Loss of Protection as Injury in Fact: An Approach to Establishing Standing to Challenge Environmental Planning Decisions

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As currently interpreted by the United States Supreme Court, Article III of the Constitution creates a significant hurdle for plaintiff citizen groups seeking standing to challenge environmental planning or management decisions. In particular, plaintiffs have had difficulty in making the required showing of an "injury in fact" where an agency has not yet approved a site-specific action but has approved only a general plan for an area to govern future site-specific actions. The Supreme Court has not articulated a clear rule for standing to challenge the latter type of agency decision making, and the courts of appeals for the various circuits appear to disagree as to the effect of Supreme Court decisions that have touched on the issue. This Note argues that an agency planning or management decision that amounts to a loss of protection for a once-protected natural area should constitute a judicially cognizable injury and demonstrates how the Supreme Court, in other contexts, has recognized theoretically similar and less concrete injuries as sufficient to establish standing.

INTRODUCTION

Citizen suits by environmental groups against government agencies have met with many obstacles in the federal courts. Among the most significant legal obstacles to some of these citizen suits are the court-created standards for determining a party's standing under Article III of the United States Constitution. Current standing jurisprudence requires that a plaintiff challenging a governmental agency action show an actual or imminent injury in fact, a causal connection between the injury and the allegedly unlawful action, and that a favorable decision is likely to redress that injury. In addition, the Administrative Procedure Act (APA) requires that,
in the absence of a contrary statutory provision, an agency action must be final to be reviewable and that the harm alleged be "within the meaning of a relevant statute."

These requirements have presented unique difficulties to plaintiffs attempting to challenge broad agency planning decisions regarding natural resources and the environment. For example, it is difficult for citizen groups to show that they have, or will be, injured in fact by an agency decision where it is the environment, not the group, that is the object of the decision or regulation. Thus, courts have required citizen groups to allege that their individual members use the area affected by the proposed agency decision. Courts also may deny standing to plaintiffs who have alleged a threatened harm but have not shown that the harm is imminent or that the agency action is the cause of the anticipated injury. As with the injury-in-fact requirement, showing causation and redressability is particularly difficult where the claimed injury results from the allegedly unlawful regulation by another party, so that it is really the acts of that third party

3. Id. § 704.
4. Id. § 702.
6. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992) (opining that when the plaintiff is not the object of the challenged action or inaction, establishing standing is "substantially more difficult") (citation omitted); Lujan v. National Wildlife Fed'n, 497 U.S. 871, 886-88 (1990) (finding affidavits filed by wildlife group members complaining that agency action affected recreational use and enjoyment of land in the vicinity insufficient to show that their interests were affected for purposes of the APA); Sierra Club v. Morton, 405 U.S. 727, 739 (1972) (holding that an organization's interest in an issue such as environmental protection is, by itself, insufficient to render the organization adversely affected within the meaning of the APA); Sierra Club v. Robertson, 28 F.3d 753, 758 (8th Cir. 1994) (refusing to find an injury in fact in the Department of Agriculture's adoption of a national forest plan as its adoption did not effectuate on-the-ground environmental changes, nor did the plan dictate site-specific action).
7. Morton, 405 U.S. at 735.
8. See, e.g., Defenders of Wildlife, 504 U.S. at 564 (holding that "some day" intentions without concrete plans to visit the area affected by the proposed government action are insufficient to support a finding of actual or imminent injury).
9. See id. at 568 (finding that challenges to particular programs that agencies establish to carry out their legal obligations, as opposed to challenges to identifiable government violations of law, are rarely appropriate for adjudication). When the agency action has not caused the injury, it follows that the harm cannot be redressed by a favorable decision. Id. at 571.
that threaten the plaintiff with harm.\textsuperscript{10} Similarly, plaintiffs have encountered difficulty with the final-agency-action requirement of the APA where, for example, further steps must be taken before a stand of timber is finally harvested.\textsuperscript{11}

These challenges become more formidable as the agency decision at issue becomes more general in scope and effect. Although the Supreme Court has not ruled explicitly on the issue, one court even has suggested that broad planning decisions affecting the environment are never reviewable absent a site-specific action.\textsuperscript{12} Where the alleged injury caused by an agency action has been indirect or vague, one strategy plaintiff citizen groups have used has been to characterize an injury as procedural,\textsuperscript{13} such as when an agency has allegedly failed to prepare an environmental impact statement.\textsuperscript{14} Another approach suggested by some scholars is to rewrite citizen suit provisions such that a cash bounty is awarded to successful plaintiffs and thus the loss of the bounty itself becomes a threatened injury in fact.\textsuperscript{15} Both of these approaches are limited. A more comprehensive and coherent approach would be to reconsider the nature of the injury caused by agency planning decisions such that the loss of protection resulting from a planning decision is seen as an injury in itself. This concept is not foreign to some courts, and the Supreme Court has recognized similar types of injuries in analogous cases.

This Note begins by briefly summarizing the relevant recent history of standing law in Part I, focusing in particular on the two relatively recent Supreme Court decisions in \textit{Lujan v. National Wildlife Federation (NWF)}\textsuperscript{16} and \textit{Lujan v. Defenders of Wildlife}.

\textsuperscript{10} \textit{See id.} at 562.
\textsuperscript{11} \textit{See Sierra Club v. Robertson}, 28 F.3d 753, 758 (8th Cir. 1994).
\textsuperscript{12} \textit{Id.}
\textsuperscript{14} \textit{See Trustees for Alaska v. Hodel}, 806 F.2d 1378, 1379–80 (9th Cir. 1986).
\textsuperscript{17} 504 U.S. 555 (1992).
have reached opposite conclusions. Part III first argues that ecological, administrative, and common sense considerations support opening environmental planning decisions to judicial review before any site-specific action. Part III then addresses the difficulties encountered by citizen groups seeking judicial review of environmental planning decisions by proposing a new understanding of "injury in fact." This proposed understanding draws support from analogous United States Supreme Court decisions, as well as from an aspect of the case of Regents of the University of California v. Bakke.19

I. A BRIEF HISTORY OF STANDING

The basic question underlying any standing inquiry is simply whether or not a particular plaintiff has a right to sue for enforcement of an alleged legal duty. Although this has always been at least an implicit question for the courts, a separate standing doctrine did not develop until the 1920s and 1930s, when the rapid growth of the administrative state presented the courts with the problem of deciding who could sue to enforce the duties of the new government agencies.19 Early standing law was therefore a means whereby the courts either could insulate agencies from, or expose them to, challenges by private citizens. Supporting greater access to the courts was the notion that citizens might serve as private attorneys general by suing agencies in the name of the public interest.20 Supporting more limited access to the courts was the notion that individuals should not be permitted to enlist the judiciary to intervene in the essentially democratic processes of legislation and administration.21 The basic rule that

19. See Sunstein, supra note 15, at 179 (noting that in an effort to protect New Deal legislation from frequent judicial intervention, Justices Brandeis and Frankfurter developed a range of standing limits).
20. E.g., Associated Indus., Inc. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943) ("Congress can constitutionally enact a statute conferring on any non-official person . . . authority to bring a suit to prevent action by an officer in violation of his statutory powers . . . . Such persons . . . are, so to speak, private Attorney Generals.") (footnote omitted), vacated as moot, 320 U.S. 707 (1943).
emerged from the early standing decisions was that a plaintiff's right to sue depended on the existence of a particular common law or statutory right. Thus, courts largely rejected constitutional claims brought by citizens.

