisions.

⁷ See generally *Whitmore v. Arkansas*, 495 U.S. 149, 154 (1990) ("[B]efore a federal court can consider the merits of a legal claim, the person seeking to invoke the jurisdiction of the court must establish the requisite standing to sue."); *Warth v. Seldin*, 422 U.S. 490, 498 (1975) ("[T]he question of standing is whether the litigant is entitled to have the court decide the merits of the dispute . . .").

⁸ Unfortunately, the U.S. Supreme Court chose not to resolve these issues by denying certiorari to Public Citizen in *Public Citizen v. United States Trade Representative*, 5 F.3d 549 (1993), *cert. denied*, 114 S. Ct. 685 (1994).

⁹ 497 U.S. 871 (1990) [hereinafter *Lujan I*].

¹⁰ The two separate challenges by Public Citizen resulted in four opinions: *Public Citizen v. Office of the U.S. Trade Representative*, 782 F. Supp. 139 (D. D.C.) [hereinafter *PC I*], *aff'd*, 970 F.2d 916 (D.C. Cir. 1992) [hereinafter *PC IA*]; *Public Citizen v. Office of the U.S. Trade Representative*, 822 F. Supp. 21 (D. D.C. 1993) [hereinafter *PC II*], *rev'd sub nom.* *Public Citizen v. U.S. Trade Representative*, 5 F.3d 549 (D.C. Cir. 1993) [hereinafter *PC IIA*], *cert. denied*, 114 S. Ct. 685 (1994).

Statements ("EIS")¹¹ for various trade agreements which were being negotiated by the agency. Public Citizen brought two separate court challenges¹² claiming informational injury from OTR's failure to prepare an EIS.¹³ In both challenges, the circuit court concluded that Public Citizen could not point to a final agency action, required by the APA,¹⁴ which would trigger the alleged harm.¹⁵

Public Citizen claimed informational injury to gain standing for its NEPA challenge.¹⁶ Interest groups claim a right to an EIS based on their purposes of public education and advocacy.¹⁷ The Court must confront whether informational injury is a sufficient injury in fact to meet the Article III standing requirements.¹⁸ To establish an injury in fact, interest groups must demonstrate a sufficient stake in the controversy to warrant a judicial resolution of the problem.¹⁹ Unless the interest group can show a direct relationship to a valid injury in fact in conjunction with an informational injury, the group has no special rights to claim this information. Instead, the information belongs to all members of the

¹¹ 42 U.S.C. § 4332(2) (1988); 40 C.F.R. § 1502.1 (1992) ("The primary purpose of an environmental impact statement . . . [is to] provide full and fair discussion of significant environmental impacts . . .").

¹² See *supra* note 10.

¹³ See *PC I*, 782 F. Supp. at 141; *PC II*, 822 F. Supp. at 29 n.12; see also Lawrence Gerschwer, *Informational Standing Under NEPA: Justiciability and the Environmental Decisionmaking Process*, 93 COLUM. L. REV. 996, 1006 (1993).

¹⁴ 5 U.S.C. § 704 (requiring that the agency action in question be final agency action).

¹⁵ See *PC IIA*, 5 F.3d 549, 553 (D.C. Cir. 1993).

¹⁶ See *supra* note 13; see also *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 83-85 (D.C. Cir. 1991) (discussing history of informational injury claim in D.C. Circuit).

¹⁷ See *PC I*, 782 F. Supp. at 141.

¹⁸ See *Foundation*, 943 F.2d at 82 ("There is first the need to satisfy the minimum requirements of Article III of the Constitution. To this end, a party seeking judicial relief must show (1) an injury in fact, (2) fairly traceable to the challenged action, and (3) likely to be redressed by a favorable decision." (citing *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982))).

¹⁹ *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972).

general public.²⁰ Courts have held that “a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest . . . and seeking relief that no more directly . . . benefits him than it does the public at large—does not state an Article III case or controversy.”²¹ Informational injury is inherently a generalized grievance.²²

This Note will begin by briefly reviewing the Article III standing requirements. In part II, this Note will discuss NEPA’s requirements and the APA review elements required to bring a challenge under NEPA as well as analyzing both the current standing inquiry applied by the courts and informational injury. This Note will conclude in part III with a discussion of the four opinions of the *Public Citizen* case.

I. ARTICLE III STANDING

Article III of the U.S. Constitution²³ requires the courts “to identify those disputes which are appropriately resolved through the judicial process” as actual cases and controversies.²⁴ This is known as the “doctrine of standing.”²⁵ There is only one question under standing: who is eligible to obtain judicial review of a

²⁰ *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2144 (1992) [hereinafter *Lujan II*]. The Court stated that when an individual seeks judicial review of an agency action “it is not sufficient that [the individual] has merely a general interest common to all members of the public.” *Id.* (citation omitted).

²¹ *Id.* at 2143.

²² *See Foundation*, 943 F.2d at 85 (“If one of NEPA’s purposes is to provide information to the public, any member of the public—anywhere—would seem to be entitled to receive it.”).

²³ U.S. CONST. art. III, § 2 states: “The judicial Power shall extend to all Cases, in Law and Equity, arising under . . . the Laws of the United States, and . . . to Controversies to which the United States shall be a party”

²⁴ *Lujan II*, 112 S. Ct. at 2136 (citing *Whitmore v. Arkansas*, 495 U.S. 149, 155); *Allen v. Wright*, 468 U.S. 737, 750 (1984); *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471, 475-76; *see also* Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163 (1992) (discussing “a capsule history of standing”).

²⁵ *Lujan II*, 112 S. Ct. at 2136.

governmental action claimed to be causing harm.²⁶ A party who has established standing has demonstrated a sufficient stake in the controversy to warrant judicial resolution of the issue raised before the court.²⁷

A. General Requirements

The U.S. Supreme Court has adhered to a core component, consisting of three elements, which establishes the "irreducible constitutional minimum" of Article III standing.²⁸ A party must demonstrate that they personally suffered an injury in fact,²⁹ the injury must be "fairly traceable to the challenged action";³⁰ and "is likely to be redressed by a favorable decision."³¹

In addition, the Court has limited standing by requiring that a party overcome three prudential principles.³² First, a party may not assert a generalized grievance, "claiming only harm to his and

²⁶ DAVIS & PIERCE, *supra* note 2, at § 16.1, 1; see *Whitmore*, 495 U.S. at 154-55; *Allen*, 468 U.S. at 750-51; *Valley Forge*, 454 U.S. at 471 (citing *Liverpool S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885)); *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972) (citing *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

²⁷ See *Valley Forge*, 454 U.S. at 472 (quoting *Flast v. Cohen*, 392 U.S. 83, 97 (1968)); *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (citing *Baker*, 369 U.S. at 204); *Morton*, 405 U.S. at 731; see also *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 82 (D.C. Cir. 1991) (quoting *United States ex rel. Chapman v. Federal Power Comm'n*, 345 U.S. 153, 156 (1953)).

²⁸ *Lujan II*, 112 S. Ct. at 2136; see *Allen*, 468 U.S. at 751; *Valley Forge*, 454 U.S. at 472; see also *Gerschwer*, *supra* note 13, at 1009.

²⁹ See *Lujan II*, 112 S. Ct. at 2136 (defining injury in fact as "an invasion of a legally protected interest which is . . . concrete and particularized" and the injury must be "actual or imminent, not 'conjectural' or 'hypothetical . . .'" (citations omitted). Further, the Court stated: "By particularized, we mean that the injury must affect the plaintiff in a personal and individual way." *Id.* at 2136 n.1); *Valley Forge*, 454 U.S. at 472 (citing *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)).

