Broadening the Scope of Environmental Standing: Procedural and Informational Injury-in-Fact After *Lujan v. Defenders of Wildlife*

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INTRODUCTION

The law of environmental standing has expanded dramatically since its inception in 1972 with the United States Supreme Court's decision in *Sierra Club v. Morton*.[1] At about the same time, Congress lowered the standing hurdle for environmental plaintiffs by incorporating citizen suit provisions into the enforcement schemes of the Clean Air Act[2] and Clean Water Act,[3] with many other major federal environmental statutes adopting citizen suit provisions shortly thereafter. These landmark developments in the judicial and legislative arenas offered individual and organizational plaintiffs vastly enhanced access to the federal courts to bring environmental challenges under the Administra-

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1. Sierra Club v. Morton, 405 U.S. 727 (1972).
2. Clean Air Act, 42 U.S.C. §§ 7401-7671q (1990).
3. Clean Water Act, 33 U.S.C. §§ 1251-1387 (1990).

tive Procedure Act[4] (APA) and, more extensively, under the citizen suit provisions of the major environmental statutes.[5]

To establish standing, Article III of the U.S. Constitution requires a party to demonstrate: (1) an actual or threatened "injury-in-fact"; (2) that the injury is traceable to the challenged action; and (3) that the relief requested is likely to redress the injury.[6] In environmental cases, courts have recognized three types of injury that may satisfy the injury-in-fact requirement: substantive, informational, and procedural. Although substantive injury has received the most attention in the courts and has been the principal vehicle through which the doctrine of environmental standing has evolved, there also has been a growing recognition of procedural and informational injury in the courts in recent years. Environmental plaintiffs asserting any of the three types of injury must satisfy the Article III standing requirements; however, courts have failed to offer a clear explanation of what distinguishes substantive injury from procedural and informational injury.

Substantive injury embraces those classes of harm that are not grounded in the effects suffered from a deprivation of information or a governmental entity's failure to follow required procedures.[7] Informational injury exists when the government or a private party fails to provide or collect information, impairing an individual's or organization's ability to obtain or disseminate information.[8] Procedural injury is found when a governmental entity's action or inaction violates a law under a statutory scheme in which Congress has expressly or impliedly created an interest in private individuals to affect such administrative decisions through the law.[9] In essence, procedural injury involves govern-

4. 5 U.S.C. § 702 (1976). The APA gives an individual the right of judicial review when that individual suffers legal wrong because of agency action or is adversely affected or aggrieved by agency action within the meaning of a relevant statute.

5. *See generally* MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS (1991); JEFFREY G. MILLER, CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS (1987).

6. Lujan v. Defenders of the Wildlife, 112 S. Ct. 2130 (1992). Without de-emphasizing the importance of the traceability and redressability components of the Article III standing requirements, this Article focuses on the injury-in-fact requirement.

7. An in-depth analysis of substantive injury is beyond the scope of this article. For a discussion of substantive injury in the environmental context, see Lisa M. Bromberg, Lujan v. Defenders of Wildlife: *Where Does the Standing Issue Stand in Environmental Litigation?*, 16 AM. J. TRIAL ADVOC. 761, 765-71 (1993).

8. *See infra* part I.A.

9. *See infra* part I.B.

ment failure to follow procedures designed to ensure that the environmental consequences of governmental action are adequately evaluated.[10]

In 1989, despite a continuing trend of liberal interpretation of environmental standing at the federal district and circuit court levels,[11] the Supreme Court began issuing a backlash of restrictive decisions for citizen-plaintiffs' challenges under federal environmental statutes,[12] culminating with the controversial decision in *Lujan v. Defenders of Wildlife*.[13] Championed by Justice Scalia's restrictive approach toward environmental standing, the decision in *Defenders* in 1992 is the most recent instance of the Supreme Court's restriction of environmental plaintiffs' ability to sue in the federal courts.[14]

Even if the Supreme Court's substantive injury analysis in *Defenders* can be considered restrictive,[15] the Court's analysis does not necessarily impair the viability of procedural and informational injury, since the latter two injuries are governed by different and less restrictive doctrines. Thus, in the wake of *Defenders*, procedural and informational injury offer a more promising

10. Friends of the Earth v. United States Navy, 841 F.2d 927, 931 (9th Cir. 1988) *modified* 850 F.2d 599 (9th Cir. 1988); City of Davis v. Coleman, 521 F.2d 661, 671 (9th Cir. 1975).

11. *See* Michael A. Perino, Note, *Justice Scalia: Standing, Environmental Law and the Supreme Court*, 15 B.C. ENVTL. AFF. L. REV. 135, 144-48 (1987) (discussing former trend toward liberalization of standing requirements in environmental cases).

12. Hallstrom v. Tillamook County, 493 U.S. 20 (1989) (strict compliance with the literal language of the 60-day notice requirement is a prerequisite to filing a citizen suit); Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990)(members of environmental organization challenging Bureau of Land Management's land withdrawal review program lack standing because affidavits alleging their use of lands "in the vicinity" of the challenged projects lacked the requisite geographical specificity to sustain substantive injury-in-fact).

13. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992) (hereinafter *Defenders*).

14. For a discussion of the restrictive effect of *Defenders*, see generally Patti A. Meeks, *Justice Scalia and the Demise of Environmental Law Standing*, 8 J. LAND USE & ENVTL. L. 343 (1993); Karin P. Sheldon, Lujan v. Defenders of Wildlife: *The Supreme Court's Slash and Burn Approach to Environmental Standing*, 23 ENVTL. L. REP. (Envtl. L. Inst.) 10031 (1993); Lisa M. Bromberg, Lujan v. Defenders of Wildlife: *Where Does the Standing Issue Stand in Environmental Litigation?*, 16 AM. J. TRIAL ADVOC. 761 (1993); James M. McElfish Jr., *Drafting Standing Affidavits After* Defenders: *In the Court's Own Words*, 23 ENVTL. L. REP. (Envtl. L. Inst.) 10026 (1993).

15. At least two courts since *Defenders* have questioned this assumption. *See* Portland Audubon Soc'y v. Babbitt, 998 F.2d 705 (9th Cir. 1993) (rejecting contention that *Defenders* established a "new, stricter burden on plaintiffs to establish with specificity an injury-in-fact caused by a challenged government action"); *see also* Resources Ltd., Inc. v. Robertson, 8 F.3d 1394 (9th Cir. 1993).

mechanism for the redress of environmental harms, particularly when such harms fall within the scope of a substantive environmental statute with a citizen suit provision.

Part one of this article examines the origins and development of procedural and informational injury-in-fact, both of which have their origins in case law addressing the environmental impact statement (EIS) requirement under the National Environmental Policy Act (NEPA).[16] Part one also discusses procedural and informational injury claims under substantive environmental statutes addressed in case law prior to the *Defenders* decision.

Part two begins with an analysis of the Eighth Circuit's decision in *Defenders*. It then examines the majority, concurring, and dissenting opinions in the Supreme Court's reversal of the Eighth Circuit, identifying the aspects of the decision that have provided fertile ground for the post-*Defenders* courts to grant standing for procedural and informational injury claims brought under federal environmental statutes.

Part three analyzes the effect of *Defenders* on plaintiffs' ability to allege procedural and informational injury claims under NEPA and under the citizen suit provisions of substantive environmental statutes. First, cases involving procedural and informational injury under NEPA are examined. Next, part three considers informational injury-in-fact under the Emergency Planning and Community Right-to-Know Act (EPRCA)[17] and explores the interplay between EPCRA's substantive statutory mandate and its citizen suit provision. Part three then analyzes the operative mechanisms of the Endangered Species Act and argues that the Act's citizen suit provision is a powerful tool through which plaintiffs can successfully assert informational and procedural injury without being limited by NEPA case law or by the *Defenders* decision. Finally, part three considers procedural injury claims under RCRA, CERCLA, the Clean Water Act (CWA), and the Marine Mammal Protection Act (MMPA).

16. National Environmental Policy Act, 42 U.S.C. §§ 4321-4370b (1988 & Supp. II 1990).

17. Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11001-11050 (1988).

I.
THE LEGAL AND CONCEPTUAL FOUNDATIONS OF INFORMATIONAL AND PROCEDURAL INJURY-IN-FACT.

A. *Origins and Development of Informational Injury*

To sustain standing under a theory of informational injury, plaintiff organizations must demonstrate a plausible link between their organization's informational purposes and the challenged agency action.[18] Organizations whose primary function is to disseminate information to their members may be injured by an agency's failure to provide or collect such information.[19] Such organizations need not be the statutorily designated recipient of information to suffer informational injury sufficient to confer standing.[20]

Informational injury has its roots in NEPA.[21] NEPA establishes a procedural framework to promote better-informed decisions and to facilitate public participation. The informational rights embodied in the EIS requirement are essential to fulfill this purpose. Informational injury under NEPA is grounded in the EIS's purpose to ensure that "relevant information will be made available to the larger audience that may also play a role in both the decision making process and the implementation of that decision."[22]

A court first recognized informational injury under NEPA in 1973 in a footnote in *Scientists' Institute for Public Information,*

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18. *See, e.g.*, Competitive Enter. Inst. v. National Highway Traffic Safety Admin., 901 F.2d 107, 122-23 (D.C. Cir. 1990).

19. Scientists' Inst. for Pub. Info. v. Atomic Energy Comm'n, 481 F.2d 1079, 1086 n.29 (D.C. Cir. 1973).

20. *See, e.g.*, Action Alliance of Senior Citizens v. Heckler, 789 F.2d 931 (D.C. Cir. 1986), *vacated on other grounds*, 494 U.S. 1001 (1990) (plaintiff's deprivation of information directed from one governmental agency to another found to be sufficient injury on which to base standing).

21. The concept of informational injury can be traced back further to the citizen suit provision of the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B) (1988). NEPA documents are subject to this provision, which compels an agency to provide requested information. NEPA's EIS requirement adds another dimension to this informational focus by imposing a mandate on agencies to generate requested information, rather than merely requiring that such agencies provide information already in their possession. *See* Lawrence Gershwer, Note, *Informational Standing Under NEPA: Justiciability and the Environmental Decision Making Process*, 93 COLUM. L. REV. 996, 1005-6 (1993).

22. *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

Inc. v. Atomic Energy Commission.[23] The D.C. Circuit reasoned that the plaintiff had suffered injury-in-fact[24] on the ground that the Atomic Energy Commission's failure to comply with NEPA's procedural mandates would impair one of the plaintiff's main objectives — providing scientific and policy information to the public.

Unlike the majority of the major federal environmental statutes, however, NEPA is a procedural statute and lacks a citizen suit provision.[25] Thus, although NEPA mandates that information-based procedures be carried out, it does not vest citizens with a statutorily authorized right to attempt to ensure that those procedures are executed in accordance with NEPA's requirements.[26] With the notable exception of *Colorado Environmental Coalition v. Lujan*,[27] the lack of both substantive mandates and a citizen suit provision have diluted the viability of informational injury under NEPA. The D.C. Circuit has denied informational standing in three recent cases under NEPA, thereby adding to the uncertain status of informational standing under NEPA.

The first of these cases, *Foundation on Economic Trends v. Lyng*,[28] involved a challenge brought against the United States Department of Agriculture (USDA) for failing to prepare an EIS on its germplasm preservation program. In dicta, the court doubted the validity of informational injury, noting that courts have "never sustained an organization's standing in a NEPA case solely on the basis of 'informational injury.' "[29]

This skepticism fueled the denial of informational standing in two subsequent NEPA cases in the D.C. Circuit.[30] In *Foundation on Economic Trends v. Watkins*, the court felt bound by *Lyng*,

23. Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n, 481 F.2d 1079, 1087 n.29 (D.C. Cir. 1973).

24. The court did not use the term "informational injury" to identify the type of injury that plaintiff had suffered.

25. Informational standing claims under NEPA must be brought under the more rigorous standard imposed by the APA. *See supra* note 4.