The APA did little to change standing doctrine. The APA provided that proper plaintiffs were those suffering a "legal wrong . . . or adversely affected or aggrieved by agency action within the meaning of a relevant statute." This was meant to be a restatement of existing law rather than an addition to it.

In the 1960s and 1970s, another period of dramatic growth for the regulatory state, the APA's "legal wrong" language was used to open the courts to claims by the beneficiaries of agency actions rather than just by the regulated parties themselves. During this period, the notion of private citizens acting as attorneys general was revived, and many of the regulatory statutes enacted in this time included citizen suit provisions. During this period, the Supreme Court even granted standing to a group of taxpayers who asserted a vague constitutional challenge to a federal program authorizing grants for teaching materials in religious schools, a claim quite similar to those for which the Court had previously denied standing.

It was not until 1970, in Association of Data Processing Service Organizations v. Camp (ADP), that the injury-in-fact

23. See, e.g., Massachusetts v. Mellon, 262 U.S. 447, 488-89 (1923) (holding that a taxpayer does not have standing to challenge the constitutionality of a federal appropriations act).
26. See, e.g., Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1003-04, 1006 (D.C. Cir. 1966) (holding that the FCC must allow standing to citizens representing the listening public to challenge the renewal of a broadcast license).
27. See Sunstein, supra note 15, at 192-93. Citizen suit provisions were particularly common in environmental statutes. Id. at 193. Sunstein also notes that "[e]very major environmental statute except [the Federal Insecticide, Fungicide, and Rodenticide Act] authorizes a citizen suit." Id. at 165 n.11.
requirement was introduced.\(^{31}\) Since ADP, the courts have regarded injury-in-fact as an essential element of establishing standing under Article III.\(^ {32}\) Even where Congress, by statute, has explicitly granted broad power to citizens to challenge agency actions, the Supreme Court has ruled that the injury-in-fact requirement is a constitutional prerequisite and cannot be waived.\(^ {33}\)

The Court has recognized less concrete injuries, such as harm to recreational or aesthetic enjoyment of a natural area or a particular species.\(^ {34}\) The Court also has recognized alleged injuries potentially resulting from quite attenuated chains of causation, as in United States v. Students Challenging Regulatory Agency Procedures (SCRAP).\(^ {35}\) SCRAP claimed that increased railroad freight charges would disproportionately raise the cost of recycled goods compared to those made from raw materials, thereby increasing the amount of litter in and around the area in which they lived.\(^ {36}\) SCRAP is an extreme example, one which the Court would rather ignore,\(^ {37}\) but it is nonetheless an example of how willing the Court has been about to allow standing where plaintiffs can show a cognizable injury in fact.

31. Under ADP, rather than showing harm to a "legal interest," a test that "goes to the merits," id. at 153, a plaintiff need only show that an "injury in fact, economic or otherwise," exists. Id. at 152. The suit was brought by a company that provided data processing services against the Comptroller of the Currency and a national bank, challenging the Comptroller's ruling allowing banks to provide data processing services to other banks and banking customers. Id. at 151. Although the plaintiffs were affected indirectly by the Comptroller's ruling, they were not among the regulated parties. See id. In finding that standing was established by the economic injury that the plaintiffs might suffer as a result of increased competition from banks, the Court apparently sought to simplify and liberalize standing requirements. See id. at 154. The Court noted that the decision was consistent with the trend toward enlarging the class of those who had standing to challenge agency actions. Id.


33. E.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 571–73 (1992). The Court rejected the view that the injury-in-fact requirement was satisfied by the Endangered Species Act's provision that "any person may commenced a civil suit on his own behalf." Id. at 571–72 (quoting 16 U.S.C. § 1540(g)).

34. See, e.g., Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 230 n.4 (1986) (noting that a potential threat to plaintiffs' opportunities for whale-watching is an injury in fact); Sierra Club v. Morton, 405 U.S. 727, 734–35 (1972) (recognizing potential harm to a plaintiff's individual interest in recreational use of a natural area as an injury in fact).


36. Id. at 675–76.

37. See, e.g., Lujan v. National Wildlife Fed'n, 497 U.S. 871, 889 (1990) (dismissing the SCRAP opinion as one "whose expansive expression of what would suffice for § 702 review . . . has never since been emulated by this Court").
Although the injury-in-fact requirement originally may have been intended to create easier access to the courts, courts have used it more recently to keep plaintiffs with otherwise valid claims out of court, especially in cases involving environmental law. In *Sierra Club v. Morton*, the Supreme Court denied standing to an environmental group seeking to enjoin construction of a ski resort in the Sierra Nevada mountains because the group did not allege that any of its members actually used the area where the resort was to be built. Although the decision did not create a prohibitively high barrier to suits by environmental groups, it is clear that such groups now must find individual members to submit affidavits claiming that they regularly use, have used, and plan to continue to use the particular area in question.

The more recent cases of *Lujan v. Defenders of Wildlife* and *Lujan v. National Wildlife Federation (NWF)* have presented more difficulty for environmental groups. In *NWF*, the plaintiffs sought to challenge a decision by the Bureau of Land Management to reclassify vast tracts of protected, or "withdrawn," land so as to open the tracts to multiple uses, including surface mining and oil and gas leasing. Both affidavits filed to establish standing alleged that the plaintiffs used areas "in the vicinity" of two different portions of the reclassified land, one consisting of 4500 acres and the other approximately 5.5 million acres. The Court found that standing was not established by "averments which state[d] only that one of respondent's members use[d] unspecified portions of an immense tract of territory, on some portions of which mining activity ha[d] occurred or probably w[ould] occur by virtue of the governmental action."