³⁰ *Lujan II*, 112 S. Ct. at 2136 (citing *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)); see *Whitmore*, 495 U.S. at 155; *Allen*, 468 U.S. at 751; *Valley Forge*, 454 U.S. at 472.

³¹ *Valley Forge*, 454 U.S. at 472 (citing *Simon*, 426 U.S. at 38, 41); see *Lujan II*, 112 S. Ct. at 2136; *Whitmore*, 495 U.S. at 155; *Allen*, 468 U.S. at 751.

³² See *Allen*, 468 U.S. at 751; *Valley Forge*, 454 U.S. at 474-75.

every citizen's interest."³³ These claims are "more appropriately addressed in the representative branches."³⁴ Second, a party "must assert his own legal rights and interests" and not those of a third party³⁵ and finally, the party's complaint must fall within the "zone of interests" protected by the statute in question.³⁶

Interest groups must satisfy both Article III and the prudential principles to obtain standing. However, an interest group may claim injuries to either the group's own interests or derivatively through the interests of its members.³⁷ In either circumstance, the interest group must demonstrate that it has a direct stake in the outcome of the controversy.³⁸ The Court has stated that merely requesting a declaration of legal rights does not satisfy Article III standing; instead, a "real, earnest and vital controversy" must exist.³⁹

B. The Injury in Fact Test and Geographic Nexus

The key elements relating to this Note's discussion of interest group challenges to agency actions in the environmental context are the injury in fact requirement and the generalized grievance principle. The injury in fact test helps to establish the direct and

³³ *Lujan II*, 112 S. Ct. at 2143. The Court defined "generalized grievance," stating that a party "must show he has sustained or is immediately in danger of sustaining a direct injury as the result of [the complained of] action and it is not sufficient that he has merely a general interest [or is disagreeing with some public policy that would be] common to all members of the public." *Id.* at 2144 (citing *In ex parte Levitt*, 302 U.S. 633, 634 (1937)).

³⁴ *Allen*, 468 U.S. at 751; see *Valley Forge*, 454 U.S. at 475; *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

³⁵ *Valley Forge*, 454 U.S. at 474; see *Allen*, 468 U.S. at 751; *Warth*, 422 U.S. at 499.

³⁶ See *Allen*, 468 U.S. at 751; *Valley Forge*, 454 U.S. at 475; *Warth*, 422 U.S. at 499.

³⁷ See *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

³⁸ *United States v. Students Challenging Regulatory Agency Procedures* ("SCRAP"), 412 U.S. 669, 686-87 (1973) ("The importance of demonstrating that the party seeking review be himself among the injured is . . . [what] gives a litigant a direct stake in the controversy . . .").

³⁹ *Valley Forge*, 454 U.S. at 471 (quoting *Chicago & Grand Trunk Ry. v. Wellman*, 143 U.S. 339, 345 (1892)).

personal stake in the outcome of a dispute necessary to demonstrate the existence of a legal controversy.⁴⁰ Conversely, when an interest group fails to establish that it is directly harmed or fails to show how a judicial resolution of this alleged harm will directly benefit the group differently than it would benefit any other member of the general public, then the group's complaint has raised only a generalized grievance better suited for the political branches.⁴¹

To assert a sufficient injury in fact, an interest group must demonstrate that it has been or will be "perceptibly harmed by a challenged agency action."⁴² The injury must be to a cognizable interest,⁴³ and the interest group must show that it has personally suffered this actual and concrete injury and that it is not merely raising an abstract or conjectural claim.⁴⁴ When an interest group is not the "object of the action" it must allege "more than an injury to a cognizable interest."⁴⁵ The group must demonstrate that its members will be directly affected by the agency's action or non-action by having more than a "special interest in the subject."⁴⁶ Demonstrating that the group's members would be injured establishes "a direct stake in the controversy."⁴⁷

⁴⁰ See *Lujan II*, 112 S. Ct. 2130, 2137-38 (1992); *Sierra Club v. Morton*, 405 U.S. 727, 733-38 (1972); see also *Allen*, 468 U.S. at 752; *Valley Forge*, 454 U.S. at 473; *Warth*, 422 U.S. at 498-99.

⁴¹ See *Lujan II*, 112 S. Ct. at 2142-44; *Valley Forge*, 454 U.S. at 473, 475; *Warth*, 422 U.S. at 499-500; *Morton*, 405 U.S. at 732 n.3; see also Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983) (discussing the distinction between claims addressed to the courts and to the political branches).

⁴² *SCRAP*, 412 U.S. at 688-89.

⁴³ *Id.* at 686-87; see *Lujan II*, 112 S. Ct. at 2137; *Morton*, 405 U.S. at 734.

⁴⁴ *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (citing *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)); see *Lujan II*, 112 S. Ct. at 2136; *Valley Forge*, 454 U.S. at 472 (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)).

⁴⁵ *Lujan II*, 112 S. Ct. at 2137-38 (quoting *Morton*, 405 U.S. at 735).

⁴⁶ *Morton*, 405 U.S. at 735.

⁴⁷ *SCRAP*, 412 U.S. at 687; see *Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury . . .'" (quoting *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 (1973))); see also *City of Davis v. Coleman*,

Typically, an interest group claims harm to the recreational and aesthetic interests of its members, which courts have held demonstrates a cognizable interest for standing.⁴⁸ In addition, courts require the group to establish a geographic nexus.⁴⁹ To demonstrate this nexus, the group must show that the alleged aesthetic harm will occur to a particular geographic area and that the group's members have a relationship to this allegedly threatened area.⁵⁰ "[A] plaintiff claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly 'in the vicinity' of it."⁵¹ Under the Supreme Court's analysis, an interest group claiming aesthetic injury from an alleged harm to a wilderness area must show that it uses the whole area and not simply a part thereof.⁵²

521 F.2d 661, 670 (9th Cir. 1975) (quoting *Morton*, 405 U.S. at 734-35).

⁴⁸ *SCRAP*, 412 U.S. at 686 ("Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society" (quoting *Morton*, 405 U.S. at 734)).

⁴⁹ The *Lujan II* Court cited *Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810 (9th Cir. 1987), *rev'd on other grounds*, 490 U.S. 332 (1989) as an example of an interest group who had established a geographic nexus and thus was concretely affected by the alleged harm. *Lujan II*, 112 S. Ct. at 2143 n.8.

⁵⁰ See *Lujan II*, 112 S. Ct. at 2139; *SCRAP*, 412 U.S. at 687-90; *Morton*, 405 U.S. at 735; *Wilderness Soc'y v. Griles*, 824 F.2d 4, 12-15 (D.C. Cir. 1987); *Coleman*, 521 F.2d at 671; see also Lisa M. Bromberg, *Lujan v. Defenders of Wildlife: Where Does the Standing Issue Stand in Environmental Litigation?*, 16 AM. J. TRIAL ADVOC. 761 (1993) (discussing geographic nexus in *Lujan II*); Bill J. Hays, Comment, *Standing and Environmental Law: Judicial Policy and the Impact of Lujan v. National Wildlife Federation*, 39 U. KAN. L. REV. 997 (1991) (discussing geographic nexus in general as well as in *Lujan I*); Katherine B. Steuer & Robin L. Juni, Note, *Court Access for Environmental Plaintiffs: Standing Doctrine in Lujan v. National Wildlife Federation*, 15 HARV. ENVTL. L. REV. 187 (1991) (discussing geographic specificity in *Lujan I*).

⁵¹ *Lujan II*, 112 S. Ct. at 2139 (citing *Lujan I*, 497 U.S. 871, 887-89 (1990)).