26. *See infra* part III.B.1 (discussing the effect of the substantive mandates and citizen suit provision in EPCRA on informational standing cases).

27. Colorado Envtl. Coalition v. Lujan, 803 F. Supp. 364 (D. Colo. 1992); *see also infra* part III.A.

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

29. *Id.* at 84. The court further noted that " 'informational injury' . . . exists day in and day out, whenever federal agencies are not creating information a member of the public would like to have." *Id.*

30. Foundation on Economic Trends v. Watkins, 794 F. Supp. 395 (D.D.C. 1992); Public Citizen v. Office of the United States Trade Representative, 782 F. Supp. 139 (D.D.C. 1992), *aff'd*, 970 F.2d 916 (D.C. Cir. 1992).

noting that the *Lyng* court had "recently reexamined the informational standing concept and found it wanting."[31] Similarly, in *Public Citizen v. Office of the United States Trade Representative*,[32] the court interpreted *Lyng* to have overruled the precedent[33] that informational injury such as that asserted by Public Citizen could support standing.[34]

Courts are much more receptive to standing based on informational injury under substantive statutes, especially substantive environmental statutes.[35] In *Natural Resources Defense Council, Inc. v. SEC*,[36] plaintiff NRDC sought to compel the SEC to broaden its policy regarding the disclosure of information on corporate activities that affect the environment.[37] The federal district court held that the SEC's narrow disclosure policy harmed NRDC's interest "in protecting the environment, in investing their funds, and in voting their shares in a socially responsible manner."[38]

In *National Wildlife Federation v. Hodel*,[39] the D.C. Circuit held that the National Wildlife Federation (NWF) established standing through allegations of informational injury under the Surface Mining Control and Reclamation Act (SMCRA).[40]

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31. 794 F. Supp. at 398.

32. 782 F. Supp. 144 (D.D.C. 1992).

33. Los Angeles v. National Highway Saftey Admin., 912 F.2d 478 (D.C. Cir. 1990).

34. *Public Citizen*, 782 F. Supp. 144. The plaintiffs challenged the Office of the United States Trade Representative's failure to prepare an EIS assessing the potential impacts of trade agreements under negotiation, thus allegedly impairing their effort to educate Congress and the public about the environmental ramifications of the trade agreements.

35. Informational standing also has been successfully asserted under non-environmental substantive statutes. *See, e.g.*, Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 449-51 (1989)(granting informational standing under Federal Advisory Committee Act); Havens Realty Corp. v. Coleman, 455 U.S. 363, 373-75 (1982)(granting informational standing under Fair Housing Act of 1968); Action Alliance of Senior Citizens v. Heckler, 789 F.2d 931 (D.C. Cir. 1986), *vacated on other grounds*, 494 U.S. 1001 (1990)(granting informational standing under Age Discrimination Act); *see also infra* part III.B.1 (discussing informational injury under EPCRA).

36. Natural Resources Defense Council, Inc. v. Securities Exch. Comm'n, 389 F. Supp. 689 (D.D.C. 1974).

37. NRDC brought suit under two federal securities laws, the Securities Exchange Act of 1933, 15 U.S.C. §§ 77a-b (1987), and the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-ll (1990). The SEC issued the regulations in response to Congress's passage of NEPA requiring disclosure of information in the public interest.

38. 389 F. Supp. at 697.

39. National Wildlife Fed'n v. Hodel, 839 F.2d 694 (D.C. Cir. 1988).

40. 30 U.S.C. §§ 1201-1328 (1988).

NWF had challenged twenty-one different regulations promulgated by the Secretary of the Interior. The court determined that the affiants were injured when the Secretary delegated authority to approve mining plans on federal lands in contravention of SMCRA.[41] By this delegation, the Secretary denied NWF their right to participate in the federal decision making process under the statute. Specifically, the affiants lost the "distinctive federal substantive right" to have an environmental impact statement prepared.[42] Citing five cases[43] for the proposition that the denial of access to government-provided information constitutes injury-in-fact, the court determined that SMCRA dictated a similar result.[44] The Court of Appeals concluded that "for affiants voicing environmental concerns like those in the aforementioned affidavits, the elimination of the opportunity to see and use an EIS prepared under federal law does constitute sufficient injury on which to ground standing."[45] Thus, through alleging informational harm, NWF was able to establish standing.[46]

In *Animal Legal Defense Fund v. Yeutter*,[47] two animal welfare organizations challenged the Secretary of the USDA and the Administrator of the Animal Plant Health Inspection Service for promulgating regulations under the Federal Laboratory Animal Welfare Act[48] that failed to include birds, rats, and mice as "animals" within the Act's protection and reporting requirements.

41. *Hodel*, 839 F.2d at 712. Under SMCRA, a state may agree to regulate mining operations on federal land, but the Act also provides that "[n]othing in this subsection shall be construed as authorizing the Secretary to delegate to the States his duty to approve mining plans on Federal lands . . . ." 30 U.S.C. § 1273(c)(1988).

42. *Hodel*, 839 F.2d at 712.

43. Action Alliance of Senior Citizens v. Heckler, 789 F.2d 931 (D.C. Cir. 1986), *vacated on other grounds*, 494 U.S. 1001 (1990); Cady v. Morton, 527 F.2d 786 (9th Cir. 1975); Scientists' Inst. for Pub. Info. v. Atomic Energy Comm'n, 481 F.2d 1079 (D.C. Cir. 1973); National Org. for the Reform of Marijuana Laws (NORML) v. United States Dep't of State, 452 F. Supp. 1226 (D.D.C. 1978); Natural Resources Defense Council v. Securities and Exch. Comm'n, 389 F.Supp. 689 (D.D.C. 1974).

44. *Hodel*, 839 F.2d at 712.

45. *Id.*

46. Similarly, see City of Los Angeles v. National Highway Safety Admin., 912 F.2d 478 (9th Cir. 1990) (granting standing to environmental group to challenge NHTSA's decision reducing minimum mileage requirements for automobiles without first preparing an EIS evaluating the impact of such reductions on the global greenhouse effect.) *cert. denied*, 112 S. Ct. 1225 (1992).

47. Animal Legal Defense Fund v. Yeutter, 760 F. Supp. 923 (D.D.C. 1991).

48. Like NEPA, the Act does not have a citizen suit provision, thus requiring the court to consider plaintiffs' challenge under the APA. However, unlike NEPA, the Act contains substantive mandates that, when violated, give rise to a viable claim of informational injury even when such claim is the sole ground upon which to grant standing.

The organizations alleged that the defendants' failure to include rats, mice, and birds injured their ability to disseminate information to their members about the treatment and conditions of these fauna.

The court held that plaintiffs' informational injury claim survived defendants' motion to dismiss. The claim fell within the Act's zone of interests and satisfied the requirement that an activity germane to plaintiffs' organizational purpose had been "significantly hindered."[49] The court further held that the causation and redressability elements of standing had been met in that an order requiring USDA to issue the regulations would cure plaintiffs' alleged injury.[50]

Thus, while informational injury originated under NEPA, its future under NEPA is uncertain. However, substantive environmental statutes such as those in *Animal Legal Defense Fund* are a more effective mechanism to gain standing to redress information-based harms.[51]

B. *Origins and Development of Procedural Injury*

Each federal circuit court to consider the question has found standing to require federal agencies and private parties to comply with procedural mandates of both environmental and non-environmental statutes.[52] Although widely recognized under substantive statutes,[53] the origins and development of the concept of procedural injury are grounded in NEPA's EIS requirement.

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49. 760 F. Supp. at 927.

50. *Id.* at 927 n.6.

51. When substantive environmental statutes contain a citizen suit provision, the viability of such information-based claims is further enhanced. *See infra* part III.B.1 (discussing informational standing under EPCRA).

52. *See, e.g.*, McGarry v. Secretary of the Treasury, 853 F.2d 981, 984 (D.C. Cir. 1988); Friends of the Earth v. United States Navy, 841 F.2d 927, 932 (9th Cir. 1988), *modified*, 850 F.2d 599 (9th Cir. 1988); Motor Coach Indus., Inc. v. Dole, 725 F.2d 958, 964 n.5 (4th Cir. 1984); Munoz-Mendoza v. Pierce, 711 F.2d 421, 428 (1st Cir. 1983); South East Lake View Neighbors v. Department of Hous. & Urban Dev., 685 F.2d 1027, 1038 (7th Cir. 1982). These cases all stand for the proposition that a violation of a procedural right itself — not the substantive injury caused by the procedural violation — can satisfy the injury-in-fact requirement. *See* Amicus Brief of the States of Texas, Arizona, Arkansas, California, Florida, Maine, Michigan, Minnesota, New Jersey, New York, Ohio, and Vermont and the Cities of New York, Baltimore, Denver, Elizabeth, Los Angeles, San Francisco, Seattle and Broward County in Support of Respondents at 5-6, Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992)(No. 90-1424)(hereinafter *Defenders Amicus Brief*).

53. *See infra* part III.

In *City of Davis v. Coleman*,[54] the Ninth Circuit became the first federal court of appeals to identify procedural injury as a separate and distinct form of injury that may satisfy the Article III standing requirements. The court held that the Federal Highway Administration's failure to prepare an EIS for a proposed highway interchange project constituted a procedural injury to the plaintiff, City of Davis. The court stated that "the procedural injury implicit in the agency failure to prepare an EIS . . . is itself a sufficient 'injury-in-fact' to support standing."[55] However, the court further stated that a plaintiff alleging procedural injury must have a sufficient "geographical nexus" to the site of the challenged project such that the plaintiff may be expected to suffer whatever environmental consequences the project may have.[56] Because of the city's proximity to the project site, the court reasoned that the city had demonstrated such a nexus in that the challenged project might have adversely affected the city's water supply and controlled population growth policy.[57]

Subsequently, in *Trustees for Alaska v. Hodel*,[58] the Ninth Circuit held that the plaintiff environmental organizations had standing as a result of procedural harm suffered under NEPA. The Secretary of the Interior had sought to submit a legislative environmental impact statement (LEIS) to Congress regarding oil and gas drilling in the Arctic National Wildlife Refuge (ANWR) without allowing a period for public comment. The court held that the Secretary's decision to submit the LEIS without first providing an opportunity for public notice and comment violated NEPA and its implementing regulations. Rejecting the government's contention that the Trustees lacked standing because impairment of their members' use of the ANWR could only be accomplished by Congress choosing to eliminate the statutory prohibition against gas and oil development in the refuge, the court held that the plaintiffs had a "procedural right" to comment on the LEIS.[59] Citing *City of Davis*, the court ruled that the Trustees had standing to challenge alleged agency violations of this procedural right.[60]

54. City of Davis v. Coleman, 521 F.2d 661 (9th Cir. 1975).
55. *Id.* at 671.
56. *Id.*
57. *Id.*
58. Trustees for Alaska v. Hodel, 806 F.2d 1378 (9th Cir. 1986).
59. *Id.* at 1378.
60. *Id.* (citing *City of Davis*, 521 F.2d at 671-72.)