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38. 405 U.S. 727 (1972).
39. See id. at 734-35. The case apparently was meant to test the limits of what constitutes injury in fact, for it is suggested in a footnote that some of the group's members actually did use the area, but the group nonetheless chose to rely solely on its more abstract interest in preserving natural areas in general. See id. at 735 n.8.
40. Indeed, the plaintiffs in *Morton* subsequently were allowed to establish standing by amending their complaint with further allegations concerning standing and adding certain additional parties. See *Sierra Club v. Morton*, 348 F. Supp. 219, 220 (N.D. Cal. 1972).
43. Id. at 879.
44. Id. at 886-87.
45. Id. at 889 (emphasis added). Note that the court was applying summary judgment standards and therefore was not willing to rely on conclusory allegations.
Thus the Court conceded that mining had occurred or probably would occur in the areas at issue. The fatal flaw in the plaintiffs' allegations was that they did not show that the specific sites where mining had occurred or would occur were the very ones that the affiants claimed to use.\textsuperscript{46} Such a showing probably would have been impossible to make, as it would require, in part, a prediction of where future mining rights would be sold. Perhaps this is why the affidavits used the language, “in the vicinity.” In finding such language insufficient, even when a large area is at issue, the Court seems to have precluded all but site-specific complaints regarding use of the environment. As long as the Court understands injury to mean the actual mining of a particular area rather than the threat or eventual likelihood of mining in a large area, standing will be difficult to establish because it will be impossible for a plaintiff to plead with any more specificity than “in the vicinity” until those operations actually exist or, at least, until the mining rights have been sold.

Two years after \textit{NWF}, \textit{Defenders of Wildlife}\textsuperscript{47} established that an express grant by Congress of a right to challenge an agency action does not satisfy the injury-in-fact requirement.\textsuperscript{48} The case also elaborated on the specificity of facts required to establish injury in fact. \textit{Defenders of Wildlife} involved a challenge to the Department of the Interior's interpretation of the Endangered Species Act as not applying to government actions overseas.\textsuperscript{49} The alleged injury was that several overseas construction projects, with which the United States was involved, threatened to increase the rate of extinction of certain endangered species.\textsuperscript{50} The plaintiff environmental group submitted affidavits from members who claimed to have visited the construction sites to view the endangered species in the past and also claimed an intent to return to those sites to view those species again.\textsuperscript{51} The Court held that

an “inten[t]” to return to the places they had visited before . . . is simply not enough. Such “some day” intentions—without any description of concrete plans, or indeed

\begin{footnotes}
  \footnote{46. \textit{Id.} at 886–89.}
  \footnote{47. 504 \textit{U.S.} 555 (1992).}
  \footnote{48. \textit{Id.} at 573.}
  \footnote{49. \textit{Id.} at 557–58.}
  \footnote{50. \textit{Id.} at 562.}
  \footnote{51. \textit{Id.} at 563–64.}
\end{footnotes}
even any specification of when the some day will be—do not support a finding of the "actual or imminent" injury that our cases require.  

This was true even where, as here, the relevant statute provided that "any person may commence a civil suit on his own behalf" to enjoin or compel agency action.  

In *Defenders of Wildlife*, the nature of the injury that the Court contemplated was again narrow and specific. The threat of an increased rate of extinction of various species resulting from government activities was not enough; nor would the actual extinction of the species, in itself, constitute injury in fact by the Court's reasoning. The Court seemed to require that certain individuals would likely witness the actual extinction of one or more species. Indeed, the Court indicated that the outcome might have been different if the plaintiffs had produced plane tickets in support of their alleged intent to return to the countries in question.  

A standing test that can make the existence of a case or controversy depend on the purchase of an airline ticket certainly has the potential to miss the point. Although the unique facts of *Defenders of Wildlife* make it easily distinguishable and therefore not, on its facts, a great hurdle for environmental groups seeking standing, it demonstrates the high degree of specificity required to establish injury in fact and provides an example of how ill-suited the test can be for determining what types of claims are properly decided by the courts.

II. RECENT CASES REGARDING STANDING TO CHALLENGE BROAD AGENCY PLANNING DECISIONS

Lower courts' interpretations of *NWF* and *Defenders of Wildlife* have had a profound effect on court access afforded to citizens seeking to challenge agency decisions regarding the environment. Of particular concern here are the consequences that those cases have had for plaintiffs seeking to challenge the broad planning decisions of environmental agencies before

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52. *Id.* at 564.  
54. 504 U.S. at 579 (Kennedy, J., concurring in part and concurring in the judgment).
those decisions have manifested themselves in site-specific actions such as timber sales.

A. The Eighth Circuit: Sierra Club v. Robertson

In *Sierra Club v. Robertson*, the United States Court of Appeals for the Eighth Circuit held that, under *NWF* and *Defenders of Wildlife*, a plaintiff environmental group has no standing to challenge a United States Forest Service Land and Resource Management Plan (LRMP), except when challenging a specific timber sale. The court cast its decision in such broad terms that the holding went beyond the facts and established a basic rule for the Eighth Circuit. The LRMP at issue set forth guidelines and principles for the Forest Service to follow in making site-specific decisions for approximately 1.6 million acres of land. The decision did not state precisely what effect the LRMP would have had in terms of the volume of timber that would be sold for harvest under the LRMP’s guidelines. By the court’s reasoning, even if the LRMP opened the entire 1.6 million acres to timber harvesting where before it had all been protected, and even if the Sierra Club could establish that its members regularly used the entire area, the Sierra Club would not have been able to allege that the LRMP amounted to an injury in fact because, according to the court, “the mere existence of [an LRMP] does not produce an imminent injury in fact.”

55. 28 F.3d 753 (8th Cir. 1994).
56. See id. at 758–60.
57. Id. at 759 (“Standing thus can accrue only when the ‘factual components [are] fleshed out ... by some concrete action... ’ (quoting *Lujan v. National Wildlife Fed’n*, 497 U.S. 871, 891 (1990)). The decision, a direct response to *Defenders of Wildlife* and *NWF*, see id. at 758–59, was reached by the same court that had found standing for the plaintiffs in *Defenders of Wildlife* before it reached the Supreme Court. See *Defenders of Wildlife v. Lujan*, 911 F.2d 117 (8th Cir. 1990), rev’d sub nom. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).
58. 28 F.3d at 755.
59. Id. at 758. The court reasoned:

Adoption of the [LRMP] does not effectuate any on-the-ground environmental changes. . . . [B]efore an environmental change can come about, . . . a site-specific action (e.g., a timber sale) must be proposed and found to be consistent with the Plan. . . . Finding an environmental injury based on the [LRMP] alone, without reference to a particular site-specific action, would “take[ ] us into the area of speculation and conjecture.”
By the Robertson court's reasoning, the nature of a management plan and its implications are of no relevance. It is not until tracts of timber are actually proposed for sale that a plaintiff can claim injury. Even then, according to the Eighth Circuit, the plan driving the timber sales would be immune from attack.60

The Supreme Court has not addressed directly whether plaintiffs have standing to challenge an LRMP,61 but the Robertson court is correct that its reasoning is consistent with NWF. The LRMP at issue in Robertson was similar to the reclassification decisions at issue in NWF. Both agency actions subjected large areas of land to potential uses to which they had not been subjected previously without compelling any particular future site-specific action.62 The Supreme Court stopped short of holding that a plaintiff can never challenge a broad management plan, limiting its discussion instead to the facts of the case and the inadequacy of the language, "in the vicinity." However, it seems likely that, given the Court's understanding of "injury" in this context, Robertson would be affirmed by the Supreme Court on appeal.