⁵² The *Lujan II* court stated: "We did not so much as mention standing, for the very good reason that the plaintiff [interest group] was a citizen's council for the area in which the challenged [action] was to occur, so that its members would obviously be concretely affected." *Lujan II*, 112 S. Ct. at 2143 n.8. The plaintiff interest group, therefore, established a geographic nexus by its members' ongoing presence at the location of the alleged harm.

In *Sierra Club v. Morton*,⁵³ an interest group claimed aesthetic injury resulting from an agency's proposed actions regarding the development of a wilderness area. The Court held that to establish an injury in fact and to demonstrate that the interest group is among the injured, the group must show that it actually uses the threatened area. Otherwise, the Court noted, the alleged harm would affect every citizen in the same manner. By showing that those persons who actually use the threatened area would be directly affected, the alleged harm would lessen "the aesthetic and recreational values of [that] area," thus causing an injury.⁵⁴ By alleging harm to a geographic area unrelated to the group's activities, the group has raised only a generalized grievance which is inappropriate for judicial resolution.

C. Generalized Grievances

The Supreme Court has refused to adjudicate "abstract questions of wide public significance,"⁵⁵ or "generalized grievances,"⁵⁶ for they are more appropriately addressed by the political branches.⁵⁷ The Court seeks to avoid the federal courts becoming "merely publicly funded forums for the ventilation of public grievances,"⁵⁸ or parties attempting to "convert the judicial process into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'"⁵⁹

When the interest group in *Sierra Club v. Morton*⁶⁰ failed to

⁵³ 405 U.S. 727 (1972).

⁵⁴ *Id.* at 734-35.

⁵⁵ *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (citation omitted).

⁵⁶ *Id.*

⁵⁷ *Allen v. Wright*, 468 U.S. 737, 751 (1984) ("Standing doctrine embraces . . . the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches."); *Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("[W]hen the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction.").

⁵⁸ *Valley Forge*, 454 U.S. at 473.

⁵⁹ *Id.* (quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973)).

⁶⁰ 405 U.S. 727 (1972).

establish a geographic nexus, the Court viewed the group's claim as predicated upon no more than a "mere [or special] interest in [the] problem."⁶¹ The Court noted that "if a special interest in this subject were enough to entitle Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide 'special interest' organization however small or short-lived."⁶²

Thus, an interest group that raises a complaint, only demonstrating a mere or special interest in an environmental problem, is voicing a political grievance about an agency's policy.⁶³ As *Morton* stated, the test for injury in fact serves to distinguish those claims by interest groups that seek to "vindicate their value preferences through the judicial process" from those who are directly injured or affected by some agency action.⁶⁴ In other

⁶¹ *Id.* at 739.

⁶² *Id.* The Court continues this logic and notes that it would also not prevent any individual citizen with a special interest from raising the same complaint. *Id.* at 739-40.

⁶³ [F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 866 (1984) (quoting *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978)); see also Cornish F. Hitchcock et al., *Developments in Judicial Review with Emphasis on the Concepts of Standing and Deference to the Agency*, 4 ADMIN. L.J. 113, 127 (1990) ("Policy and politics come from the same root; they belong together." (statement of Judge Stephen F. Williams)). Policy is meant to apply to the public in a generalized similar manner. When a member of the general public disagrees with a policy, either politically or ideologically, that person is still in a common position with the general public. Because the policy applies to the whole public in the same manner, the individual can only raise a generalized grievance. "These sorts of ideological concerns are not supposed to give rise to standing." *Id.* at 121 (statement of Edward W. Warren).

⁶⁴ *Morton*, 405 U.S. at 740. The Court noted that "'scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question . . .'" *Id.* at 740 n.16 (quoting ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA at 280 (1945)). However, "judicial review is effective largely because it is not available simply at the behest of a partisan faction, but

words, Sierra Club's complaint failed to establish a "direct stake in the outcome" of the controversy.⁶⁵

To overcome merely being a generalized grievance and to demonstrate a valid injury in fact, an interest group's complaint must establish a geographic nexus to the alleged threatened area that is causing the harm to the group's interests.⁶⁶ Without establishing this relationship, the group cannot demonstrate a sufficient stake in the outcome of the claimed controversy to warrant judicial resolution of the problem.⁶⁷ A generalized grievance claim, the opposite of a valid injury in fact, fails to distinguish the interest group from any other member of the public who could claim the same harm and same benefits resulting from judicial resolution of an alleged problem.⁶⁸

II. STANDING UNDER NEPA

Environmental policymaking often results in contentious choices. Interest groups, holding deeply felt views regarding what

is exercised only to remedy a particular, concrete injury." *Id.*

⁶⁵ *Morton*, 405 U.S. at 740.

⁶⁶ *Lujan I*, 497 U.S. 871, 887-89 (1990); *Morton*, 405 U.S. at 734-35.

⁶⁷ [W]hen an alleged injury involves the use and enjoyment of land, it is not enough that plaintiffs have a generalized interest in preserving such use and enjoyment. Rather, plaintiffs must allege that they or their members will suffer particularized injury from being denied the use and enjoyment of the land [T]he required showing involves the specification of the land that the plaintiff intends to use that the challenged action will affect. Otherwise, we cannot be certain enough that the plaintiff will himself be among the injured.

Wilderness Soc'y v. Griles, 824 F.2d 4, 15 (D.C. Cir. 1987).

⁶⁸ We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.

Lujan II, 112 S. Ct. 2130, 2143 (1992).

constitutes environmental harm, often oppose these choices made by governmental agencies.⁶⁹ There is, however, no entitlement to judicial resolution simply because a group holds beliefs or maintains a special interest regarding environmental policies.⁷⁰ The appropriate forum to raise challenges to policy choices is the political branches, not the courts.⁷¹

⁶⁹ See generally Keith Bradsher, *Court Ruling Lets Trade Agreement Move to Congress*, N.Y. TIMES, Sept. 25, 1993, at 1; cf. John H. Cushman, Jr., *Owl Issue Tests Reliance on Consensus in Environmentalism*, N.Y. TIMES, Mar. 6, 1994, at 28; Timothy Egan, *Tight Logging Limit Set in Northwest*, N.Y. TIMES, Feb. 24, 1994, at A18. While these two articles do not address NEPA per se, they do address the nature of a typical environmental policy dispute which is often at the heart of NEPA challenges.

⁷⁰ See Gerschwer, *supra* note 13, at 996. ("Decisions about the appropriate level of protection of the environment and of the public health are inescapably political decisions.").

In reviewing the policy area, however, the pressures for control of agency power on the one hand, and for proper use of existing institutions on the other hand, are dramatically opposed. One may believe that the more important the policy decision, the greater the need for a check outside the agency. But, for reasons of "comparative expertise," increased judicial scrutiny seems *less* appropriate.

Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 394 (1986).

⁷¹ See Scalia, *supra* note 41, at 892 ("The degree to which the courts become converted into political forums depends not merely upon what issues they are permitted to address, but also upon *when* and *at whose instance* they are permitted to address them.").

The desire to separate law and politics has always been a central aspiration of the American legal profession. From the time of its earliest incarnation in postrevolutionary constitutional theory, politics in American thought has usually represented power and will, the clash of interests, and the subjectivity of values. Law, by contrast, has been the only plausible claimant to the role of objectivity and political neutrality. The legal profession, in turn, has had every reason to insist on its own autonomy. If law is simply a product of power or will, any special claims of the profession to determine the nature and scope of legal development is undermined. The special power of the legal profession in American society has always been grounded in some theory of the distinctively objective and autonomous nature of law.

MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860*, 256-57 (1977).