One year later, the Ninth Circuit handed down *Oregon Environmental Council v. Kunzman*,[61] a case in which the court upheld the plaintiff's standing under NEPA. Oregon Environmental Council (OEC), an environmental group, had sought to enjoin a government pesticide spraying program aimed at eradicating gypsy moths. OEC established standing on the basis of alleged failures in the preparation of an EIS calculating the harmful effects of the pesticides. The court held that "procedural failures in EIS preparation create a risk that environmental impacts will be overlooked and provide sufficient 'injury in fact' to support standing."[62]

The court noted that the case did not present a situation allowing just anyone, including individuals residing in states without gypsy moths, to bring an action to stop the spraying. OEC's members resided in a state (Oregon) with an actual gypsy moth problem. Thus, as in *City of Davis*, the plaintiffs had "a sufficient geographical nexus to the site of the challenged project that [they] may be expected to suffer whatever environmental consequences the project may have" and could challenge a nationwide EIS.[63]

In *Natural Resources Defense Council v. Lujan*,[64] the district court held that plaintiff NRDC had successfully alleged procedural harm. NRDC sued under NEPA to challenge the adequacy of a legislative impact statement (LEIS) concerning the future management of the Alaskan Wildlife National Refuge. The court determined that the requirement of an adequate environmental impact statement for legislative proposals could be enforced by a private action. The plaintiffs proved a risk that serious environmental impacts would be overlooked and that they had a geographic nexus to the challenged action.[65] In addition, the court found that "plaintiffs' participation rights are within the interests protected by the statute" since an LEIS is "intended by Congress to provide detailed environmental information to the public to permit them to participate in a meaningful way in further decision making both at the administrative and legislative levels."[66]

61. Oregon Envtl. Council v. Kunzman, 817 F.2d 484 (9th Cir. 1987)
62. *Id.* at 491 (citing *City of Davis*, 521 F.2d at 670-71).
63. *Id.* (quoting *City of Davis*, 521 F.2d at 671)
64. 768 F. Supp. 870 (D.D.C. 1991)
65. *Id.* at 877-78.
66. *Id.* at 878 (citation omitted).

Although courts first recognized procedural injury in environmental cases under NEPA, plaintiffs also have successfully asserted procedural injury under substantive statutes.[67] Substantive environmental laws[68] differ from procedural statutes such as NEPA. The former espouse environmental protection as their primary purpose and offer substantive remedies to prevailing plaintiffs, such as monetary damages or injunctions against environmentally destructive practices.[69] In contrast, the latter merely grant relief in the form of directives to follow mandated procedures.[70]

Environmental organizations first began to assert procedural injuries under substantive statutes in the early 1970s. Although the term "procedural injury" had not yet been coined, the court in *Environmental Defense Fund, Inc. v. Hardin*[71] held that EDF had standing to challenge the USDA for the "procedural" harm caused by USDA's failure to act on a petition calling for the ban of the pesticide DDT. The plaintiffs had sued under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA),[72] asking the USDA to cancel DDT's registration and, in the interim, to suspend its use. FIFRA requires the Secretary of Agriculture to

67. *See* Miriam S. Wolok, Note, *Standing for Environmental Groups: Procedural Injury as Injury-in-Fact*, 32 NAT. RESOURCES J. 163, 184 (1992). The note cites numerous instances of groups representing interests other than environmental protection that have also alleged procedural injury under the following statutes: Staggers Railroad Act of 1980 49 U.S.C. § 10101 (1988), United Transp. Union v. Interstate Commerce Comm'n, 891 F.2d 908 (D.C. Cir. 1989); Employee Retirement Income Security Act 29 U.S.C. § 1381 (1988), Fernandez v. Brock, 840 F.2d 622 (9th Cir. 1988); Ethics in Government Act 2 U.S.C. § 1 (1988), Dellums v. Smith, 797 F.2d 817 (9th Cir. 1986); Farm Labor Contractor Registration Act 7 U.S.C. § 2041 (1988), Alvarez v. Longboy, 697 F.2d 1333 (9th Cir. 1983); Age Discrimination Act 42 U.S.C. § 6101 (1988), Action Alliance of Senior Citizens of Greater Philadelphia v. Heckler, 789 F.2d 931 (D.C. Cir. 1986), *vacated on other grounds*, 494 U.S. 1001 (1990); Education for All Handicapped Children Act 20 U.S.C. § 821 (1988), Georgia Ass'n of Retarded Citizens v. McDaniel, 716 F.2d 1565 (11th Cir. 1983); Federal Election Campaign Act 2 U.S.C. § 431 (1988 & Supp. I 1990), National Conservative Political Action Comm. v. Federal Election Comm'n, 626 F.2d 953 (D.C. Cir. 1980).

68. Such statutes include the Federal Water Pollution Control Act (FWPCA, or Clean Water Act), Clean Air Act (CAA), Endangered Species Act (ESA), Emergency Planning and Community Right-to-Know Act (EPCRA), Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Marine Mammal Protection Act (MMPA), Resource Conservation and Recovery Act (RCRA), Oil Pollution Act (OPA), Coastal Zone Management Act (CZMA), Surface Mining Control and Reclamation Act (SMCRA), Safe Drinking Water Act (SDWA), and Toxic Substances Control Act (TSCA).

69. Wolok, *supra* note 67, at 184.

70. *Id.*

71. Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970).

72. 7 U.S.C. §§ 135-136y (1990).

cancel the registration of a "misbranded" pesticide, a chemical that cannot adequately be made safe for the public through proper labeling.[73] In addition, the Act grants the Secretary power to suspend such a registration immediately if such action is necessary to prevent an imminent hazard to the public.[74]

As to standing, the court rejected the government's contention "that only registrants and applicants for registration have standing to challenge the [Secretary of Agriculture's] determinations under the Act."[75] Instead, FIFRA afforded a right of review to "any person who will be adversely affected by an order."[76] EDF asserted that the Secretary's failure to restrict the use of DDT in the environment would cause biological harm to humans and to other living things. The court held that "consumers of regulated products and services have standing to protect the public interest in the proper administration of a regulatory system enacted for their benefit."[77] Thus, EDF was able to establish standing based on procedural injury.

In *Friends of the Earth v. United States Navy*,[78] the court found standing based on procedural injury under the Federal Water Pollution Control Act (Clean Water Act)[79] and the National Defense Authorization Act of 1987 (NDAA).[80] Friends of the Earth (FOE) sought to enjoin the Navy from taking any action to establish a homeport in Puget Sound until it had completed an environmental review of the shoreline impacts of the project.[81] FOE's members lived near the harbor and used the shoreline and waters of Puget Sound for environmental, scientific, economic,

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73. 7 U.S.C. § 135f.

74. 7 U.S.C. § 136d(c)(1).

75. 428 F.2d at 1096.

76. 7 U.S.C. § 135b (d).

77. 428 F.2d at 1097.

78. Friends of the Earth v. United States Navy, 841 F.2d 927 (9th Cir. 1988).

79. The Clean Water Act requires the Navy to comply with all state and local requirements concerning the discharge of dredged and fill materials and the control of water pollution. 33 U.S.C. §§ 1323, 1344(t).

80. National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661 (1986) (NDAA for 1987). Section 2207 of the NDAA for 1987 prohibits the Navy from spending funds for construction of a homeport until "all Federal, state, and local permits required for the dredging activities to be carried out with respect to homeporting at Everett, Washington, have been issued."

81. The review of environmental effects in the harbor was conducted pursuant to Washington's Shoreline Management Act. Wash. Rev. Code §§ 90.58.010 - .930. The Navy had already been granted a permit by the Army Corps of Engineers to dredge the harbor. FOE claimed that such dredging would release a large quantity of heavy metals that lay at the bottom of the harbor.

and recreational activities. They alleged that, without adequate environmental review and protection, the construction of the homeport would directly and adversely affect the plaintiff members' interests in the Sound.

In light of the purpose of the Clean Water Act and of the NDAA, the Ninth Circuit determined that FOE had suffered a procedural injury. Like NEPA, both statutes required the consideration of environmental impacts before the commencement of government action.[82] Thus, when the Navy announced that dredging would begin before the completion of environmental review, the plaintiffs were harmed by "the creation of a risk that serious environmental impacts will be overlooked."[83]

Friends of the Earth represented an important development in the law of procedural injury. For the first time since procedural injury was officially recognized in *City of Davis*, procedural harm formed the basis of standing under a substantive environmental statute. Arguably, an assertion of procedural harm brought under the citizen suit provision of a substantive environmental statute like the Clean Water Act should suffice alone to establish standing regardless of the plaintiffs' proximity to the challenged action. Nevertheless, the Ninth Circuit continued to apply the geographic nexus test that had been used in previous cases involving procedural claims under NEPA.

II.
DEFENDERS

A. *The Eighth Circuit's Decision*

In *Defenders of Wildlife v. Lujan*,[84] the Eighth Circuit upheld the plaintiff's standing on the basis of substantive and procedural injuries. Unlike the Ninth Circuit in *Friends of the Earth*, the Eighth Circuit found that procedural injury alone established Defenders' standing and that geographic proximity to the challenged agency action was not required. Plaintiff Defenders sued the Secretary of the Interior, challenging a 1986 rule promulgated by the Secretary interpreting the consultation provision[85] of the Endangered Species Act (ESA).[86] Under the Secretary's

82. *Friends of the Earth*, 841 F.2d at 932.

83. *Id.* (quoting *City of Davis*, 521 F.2d at 671) (citation omitted).

84. Defenders of Wildlife v. Lujan, 911 F.2d 117 (8th Cir. 1990), *rev'd*, Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992).

85. 16 U.S.C. § 1536 (a)(2).

86. Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1988 & Supp. 1993).

original interpretation of the consultation provision in 1978, federal agencies were required to consult with the Secretary regarding the effects on endangered species of agency projects in the United States and in other countries.[87] The 1986 regulation removed the consultation requirement for federal agency actions occurring in foreign countries.[88]

Defenders identified three foreign projects that had not been and would not be subjected to the consultation requirement in the future if the new regulation remained in effect. Amy Skilbred, a member of Defenders, stated that she had observed wildlife in the area of the proposed Mahaweli project in Sri Lanka and that she intended to return in the future to view fauna in the project area. She stated that she would be harmed by the Mahaweli project because of its likely adverse impact on the wildlife. Joyce Kelly, the president of Defenders, claimed that she had visited Egypt and would suffer harm from the Bureau of Reclamation's Aswan High Dam Project. She also expressed the intent to return to the area in the future. Finally, J. Campbell Plowden asserted that he had visited Peru within several hundred miles of the Picchis-Palcazu project, and that he intended to return to Peru to view wildlife.[89] Thus, none of Defenders' members lived in these foreign countries, nor did any have concrete plans to return.[90]

Defenders premised their claim of procedural injury on the assumption that the failure of the Secretary of the Interior to consult with agencies regarding the effects of projects in other countries created a risk that endangered species in those areas (and hence Defenders' interest in observing these species) would be harmed. The Court of Appeals held that Defenders had set forth specific facts adequate to show procedural injury; Defenders established that the benefits flowing from the procedures at issue were an objective of the statute and also identified the agency action that was the source of its injuries, as required by

87. 50 C.F.R. § 402.04 (1978).

88. 50 C.F.R. § 402.01 (1993).

89. Based on the Supreme Court's decision in Lujan v. National Wildlife Federation, 497 U.S. 871 (1990), the Eighth Circuit determined that Plowden's affidavit was insufficient to establish substantive injury since he only came within several hundred miles of the project. 911 F.2d at 121.

90. *Id.* at 120-21.

the Supreme Court's decision in *Lujan v. National Wildlife Federation*.[91]

The Eighth Circuit rejected the Secretary's contention that Defenders had to show a "geographical nexus" to the challenged agency projects. Citing the Ninth Circuit's opinion in *Fernandez v. Brock*,[92] the *Defenders* court noted that subsequent to *City of Davis*, the Ninth Circuit had decided cases that indicated that the geographical nexus test was "not determinative."[93] As a result, the Eighth Circuit followed the procedural injury approach set out by the Ninth Circuit in *Fernandez*, that "[to] determine[e] whether a given statutory duty creates a correlative procedural right, we look to the statutory language, the statutory purpose, and the legislative history."[94] Thus, the Eighth Circuit became the first court to use a correlative rights approach in an environmental case to determine whether a party had suffered procedural harm.

Applying the *Fernandez* test, the Eighth Circuit determined that the ESA created a correlative procedural right in all citizens to challenge violations of the ESA committed by government officials. The citizen suit provision of the ESA provides that "any person" may commence a suit to enjoin any government official

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91. Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990). In *NWF*, the Court stated that plaintiffs must identify a specific agency action that they wish to challenge.