The Eighth Circuit's approach also draws support from Defenders of Wildlife. In discussing the causation and redressability requirements in Defenders of Wildlife, the Supreme Court explained that the level of certainty required when showing injury is much higher when the injury ultimately "'depends on the unfettered choices made by independent actors not before the courts and whose exercise of... discretion the courts cannot presume either to control or to


60. Id. at 759. The court found that when a site-specific action eventually was proposed the plaintiffs could assert only "that the proposed site-specific action is not consistent with the [LRMP], or that the [LRMP] as it relates to the proposed site-specific action is inconsistent with the governing statutes, or both." Id.

61. Id. at 758. The NWF Court did hold that the plaintiffs lacked standing to make a wholesale challenge to the ongoing "land withdrawal review program" because the program did not amount to an agency action, much less a final agency action, as required by the APA. NWF, 497 U.S. at 890. The program guided specific reclassification decisions, however. See id. at 877-79 (describing the program). Therefore the program was much broader in scope and effect than the reclassification decisions made under it. See supra text accompanying notes 43-46 (discussing plaintiffs' challenge to the reclassification decisions).

62. See Robertson, 28 F.3d at 759. The court noted that the appellants' situation was very similar to that of the plaintiffs in NWF. The appellants in Robertson, however, mounted a facial attack on the LRMP, not as in NWF, on its application.
predict.’” Thus, when an agency decision merely has made possible—or even likely—the actions of third parties such as timber harvesters or mining companies who will ultimately cause environmental damage, standing is “‘substantially more difficult’ to establish.”


The Ninth Circuit has developed a broader and more realistic concept of what constitutes injury in the context of environmental agency planning decisions. The 1991 case of *Idaho Conservation League v. Mumma* provides the precedent for most of the circuit’s decisions in this area. Similar to *Sierra Club v. Robertson*, the case involved a challenge to an agency plan for managing more than two million acres of national forest. In particular, the plaintiffs challenged the forest service’s decision, pursuant to the plan, to sacrifice certain areas of roadless land in order to allow timber harvesting. The plan opened the affected land to uses to which it had not been subject before without dictating any particular future site-specific action. Unlike *Robertson*, however, the *Idaho Conservation League* court found that the plaintiff environmental group had standing to bring such a claim. In reaching its decision, the court employed a variety of rationales, without articulating in great detail any one of them.

1. Procedural Injury—First, the court discussed procedural injury. Because the National Environmental Protection Act (NEPA) “is essentially a procedural statute designed to ensure that environmental issues are given proper consideration in the decision making process,” the court concluded that an

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64. Id. at 562 (quoting Allen v. Wright, 468 U.S. 737, 758 (1984)).
65. 956 F.2d 1508 (9th Cir. 1992).
66. 28 F.3d 753 (8th Cir. 1994). For further discussion of the facts of *Robertson*, see supra notes 55–59 and accompanying text.
68. Id. at 1512.
69. See id.
70. Id. at 1518.
71. Id. at 1514 (quoting Trustees for Alaska v. Hodel, 806 F.2d 1378, 1380 (9th Cir. 1986)).
alleged injury resulting from the violation of a statutorily mandated procedure confers standing. Specifically, the injury caused by the violation of the procedural right was the possibility that certain environmental consequences would be overlooked. Such an approach is essentially merit-based, as it looks to the nature of the claim in light of the relevant statute. The approach derives support from the "zone of interests" test set forth by the Supreme Court in Association of Data Processing Organizations v. Camp (ADP), as well as from the APA, which requires that a plaintiff be aggrieved "within the meaning of a relevant statute. But the approach does not address adequately the injury-in-fact requirement as established by the Supreme Court. The Court in Defenders of Wildlife did acknowledge that, a person living next to a proposed dam site would have standing to challenge an agency's failure to prepare an environmental impact statement with respect to construction of the dam. The assertion by an environmental group that a forest plan creates a risk that environmental consequences will be overlooked, however, does not present the same degree of specificity or imminence.

2. Threatened Harm and Causation—The court in Idaho Conservation League next focused on the threatened harm of future logging activity. Certainly actual logging in an area would amount to an injury in fact to those who use the area. In the context of challenging a management plan, it is the intermediate steps and contingencies that come between the

72. Id.
73. Id. at 1511.
74. 397 U.S. 150, 153 (1970). For further discussion of ADP, see supra notes 30–31 and accompanying text.
75. 5 U.S.C. § 702 (1994). The Idaho Conservation League court also cited William A. Fletcher, The Structure of Standing, 98 Yale L.J. 221, 264–65 (1988), who argued that the injury-in-fact requirement should be abandoned in favor of a merit-based approach that considers the purpose of the underlying statute. 956 F.2d at 1513 n.10.
76. 504 U.S. 555, 572 n.7 (1992).
77. In addition, the procedural injury approach is of no use in cases where an agency has followed the proper procedure in reaching a decision, but where the decision is alleged to be unlawful because the alleged injury is substantive rather than procedural. The APA allows judicial intervention not only in the event of procedural violations but also, for example, when an agency decision is found to be "arbitrary [or] capricious," or "in excess of statutory . . . authority." 5 U.S.C. § 706(2)(A), (C) (1994). Thus, the procedural injury approach is, at best, limited in scope.
78. 956 F.2d at 1515.
approval of a plan and the actual logging that present a potential problem for standing. These contingencies make it difficult to show a causal connection between the plan and the ultimate injury. The court dealt with the problem first by focusing on the nature of the threat of injury. Noting that an injury in fact may be threatened rather than actual, the court concluded that the fact "that the potential injury would be the result of a chain of events need not doom the standing claim." Here, the court suggested that the threat was sufficiently strong, although it seems unlikely that the Supreme Court would agree.

A stronger point was that third-party developers "could not undertake their future actions but for the challenged decision." But those third parties nonetheless could choose not to develop. That is, even though the "'potential . . . development activity of third parties on [affected] lands . . . is a direct result of the [agency's] action,'" that development is only potential in the absence of a proposed, site-specific development.