NEPA has either served its purpose well, promoting environmental considerations in agency policymaking, or as a number of academic commentators have suggested, failed to force agencies to produce environmentally correct decisions.⁷² Some academic commentators have concluded that the courts have misinterpreted the public's role under NEPA.⁷³ Commentators argue that interest groups would monitor agencies and raise complaints whenever an agency failed to consider the environment appropriately in its decision making.⁷⁴ However, interest groups have struggled to

⁷² Compare David C. Shilton, *Is The Supreme Court Hostile to NEPA? Some Possible Explanations for a 12-0 Record*, 20 ENVTL. L. 551 (1990) with Nicholas C. Yost, *NEPA's Promise—Partially Fulfilled*, 20 ENVTL. L. 533 (1990). See generally M. Diane Barber, *Bridging the Environmental Gap: The Application of NEPA to the Mexico-United States Bilateral Trade Agreement*, 5 TUL. ENVTL. L.J. 429 (1992); Michael C. Blumm, *Symposium on NEPA at Twenty: The Past, Present and Future of the National Environmental Policy Act: Introduction: The National Environmental Policy Act at Twenty: A Preface*, 20 ENVTL. L. 447 (1990); David B. Lawrenz, *Judicial Review under the National Environmental Policy Act: What Remains After Robertson v. Methow Valley Citizens Council?*, 62 U. COLO. L. REV. 899 (1991). But see William L. Andreen, *In Pursuit of NEPA's Promise: The Role of Executive Oversight in the Implementation of Environmental Policy*, 64 IND. L.J. 205 (1989).

⁷³ Some members of Congress also stated that their intention for NEPA was to have the public enforce EIS compliance. See Yost, *supra* note 72, at 534-37.

⁷⁴ This expectation for NEPA, that interest groups would monitor compliance, can be traced to comments made by individual congressional members who aired their personal goals for NEPA in the press. Senator Jackson stated: "We expected Section 102 [the EIS requirements] . . . to force the agencies to move We did not anticipate that it would be private parties through the courts that would force compliance. This is what has made it work." *United States v. SCRAP*, 412 U.S. 669, 709 n.5 (1973) (quoting Jackson's comments from Cahn, *Can Federal Law Help Citizens Save Nature's Fragile Beauty?*, CHRISTIAN SCI. MONITOR, Feb. 28, 1973, at 12). In addition, Congressman Dingell stated: "The success of the environmental impact statements is not so much that they were used as we intended they should, but that citizens have been able to use the process as a [way] to get into courts." *SCRAP*, 412 U.S. at 712 n.10 (quoting Dingell's comments from Cahn, *supra*, at 12). While these members of Congress may have hoped for different results under NEPA, one could assume that had Congress as a whole wanted public participation for judicial review, it would have included a private right of action in the statute.

obtain judicial review of agencies' environmental decision making under NEPA.⁷⁵

A. NEPA's Statutory Requirements

NEPA appears to require only what its language states: "Environmental amenities and values may be given appropriate consideration in [the] decisionmaking [processes] along with economic and technical considerations."⁷⁶ The statute requires governmental agencies to include environmental considerations in their policymaking decisions by producing an EIS.⁷⁷ Congress requires agencies to include an EIS "in every recommendation or report on proposals for legislation and other major Federal actions" that impacts the environment.⁷⁸ Thus, the agency prepares an EIS as an information tool, first for the government, and second for the public.⁷⁹

⁷⁵ See Shilton, *supra* note 72.

⁷⁶ 42 U.S.C. § 4332 (1988); see *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983) ("Congress in enacting NEPA, however, did not require agencies to elevate environmental concerns over other appropriate considerations.").

⁷⁷ Congress requires agencies to adopt policies that reflect the purposes and declarations of NEPA. See 42 U.S.C. § 4332. The stated purpose is to promote efforts to protect the environment and maintain the natural resources essential to the United States. See 42 U.S.C. § 4321. Further, Congress intended that all practical means and measures should be used to promote and create conditions to balance our country's social and economic needs with the environment. See 42 U.S.C. § 4331 (1988). See generally Kirsten Hughes, *Environmental Quality: National Environmental Policy Act*, 21 ENVTL. L. 1159 (1991).

⁷⁸ "All agencies of the Federal Government shall . . . (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—(i) the environmental impact of the proposed action" 42 U.S.C. § 4332(2). Congress also created the Council on Environmental Quality ("CEQ") to promulgate regulations to guide agencies preparing an EIS. See 42 U.S.C. § 4321; CEQ REGULATIONS, 40 C.F.R. §§ 1500-1508 (1992).

⁷⁹ Federal officials must consult with federal agencies for their comments regarding the proposed environmental policy prior to the final preparation of an EIS. See 42 U.S.C. § 4332(2)(C). The completed EIS will then be "made available to the President, the Council on Environmental Quality and to the

Courts have interpreted NEPA as imposing only a procedural requirement on governmental agencies' decision making when they consider the environment.⁸⁰ Moreover, courts have conclusively rejected all attempts at imposing or requiring any particular results under NEPA when an EIS is prepared by an agency.⁸¹ NEPA is construed narrowly by courts due to the broad language that

public" *Id.*; see also *Baltimore Gas & Elec. Co.*, 462 U.S. at 97 (stating the twin aims of NEPA: first, the agency must "consider every significant aspect of the environmental impact of a proposed action, [and second,] . . . inform the public that it has indeed considered environmental concerns in its decisionmaking process").

CEQ regulations state that "[t]he primary purpose of an [EIS] is to serve as an action-forcing device to insure that the policies and goals defined in [NEPA] are infused into the on-going programs and actions of the Federal Government" An [EIS] is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.

Andrus v. Sierra Club, 442 U.S. 347, 351 n.3 (1979) (quoting 40 C.F.R. § 1502.1 (1992)).

⁸⁰ See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) ("NEPA itself does not mandate particular results, but simply prescribes the necessary process."); *Baltimore Gas & Elec. Co.*, 462 U.S. at 96 ("The key requirement of NEPA, however, is that the agency consider and disclose the actual environmental effects in a manner that will ensure that the overall process . . . brings those effects to bear on decisions to take particular actions that significantly affect the environment."); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978) ("NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural."); see also *City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975) (stating that while an agency must solicit comments from the public, "[i]t is the Federal agency, not environmental action groups . . . which is required by NEPA to produce an EIS").

⁸¹ *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989) ("NEPA does not work by mandating that agencies achieve particular substantive environmental results."); *Robertson*, 490 U.S. at 353 ("NEPA's reliance [is] on procedural mechanisms—as opposed to substantive, result-based standards"); *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) ("Neither . . . [NEPA] nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions."); *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 83 n.2 (D.C. Cir. 1991) ("NEPA does not require that any particular substantive action be taken in response to the environmental impact statement.").

Congress used when drafting this statute.⁸² This language may have inspired lofty goals, but it did not translate well into applicable law.⁸³

The problems confronting interest group challenges under NEPA's statutory language are twofold. First, courts have been unable to determine, from NEPA's language, a precise time that interest groups can raise challenges when an EIS will not be made available.⁸⁴ Second, Congress did not include a private right of action or citizen suit provision in NEPA. This has made interest group challenges more difficult and has required judicial challenges to be made through the general review provisions of the APA.⁸⁵

⁸² See *Shilton*, *supra* note 72, at 552 (citing *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980)). *Shilton* noted that "the Court does not treat NEPA as an extraordinary statute under which the courts can take an activist role in protecting the environment . . . because no evidence suggests that Congress intended NEPA to provide such a broad grant of power to the courts." *Id.* at 558; *cf.* *Blumm*, *supra* note 72, at 453 ("[A]n apparent political consensus holds that amending NEPA to ensure that its goals are not obscured by its procedures would be politically unwise. As a result, Congress has acquiesced in the statute's substantive demise.").