92. Fernandez v. Brock, 840 F.2d 622 (9th Cir. 1988). In *Fernandez*, migrant workers challenged the Secretary of Labor's failure to promulgate regulations that would grant them benefits under the Employee Retirement Income Security Act (ERISA). The court examined ERISA's language, purpose and legislative history to determine whether the Secretary of Labor's duties under the Act created "correlative procedural rights" in the plaintiffs. Without applying the geographical nexus requirement, the court held that the plaintiffs had standing on the ground that the Secretary's failure to promulgate the regulation violated the plaintiffs' procedural rights under ERISA.

93. *Defenders*, 911 F.2d at 121.

94. *Id.* (quoting *Fernandez*, 840 F.2d at 630). The Ninth Circuit also used this approach in two other cases, Dellums v. Smith, 797 F.2d 817 (9th Cir. 1986), and Alvarez v. Longboy, 697 F.2d 1333 (9th Cir. 1983). Using the correlative rights approach in these two cases, the Ninth Circuit found in one that the statute created correlative rights, while in the other, the statute did not create such rights and the plaintiff's procedural injury claim failed. In *Dellums*, the court reversed the district court's finding of standing based on procedural injury, holding that the Ethics in Government Act is not a statute designed to establish a correlative procedural right in members of the public. In *Alvarez*, the court found that the plaintiff had alleged procedural harm under the Farm Labor Contractor Registration Act, where the statutory language, purpose, and legislative history indicated that Congress intended to create procedural rights in farm workers.

alleged to be in violation of the Act.[95] Furthermore, the Act's ambitious purpose supported the construction that Congress intended to bestow procedural rights upon environmental organizations such as Defenders.[96] The legislative history of the ESA also bolstered the conclusion that procedural rights may be enforced.[97]

The Court of Appeals found especially persuasive the Supreme Court's description of the strength of the Act in *Tennessee Valley Authority v. Hill*.[98] In *Hill*, the Supreme Court noted that "[t]he pointed omission of the type of qualifying language previously included in endangered species legislation reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies."[99] Since the ESA created procedural rights, Defenders could sue based on the Secretary's alleged violations of the statute's procedural requirements. The Eighth Circuit held that Defenders had standing on the basis of both substantive injury and procedural injury to challenge the new regulation, and that the regulation was invalid.

Defenders was a case in which government failure to follow procedures created the danger of overlooking an environmental risk. The Eighth Circuit likened the Secretary's failure to consult with the action agencies regarding the effects on endangered species to the NEPA cases of *Trustees for Alaska v. Hodel*[100] and *Oregon Environmental Council v. Kunzman*[101] where failures in the EIS process created enforceable procedural rights. All of these decisions demonstrate the courts' concern that if the government does not follow procedural safeguards mandated by Congress, environmental degradation may be overlooked, in turn causing harm to the plaintiff's interests. Strict adherence to these safeguards becomes more important in cases like *Friends of the Earth* and *Defenders* where a substantive statute is involved.[102] Not only do the procedures ensure that environmental consequences are considered, as with NEPA, but the safeguards

95. 16 U.S.C. § 1540(g).

96. This "ambitious purpose" was emphasized by the Supreme Court in the snail darter case, where the Court stated "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." Tennessee Valley Auth. v. Hill, 437 U.S. 153, 184 (1978).

97. *Defenders*, 911 F.2d at 121.

98. Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978).

99. *Id.* at 185.

100. 806 F.2d 1378 (9th Cir. 1986).

101. 817 F.2d 484 (9th Cir. 1987).

102. *See infra* part III.B.

ensure the achievement of Congress's substantive goals relating to environmental protection.

B. *The Supreme Court's Decision*

1. Overview

On appeal, the Supreme Court reversed the Eighth Circuit.[103] Declining to reach the merits of the case, six justices found that Defenders lacked standing to challenge the Secretary's regulation. Justice Kennedy, in an opinion joined by Justice Souter, joined the majority opinion except for the portion addressing whether Defenders' injury was redressable. Justice Kennedy also wrote separately to emphasize that he did not share the majority's virtually categorical dismissal of some of Defenders' claimed injuries. Justice Stevens, although disagreeing with the majority that Defenders lacked standing, concurred in the judgment, reasoning that Congress did not intend the consultation provision of the ESA to apply overseas. Justice Blackmun, joined by Justice O'Connor, dissented, arguing that Defenders had standing to challenge the regulation.

2. Majority Opinion

In the majority opinion, Justice Scalia noted that to survive the summary judgment motion, Defenders must set forth by affidavit or other evidence specific facts to support their claim. He stated that standing is more difficult for a party to establish in a case like *Defenders*, since third parties (the federal agencies involved in the overseas projects) were the actual objects of the government action or inaction at issue.

In this context, Defenders' affidavits of substantive injury were insufficient. While the desire to observe an animal species is "undeniably a cognizable injury for the purpose of standing," affidavits submitted by Amy Skilbred and Joyce Kelly claiming an intent to revisit project sites in the future did not demonstrate an "imminent" injury.[104] Justice Scalia harshly rejected Defenders' other theories of substantive injury including the "inelegantly styled" "ecosystem nexus" approach. He reasoned that such an approach would be inconsistent with the Court's opinion in *Lu-*

103. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992).
104. *Id.* at 2138.

jan v. National Wildlife Federation[105] since it would not require member use of the challenged area.[106]

In his dissent in *Defenders*, Justice Blackmun (one of the four dissenters in *National Wildlife Federation*) disputed Justice Scalia's assertion that *NWF* had established a general rule that "a plaintiff claiming injury from environmental damage must use the area affected by the challenged activity."[107] Justice Blackmun stated that in *NWF*, the particular harm (visual enjoyment of nature undisrupted by mining activities) required specific geographic proximity because "[o]ne cannot suffer from the sight of a ruined landscape without being close enough to see the sites actually mined."[108] However, many actions may cause environmental injuries geographically remote from the areas immediately affected by the challenged action. As a result, "[i]t cannot be seriously contended that a litigant's failure to use the precise or exact site where animals are slaughtered or where toxic waste is dumped into a river means he or she cannot show injury."[109]

Whatever the original scope of the Court's decision in *NWF* regarding member use, in *Defenders*, Justice Scalia established a member use requirement for plaintiffs alleging substantive injury. Such a requirement will likely be fatal in a case such as *Defenders* where the party challenging the government action neither lives near the challenged area nor is a frequent user of the affected resource.[110]

a. Three Acceptable Forms of Procedural Injury

Justice Scalia also rejected Defenders' procedural injury claim. Scalia disagreed with the Eighth Circuit's reasoning that because § 7(a)(2) of the ESA required interagency consultation, the citizen suit provision of the ESA created a procedural right author-

105. Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990). In *NWF*, the Court, per Justice Scalia, held 5-4 that an environmental organization did not have standing under § 702 of the Administrative Procedure Act to challenge several Bureau of Land Management regulations regarding strip mining. The Court determined that NWF had failed to establish substantive injury because the affidavit provided by an NWF member alleged that he used land "in the vicinity" of the area challenged under the regulations. *Id.* at 885.

106. 112 S. Ct. at 2139.

107. *Id.* at 2154 (Blackmun, J. dissenting).

108. *Id.*

109. *Id.*

110. Basing standing on alleged procedural and informational harms may offer plaintiffs an opportunity to avoid the substantive injury requirement established in *Defenders*.

izing 'anyone' to file suit in federal court to challenge the Secretary's failure to consult with the relevant agency.[111] Justice Scalia first distinguished Defenders' injuries from three types of procedural injury that would, in his view, satisfy standing requirements. First, Defenders was not seeking to enforce a procedural requirement, "the disregard of which could impair a separate concrete interest of theirs."[112] The majority's examples of this type of injury included the requirement of a hearing prior to the denial of a license application and the filing of an environmental impact statement (EIS) before a federal facility is constructed next door to the plaintiff.[113] In comparison, Scalia found the *Defenders* plaintiffs on "the other side of the country" from the alleged harm.[114] Second, *Defenders* was not a case where concrete injury was suffered by many persons, as in a mass tort situation.[115] Finally, it was not the "unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the government's benefit, by providing a cash bounty for the victorious plaintiff."[116]

b. Critique of the Eighth Circuit's Decision

Justice Scalia then critiqued the basis of the Eighth Circuit's procedural injury holding. In his view, the Court of Appeals had held that the injury-in-fact requirement had been satisfied by "congressional conferral upon all persons of an abstract, self-contained, non-instrumental 'right' to have the Executive observe the procedures required by law."[117] Rejecting this notion, Justice Scalia replied:

> 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 Constitu-

111. 112 S. Ct. at 2142 (emphasis in original).

112. *Id.*

113. Although the Supreme Court did not specifically address the geographic nexus requirement, from this example, Justice Scalia would appear to consider such a nexus to be a "separate concrete interest."

114. Defenders' members did not live near the challenged projects in Peru, Sri Lanka, or Egypt, nor could any of these individuals submit concrete proof when, or even if, they might return abroad to view wildlife.

115. 112 S. Ct. at 2143.

116. *Id.* One commentator has suggested that Congress amend the citizen suit provisions in this manner to override any negative effects of the *Defenders* decision. *See* Cass Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, Injuries, and Article III*, 91 MICH. L. REV. 163 (1992).

117. 112 S. Ct. at 2143.

> tion 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.[118]

Justice Scalia focused on what he considered to be the weak facts of Defenders' claimed substantive injury, and therefore viewed Defenders' procedural injury claim as nothing more than a mere interest that the executive branch "take Care that the Laws be carefully executed."[119] In essence, Justice Scalia perceived Defenders' procedural injury as an "abstract, self-contained, non-instrumental right" to have the executive branch follow those procedures mandated by law.[120] To claim standing, Justice Scalia would require that plaintiffs show that a procedural violation would "impair a separate concrete interest of theirs."[121]

Thus, Justice Scalia apparently rejected the Eighth Circuit's "correlative rights" approach to determine procedural harm, whereby the court examined the statutory language, purpose, and legislative history of the ESA to determine whether Congress had created correlative procedural rights that could be enforced by the plaintiffs. Scalia did not ascertain Defenders' procedural rights based on the language, purpose, and legislative history of the ESA as a whole, but instead made a determination based on the text of the ESA citizen suit provision as applied to his interpretation of the facts alleged by Defenders.

Interestingly, Justice Scalia did not mention the Supreme Court's decision in *Primate Protection League v. Tulane Education Fund*, issued one year before *Defenders*.[122] The Court, in a unanimous eight-member decision (Justice Scalia did not participate), quoted a law review article for the proposition that "standing 'should be seen as a question of substantive law, answerable by reference to the statutory and constitutional provision whose protection is invoked.' "[123] In the majority opinion in *Defenders*, however, Justice Scalia did leave the door open for a correlative

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118. *Id.*

119. *Id.* at 2145 (quoting U.S. CONST., art. II, § 3). These weak facts for substantive injury were that none of Defenders' members lived in the same country or area as the projects and that none of these members could state definitively when they would return to the project areas.

120. *Id.* at 2143.

121. *Id.* at 2142.

122. Primate Protection League v. Tulane Educ. Fund, 500 U.S. 72 (1991).

123. *Id.* at 77 (quoting William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988)); *see also* George K. Pash, Note, *NEPA: As Procedure It Stands, As Procedure It Falls: Standing and Substantive Review In* Idaho Conservation League v. Mumma, 29 WILLAMETTE L. REV. 365, 388-89 (1993).

rights type approach in some instances, maintaining that nothing in the *Defenders*' holding "contradicts the principle that '[t]he . . . injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.' "[124] He specifically cited two cases in which Congress had elevated harms that were previously inadequate in law to the status of legally cognizable injuries.[125] However, Defenders' interest in enforcing the consultation provision of the Endangered Species Act was apparently not sufficiently "concrete" to rise to this level.