3. Final Agency Action—As for the APA's final-agency-action requirement, the court concluded that "the initial plan and wilderness recommendation represent important decisions." Clearly this is not enough; importance is not finality. However, the court also suggested that, insofar as the management of the area in question is concerned, the plan is a final decision. This makes sense. An agency charged with managing an area will always have additional decisions to make regarding that area. Just as a timber sale represents a final decision causing injury on one level, the final adoption of a plan designating the whole area in a particular way also should be considered final, as there are no more steps to be taken in deciding how the area is to be used.

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79. Id.
80. See Defenders of Wildlife, 504 U.S. at 565 n.2 ("Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is . . . certainly impending.") (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990) (internal quotation marks omitted)); id. at 579 (Kennedy, J., concurring) (agreeing that the "'injury must be both real and immediate, not conjectural or hypothetical'") (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 101–02 (1983) (internal quotation marks omitted)).
81. 956 F.2d at 1518.
82. Id. at 1518 n.19. (quoting Sierra Club v. Watt, 608 F. Supp. 305, 315 (E.D. Cal. 1985)).
83. See supra notes 3, 11 and accompanying text.
84. 956 F.2d at 1516.
85. Id. at 1519.
4. The Problem with "In the Vicinity"—The Idaho Conservation League court also attempted to solve the problem that the plaintiffs in NWF faced in pleading use of areas "in the vicinity" of the land affected by agency action. The court distinguished NWF by pointing out that the plaintiffs in the instant case had alleged use of specific areas within the area affected by the plan. This distinction is tenuous, as one easily could argue that the plaintiffs had not shown that the areas that they used were the same ones that would be affected. The court was sympathetic to the fact that "because no development has yet been authorized, plaintiffs cannot provide any more detail than they have." The court addressed this problem by reasoning that, "to the extent that the threat of development in one specific area is sufficient... a similar threat to a number of specified areas also must suffice." The court again emphasized the threat, but, as noted above, the threat of logging in several particular areas probably is not enough to pass muster by Supreme Court standards.

5. The Plan as Injury in Fact—Laced into the court’s discussion about the threatened harm and the relative finality and causal effect of the agency action is a unique recognition of a very real form of injury not commonly considered by the courts in this context. The court noted that “the Service’s decision is harmful for standing purposes” because it made possible development that otherwise would have been prevented. Decisions making development possible “are injuries that we must deem immediate, not speculative. Indeed, short of assuming that Congress imposed useless procedural safeguards, and that wilderness designation is a superfluous step, we must conclude that the management plan plays some, if not a critical, part in subsequent decisions.”

87. 956 F.2d at 1517.
88. Id.
89. This is perhaps why the plaintiffs in NWF pleaded use of land “in the vicinity” in the first place.
90. 956 F.2d at 1517. Note that the same thing could have been said on behalf of the plaintiffs in NWF.
91. Id.
92. See supra note 80 and accompanying text.
93. 956 F.2d at 1516 (emphasis added).
94. Id.
Thus the court recognized the obvious fact that the plan drove future site-specific actions by making them possible. Indeed, the plan seemed to make at least some logging activity all but inevitable where before it had been precluded. The plan, therefore, took protection away from an area. Unless such protection—which included the procedural safeguards created by Congress—was worthless to begin with, the loss of it was harmful. Therefore, "[t]o the extent that the plan predetermine[d] the future, it represent[ed] a concrete injury."95

6. Subsequent Cases—With varying degrees of clarity, the United States Court of Appeals for the Ninth Circuit has followed the approach of Idaho Conservation League.96 In some of these cases, the court has distinguished Defenders and NWF.97 In Resources Ltd. v. Robertson,98 however, the court explicitly rejected the argument that Defenders of Wildlife and

95. Id.
96. For example, in Portland Audubon Soc'y v. Babbitt, 998 F.2d 705, 707–08 (9th Cir. 1993), the court granted standing to a plaintiff environmental group challenging a timber management plan. The plaintiffs claimed that the Forest Service violated the NEPA with its decision not to supplement the plan's Environmental Impact Statement in light of new evidence regarding the potential impact of logging on the spotted owl, an endangered species. Id. at 707. The court reasoned that the existence of the spotted owl was linked to the existence of the forest, that the management plan drove the location and volume of future timber sales such that timber that otherwise might have been protected now would be sold, and that, therefore, the plan itself represented an injury. Id. at 708. See also Seattle Audubon Soc'y v. Espy, 998 F.2d 699 (9th Cir. 1993) (applying the same reasoning to similar facts).

The court in Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346 (9th Cir. 1994), relied more on the procedural injury approach. In that case, the plaintiffs challenged a region's vegetation management policy under the NEPA. Id. at 1348. The court found sufficient for standing purposes the allegation that an agency's failure to follow the procedures mandated by the NEPA would lead to the possibility that environmental consequences, which the NEPA requires agencies to consider, would be overlooked. Id. at 1355. The court actually quoted Defenders of Wildlife in support of its approach, noting that "plaintiffs who are 'seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs' have standing." Id. at 1355 n.14 (quoting Defenders of Wildlife, 594 U.S. at 572). The Supreme Court probably would not approve of this application. See supra note 79 and accompanying text.

97. E.g., Seattle Audubon Soc'y v. Espy, 998 F.2d 699 (9th Cir. 1993). The court distinguished Defenders of Wildlife on the ground that the plaintiffs could not prove imminent or actual injury because they were unable to state when, or even if, they would return to the construction sites and distinguished NWF on the grounds that the agency action in that case was not final. Id. at 702–03. It is difficult to see how the specific reclassification decisions in NWF were any less final than the actions in the instant case. Perhaps this is why the court focused on the "land withdrawal review program" at issue in NWF, as opposed to the more specific reclassification decisions that were also at issue. See id.; supra note 61 (discussing the reclassification decisions and the "land withdrawal review program" in NWF).

98. 35 F.3d 1300 (9th Cir. 1993).
NWF had done anything to change the standing requirements in the Ninth Circuit. 99 Resources is nearly identical on its facts to the decision of the Court of Appeals for the Eighth Circuit in Sierra Club v. Robertson, 100 which reached the opposite conclusion as to the effect of Defenders of Wildlife and NWF. 101 Like Robertson, Resources involved a challenge to a forest-wide LRMP. 102 The court reasoned that the LRMP pre-determined the future because it drove individual timber sales, that the plaintiff's challenge was to the overall plan, and that therefore the time to bring such a challenge was the present. 103 The court considered irrelevant the events that might intervene between the adoption of the plan and an actual timber sale. 104 Thus, the Courts of Appeals for the Eighth and Ninth Circuits are in direct conflict on this issue.

III. THE LOSS OF PROTECTION AS INJURY IN FACT

As outlined above, the United States Court of Appeals for the Ninth Circuit has displayed an eclectic approach in conferring standing to citizen groups challenging broad environmental planning decisions by government agencies. 105 The court has employed the concept of procedural injury, focused on the threat of future site-specific actions, and attempted to characterize planning decisions as injuries in themselves. It is this third approach that is of interest here and that this Note will develop and clarify. First, however, it is necessary to say something about why standing doctrine should be liberalized in this arena in the first place.