⁸³ While section 101 [of NEPA] sets out important policy goals for the nation, there is no apparent way to translate these into judicially manageable standards for resolving individual controversies. Thus, the Act provides no "law to apply" to determine the propriety of an agency's balancing of environmental goals with other national policy objectives, and that balancing must be considered unreviewable.

Shilton, *supra* note 72, at 565.

⁸⁴ See 40 C.F.R. § 1500.1(b) (1992) ("NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken."). *But see Kleppe*, 427 U.S. at 406 ("A court has no authority to . . . determine a point during the germination process of a potential proposal at which an impact statement should be prepared.").

⁸⁵ PC I, 782 F. Supp. 139, 141 (D. D.C. 1992) ("Judicial review of an agency's actions under NEPA is available only under the general review provision of the Administrative Procedure Act ('APA'), 5 U.S.C. §§ 702-704 (1988)."); see *Lujan I*, 497 U.S. 871, 882 (1990).

B. The APA Review Requirements

Because NEPA does not contain a private right of action, an interest group raising a challenge under the statute “must rest its claim for judicial review on the Administrative Procedure Act.”⁸⁶ If an interest group can demonstrate that it has been legally harmed by some agency action, it may seek injunctive relief under the APA.⁸⁷ In general, the “APA sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts.”⁸⁸

Under section 702 of the APA⁸⁹ there are two separate, yet related requirements to Article III standing.⁹⁰ First, a party claiming harm “must identify some ‘agency action’ that affects [them] in the specified fashion.”⁹¹ Second, the party must demonstrate that they are “adversely affected or aggrieved . . . within the meaning of the relevant statute.”⁹² Further, when review is sought under the general review provisions, APA section 704⁹³ requires that the identified agency action must also be a final agency action.⁹⁴

Courts have held that the “adversely affected” element of

⁸⁶ PC IIA, 5 F.3d 549, 551 (D.C. Cir. 1993).

⁸⁷ *Id.* (citing 5 U.S.C. § 702).

⁸⁸ *Franklin v. Massachusetts*, 112 S. Ct. 2767, 2773 (1992); *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (“Section 701 of the [APA], 5 U.S.C. § 701 . . . provides that the action of ‘each authority of the Government’ . . . is subject to judicial review except where there is a statutory prohibition on review . . .”). *But see Califano v. Sanders*, 430 U.S. 99, 105 (1977) (stating that “the better view is that the APA is not to be interpreted as an implied grant of subject-matter jurisdiction to review agency actions”).

⁸⁹ 5 U.S.C. § 702 (“Right of review”).

⁹⁰ PC I, 782 F. Supp. 139, 141 (D. D.C. 1992) (stating “two separate requirements”); *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 83 (D.C. Cir. 1991) (stating “two related requirements”).

⁹¹ *Lujan I*, 497 U.S. 871, 882 (1990) (citing 5 U.S.C. § 702).

⁹² *Id.* at 883.

⁹³ 5 U.S.C. § 704 (“Actions reviewable”).

⁹⁴ *Lujan I*, 497 U.S. at 882; *see Franklin v. Massachusetts*, 112 S. Ct. 2767, 2773 (1992).

section 702 translates into the Article III injury in fact test.⁹⁵ In addition, the "aggrieved within the meaning of a relevant statute" element of section 702 duplicates the prudential principle "zone of interests" test.⁹⁶ When an interest group raises a challenge under these APA review provisions, courts should still determine whether the group has alleged a "personal stake in the outcome of the controversy."⁹⁷ The logical first question that courts should ask under a NEPA challenge, is whether the plaintiff has suffered a valid injury in fact. Unfortunately, courts have not followed this inquiry in their current application of APA review under NEPA.

C. The Current Application of Standing Analysis Under NEPA

Interest groups raise two basic claims when attempting to obtain standing under NEPA to challenge agency actions.⁹⁸ First, when an interest group raises a derivative challenge, the group alleges that its members will suffer harm to their recreational and aesthetic interests. The members' use and enjoyment of some area is harmed by a proposed agency action and this harm is directly related to the failure of the agency to prepare an EIS.⁹⁹ Courts have consistently held that aesthetic injury meets the adversely affected (injury in fact) test, if the group can also establish a geographic nexus to the

⁹⁵ See *Lujan I*, 497 U.S. at 883; *United States v. SCRAP*, 412 U.S. 669, 686 (1973); *Sierra Club v. Morton*, 405 U.S. 727, 732-33 (1972); *Wilderness Soc'y v. Griles*, 824 F.2d 4, 11 (D.C. Cir. 1987).

⁹⁶ See *Lujan I*, 497 U.S. at 883; *SCRAP*, 412 U.S. at 686; *Morton*, 405 U.S. at 732-33; see also Gerschwer, *supra* note 13, at 1010 ("The zone of interests test is not demanding: it is satisfied unless 'the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute . . .'" (quoting *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987))).

⁹⁷ *Morton*, 405 U.S. at 732 (citation omitted). Although, *Sierra Club* did not raise a NEPA challenge, the group still sought standing for an environmental complaint under the same general review provisions of the APA.

⁹⁸ See *PC I*, 782 F. Supp. 139, 142 (D. D.C. 1992) (citing *Lujan I*, 497 U.S. 871 (1990)); *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 83-85 (D.C. Cir. 1991).

⁹⁹ See *PC I*, 782 F. Supp. at 142; *Foundation*, 943 F.2d at 83. Interest groups typically want to prevent the proposed agency action and claim that if the agency would prepare an EIS for the proposal, then information produced in the EIS would persuade the agency not to take the action.

threatened area, and the aggrieved (zone of interests) test under the APA.¹⁰⁰

Under the second claim, an interest group alleges harm to its own interests. The interest group claims a procedural right to the information contained in the EIS.¹⁰¹ When an EIS is withheld, the group claims that the lack of information prevents the group from pursuing its central purpose of educating the public or lobbying Congress concerning the environment.¹⁰² The group needs the information in a timely manner to perform its role.¹⁰³ However, the courts' acceptance of informational injury as a valid injury in fact is not clear.

In some circumstances, a party raising a complaint under NEPA does not have to meet all of Article III's standing requirements. The Supreme Court has stated that a person living next door to a proposed federal facility may assert a procedural right in the event that the governing agency failed to prepare an EIS for the proposal.¹⁰⁴ In this situation, given the neighboring proximity of the threatened harm, the party would automatically establish a geographic nexus. In addition, this party would have standing "without meeting all the normal standards for redressability and immediacy."¹⁰⁵ Thus, this party, who has established a concrete interest because of their geographic nexus, must simply allege their injury.¹⁰⁶

¹⁰⁰ *Lujan II*, 112 S. Ct. 2130, 2137 (1992) ("Purely aesthetic purposes is undeniably a cognizable interest for purpose of standing."); *Lujan I*, 497 U.S. at 885-86 ("Recreational use and aesthetic enjoyment—are sufficiently related to the purposes of [the interest group] . . . [and] are among the sorts of interests [NEPA was] specifically designed to protect."); *SCRAP*, 412 U.S. at 686 (citing *Morton*, 405 U.S. at 734).

¹⁰¹ See *PC I*, 782 F. Supp. at 142; *Foundation*, 943 F.2d at 83-84.

¹⁰² See *PC I*, 782 F. Supp. at 141-42; *Foundation*, 943 F.2d at 83-85.

¹⁰³ See *PC I*, 782 F. Supp. at 141.

¹⁰⁴ *Lujan II*, 112 S. Ct. at 2143.

¹⁰⁵ *Id.* at 2143 n.7.