3. Kennedy Concurrence

In his concurring opinion, Justice Kennedy wrote separately to emphasize that Congress possesses the power to define new rights of action that "do not have clear analogs in our common-law tradition."[126] However, Justice Kennedy determined that Congress did not use this power in the ESA.[127] The citizen suit provision of the Act did not identify the injury Congress sought to vindicate and relate that injury to the class of persons entitled to bring suit. The provision did not pass muster because, while the ESA purported to confer a right on "'any person . . . to enjoin . . . the United States and any other governmental . . . agency . . . alleged to be in violation of this chapter,'" the ESA did not of its own force establish that there is an injury in "any person" by virtue of any "violation."[128]

Since the plaintiffs in *Defenders* did not present compelling facts that their interest in protecting endangered species would

124. *Defenders*, 112 S. Ct. at 2145 (quoting Warth v. Seldin, 422 U.S. 490 (1975)) (citation omitted).

125. Trafficante v. Metropolitan Life Ins., 409 U.S. 205 (1972) (injury to an individual's personal interest in living in a racially integrated community); Hardin v. Kentucky Utilities Co., 390 U.S. 1 (1968) (injury to a company's interest in marketing its product free from competition). Since it appears that Justice Scalia favors more of the individual rights or private law models of standing that predominated between the late 1930s and early 1960s, it is somewhat ironic that Scalia cited the *Hardin* decision. *Hardin* was one of the first instances where the Court moved away from the private law model of standing and recognized that regulatory beneficiaries could suffer from a legal injury in the form of harm to their statutorily protected interests.

126. *Defenders*, 112 S. Ct. at 2146 (Kennedy, J., concurring).

127. *Id.* at 2147; *see also* James M. McElfish Jr., *Drafting Standing Affidavits After* Defenders: *In the Court's Own Words*, 23 ENVTL. L. REP. (Envtl. L. Inst.) 10026, 10028 (January 1993).

128. 112 S. Ct. at 2147 (Kennedy, J., concurring). Interestingly, unlike Justice Scalia's preoccupation with separation of powers concerns, Justice Kennedy appeared to consider the primary function of requiring a concrete injury to "preserve the vitality of the adversarial process." *Id.*

actually be harmed through a failure of the agencies and the Secretary to consult, it was easier for Justice Scalia to view the plaintiff's claim as a mere abstract interest that the executive branch enforce the ESA's procedures. If the plaintiffs lived somewhere near the species or, as Justice Kennedy stated, had "concrete plans" to return and see the animals, the Court certainly would have been presented with a case in which the omission of a procedural duty would have substantive implications.

4. Blackmun's Dissent

In his dissent, Justice Blackmun reasoned that the ESA's consultation provision is "an action-forcing procedure designed to protect some threatened concrete interest" — the interest of those who observe and work with endangered species in protecting those species against extinction.[129] Thus, unlike Justice Scalia, Blackmun examined the consultation provision and interest being protected by the procedure — the value of preserving endangered species and their habitats. Justice Blackmun stated that "some classes of procedural duties are so enmeshed with the prevention of a substantive, concrete harm that an individual plaintiff may be able to demonstrate a sufficient likelihood of injury just through breach of that procedural duty."[130]

Like the appellate courts in *Friends of the Earth* and *Defenders*, Justice Blackmun reasoned that government failure to follow procedural safeguards could lead to substantive environmental harm.[131] In addition, he posited that the courts owe significant deference to Congress's substantive purpose in imposing procedural requirements such as the ESA's consultation provision.[132]

In his dissent, Justice Blackmun characterized Justice Scalia's opinion as "a slash-and-burn expedition through the law of environmental standing."[133] The question remains, however, as to the nature and degree of the impact of *Defenders* on procedural injury as an independent basis of fulfilling the standing requirement. Although Justice Scalia made it fairly clear that he believed that procedural injury will rarely provide an independent

129. *Id.* at 2159 (Blackmun, J., dissenting)
130. *Id.*
131. *Id.* at 2160.
132. One federal district court has endorsed Justice Blackmun's interpretation in a case brought under NEPA. Colorado Envt'l Coalition v. Lujan, 803 F. Supp. 364 (D. Colo. 1992). *See infra* part III A for a detailed discussion of this case.
133. 112 S. Ct. at 2160 (Blackmun, J., dissenting).

basis for satisfying standing requirements, Justice Kennedy's concurrence (joined by Justice Souter) and Justice Blackmun's dissent (joined by Justice O'Connor) leave the door open for procedural injury to provide an independent basis for standing.[134] In addition, *Defenders* did not preclude the establishment of injury-in-fact through an allegation of both procedural and informational harm.

III.
POST-DEFENDERS PROCEDURAL AND INFORMATIONAL INJURY ANALYSIS

Several cases have addressed procedural and informational injury claims in the wake of the Supreme Court's decision in *Defenders*. Four of these cases involved challenges that were brought primarily under NEPA,[135] while others addressed claims under substantive environmental statutes, including EPCRA, ESA, MMPA, CERCLA, RCRA, and the FWPCA.[136]

A. *Procedural and Informational Injury Alleged in NEPA Cases*

In the first post-*Defenders* case, *Colorado Environmental Coalition v. Lujan*,[137] the Colorado Environmental Coalition (CEC) and several other environmental organizations challenged the decision of the Secretary of Interior to remove five wilderness study areas from wilderness recommendation without preparing a supplemental environmental impact statement (SEIS). Plaintiffs had asserted standing on the basis of substantive injury, informational injury, and procedural injury. The district court found that CEC had standing to sue the Secretary under NEPA.

Both the informational and procedural injury claims were based on the failure of the Secretary to prepare an SEIS pursu-

134. Also, Justice Stevens would have granted standing to Defenders on these facts, thus establishing a five justice majority to grant standing on the basis of procedural injury.

135. Region 8 Forest Serv. Timber Purchasers Council v. Alcock, 993 F.2d 800 (11th Cir. 1993), *cert. denied*, 62 U.S.L.W. 3446 (Jan. 11, 1994); Fund for Animals v. Espy, 814 F. Supp. 142 (D.D.C. 1993); Douglas County v. Lujan, 810 F. Supp. 1470 (D. Or. 1992); Colorado Envtl. Coalition v. Lujan, 803 F. Supp. 364 (D. Colo. 1992).

136. *See, e.g.*, Citizens to End Animal Suffering and Exploitation v. New England Aquarium, 836 F. Supp. 45 (D. Mass. 1993); Heart of America Northwest v. Westinghouse Hanford Co., 820 F. Supp. 1265 (E.D. Wash. 1993); Swan View Coalition v. Turner, 824 F. Supp. 923 (D. Mont. 1992).

137. Colorado Envtl. Coalition v. Lujan, 803 F. Supp. 364 (D. Colo. 1992).

ant to NEPA. In support of its informational injury claim, CEC presented several affidavits indicating that the alleged violation of NEPA deprived their organization of information, thereby adversely affecting the function of their organization. The court found that CEC's informational injury fell within the zone of interests sought to be protected by NEPA and that the plaintiffs had standing based on this alleged injury in combination with the other asserted injuries.

The court next rejected the defendant's argument that CEC's procedural injury under NEPA was not cognizable. NEPA requires the preparation of a supplemental environmental impact statement if:

> (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.[138]

First, the court found *Colorado Environmental Coalition* to be a case involving a procedure described by Justice Blackmun in his *Defenders* dissent, in which a procedural duty is "so enmeshed with the prevention of a substantive, concrete harm that a plaintiff may be able to demonstrate a sufficient likelihood of injury just through the breach of that procedural duty."[139] Although NEPA simply prescribes the necessary process and does not mandate particular results, these procedures are almost certain to affect the agency's substantive decision.[140] If the Secretary's recommendations to the President are based on a violation of the procedural safeguards mandated by Congress, the violations will affect the agency's substantive decision.[141] Furthermore, the court stated that "courts owe substantial deference to Congress' substantive purpose in imposing a certain procedural requirement,"[142] such as the SEIS requirement mandated by NEPA.

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138. 40 C.F.R. § 1502.9(c)(1) (1993).

139. 803 F. Supp. at 368 (citing *Defenders*, 112 S. Ct. at 2160 (Blackmun, J., dissenting)).

140. *Id.* at 369 (citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989))

141. 803 F. Supp. at 368.

142. *Id.* (citing *Defenders*, 112 S. Ct. at 2160 (Blackmun, J., dissenting). Later in the opinion, the district court again used language from Justice Blackmun's dissent, this time to address separation of powers concerns:

> Just as Congress does not violate separation of powers by structuring the procedural manner in which the executive branch shall carry out the laws, surely the federal courts do not violate [the] separation of powers when, at the very instruction and command of Congress, they enforce these procedures.

Second, the court emphasized that the SEIS requirement was the type of procedure cited by the majority in *Defenders*, "the disregard of which could impair a separate concrete interest of [plaintiffs]."[143] To support this finding, the district court used one of Justice Scalia's examples of a "separate concrete interest," namely "the procedural requirement for an environmental impact statement before a federal facility is constructed next door [to the plaintiffs]."[144] Here, a CEC member, James Geheres, was a long-standing user of the two areas in dispute. Thus, the court found that "the instant action *is* 'a case where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs.' "[145] As a result, the court determined that CEC had established standing by alleging procedural harm.

Another post-*Defenders* decision, *Douglas County v. Lujan*,[146] also found that plaintiffs had established standing under a theory of procedural injury. Douglas County sought a declaratory judgment that the Fish and Wildlife Service (FWS) had violated NEPA and ESA when it designated a habitat for the northern spotted owl. The county sought an injunction prohibiting the FWS from taking any action to designate a critical habitat until it prepared an environmental impact statement or environmental assessment.

The court held that the government's failure to follow NEPA procedures designed to ensure that it had adequately considered the environmental consequences of the proposed action was sufficient to support standing.[147] Using a *City of Davis* analysis, the court stated that a procedural injury alone suffices for standing if the injury is alleged by a plaintiff "having a sufficient geographical nexus to the site of the challenged project that he may be expected to suffer whatever environmental consequences the project may have."[148] Since Douglas County was situated such that it would incur any environmental consequences of the spotted owl designation, such a nexus existed in the case.

Id. at 370.

143. *Id.* at 368 (quoting *Defenders*, 112 S. Ct. at 2142).

144. *Id.* (quoting *Defenders*, 112 S. Ct. at 2142) (emphasis omitted).

145. *Id.* at 368 (quoting *Defenders*, 112 S. Ct. at 2143 n.8)

146. Douglas County v. Lujan, 810 F. Supp. 1470 (D. Or. 1992).

147. *Id.* at 1476.

148. *Id.* at 1476 (quoting *Friends of the Earth*, 841 F.2d at 932, and *City of Davis*, 521 F.2d at 671).

The *Douglas County* court also invoked the Ninth Circuit's decision in *Oregon Environmental Council v. Kunzman*,[149] rejecting the notion that *NWF* had called *Kunzman* into question. In *Kunzman*, the court noted that "[p]rocedural failures in EIS preparation create a risk that environmental impacts will be overlooked and provide sufficient 'injury-in-fact' to support standing."[150] The *Douglas County* court found that *NWF*'s requirement that the plaintiff demonstrate that he or she has been "actually affected" within the meaning of the relevant statute "is really nothing more than a restatement of the 'geographical nexus' test . . . ."[151] To bolster its reasoning, the court cited Justice Scalia's proposition that "one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an [EIS], even though the dam will not be completed for many years."[152]

In the third district court case, *The Fund for Animals, Inc. v. Espy*,[153] a nonprofit organization dedicated to the prevention of cruelty to animals sought a preliminary injunction under NEPA to prevent a Department of Agriculture research study involving the capture of wild bison from outside the boundary of Yellowstone National Park.[154] The Fund asserted a procedural injury on the basis of the agency's failure to prepare an EIS or an EA or to determine whether the project was exempt from either requirement. The court ruled that the Fund had satisfied the procedural injury requirements set out in *Defenders*.