99. Id. at 1303. The court pointed out that, in fact, Idaho Conservation League was decided after NWF. Id.
100. 28 F.3d 753 (8th Cir. 1994).
101. See supra notes 55–60 and accompanying text.
102. 35 F.3d at 1302.
103. Id. at 1303–04.
104. Id. at 1303.
105. Supra Part II.B.
A. Why a Management Plan Should Be Open to Challenge

1. Keeping Agencies Accountable—To find the approach suggested in this Note desirable, one must start by accepting the proposition that citizen suits can serve and have served a useful and positive function. Since the early days of the administrative state, citizen suits have been valued for allowing private persons to help monitor the activities of government agencies. As such, citizen suits serve to keep government more accountable to regulated parties, as well as to the real or potential beneficiaries of regulation, by forcing agencies to comply with the will of Congress. Citizen suits also can conserve government resources, including the resources of the agencies themselves, by providing another forum where private parties may bring their own resources and knowledge to bear on important decisions. Ideally, then, citizen suits do not hinder the executive branch in performing its functions; rather, they help the executive branch to do its job better and they provide an additional safeguard to ensure that it does so responsibly.

2. Supplying Information—In the area of environmental law, citizen suits may be uniquely valuable insofar as they bring additional research and information to the decision-making process. Ecology, as opposed to environmentalism, which describes an essentially political phenomenon, is scientific in nature. As such, it depends on research and information. It has been suggested that such information is in high demand by government agencies and that Congress has failed to ensure that environmental laws are supported adequately by ecological information. Litigation at the broad planning level requires parties bringing a claim to support that claim with broad, generally relevant research and information, and the resource-management process benefits from

106. See supra note 20 and accompanying text.
107. See Feld, supra note 15, at 146–47.
108. See id. at 144 (citing 132 CONG. REC. H6482 (daily ed. Sept. 9, 1986) (statement of Rep. Berman on reasons to broaden the qui tam action)).
the information at the expense of the private parties bringing the challenge. Site-specific challenges arguably do not generate information that is broad in scope and generally relevant, as the focus of such challenges is necessarily limited.

3. Common Sense—The Court of Appeals for the Ninth Circuit has raised some legitimate common sense justifications for allowing planwide challenges. One justification is that a "challenge to a particular, site-specific action would lose much force once the overall plan has been approved—especially if the challenge were premised on the view that the overall plan grew out of erroneous assumptions." One might argue that a planwide decision should not be challenged at all, but, in responding that it should be, it seems clear that the plan should be challenged when it is adopted and not in the context of a site-specific challenge.

4. The Tiering Policy for Environmental Impact Statements—Allowing standing to challenge a general plan is consistent with the "tiered" approach to the creation of environmental impact statements required by federal regulations. The regulations encourage agencies to "tier" their environmental impact statements such that early, broader environmental impact statements address general questions, allowing subsequent site-specific statements to avoid repetitive discussion of the same issues and to focus on narrower issues concerned. The approach allows an agency to "exclude from consideration issues already decided or not yet ripe." This suggests that, if a court considers a plan not-yet-ripe at the planwide level, another court might consider the plan's validity already decided by the time decision making reaches the site-specific level. Thus, if a management plan is to be challenged, the time for that challenge is when the plan is adopted.

5. Legislative Intent—The major statutes governing environmental agency processes and decision making suggest that planwide challenges are appropriate and within the contemplation of Congress. For example, the purpose of the NEPA is "to promote efforts which will prevent or eliminate damage to

110. See Lewis, supra note 109, at 291.
111. See supra notes 93–95 and accompanying text.
113. See Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1355 n.15 (9th Cir. 1994).
115. Id. § 1508.28.
the environment and biosphere and stimulate the health and welfare of man.\textsuperscript{116} The NEPA further provides that all agencies shall "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences . . . in planning and in decisionmaking which may have an impact on man's environment."\textsuperscript{117} In addition, the NEPA requires agencies to recognize the "worldwide and long-range character of environmental problems.\textsuperscript{118}

The Endangered Species Act is similarly broad in its focus, providing that its purpose is "to provide a means whereby the ecosystems on which endangered species and threatened species depend may be conserved."\textsuperscript{119} Similarly, the Forest and Rangeland Renewable Resources Planning Act recognizes that the management of the nation's resources is "highly complex," requiring a comprehensive "renewable resource program.\textsuperscript{120}

Each of these statutes recognizes implicitly that the important decisions regarding the management of the environment are made at the general planwide level. Certainly a complaint alleging that a planning decision was adopted without proper consideration of its impact on the environment, or in violation of one of the principles set forth in statutes such as these, falls "within the zone of interests\textsuperscript{121} to be protected by these statutes, and, insofar as the plaintiffs are injured, they are injured "within the meaning of [the] relevant statute.\textsuperscript{122}

6. Ecology—As suggested above, there are ecological reasons for allowing plaintiffs to challenge planwide agency decisions. For instance, commentators have argued that the common law property concepts underlying the traditional approach to environmental management, with their emphasis on abstract individual rights and the treatment of persons as subjects and the environment as an object, are ill-suited to their task.\textsuperscript{123} For example, the boundary between site A and site B, although it has a significant legal meaning, has no meaning in nature's terms. As our understanding of the environment has changed over the years, the view of nature

\textsuperscript{117} Id. § 4332(2)(A) (emphasis added).
\textsuperscript{118} Id. § 4332(2)(F).
\textsuperscript{119} 16 U.S.C. § 1531(b) (1994) (emphasis added).
\textsuperscript{120} Id. § 1600(1), (2).
\textsuperscript{121} See Association of Data Processing Orgs. v. Camp, 397 U.S. 150, 156 (1970).
as balanced and predictable has shifted.\textsuperscript{124} The modern view requires that environmental management be approached as an ongoing experiment conducted without regard to boundaries rather than as a series of discrete, final decisions.\textsuperscript{125} While "[d]evelopment occurs on a project-by-project scale . . . ecosystems . . . respond at larger scales, ranging from the drainage basin to the airshed."\textsuperscript{126} Of course, the ultimate decision whether to sell a stand of timber for logging will necessarily be site-specific and will involve boundaries, but the place to bring any comprehensive, meaningful, and useful challenge to how an agency is handling its task is at the planwide level.\textsuperscript{127}

7. Efficiency—Because the demands for land use often inherently stand at odds with one another—an environmental group, for example, wanting to preserve an area that a timber company wants to harvest—the real battle could be fought most efficiently at the stage when the dominant use for a general area is being defined. Just as a site-specific challenge will lack force when the plan allowing the action has already been approved, the challenge will be lacking even more when the approved plan has been subject to judicial review. A plan that has withstood judicial scrutiny could eliminate, or at least simplify, future site-specific challenges, thereby conserving judicial resources and perhaps reducing the total number of claims a court must hear regarding a particular area.