¹⁰⁶ See *id.* The problem for interest groups is that they are seldom next door neighbors to proposed federal facilities or to wilderness areas where an agency has proposed some allegedly harmful action. The Court's reasoning is as follows: a person or group that resides at the opposite end of the country from the proposed federal facility would not have concrete interests affected to establish

A federal court cannot "consider the merits of a legal claim," unless the party seeking review has established standing.¹⁰⁷ In other words, whether the party is proper or has standing to raise an asserted challenge is "the threshold question in every federal case."¹⁰⁸ Without answering this question, the court has not established that it has the power to hear a particular case.¹⁰⁹ The Supreme Court's current analysis under NEPA, however, has first focused on the existence of a final agency action. The "core question" has become: "Whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties."¹¹⁰

D. The Source of the Inverted Standing Inquiry Under NEPA

Although the tests posed by Article III standing and the APA review are analytically distinct questions and should be reviewed as such, courts have merged the two inquiries.¹¹¹ Courts are looking at whether the plaintiff is personally injured and at whether the injury was caused by a final agency action together. In effect though, the existence of a final agency action dominates this merged inquiry to the detriment of determining first whether the party actually has a valid injury in fact.

standing to challenge the agency's failure to prepare an EIS. Interest groups in this position would not be able to establish a geographic nexus between the threatened area, which would be on the other side of the country, and the alleged harm to the group's interests. More often than not, groups claim harm to aesthetic interests resulting from dispersed areas. Under the Court's analysis, in this circumstance it is unlikely that a group could demonstrate a geographic nexus.

¹⁰⁷ *Whitmore v. Arkansas*, 495 U.S. 149, 154-55 (1990); see *Lujan II*, 112 S. Ct. at 2144.

¹⁰⁸ *Warth v. Seldin*, 422 U.S. 490, 498 (1975); see *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982) ("[T]his Court has always required that a litigant have 'standing' to challenge the action sought to be adjudicated in the lawsuit.").

¹⁰⁹ *Warth*, 422 U.S. at 498.

¹¹⁰ *Franklin v. Massachusetts*, 112 S. Ct. 2767, 2773 (1992).

¹¹¹ *Wilderness Soc'y v. Griles*, 824 F.2d 4, 11 (D.C. Cir. 1987).

In *Foundation on Economic Trends v. Lyng*,¹¹² the D.C. Circuit court merged Article III standing with APA review. The court, in effect, elevated its review of determining the existence of a final agency action over examining whether the interest group was the proper party to challenge the agency action in the first place.¹¹³ The court was looking at the source of the injury before determining if the injury itself was valid for judicial resolution. The culprit for the *Foundation* court's merger and reversal of the standing inquiry is the Supreme Court's decision in *Lujan I*.¹¹⁴

In *Lujan I*,¹¹⁵ the interest group, National Wildlife Federation ("NWF"), claimed that a government program, reclassifying public lands to make them available for mining activities, would destroy the lands natural beauty, thus causing aesthetic injury.¹¹⁶ The group also claimed informational injury resulting from the lack of an EIS.¹¹⁷ After examining NWF's claims, the Court found only a "bare allegation of injury."¹¹⁸ NWF's claims failed on two grounds. The Court held that the group did not establish a geographic nexus between NWF's members and the alleged threatened area causing NWF's claimed aesthetic harm.¹¹⁹ In addition, the Court refused to review a complaint that was aimed at an entire agency's program.¹²⁰

The programmatic challenge raised by NWF appears to be a variant of a generalized grievance claim. The Court stated that the

¹¹² 943 F.2d 79 (D.C. Cir. 1991).

¹¹³ The *Foundation* court recognized this fact stating, "this tends to merge standing under the APA with the merits of a plaintiff's NEPA claim. But such a result is not an uncommon consequence of applying the standing test for APA review" *Id.* at 85-86.

¹¹⁴ *Id.* The court states: "The issues thus presented by the Foundation's claim of standing are, however, unnecessary to decide in view of the Supreme Court's decision in [*Lujan I*, 497 U.S. 871 (1990)]." *Id.* at 85.

¹¹⁵ 497 U.S. 871 (1990).

¹¹⁶ *Id.* at 875-79. The National Wildlife Federation ("NWF") complained that the agency violated NEPA by failing to prepare an EIS. *Id.* at 879.

¹¹⁷ *Id.* at 898.

¹¹⁸ *Id.* at 887.

¹¹⁹ *Id.* (citing the district court record, *National Wildlife Fed'n v. Burford*, 669 F. Supp. 327, 331 (D. D.C. 1988)).

¹²⁰ *Id.* at 891.

interest group could not "seek wholesale improvement of this program by court decree, [but in] . . . the halls of Congress, where programmatic improvements are normally made."¹²¹ This programmatic claim, combined with NWF's failure to establish a geographic nexus to the alleged harm, implicates the group's complaint of informational injury as merely a generalized grievance. In other words, NWF's complaint seems to be based only on a mere interest in resolving a policy dispute regarding the environment.

While the Court initially stated that the issue was whether the interest group was a proper party to challenge the agency action,¹²² its conclusion did not rest on any aspect of Article III standing. Even though the Court acknowledged that the complaint failed the injury in fact test and in effect only raised a generalized grievance,¹²³ the Court instead focused on the lack of an identifiable final agency action. Hence, *Lujan I* delivered a message to future courts that the need to identify a final agency action trumps the Article III standing inquiry. This new inquiry, however, does not provide an answer to whether informational injury is a valid harm under Article III to confer standing.

E. Informational Injury is Inherently a Generalized Grievance

An interest group that claims informational injury without demonstrating a relational nexus between the group's harm and the source of this threatened harm is relying on a mere special interest to obtain this information. In other words, the group wants information to lobby and educate about a specific alleged harm. However, the real source of the injury is not the lack of information to the group. Instead, the injury is the alleged harm to the particular area or program that the group is seeking to prevent. Therefore, the interest group must demonstrate a nexus to the real source of the harm, the threatened area or program, in order to establish a valid injury in fact.

¹²¹ *Id.* at 891.

¹²² *Id.* at 875.

¹²³ *Id.* at 890.

In the *Foundation* case,¹²⁴ the interest group claimed informational injury relating to an alleged harmful germplasm program conducted by a government agency.¹²⁵ The group wanted the agency to prepare an EIS, believing that this information would result in the program's rejection.¹²⁶ But, the group's only relationship to this particular program was its special interest in preventing a perceived environmental harm and its desire for information to publicize the alleged harm.¹²⁷ Yet, the interest group claimed informational injury as a direct harm to the group by only alleging that its purposes were injured.

Informational injury claims without a relational nexus are really a variant on the special interest standing claim which the *Morton* Court rejected.¹²⁸ If the *Foundation* court had applied the injury in fact test as the Supreme Court has required under Article III, the interest group here would not have standing because its informational injury claim was nothing more than a generalized grievance.¹²⁹

The *Foundation* court stated that there was a "logical appeal" in recognizing informational injury as valid to grant standing in terms of the Article III requirements.¹³⁰ However, the court recognized a drawback in this reasoning: To give in to this logical appeal "would potentially eliminate any standing requirement in NEPA cases . . ." involving informational injury.¹³¹ The *Foundation* court discussed the history of informational standing in the D.C. Circuit and noted that despite general statements by courts favoring the validity of this injury, no prior decision had granted

¹²⁴ 943 F.2d 79 (D.C. Cir. 1991).

¹²⁵ *Id.* at 80-82.

¹²⁶ *Id.* at 83.

¹²⁷ *Id.* at 85.

¹²⁸ See *Sierra Club v. Morton*, 405 U.S. 727 (1972); *supra* notes 60-68 and accompanying text.

¹²⁹ See *supra* notes 55-68 and accompanying text.