Initially, the court discussed plaintiffs' contention that *Defenders* was distinguishable because "the entire fabric of NEPA is fundamentally procedural, and the Act would be rendered impotent in the absence of plaintiffs' standing premised on 'mere' procedural injury."[155] Although the court found "some appeal" to this argument, it stressed that the Court's holding in *Defenders*

149. Oregon Envtl. Council v. Kunzman, 817 F.2d 484 (9th Cir. 1987).

150. *Douglas County*, 810 F. Supp. at 1476-77 (quoting *Kunzman*, 817 F.2d at 491).

151. 810 F. Supp. at 1477.

152. *Id.* (quoting *Defenders*, 112 S. Ct. at 2142 n.7).

153. 814 F. Supp. 142 (D.D.C. 1993).

154. The objective of the research program was to mitigate or eliminate the potential spread of the disease brucellosis to domestic cattle. The project involved capturing 10 to 60 pregnant wild bison from just outside the boundary of their habitat, Yellowstone National Park, transporting them by truck 2000 miles to Texas, artificially infecting the bison with the microorganism brucella, corralling them in Texas with cattle, and after a few months of study, slaughtering the bison. *Id.* at 145.

155. *Id.* at 149.

was based on the requirements of the Constitution; therefore "the particular statute alone cannot cure such a defect."[156]

The court then determined that the plaintiffs met the strict standing requirements of *Defenders*. The Fund established standing by submitting undisputed evidence that defendant's approval and imminent implementation of the program threatened the combination of: (1) plaintiffs' procedural right to the notice and reasoned process required of defendant by NEPA; and (2) the concrete, aesthetic viewing interest of the two Fund members and of the individual plaintiffs in the Yellowstone bison, particularly those bison that had been attracted from the wild and threatened with an inhumane process of destruction by the program.[157]

In *Region 8 Forest Service Timber Purchasers Council v. Alcock*,[158] the Eleventh Circuit rejected plaintiffs' standing on the basis of allegations of procedural harm due to violations of NEPA, ESA, and National Forest Management Act. The court held that timber companies and their trade association lacked standing to sue the Forest Service for a policy preserving the red cockaded woodpecker, an endangered species.

The Secretaries of the Interior, the Forest Service, and the Fish and Wildlife Service had engaged in consultation pursuant to § 7(a)(2) of the ESA,[159] to ensure that agency actions were not likely to jeopardize the woodpecker's survival. As a result, the Forest Service submitted a plan to ensure the continued existence of the woodpecker. However, when the plan failed to halt the decline in woodpecker population, the Forest Service announced a new policy for any timber contracts issued in the woodpecker's habitat. This policy strictly limited the permissible methods for harvesting within 3/4 mile of a woodpecker colony. The timber companies whose contracts were affected by the policy filed suit, claiming that the government had violated NEPA, ESA, and

156. *Id.* This statement by the *Espy* court is inconsistent with *Defenders*. Although it is true that the holding in *Defenders* was based on Article III of the Constitution, neither Justice Scalia nor Justice Kennedy questioned the principle that injury-in-fact may exist solely by virtue of a violation of a statute creating legal rights. *Defenders*, 112 S. Ct. at 2145; *Id.* at 2146-47 (Kennedy, J., concurring).

157. Several Fund members had previously seen bison killed near Yellowstone and intended to view the free-roaming bison in that area in the future. 814 F. Supp. at 149.

158. Region 8 Forest Serv. Timber Purchasers Council v. Alcock, 993 F.2d 800 (11th Cir. 1993), *cert. denied*, 62 U.S.L.W. 3446 (Jan. 11, 1994).

159. 16 U.S.C. § 1536(a)(2). The same statutory provision was at issue in *Defenders*.

NFMA. The Eleventh Circuit rejected the timber companies' assertions of economic, environmental, and procedural injuries.

After finding that the timber companies did not have cognizable economic or environmental injuries, the court discussed the alleged procedural injury, which was, in essence, a claim of informational harm. The Council claimed that the failure of the Forest Service to comply with the procedures mandated by NEPA, ESA, and NFMA in adopting the woodpecker policy injured their rights to information, participation, and informed decision making. The Eleventh Circuit held that, as in *Defenders*, the procedural harm alleged was "nothing more than [a] generalized grievance which fail[s] to satisfy the injury-in-fact requirement for standing."[160] *Alcock* was "not a case where the failure to follow a mandated procedure caused a distinct injury different from that suffered by the public generally."[161] The asserted rights to information, participation, and informed decision making "were not peculiar to the . . . timber companies, but are rather shared by all citizens."[162] This characteristic made the case distinguishable from *Foundation on Economic Trends v. Lyng*,[163] which noted that the right to information might support standing where the purpose of the organization was to provide information to the public.[164]

Viewed as a whole, the four post-*Defenders* cases brought under NEPA indicate that *Defenders* did not close the door on the use of procedural and informational injury claims to establish standing. In three of the four cases, the courts determined that the plaintiffs had alleged sufficiently procedural injury to establish standing. The courts in these decisions all distinguished *Defenders* on its facts while the *Colorado Environmental Coalition* court principally cited Justice Blackmun's dissent in its reasoning. The *CEC* case may prove to be an important step in recognizing that a government failure to follow procedures with substantive implications may form a basis for standing. In addition, the *Alcock* court intimated that an environmental group whose purpose was the dissemination of information to the public might well have been granted standing.[165] Thus, these cases indicate an

160. 993 F.2d at 810.
161. *Id.* n.16.
162. *Id.* at 810.
163. 943 F.2d 79 (D.C. Cir. 1991).
164. *Alcock*, 993 F.2d at 810 n.16.
165. *Id.*

evolving trend toward finding standing in NEPA cases on the basis of procedural and informational injury.

B. *Procedural and Informational Injury Under Substantive Environmental Statutes*

1. Informational Injury Under EPCRA

In enacting the Emergency Planning and Community Right-to-Know Act (EPCRA),[166] Congress sought to provide the public with information on hazardous chemicals existing within their communities and establish reporting, notification, and planning requirements to aid state and local governments in preparing for and dealing with an emergency caused by the release of a hazardous chemical.[167] EPCRA contains a citizen suit provision[168] authorizing citizens to bring civil actions against owners or operators of a facility who fail to: (1) submit an emergency notice under § 304;[169] (2) submit material safety data sheets under § 311;[170] (3) complete and submit an inventory form under § 312;[171] or (4) complete and submit a toxic chemical release form under § 313.[172] Citizens may also bring actions against the EPA, state governors, or State Emergency Response Commissions for failing to provide a mechanism for public access to EPCRA information.[173] Thus, the citizen suit provision authorizing

166. 42 U.S.C. § 11001-11050 (1988).

167. H.R. CONF. REP. No. 962, 99th Cong., 2d Sess. 281 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3374.

168. 42 U.S.C. § 11046 (1988).

169. 42 U.S.C. § 11004 (1988).

170. 42 U.S.C. § 11021 (1988).

171. 42 U.S.C. § 11022 (1988).

172. 42 U.S.C. § 11023 (1988). In addition to EPCRA, several other major environmental statutes containing citizen suit provisions impose release reporting obligations. *See, e.g.,* CERCLA, 42 U.S.C. § 9603(a) (requiring that a facility with knowledge of a release of a reportable quantity of a hazardous substance report the release immediately to the National Response Center); Clean Water Act Regulations, 40 C.F.R. pts. 100-140, 400-471 (requiring any person in charge of a vessel or an on-shore or off-shore facility to notify immediately the appropriate government agency of unpermitted spills or releases of oil or a designated hazardous substance in excess of a reportable quantity into navigable waters of the United States); Resource Conservation and Recovery Act Regulations, 40 C.F.R. pts. 240-271 (requiring that all leaks from hazardous waste storage tanks above a *de minimis* level must be reported immediately to federal and state regulatory authorities); Safe Drinking Water Act Regulations, 40 C.F.R. pts. 144-47 (requiring underground well operators to inform the state within 24 hours if the well is not in compliance with its permits under the Underground Injection Control Program).

173. 42 U.S.C. § 11046(a)(1)(C).

suits for specific information-based violations of the Act provides fertile ground for the successful assertion of informational injury.

In a post-*Defenders* decision on informational injury under EPCRA, *Delaware Valley Toxics Coalition v. Kurz-Hastings*,[174] the court held that two environmental organizations had standing to challenge a company for filing late and inaccurate toxic chemical release forms (Form R's) under EPCRA § 313. Plaintiffs asserted that they had standing on the ground that they were required to expend time and money to uncover defendant's violation, which had a restrictive effect on plaintiffs' efforts to disseminate information regarding their programs. Plaintiffs further alleged that their members lived, worked, and traveled past or near defendant's manufacturing plant where the alleged violation occurred.

In granting plaintiffs standing, the court reasoned that the purpose behind EPCRA is defeated when parties subject to its requirements fail to file accurate information in a timely manner, because such failure may inhibit "the conduct of research and data gathering or the ability to aid in the development of appropriate regulations, guidelines, and standards."[175] The court distinguished *Foundation on Economic Trends v. Lyng*[176] on the ground that the court in *Lyng* decided that case on judicial review grounds under the APA. In addition, with respect to Form R's that contain inaccurate information, the court noted with caution that "a ruling that 'knowing' failures to file accurate information with the EPA are not subject to rectification by citizen suits would defeat the purposes of citizen suits."[177]

Relying on *Delaware Valley Toxics Coalition*, the court in *Atlantic States Legal Foundation v. Buffalo Envelope*[178] granted informational standing under EPCRA. Plaintiff Atlantic States Legal Foundation (ASLF) contended that defendant's failure to file the required information under EPCRA caused informational injuries to the organization, including the local government's inability to develop comprehensive disaster plans to address potential releases of toxic chemicals and the environmental researchers' inability to compile accurate inventories of

174. 813 F. Supp. 1132 (E.D. Pa. 1993).
175. *Id.* at 1139-40.
176. 943 F.2d 79 (D.C. Cir. 1991).
177. *Delaware Valley Toxics Coaltion*, 813 F. Supp. at 1142.
178. 823 F. Supp. 1065 (W.D.N.Y. 1993). The same court also granted standing based on informational injury under EPCRA in a companion case, Atlantic States Legal Found. v. P.M. Refining Inc., No. 91-CV-436S (W.D.N.Y. Mar. 31, 1993).

toxic chemical users. The court cited the same statutory language as the court in *Delaware Valley Toxics Coalition*[179] in finding that ASLF had properly alleged informational injury. Relying on § 313(h), the court reasoned that the failure to file information under EPCRA regarding the release of toxic chemicals into the environment is "precisely the type of injury that EPCRA is supposed to redress" in that such a failure to report may inhibit the conduct of research and data gathering or the ability to aid in the development of appropriate regulations, guidelines or standards.[180]

Unlike NEPA, EPCRA contains a citizen suit provision to enforce its information-based mandates on governmental and private entities. In addition, courts have granted standing for information-based claims under EPRCA's citizen suit provision, even when such claims are asserted independently of procedural and substantive injury claims. Thus, informational injury claims have proven much more successful under EPRCA than under NEPA.

2. Procedural and Informational Injury Under the Endangered Species Act

The Endangered Species Act of 1973[181] (ESA) offers a hybrid of statutorily authorized informational injury as contained in EPCRA (due to its informational focus and citizen suit provision) and NEPA-based procedural injury (through the procedures that agencies must undertake to ensure against jeopardizing endangered or threatened species). The Act is one of the most important and powerful environmental laws in the United States.[182] It requires all federal agencies to use their full authority to conserve both endangered and threatened species.[183] Sections 4[184]

179. *See supra* notes 176-179 and accompanying text.