8. The Floodgates Argument—Even absent standing requirements, other procedural safeguards exist to minimize the time that courts must spend considering meritless claims. First, the APA limits the nature of the claims that a plaintiff may bring by providing that a person is entitled to judicial review of an agency action only if he is "suffering legal wrong . . . or [is] adversely affected or aggrieved by agency action

\textsuperscript{125} See id. at 1134 n.57.
\textsuperscript{126} Banta, supra note 109, at 134.
within the meaning of a relevant statute."\textsuperscript{128} Even if one reads "legal wrong" and "adversely affected" to be much broader than "injury in fact," the plaintiff still must show that his claim is recognized by a corresponding statute. Conversely, if a statute does appear to contemplate a plaintiff's claim, how can it be said that such a claim does not present a case or controversy?

Even more basic are the obstacles created by the Federal Rules of Civil Procedure. If a plaintiff has not alleged facts sufficient to support a claim, a court may dismiss the case.\textsuperscript{129} A court may also dispose of a meritless case on a motion for summary judgment.\textsuperscript{130} Even the plaintiff whose claim has some merit will have difficulty getting a court to reverse an agency decision as the scope of review under the APA is limited,\textsuperscript{131} and the courts have shown great deference to agency decisions.\textsuperscript{132}

\textbf{B. A Not-So-New Understanding of Injury}

An agency planning decision that potentially subjects a natural area to uses from which it had been protected ought

\begin{itemize}
\item \textsuperscript{128} 5 U.S.C. § 702 (1994).
\item \textsuperscript{129} Fed. R. Civ. P. 12(b)(6).
\item \textsuperscript{130} Fed. R. Civ. P. 56.
\item \textsuperscript{131} See 5 U.S.C. § 706(2)(A)–(D) (1988) (allowing a court to set aside agency action if it is found to be "arbitrary, capricious . . . contrary to constitutional right . . . in excess of statutory jurisdiction, authority, or limitations . . . or without observance of procedure").
\item \textsuperscript{132} See, e.g., Citizens to Preserve Overton Park v. Volpe, Inc., 401 U.S. 402, 416 (1971) ("[T]he ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."). Also note that Idaho Conservation League v. Mumma, 956 F.2d 1508, 1523 (9th Cir. 1992), Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1360 (9th Cir. 1994), and, in part, Resources Ltd. v. Robertson, 35 F.3d 1300, 1306 (9th Cir. 1993), discussed above, supra Part II.B., each found against the plaintiffs on the merits after finding that they had standing.
\item Another concern raised by the standing issue is that, in reviewing agency planning decisions, the courts will be overstepping their duties in violation of the separation of powers doctrine. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–60 (1992); Scalia, supra note 21. Some have suggested that the separation of powers is not a legitimate concern in this arena because the cases at issue merely ask the courts to interpret the law and decide whether or not an agency has violated it. See, e.g., Fletcher, supra note 75, at 233–34; Sunstein, supra note 15, at 196–97. In any event, the constitutionality of injury in fact as a prerequisite to establish standing is beyond the scope of this Note; this Note argues that the courts have much more latitude in defining and interpreting injury in fact than they have taken in the context of environmental law.
\end{itemize}
to be accepted by the courts as an injury in fact to plaintiff environmental groups that claim to use that area. Although some courts have rejected this idea, and no court has accepted it in so many words, the Supreme Court has paved the way for such an approach in analogous contexts.

1. Bakke-type Injury—The Supreme Court decision in Regents of the University of California v. Bakke,\(^\text{133}\) lends support to the approach to standing advocated here. In Bakke, the plaintiff challenged the special admissions program at the Medical School of the University of California at Davis under the Equal Protection Clause.\(^\text{134}\) The plaintiff's alleged injury was that he was denied admission to the medical school as a result of the school's special admissions program,\(^\text{135}\) which set aside sixteen of the one hundred openings in each class for the beneficiaries of the program.\(^\text{136}\) The plaintiff sought a mandatory injunction compelling his admission to the school.\(^\text{137}\)

It is not at all clear that the plaintiff satisfied Article III standing requirements as it has been defined in the context of citizen environmental suits. The plaintiff did provide evidence that his test scores and grade point average were higher than the average scores and grade point averages of people who were admitted under the program.\(^\text{138}\) But in the two years in which the plaintiff applied for and was denied admission, there were a total of 2464 and 3737 applicants, respectively.\(^\text{139}\) Thus, in the second year, for example, 3637 applicants were denied admission, including the plaintiff, leaving 3636 applicants who might have been admitted before the plaintiff even absent the special admissions program. To demonstrate that he was actually injured by the program, the plaintiff should have had to show that he was in fact among the sixteen who would have been admitted but for the program, which, the trial court concluded, the plaintiff was unable to show.\(^\text{140}\) The Supreme Court addressed the plaintiff's standing only briefly in a footnote and concluded that the plaintiff's "injury, apart

\(^{133}\) 438 U.S. 265 (1978).
\(^{134}\) Id. at 269–70.
\(^{135}\) Id. at 277–78.
\(^{136}\) Id. at 275.
\(^{137}\) Id. at 277.
\(^{138}\) Id. at 278 n.7.
\(^{139}\) Id. at 273 n.2.
\(^{140}\) Id. at 279.
from failure to be admitted, [was] the University's decision not to permit Bakke to compete for all 100 places in the class . . . .

By analogy, an individual's interest in the chance to compete for admission to medical school is like an environmental group's interest in the chance to use a particular area of land within a larger affected area. The injury to the plaintiff in Bakke, as one of 3637 people denied the chance to compete for sixteen openings, seems no more obvious, or "in fact," than the injury to one 1,000-acre piece of land out of 3,637,000 acres caused by a decision to deny those acres protection from development. In fact, the latter case may present a stronger showing of injury. In Bakke, only sixteen out of 3637 people, or less than one-half of one percent, could possibly have been injured "in fact." By contrast, in many reclassification decisions or forest management plans, the percentage of land that actually will eventually be affected is much greater.142 Of course, because the land itself cannot allege injury, plaintiffs challenging an environmental plan must also show that they use the affected sites and thereby show injury to themselves.143 By the standard implied by Bakke, this requirement should be satisfied by a showing that members of the plaintiff group use any part of the area encompassed by a management plan. Instead, plaintiff groups have been asked to show that a plan will affect a specific site that members use.144 This would be like asking the plaintiff in Bakke to show that he