¹³⁰ *Foundation*, 943 F.2d at 84 ("[I]f the injury in fact is the lack of information about the environmental impact of agency action, it follows that the injury is caused by the agency's failure to develop such information in an impact statement and can be redressed by ordering the agency to prepare one.").

¹³¹ *Id.*

standing to an interest group solely on the basis of informational injury.¹³²

The drawback underlying the validity of informational injury is that "[i]f one of NEPA's purposes is to provide information to the public, any member of the public—anywhere—would seem to be entitled to receive it."¹³³ In fact, given the nature of the agencies' processes, the potential for an informational injury would exist all the time, or "whenever federal agencies are not creating information a member of the public would like to have."¹³⁴ Under this scenario, any group with a special interest in agency environmental policymaking could simply claim standing whenever an EIS does not exist or an agency is not producing the type of information a group wants. However, special interest claims are really generalized claims that any member of the public could raise.

These special interest claims or generalized grievances do not distinguish how the plaintiff would directly benefit from a judicial resolution any differently from any or every other member of the public.¹³⁵ The *Foundation* court's analysis of informational injury leads to this same conclusion.¹³⁶ The harm alleged by the interest group in *Foundation* could conceivably threaten any member of the public similarly. Further, any interested member of the public could also benefit similarly from the information sought by the interest group. The interest group could not distinguish its injury from

¹³² *Id.* at 83-85. The *Foundation* court noted that informational injury first appeared in a footnote in *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n* ("SIPI"), 481 F.2d 1079, 1086-87 n.29 (D.C. Cir. 1973). *Id.* at 83. The *Foundation* court found that the SIPI court's statement concerning informational injury was "inaccurately described as a holding" in a subsequent case, *Sierra Club v. Andrus*, 581 F.2d 895, 900 n.16 (D.C. Cir. 1978), *rev'd on other grounds*, 442 U.S. 347 (1979). *Id.* However, the *Foundation* court noted that in *Natural Resources Defense Council v. Securities & Exch. Comm'n*, 606 F.2d 1031, 1042 n.6 (D.C. Cir. 1979), the SIPI court's informational injury statement was viewed with caution. *Id.* at 84. See also Gerschwer, *supra* note 13, at 1012-18 (discussing precedents for the validity of informational injury).

¹³³ *Foundation*, 943 F.2d at 85.

¹³⁴ *Id.*

¹³⁵ *Sierra Club v. Morton*, 405 U.S. 727, 739-40 (1972).

¹³⁶ *Foundation*, 943 F.2d at 85.

potential harm suffered by the general public as a whole.¹³⁷

By its nature, informational injury, claimed alone, is inherently a generalized grievance. Nonetheless, the *Foundation* court concluded that to establish standing under a claim of informational injury, an interest group must demonstrate a final agency action in conjunction with the informational claim.¹³⁸ This holding implies that an informational injury with an identifiable agency action would be sufficient to confer standing on an interest group. This would be so, even though the group's claim failed to establish a direct stake in the outcome of the controversy under the injury in fact test because the claim was inherently a generalized grievance.¹³⁹

The *Foundation* court's discussion of prior informational injury decisions explained how these claims have been misunderstood and inadequately addressed.¹⁴⁰ But, the *Foundation* court continued this trend. The *Foundation* court relied on *Lujan I*¹⁴¹ for its determination that the missing element to confer informational standing was identifying a final agency action.¹⁴² The *Lujan I* Court, rather than analyzing the nature of the informational claim, simply assumed the injury *might* be valid.¹⁴³ The Court then rejected this claim because the interest group failed "to identify any particular agency action" that triggered the alleged injury.¹⁴⁴

¹³⁷ *Id.*; see *United States v. Richardson*, 418 U.S. 166, 176-80 (1974).

¹³⁸ *Foundation*, 943 F.2d at 86-87.

¹³⁹ See *supra* notes 55-68 and accompanying text.

¹⁴⁰ *Foundation*, 943 F.2d at 83-84.

¹⁴¹ 497 U.S. 871 (1990).

¹⁴² *Foundation*, 943 F.2d at 85.

¹⁴³ *Even assuming* that the affidavit set forth "specific facts," . . . adequate to show injury to respondent through the deprivation of information; and *even assuming* that providing information to organizations such as respondent was one of the objectives of the statutes allegedly violated [NEPA], so that respondent [was] "aggrieved within the meaning" of those statutes; nonetheless, the . . . affidavit fails to identify any particular "agency action" that was the source of these injuries.

Lujan I, 497 U.S. 871, 898-99 (1990) (emphases added).

¹⁴⁴ *Id.* at 899.

Under a NEPA challenge, the key elements should be whether the plaintiff has asserted a sufficient injury in fact or whether the interest group has only raised a generalized grievance. The fact that a plaintiff with a NEPA claim must actually establish standing under the APA review provisions should not preempt the Article III standing inquiry. As the Supreme Court has stated: "[O]f one thing we may be sure: Those who do not possess [Article III] standing may not litigate as suitors in the courts of the United States."¹⁴⁵ However, in *Public Citizen*, the court followed the new *Lujan I* inquiry, seeking final agency action over the more logical threshold inquiry, determining a valid injury in fact.¹⁴⁶

III. THE PUBLIC CITIZEN CASE¹⁴⁷

The interest group, Public Citizen, brought two separate challenges under NEPA. Underlying both challenges was Public Citizen's complaint to compel the government agency involved, the Office of the United States Trade Representative ("OTR"), to prepare an EIS for trade agreements. Because the first challenge failed due to the lack of final agency action,¹⁴⁸ Public Citizen returned later with a second challenge. This second challenge also failed because Public Citizen could not point to an identifiable final agency action that would "directly affect Public Citizen's members."¹⁴⁹

¹⁴⁵ *Valley Forge Christian College v. Americans for Separation of Church & State, Inc.*, 454 U.S. 464, 475-76 (1982).

¹⁴⁶ *PC IIA*, 5 F.3d 549, 553 (D.C. Cir. 1993). The court concluded that the trade agreement was not 'final agency action' under the APA, and reversed the decision of the district court and expressed no view on the government's standing contentions. *Id.* at 550; *PC IA*, 970 F.2d 916, 917 (D.C. Cir. 1992) ("We do not reach standing, but affirm because plaintiffs have failed to identify any final agency action judicially reviewable within the meaning of [the APA].").

¹⁴⁷ See *supra* note 10.

¹⁴⁸ *PC IA*, 970 F.2d at 917.

¹⁴⁹ *PC IIA*, 5 F.3d at 553.

A. *The D.C. District Court Opinion ("PC I")*¹⁵⁰

In the first challenge before the *PC I* district court, Public Citizen alleged that "*political pressure and potential challenges to U.S. laws as trade barriers are among the factors which might weaken various state laws protecting . . . the environment.*"¹⁵¹ Public Citizen claimed that this alleged potential harm would have an injurious effect on its members who lived in various areas of the country.¹⁵² However, the court concluded that these allegations of harm were "no more precise than those held inadequate in *NWF*."¹⁵³ But, the court followed the precedent set by both the *Lujan I*¹⁵⁴ and *Foundation*¹⁵⁵ decisions and denied standing based on the group's failure to identify an agency action to accompany its informational injury claim.¹⁵⁶

The *PC I* district court began its inquiry by looking at the requirements of Article III standing and noted that the APA review added two separate requirements.¹⁵⁷ Citing *Foundation*,¹⁵⁸ the district court noted that an informational injury claim by itself appeared to be the same as the mere interest claim held by the *Morton* Court to be "inadequate for standing purposes."¹⁵⁹ Also, the court acknowledged that Public Citizen's claim here was similar to *NWF*'s claim seeking review of an entire agency's program, which the *Lujan I* Court had rejected.¹⁶⁰

However, even with all these seemingly failing aspects of the injury in fact test, the court still denied standing to Public Citizen

¹⁵⁰ *PC I*, 782 F. Supp. 139 (D. D.C.), *aff'd*, *PC IA*, 970 F.2d 916 (D.C. Cir. 1992).