180. 823 F. Supp. at 1071 (citing *Delaware Valley Toxics Coalition*, 813 F. Supp. at 1139); *see also* Sierra Club v. Simkins Indus., Inc., 847 F.2d 1109 (4th Cir. 1988), *cert. denied*, 491 U.S. 904 (1989) (granting standing under Clean Water Act to environmental organization for company's failure to file reports concerning harmful effluents).

181. Endangered Species Act of 1973, 16 U.S.C. § 1531-1544 (1988 & Supp. 1993).

182. *See* Tennessee Valley Auth. v. Hill, 437 U.S. 153, 180 (1977) (describing the ESA as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation").

183. 16 U.S.C. § 1531-1544.

184. *Id.* § 1533.

and 7[185] are the principal action-forcing mechanisms to attain this goal.

ESA section 4 governs the listing process through which endangered and threatened species are identified. After the Secretary of the Interior initiates or receives a petition from a party, and after an extensive series of procedural steps intended to ensure public notice and participation and the collection of information,[186] the Secretary must decide whether to list a species. If the species is listed, the Secretary must designate critical habitat at the time of listing.[187]

Section 7(a)(2) provides: "Each federal agency shall, in consultation with and with the assistance of the Secretary, ensure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species."[188] After consulting with an agency, the Secretary must provide the agency with a written statement outlining the Secretary's opinion as to how the agency's action would affect the species.[189] If the Secretary finds that the agency action is "likely to jeopardize the continued existence of the species,"[190] the Secretary must suggest reasonable and prudent alternatives that he believes the agency can take without violating Section 7(a)(2).

Courts have held that the consultation process is not optional.[191] Consultation does not guarantee a substantive outcome but is designed to ensure compliance with substantive provisions of the Act.[192] The end result of consultation under

185. *Id.* § 1536.

186. *Id.* § 1533(b)(5) - 1533(b)(8) (1988 & Supp. 1993).

187. *Id.* § 1533(b)(2).

188. *Id.* § 1536(a)(2) (1988 & Supp. 1993).

189. *Id.* § 1536(b)(3)(a). When the consultation process is finished, the Fish and Wildlife Service must provide the federal agency with its opinion. *See* 50 C.F.R. § 402.14(g)(1993).

190. "Jeopardize the continued existence of" means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of the species. 50 C.F.R. § 402.02 (1993).

191. *See, e.g.*, Sierra Club v. Froehlke, 534 F.2d 1289, 1303-04 (8th Cir. 1976); National Wildlife Fed'n v. Coleman, 529 F.2d 359, 371 (5th Cir.), *cert. denied*, 429 U.S. 979 (1976) (cited in *Defenders Amicus Brief*, *supra* note 52, at 7-8).

192. When assessing an agency's compliance with the ESA, courts give substantial weight to "biological opinions" produced by the Secretary during the consultation process. *See* Reply Memorandum for Sierra Club in Support of Partial Summary Judgment and Opposition to Federal Defendants' and Defendant-Intervenor's Motions for Summary Judgment at 14, Swan View Coalition v. Turner, 824 F. Supp. 923 (No. CV89-121-H-CCL) (hereinafter *Sierra Club Reply Memorandum*).

section 7 is the issuance of a biological opinion by FWS,[193] analogous to the preparation of an EIS under NEPA.[194] Plaintiffs can gain standing under the ESA to require that the consultation process be carried out, irrespective of the substantive results of such consultation; requiring that consultation lead to a specific substantive outcome in order to establish standing would lead to absurd results.[195]

Courts have likened ESA's procedural and informational mandates to those required under NEPA.[196] In fact, the need for compliance with the ESA's procedures is even greater than the need for compliance with NEPA. For instance, in *Thomas v. Peterson*,[197] the Ninth Circuit noted:

> [T]he strict substantive provisions of the ESA justify more stringent enforcement of its procedural requirements, because the procedural requirements are designed to ensure compliance with the substantive provisions. The ESA's procedural requirements call for a systematic determination of the effects of a federal project on endangered species. If a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result.[198]

In a post-*Defenders* case brought under the ESA, *Swan View Coalition, Inc. v. Turner*,[199] a district court used a *City of Davis* analysis to determine whether plaintiffs had proved procedural injury. A coalition of environmental organizations sued the director and other officials of the Fish and Wildlife Service for an alleged violation of the Endangered Species Act. The plaintiffs based their procedural injury on the failure of FWS to prepare an adequate, comprehensive biological opinion concerning the im-

193. Swan View Coalition, Inc. v. Turner, 824 F. Supp. 923, 928 (D. Mont. 1992).

194. Biological opinions and EIS's both involve potential injury to plaintiffs arising out of the increased risk that environmental harm will result from defendants' failure to comply with statutory requirements to analyze expected environmental impacts of a proposed action and to develop alternatives to minimize such impacts. *See Sierra Club Reply Memorandum, supra* note 192, at 7.

195. *See, e.g.*, EPCRA, 42 U.S.C. § 11003, 11022 ("It would be, for example, difficult to prove the substantive results of an emergency evacuation plan or an inventory of toxic chemicals."), cited in *Defenders Amicus Brief, supra* note 52, at 11.

196. *See, e.g.*, Connor v. Burford, 605 F. Supp. 107, 109 (D. Mont. 1985), *aff'd*, 848 F.2d 1441 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989), cited in *Sierra Club Reply Memorandum, supra* note 192, at 13; Swan View Coalition, Inc. v. Turner, 824 F. Supp. 923 (D. Mont. 1992).

197. Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985).

198. *Id.* at 764.

199. Swan View Coalition, Inc. v. Turner, 824 F. Supp. 923 (D. Mont. 1992).

pacts on endangered and threatened species of the Forest Service's adoption of the Flathead National Forest Plan.[200]

The court held that FWS's alleged failure to provide an adequate biological opinion resulted in procedural and substantive injuries to the environmental organizations whose members regularly enjoyed observation of listed species within affected forest areas.[201] The court stated that the Ninth Circuit has long recognized procedural injury as an independent basis for proving injury-in-fact. However, since the Supreme Court had ruled in *Defenders* that the citizen suit provision of the ESA does not create an abstract right to have the government follow procedures, the plaintiff "must himself [be] among the injured."[202] The *Swan View Coalition* court reasoned that the requirement that members personally incur an injury is akin to the *City of Davis* geographical nexus standard.

The court determined that the affidavits submitted by the plaintiffs established that they would in fact suffer procedural and substantive harm. The affidavits set out in specific detail the members' recreational, aesthetic, and other uses (including the observation of endangered species) in the affected areas of Flathead National Forest. Thus, the plaintiffs proved "under both the procedural and substantive injury theories that their members have a concrete personal interest in the protection of threatened or endangered species in the Flathead National Forest and that their members would be . . . adversely affected by any failure to protect those species."[203]

The *Swan View Coalition* case illustrates the confusion that may result if a court analyzes substantive injury first and then separately examines procedural injury according to a geographical nexus test. The court itself noted that substantive and procedural injury are "inherently connected" in this case. As a result

200. Several endangered species, including the grizzly bear, grey wolf, and peregrine falcon live in Flathead National Forest.

201. Although not a component of the court's holding, plaintiffs also alleged informational injury, contending that FWS's failure to prepare a biological opinion that fully comports with the requirements of ESA § 7 deprived plaintiffs of a critical source of information. The challenged biological opinion would include a detailed discussion of the effect of the forest plan on the threatened and endangered species that inhabit the Flathead National Forest, information that is central to plaintiffs' organizational activities and necessary to fulfill their organizational purposes. *Sierra Club Reply Memorandum*, *supra* note 192, at 8-9.

202. *Swan View Coalition*, 824 F. Supp. at 929 (quoting *Defenders*, 112 S. Ct. at 2137).

203. *Id.* at 930.

of this approach, a court examines the same factors in the plaintiff's affidavits (foremost, proximity of the plaintiff to the challenged action) to determine the viability of both substantive and procedural injuries.

This approach reveals a negative implication of the *Defenders* decision, where the Court, by holding that a procedural injury will not suffice to establish standing unless a "separate concrete interest" is implicated, has effectively merged the inquiries regarding substantive and procedural injury. Justice Blackmun noted that in some cases, the "separate concrete interest" is so intertwined with the procedural safeguard, that a mere violation of that procedure should invoke a procedural harm sufficient to sustain injury-in-fact. This aspect of the majority's approach was likely Justice Blackmun's cause of concern when he stated "I have the greatest of sympathy for the courts across the country that will struggle to understand the Court's standardless exposition of [the procedural injury] concept today." 112 S. Ct. at 2158 (Blackmun, J., dissenting). Under the analysis arising out of the majority's opinion in *Defenders*, even if an agency's failure to comply with the procedural requirements could result in a violation of the substance of the ESA, the interest in enforcing these requirements would not become "concrete" unless the plaintiff was somehow geographically situated near the affected land.

In language that may pave the way for enhanced use of procedural injury as a weapon against agency statutory violations, the *Swan View Coalition* court noted in support of its standing holding:

> Unquestionably, the formal consultation procedures at issue in this case are designed to protect the Plaintiffs' concrete interest in the preservation of listed species in the Flathead National Forest. Therefore, a failure by FWS to comply with these procedural requirements and provide an adequate biological opinion at the forest plan stage could result in an impermissible violation of ESA's substantive requirements. To hold otherwise would be to assume 'that Congress imposed useless procedural safeguards,' and that because the Forest Plan authorizes no site-specific activities, the biological opinion concerning the plan 'is a superfluous step.'[204]

The court recognized the viability of plaintiffs' standing under the ESA's citizen suit provision to seek redress for alleged procedural violations that are inextricably connected to the substantive mandates of the ESA, such as the failure to conduct consultation

204. *Id.* at 931 (citation omitted).

under § 7. Like Justice Blackmun in *Defenders*, the court viewed the ESA consultation provision as "a procedural dut[y] so enmeshed with the prevention of a substantive concrete harm that an individual plaintiff may be able to demonstrate a sufficient likelihood of injury just through the breach of that procedural duty."[205] However, the court also felt bound to engage in an analysis of the plaintiff's "separate concrete interest" to determine whether they had successfully alleged procedural harm.

3. Possible Broader Applications: Procedural Injury Under CERCLA, RCRA, CWA, and MMPA.

In *Heart of America Northwest v. Westinghouse Hanford Co.*,[206] the court held that the plaintiff citizens' group (HOAN) had standing under the citizen suit provisions of the Clean Water Act, Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[207] HOAN alleged substantive and procedural injuries arising from the release of contaminated water into the Columbia River. Its members charged Westinghouse and the Department of Energy with failure to report releases of hazardous substances into the river as required by RCRA and CERCLA. Violation of the members' right to use the area of the river near the Westinghouse nuclear facility without being exposed to harmful pollutants allegedly released without proper notice formed the crux of the plaintiffs' substantive injury claim.[208] HOAN's members also alleged procedural injury to their right to receive timely notice of any release from the facility so that they could take necessary precautionary steps.[209]

Rejecting the government's assertion that HOAN's claims of substantive injury were merely generalized grievances, the court found that the plaintiffs alleged "numerous instances of specific injury in fact."[210] Two of HOAN's members detailed in affidavits their routine use of the affected area, as well as how the alleged releases immediately threatened their use of the area. The court

205. *Defenders*, 112 S. Ct. at 2159 (Blackmun, J., dissenting).

206. Heart of Am. Northwest v. Westinghouse Hanford Co., 820 F. Supp. 1265 (E.D. Wash. 1993).

207. Although the plaintiffs established standing under these statutes, the court dismissed the case, finding the claims barred as challenges to activities within a cleanup plan governed by CERCLA. *Id.* at 1283.

208. *Id.* at 1270.

209. *Id.* at 1271.