141. Id. at 281 n.14 (emphasis added).
142. It is not always clear from the opinions how much of the area affected by an agency decision is actually likely to be logged, mined, or developed, but, for example, in Idaho Conservation League v. Mumma, the LRMP at issue recommended that 59% of the area affected be developed. 956 F.2d 1508, 1512 n.8 (9th Cir. 1992). In Salmon River Concerned Citizens v. Robertson, the plaintiffs alleged that 6 million of 20 million acres (30%) would in fact be adversely affected. 32 F.3d 1346, 1349 (9th Cir. 1993).
143. See, e.g., Sierra Club v. Morton, 405 U.S. 727, 735 (1972) (stating that the injury-in-fact test for standing requires that the "party seeking review be himself among the injured"). Under the approach suggested by this Note, plaintiff environmental organizations still would be required to show that their members use the affected areas; they simply would not be required to prove that their members use the specific sites that will in fact be physically affected.
144. See e.g., Lujan v. National Wildlife Fed'n (NWF), 497 U.S. 871, 886-87 (1990) (reversing the court of appeals and implicitly affirming the district court's ruling that the plaintiffs had submitted inadequate affidavits, noting that the district court found that "[t]here is no showing that [one plaintiff's] use and enjoyment extends to the particular 4500 acres covered by the decision . . . .").
was in fact among the sixteen people who would have been admitted but for the special admissions program.\textsuperscript{145}

The standing requirements applied in Bakke are appropriate and ought to be applied to cases in which plaintiffs seek to challenge a resource management plan.\textsuperscript{146} If the injury is understood to be the loss of the opportunity to be free from development, the other standing requirements, causation and redressability, fall into place. To the extent that plaintiffs can show an injury of the kind proposed here, the injury is clearly and directly traceable to the agency action, and the injury is sure to be redressed by a court's decision holding the action unlawful.

2. Other Precedent—As discussed earlier, the Court of Appeals for the Ninth Circuit has attempted, with varying degrees of clarity, to articulate the approach suggested here.\textsuperscript{147} Similarly, Justice Blackmun's dissent in NWF implicitly recognized such an approach by finding the affidavits alleging use of land in the vicinity of the affected lands sufficient because "[a]bundant record evidence supported the . . . assertion that on lands newly opened for mining, mining in fact would occur."\textsuperscript{148} Justice Blackmun apparently did not think it was necessary for the plaintiffs to identify the specific sites where mining would occur and then allege actual use of those sites. This approach is grounded in common sense. Fine distinctions and legal technicalities aside, it should not be difficult to find that plaintiffs who regularly use an area of once-protected wilderness that has suddenly been opened to mining or logging have suffered an injury. This is especially true when it is obvious that the mining or logging will in fact occur pursuant to the new classification, and the only question remaining is exactly where and when the activity will occur.

The Supreme Court also has recognized less concrete injuries in other contexts. In Hardin v. Kentucky Utilities Co.,\textsuperscript{149}

\textsuperscript{145} The standard for environmental groups is made even stricter by the fact that the courts, when ruling on summary judgment motions, as opposed to motions to dismiss, have required that plaintiffs actually prove standing rather than simply present a genuine issue of fact. See, e.g., NWF, 497 U.S. at 902 (1990).

\textsuperscript{146} Sunstein suggested but did not develop the idea that alleging a Bakke-type injury ought to be enough in challenging environmental agency decisions in general. Sunstein, supra note 15, at 204–05.

\textsuperscript{147} See supra Part II.B. Recently the Court of Appeals for the Seventh Circuit has taken a similar approach. See Sierra Club v. Marita, 46 F.3d 606 (7th Cir. 1995).


\textsuperscript{149} 390 U.S. 1 (1968).
A utility company challenged the validity of an agency decision that exposed it to competition from other companies to which it had not been exposed previously. The Court found that, although economic injury stemming from lawful competition could not confer standing, the fact that Congress had written a statute reflecting a purpose to protect that competitive interest did confer standing in an action seeking to compel compliance with the statute. The Court also has granted standing in a case in which plaintiff tenants sued their landlord for discrimination under the Civil Rights Act even though they were not the victims of discrimination. The injury, according to the Court, was that the plaintiff tenants were deprived of the benefits of living in a racially integrated community. Both of these examples illustrate the principle that the "injury required by Art[icle] III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." Put another way, "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." Writing for the majority in Defenders of Wildlife, Justice Scalia attempted to distinguish the line of precedent cited above on the grounds that the cases "involved Congress's elevating to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law," as opposed to cases where the courts are asked to "'abandon[] the requirement that the party seeking review must himself have suffered an injury.'" Although the facts of Defenders of Wildlife might justify such a distinction, the distinction fails in cases like Idaho Conservation League v. Mumma and Sierra Club v. Robertson, in which it seems clear that Congress, through statutes like the NEPA, in conjunction with the APA, has elevated to a legally cognizable injury the concrete,
de facto harm caused when an agency deprives a wilderness area of protection in violation of statutory mandate.

Justice Kennedy, concurring in *Defenders of Wildlife*, seemed to acknowledge the point argued here, noting:

As government programs and policies become more complex and far reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition. . . . However, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit. 159

In passing a statute like the NEPA, which defines the criteria and procedures that an agency must follow before undertaking any action that might affect the environment and that aims "to promote efforts which will prevent or eliminate damage to the environment," 160 Congress has identified an injury: agency decisions that do not follow procedures designed to prevent damage to the environment. The class of persons who ought to be entitled to bring a suit to challenge such decisions are those whose environment has been denied such protection, whether the decision affects a single acre or an entire region.

CONCLUSION

Developments in the law of standing have presented unique challenges to environmental groups seeking to challenge agency decisions. This is especially true for plaintiffs seeking to challenge broad planning decisions that affect the environment. Nonetheless, both the rationale supporting citizen suits—that citizens can act as private attorneys general and help the executive branch ensure that the laws are faithfully carried out—as well as the practical and policy concerns particular to environmental decisionmaking, present strong reasons in favor of allowing these challenges. Toward that end, the federal courts should broaden their understanding of injury in fact to encompass an agency planning decision that

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159. 504 U.S. at 580.
deprives a wilderness area of its protected status even absent a proposed site-specific action. Such an approach would be consistent with the Supreme Court's understanding of injury in analogous contexts. The Courts of Appeals for the Ninth and Seventh Circuits already have adopted an approach similar to the one proposed here, but it must be expanded and clarified; the Court of Appeals for the Eighth Circuit has adopted the opposite approach. Yet all courts claim to follow Supreme Court precedent. Whether or not the Supreme Court decides to resolve the issue in the near future, the idea of a planning decision as an injury in itself may be a viable and useful way to articulate the injury suffered in this context.