¹⁵¹ *PC I*, 782 F. Supp. at 142 (emphases added).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ 497 U.S. 871 (1990).

¹⁵⁵ *Foundation on Economic Trends v. Lyng*, 943 F.2d 79 (D.C. Cir. 1991).

¹⁵⁶ *PC I*, 782 F. Supp. at 143.

¹⁵⁷ *Id.* at 141.

¹⁵⁸ *Foundation*, 943 F.2d at 84 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)).

¹⁵⁹ *PC I*, 782 F. Supp. at 143.

¹⁶⁰ *Id.* at 142 (citing *Lujan I*, 497 U.S. 871, 890 n.2 (1990)).

under the agency action component of APA review. Further, despite the indications that Public Citizen would not be a proper party to raise this issue in the first place, the court also stated that the interest group only did "not have standing to bring [its] challenge *at this time*."¹⁶¹ This statement implies that if Public Citizen could identify an agency action, then it would become a proper party to raise this complaint.

*B. The D.C. Circuit Court Opinion ("PC IA")*¹⁶²

On appeal before the *PC IA* circuit court, Public Citizen alleged that "the agreements would have *various potentially* adverse environmental effects."¹⁶³ Public citizen also claimed that there was "the *chance* of increased pollution on the U.S.-Mexico border due to . . . treaty inspired faster economic development."¹⁶⁴ The group did point to a specific law that it claimed would be a source of harm if changed,¹⁶⁵ but did not show how this particular law related directly to its members.

The *PC IA* circuit court apparently viewed the *Lujan I*¹⁶⁶ and *Foundation*¹⁶⁷ decisions as requiring a complete separation of Article III standing and APA review. In addition, the *PC IA* circuit court elevated the APA review final agency action component over the Article III requirements. The court stated: "We do not reach standing, [at all] but affirm [the district court] because [Public Citizen has] failed to identify any 'final agency action' [that was] judicially reviewable"¹⁶⁸ The circuit court was concerned with the potential of unnecessary interference in the agency's "day-to-day decisionmaking process."¹⁶⁹ Without reviewing the group's standing, the *PC IA* court dismissed the case by finding that the

¹⁶¹ *PC I*, 782 F. Supp. at 140 (emphasis added).

¹⁶² *PC IA*, 970 F.2d 916 (D.C. Cir. 1992).

¹⁶³ *PC IA*, 970 F.2d at 918 (emphasis added).

¹⁶⁴ *Id.* (emphasis added).

¹⁶⁵ *Id.*

¹⁶⁶ 497 U.S. 871 (1990).

¹⁶⁷ *Foundation on Economic Trends v. Lyng*, 943 F.2d 79 (D.C. Cir. 1991).

¹⁶⁸ *PC IA*, 970 F.2d at 917.

¹⁶⁹ *Id.* at 920 (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 406 n.15 (1976)).

timing of the challenge was wrong.

The circuit court noted that, "NEPA itself . . . specifically identifies the time when an agency's action is sufficiently concrete to trigger the EIS requirement."¹⁷⁰ Refusal to prepare an EIS by the agency alone was not enough to identify an agency action.¹⁷¹ The court's analysis failed to address whether Public Citizen was even a proper party; nor did the court seem concerned with the implicitly generalized nature of Public Citizen's claims.

*C. The D.C. District Court Opinion ("PC II")*¹⁷²

In this second challenge, Public Citizen again alleged similar claims of harm. This harm would result from changes to various laws dictated by the trade agreements. These changes, according to the group, would "result in environmental changes to certain geographical areas, such as the area on the border between the United States and Mexico."¹⁷³ Furthermore, the group alleged that from these potential changes the court could determine whether the trade agreement was "likely to harm" the interest group.¹⁷⁴

The *PC II* district court concluded from the group's allegations that the agreements "*may very likely* result in environmental injuries to certain members of the [interest group]."¹⁷⁵ Despite the absence of a geographic nexus between the threatened areas and the group's members, the court concluded these allegations were sufficient to "establish standing under the NEPA."¹⁷⁶ The court also found that Public Citizen had identified a final agency action that triggered the alleged harm.¹⁷⁷

¹⁷⁰ *Id.* at 918.

¹⁷¹ *Id.*

¹⁷² *PC II*, 822 F. Supp. 21 (D. D.C. 1993), *rev'd*, *PC IIA*, 5 F.3d 549 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 685 (1994).

¹⁷³ *PC II*, 822 F. Supp. at 27.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 28 (emphasis added).

¹⁷⁶ *Id.* at 27.

¹⁷⁷ *Id.* at 23-26.

*D. The D.C. Circuit Court Opinion ("PC IIA")*¹⁷⁸

The *PC IIA* circuit court reversed the district court's decision and again denied standing to Public Citizen.¹⁷⁹ The court stated: "The central question in this appeal is whether Public Citizen has identified some agency action that is final upon which to base APA review."¹⁸⁰ Public Citizen again failed to identify the final agency action triggering the harm.¹⁸¹ In the circuit court's view, absent final agency action, there was no further need to review Public Citizen's standing.¹⁸² Thus, the *PC IIA* court did not consider whether Public Citizen had Article III standing to raise this claim.

The *PC IIA* circuit court pointed out that the solution to this issue was to let Congress simply refuse to consider the trade agreements until an EIS is prepared.¹⁸³ Judge Randolph, concurring in the decision, acknowledged the generalized nature of Public Citizen's complaint. He noted that "it is difficult to see how the act of proposing legislation could generate direct effects on [interest groups], or anyone else for that matter."¹⁸⁴ In other words, the court implies that Public Citizen raised a complaint better suited to the political branches. However, the court remained true to the *Lujan I*¹⁸⁵ and the *Foundation*¹⁸⁶ precedents and only reviewed for a final agency action.

CONCLUSION

As the discussion of the *Public Citizen* case indicates, standing is a confusing and difficult issue to apply. When the court's

¹⁷⁸ *PC IIA*, 5 F.3d 549 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 685 (1994).

¹⁷⁹ *PC IIA*, 5 F.3d at 550.

¹⁸⁰ *Id.* at 551.

¹⁸¹ *Id.* at 550.

¹⁸² *Id.* ("Because we conclude that [the trade agreement] is not 'final agency action' under the APA, we reverse the decision of the district court and express no view on the government's other contentions.").

¹⁸³ *Id.*; *id.* at 553-54 (Randolph, C.J., concurring).

¹⁸⁴ *Id.* at 553.

¹⁸⁵ 497 U.S. 871 (1990).

¹⁸⁶ *Foundation on Economic Trends v. Lyng*, 943 F.2d 79 (D.C. Cir. 1991).

primary focus is directed to the issue raised by the interest group, prior to verifying the existence of a valid injury in fact, it only encourages additional litigation. The *Public Citizen* case is a prime example. Interest groups will continually return to court seeking the elusive final agency action regardless of whether their claim is actually proper for judicial resolution.

The Supreme Court needs to articulate a clear process for the environmental standing inquiry under NEPA and APA review. The Court's initial focus should be on the injury in fact test. This focus will expose *Public Citizen* type informational injury claims as inherently generalized grievances and not suitable for judicial review. The Court, therefore, needs to supply a definitive answer on informational injury as a sufficient injury to confer standing under Article III. A benefit to be gained by these answers will be less use of the court's valuable resources by interest group's merely raising political policy grievances out of a mere special interest.