210. *Id.* at 1270.

found these affidavits consistent with *Defenders*, according to which, a "member's alleged injury-in-fact must be supported by concrete plans to revisit the area where they would suffer impact of the proposed action."[211]

Regarding HOAN's claim of procedural harm, the right to be notified of certain releases under § 111(g) of CERCLA,[212] the court was not persuaded that *Defenders* precluded standing in this case. The court reasoned that, in *Defenders*, the Supreme Court found that the plaintiff had not successfully alleged substantive injury to any of its members and, having so found, held that Defenders' alleged procedural violation was not enough, in and of itself, to confer standing.[213] However, in the case before it, HOAN's members alleged specific individual injury to legally protected interests, making the case distinguishable from *Defenders*, and placing the case "squarely in line" with cases cited by the *Defenders* court where plaintiffs had standing to sue to enforce procedural violations designed to protect some threatened concrete interest of the plaintiffs.[214]

As in *Swan View Coalition*, the court in *HOAN* read *Defenders* as effectively merging the determinations of substantive and procedural harm. It reasoned that since the plaintiffs, through member affidavits, had alleged substantive injury, only then did it follow that they could sue on a procedural violation of CERCLA.

Requiring plaintiffs to demonstrate substantive injury in order to create an enforceable procedural right, however, undermines both the utility of using procedural injury to establish standing and the substantive purpose of substantive environmental statutes if a plaintiff cannot show use of the area in question. The citizen suit provision of CERCLA, much like that of the Endangered Species Act, allows any person to sue for an alleged violation of any requirement under the statute.[215] Since CERCLA is a substantive environmental statute, the violation of its procedural safeguards such as the notice requirement may result in direct harm to individuals from hazardous chemicals and should be enforceable regardless of whether the plaintiffs have other con-

211. *Id.* at 1271 (citing *Defenders*, 112 S.Ct. at 2137-38).
212. 42 U.S.C. § 9611(g).
213. 820 F. Supp. at 1272.
214. *Id.* at 1273.
215. 42 U.S.C. § 9659(a)(1).

crete interests such as member use that may demonstrate substantive injury.

In *Citizens to End Animal Suffering and Exploitation v. New England Aquarium*,[216] several organizations dedicated to preventing cruelty to animals (hereinafter CEASE) sued an aquarium and the Navy under the Marine Mammal Protection Act (MMPA).[217] CEASE challenged the transfer of the dolphin "Kama" from New England Aquarium to the Navy for military use. The court granted the defendant's summary judgment motion, holding that the plaintiffs had failed to establish standing on the basis of alleged substantive, procedural, and informational harms.

Since the MMPA does not contain a citizen suit provision, CEASE filed suit under § 702 of the Administrative Procedure Act (APA).[218] The plaintiffs claimed that the transfer of the dolphin was executed in violation of the "taking" provision of the MMPA, which prohibits the transfer of a marine mammal without a permit issued by the Department of Commerce (DOC).[219] The permit process requires the publication of permit applications, with opportunity for public comment, and a hearing if requested by any "interested party." In this case, the dolphin Kama was not transferred by permit, but by a letter of agreement issued by the DOC to the Navy and the Aquarium.[220]

CEASE alleged substantive injuries to their aesthetic and conservational interests both from being unable to see Kama in the Aquarium and from the resulting reduction in the number of wild dolphins available for observation and study.[221] While acknowledging that such interest could support standing, the district court rejected the plaintiff's claims. The court found that Kama was not regularly on display at the Aquarium, CEASE's members produced no evidence that they had ever seen Kama, and that three years had elapsed before CEASE noticed Kama's absence from the Aquarium. Furthermore, the plaintiffs offered

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216. Citizens to End Animal Suffering and Exploitation v. New England Aquarium, 836 F. Supp. 45 (D. Mass. 1993).

217. 16 U.S.C. § 1361 (1978).

218. 5 U.S.C. § 702. This section provides: A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute, is entitled to judicial review thereof.

219. 16 U.S.C. § 1374(a).

220. 836 F. Supp. at 47.

221. *Id.*

no evidence that any depletion of wild dolphins had occurred or was likely to occur in any particular place.[222]

CEASE claimed procedural injury based on the transfer pursuant to the letter of agreement, which deprived the organization of public notice, opportunity to comment, and a public hearing on Kama's fate. Citing *Defenders*, the court ruled that there was no distinct or palpable injury to the plaintiffs as a result of their inability to participate in the permit process.[223] Since the plaintiffs could not show "any injury apart from that suffered by the public at large," CEASE could not establish standing on the basis of procedural injury.[224] Even though the organization's interest in the dolphin's transfer was different from that of the general public, the court held that the inability of the plaintiffs to show that a disregard of the "procedural requirement could impair a separate concrete interest of theirs" was fatal to CEASE's procedural injury claim.[225]

Apart from standing to sue on behalf of its members, CEASE argued that it had standing for injury to the organization itself. To support this contention, the plaintiffs alleged procedural and informational harm. Specifically, CEASE cited DOC's practice of refusing to require permits in order to transfer dolphins. In addition, plaintiffs asserted that modifying permits without public notice rendered the organization unable to participate in public affairs concerning activities affecting the marine mammal population or to disseminate information about such activities to their members.

In response to this argument, the court underscored the interaction between procedural and informational injuries:

> The plaintiffs' memoranda interweave their arguments concerning procedural and informational harm. This interweaving is easily understandable because the strongest argument which can be made concerning informational harm is that the improper failure of the government to disseminate information injures the ability of organizations and their members to participate in the political process to promote public policies they prefer. Adequate information about government activity is important to the exercise of fundamental political rights, including the rights to vote, to speak and write in an effort to influence the votes of others, and to lobby

222. *Id.* at 51-52.
223. *Id.* at 56.
224. *Id.*
225. *Id.*

> Congress and the President. In this sense, informational rights are instrumental to the exercise of procedural rights; the two rights are integrally related.[226]

While the court adeptly stated in theory the interrelation between procedural and informational harms, it nonetheless failed to address whether the plaintiffs had established standing through a combination of procedural and informational harms. Instead, the court reasoned that since the Supreme Court had held in *Defenders* that procedural harm alone on the facts of the case could not establish standing, then "it necessarily follows that informational harm alone is insufficient to establish standing."[227]

The *New England Aquarium* case is an important one in environmental standing law because of the court's recognition of the integral relationship between procedural and informational injuries. In environmental law disputes, procedural injury normally occurs when the government fails to follow the required process to safeguard an individual's or group's concrete interest in environmental protection, while informational injury arises when the government's failure deprives citizens of the power to protect these interests themselves. Thus, the main difference between the two harms exists in who is prevented from protecting the rights of the public: in procedural injury, the government; in informational injury, the public itself.

It follows that if a governmental failure to follow procedures mandated by Congress results both in procedural and informational harm, neither the government nor the public itself can protect its own interest and therefore the plaintiff must have standing in order to protect this interest in a court of law.[228] It becomes even more important to ensure that proper procedures are taken to guard against environmental degradation where Congress has provided substantive mandates in environmental statutes. While the *New England Aquarium* court missed an opportunity to recognize standing on the basis of a combination of procedural and informational injury, a better test case would in-

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226. *Id.*

227. *Id.*

228. This conclusion is not at odds with the Court's statement in Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974) that "[t]he assumption that if respondents have no standing to sue, no one would have standing to sue, is not a reason to find standing." Unlike the *Schlesinger* plaintiffs who sought redress of a generalized injury, citizen suit plaintiffs seek to protect an interest specifically created by Congress.

volve a combined assertion of these injuries brought under a citizen suit provision of a substantive environmental statute.

The courts in *Swan View Coalition* and *Westinghouse* interpreted *Defenders* as requiring a linkage between a statutory procedural interest and member use of the area in question. In addition to resulting in further confusion of procedural and substantive injuries, using this type of analysis presents a more significant danger — that of undercutting the substantive purpose in enacting environmental laws. For example, projects in which local populations are unconcerned with the potential environmental effects of projects with widely shared impacts could be unreviewable for lack of a willing plaintiff to allege harm with enough particularity and certainty to obtain standing.[229] Similarly, this problem is illustrated by a challenge by an organization to oil drilling in certain parts of Alaska that, although virtually inaccessible to humans, offers a safe harbor to endangered species.[230] Thus, the lack of member use of areas threatened with environmental harm should not serve as a justification to thwart Congress's environmental protection goals embodied in the substantive environmental statutes containing citizen suit provisions.

In the EPCRA context, courts have prevented this from happening by granting standing if informational injury is successfully alleged. In cases such as *Delaware Valley Toxics Coalition* and *Buffalo Envelope*, the procedural requirements are the type of process "so enmeshed with prevention of a substantive, concrete harm," mentioned by Justice Blackmun in his *Defenders* dissent, that a plaintiff can demonstrate a sufficient likelihood of injury just through the breach of that procedural duty. While courts in the wake of *Defenders* have been hesitant to recognize standing based on procedural harm alone, *New England Aquarium* provides some insight on how injury-in-fact may be established through a combination of procedural and informational harms. Since *Defenders* undermined the ability of plaintiffs to use procedural injury as an independent basis of establishing injury-in-fact, combining assertions of procedural and informational harms offers a vehicle to avoid the potentially restrictive effect of the *Defenders* holding and ensure the attainment of the substantive goals of Congress.

229. *See* Gerschwer, *supra* note 21, at 999.

230. *See* Wolok, *supra* note 67, at 191.

IV.
CONCLUSION

Procedural and informational injury claims are viable theories pursuant to which individuals and organizations may enhance their access to the courts to seek redress of certain classes of environmental harm. Although both theories are viable when asserted independently of one another, post-*Defenders* decisions indicate that the prospect of successfully asserting standing increases greatly when informational and procedural claims are alleged together or, at a minimum, when such claims are brought under a substantive environmental statute containing a citizen suit provision.

When asserted independently of procedural injury, the viability of informational injury claims under NEPA remains uncertain, although the *Colorado Environmental Coalition* case offers some hope for the beginning of a trend away from the restrictive effect of *Lyng*. Yet, apart from the restrictive effect of *Lyng* and its progeny, informational injury asserted under NEPA is also subject to the limitations inherent in NEPA as a procedural statute that lacks substantive mandates enforceable through a citizen suit provision.

By contrast, the future of informational standing claims asserted under EPCRA looks promising. Unlike NEPA, EPCRA imposes information-based mandates on governmental and private entities, the violation of which is enforceable through the Act's citizen suit provision. In addition, courts have held that informational injury claims under EPCRA are viable when asserted independently of other procedural and substantive injury claims.

Procedural injury claims asserted after *Defenders* have been largely successful. Although still subject to the difficult and inconsistently applied geographical nexus requirement, procedural injury claims are a more viable mechanism than informational injury claims to gain standing under NEPA. Nevertheless, because of the Supreme Court's confusion in *Defenders* with respect to substantive and procedural injury, procedural injury claims should be brought in conjunction with substantive and informational injury claims where possible. *Colorado Environmental Coalition* and *Swan View Coalition* are examples of successful post-*Defenders* blending of procedural and informational injury claims.

The weak facts in *Defenders* merely delayed the recognition of procedural and informational injury as viable mechanisms for the redress of many different forms of harm alleged under substantive environmental containing citizen suit provisions. Procedural injury claims brought under major environmental statutes with citizen suit provisions such as the ESA, RCRA, CERCLA and CWA have been successful in the post-*Defenders* context. These statutes are the most powerful vehicles through which to expand access to the courts for environmental harms.

Assuming Article III requirements have been met, procedural and informational injuries asserted together under substantive environmental statutes containing citizen suit provisions should suffice to confer standing. However, given the Supreme Court's reluctance to depart from its reliance on plaintiffs' geographical proximity to, and member use of, the site of alleged harm, alleging procedural and informational injury together may merely diminish the significance that future courts will place on the geographical proximity and member use requirements of substantive injury. Under either scenario, however, this pleading strategy will help to ensure that Congress's objectives in enacting substantive environmental laws are achieved more effectively.