

Developments in Standing for Public Lands and Natural Resources Litigation

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Summary

This Article offers a framework for analysis of potential developments in the law of standing in cases involving public lands and natural resources. It is based on recent federal case law and academic literature addressing the law of standing in cases that involve planning, conservation, exploitation, and disposition of public lands and resources administered by the federal government. While necessarily grounded on U.S. Supreme Court doctrines, the focus is on the application and development of standing law in the lower federal courts. The Article examines public lands and natural resources cases decided by the U.S. Courts of Appeals since the turn of the 21st century in order to capture developments applying standing doctrines within the modern Supreme Court framework. It also discusses district court opinions, particularly in the D.C. Circuit and in the western circuits, mostly where these were final decisions on standing issues. It identifies current developments, and incremental and logical steps that might support and extend the ability of interested parties to access judicial review.

The U.S. Supreme Court has identified, and grounded in Article III of the U.S. Constitution,¹ three “irreducible” requirements for plaintiffs to have standing to maintain an action in federal court. To establish standing, a plaintiff must have suffered an injury-in-fact, an invasion of a legally protected interest that is “concrete and particularized” and “actual or imminent,” not conjectural or hypothetical. The injury must be “fairly traceable” to the challenged action of the defendant. And it must be likely that a favorable judicial decision will prevent or redress the injury.²

These standards ensure that a plaintiff has alleged “such a personal stake in the outcome of the controversy”³ as to assure concrete adverseness warranting invocation of the jurisdiction of federal courts. Generalized grievances, such as concern for harm to natural resources alone, will not suffice to support standing.⁴ Further, a plaintiff “bears the burden of showing that [it] has standing for each type of relief sought.”⁵

When the plaintiff is not itself the object of the government action or inaction it challenges, the Supreme Court has observed that standing is ordinarily “substantially more difficult” to establish.⁶ Nevertheless, a substantial body of case law has arisen that supports the invocation of standing by public interest organizations and their members, state and local governments, and tribes, in cases involving management of public lands and resources and the regulation of activities affecting those resources.

In addition to the Article III requirements, the Supreme Court has also applied a “zone of interests” test for standing, designed to limit courts’ involvement to cases in which the claim asserted by the plaintiff arguably falls within the substantive category of claims that the underlying law was explicitly or implicitly designed to protect.⁷

Plaintiffs must maintain standing throughout the course of the litigation, not merely at the time when the litigation was filed or when initial motions to dismiss are decided.⁸ Organizational plaintiffs must use great care

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1. U.S. CONST. art. III, §2, cl. 1.
2. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 22 ELR 20913 (1992); *Summers v. Earth Island Inst.*, 555 U.S. 488, 39 ELR 20047 (2009).
3. *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975).
4. *Sierra Club v. Morton*, 405 U.S. 727, 2 ELR 20192 (1976). However, if that harm “in fact affects the recreational or even the mere esthetic interests of the plaintiff, that will suffice.” *Summers*, 555 U.S. at 494 (citing *Morton*, 405 U.S. at 734-36).
5. *Summers*, 555 U.S. at 493.
6. *Lujan*, 504 U.S. at 562.
7. *Bennett v. Spear*, 520 U.S. 154, 27 ELR 20824 (1997).
8. *Summers*, 555 U.S. 488 (plaintiffs lack standing where their primary affiant’s geographically specific claim of injury was settled by the government during

in pleading injury, and should plan to demonstrate sufficient evidence of injury for (potentially) a period of many years and encompassing multiple sites, in order to avoid an unwelcome loss of standing on appeal or on remand.⁹

This Article identifies and discusses current standing issues and doctrines in the following areas relevant to public lands litigation: geographical locus of the injury; increased risk of harm as an injury; procedural injury; informational injury; the “zone of interests” test; organizational standing; standing of states and Indian tribes; and standing in administrative tribunals.

Public interest plaintiffs must demonstrate injury-in-fact, causation, and redressability with respect to very specific places and times. As the federal courts become increasingly particular when applying technical doctrines and constitutionally derived limitations to avoid decisions or to deny relief, the task of the litigator at the commencement of litigation has become far more complex. The careful identification of a geographic nexus between the plaintiff’s members and a claimed injury remains fundamental, even exacting. Redundancy of declarations and invocation of multiple site-specific injuries are helpful, even in the relatively lenient area of Clean Water Act (CWA)¹⁰ claims, given some circuits’ insistence on very close correspondence of the site of injury with the scope of the legal claims. Nevertheless, the case law also shows some substantial flexibility in identifying the geographic scope of different kinds of injury—some injuries are experienced at a greater distance than others. And it is also clear that plaintiffs need not always have physical access to the site or sites of activity in order to successfully demonstrate injury-in-fact.

While aesthetic and recreational injuries are still the mainstay of public lands and natural resources pleading

ever since *Sierra Club v. Morton*¹¹ first defined the scope of such standing, it will often be important to identify additional forms of injury to demonstrate plaintiffs’ need for judicial relief. Among key concepts are the circumstances under which a governmental action or failure limits a person’s ability to look out for himself or herself in avoiding injury. As generalized harm becomes harder to rely on, plaintiffs will need to define injury in terms of reasonable risk avoidance activities. Such concepts underlie the case law dealing with probabilities of risk as a component of injury-in-fact, and the increasing occurrence of standing claims based on informational injury.

The case law has shifted in the “prudential standing” area known as the “zone of interests” test. Indeed, the Supreme Court recently revisited this doctrine, using different terminology. But at bottom, the issue is the need for even more careful pleading, and especially the ability to identify actions governed by the statutes at issue that include considerations important to the plaintiffs.

Finally, states and tribes offer some advantages in standing for public lands litigation, but the scope of the “special solicitude” recognized by the Supreme Court in *Massachusetts v. Environmental Protection Agency*¹² remains largely undefined and not particularly stable. States and tribes do have numerous interests, including proprietary and regulatory, that afford opportunity for standing even if only modestly aided by Supreme Court deference; these include issues related to waters, submerged lands, wildlife, and territorial extent, among others.

To some extent, standing doctrine has evolved in the direction of “code pleading” with a need for elaborate and well-documented showings of injury, causation, redressability, and zone of interest that may require proof at every stage of the litigation—even after entry of judgment. This Article identifies and examines in detail many of the key considerations and recent developments.

I. Geographical Connection of Injury to Action Challenged

The Supreme Court has determined that an association has standing under Article III where (1) at least one of its members would have standing to sue in its own right, (2) the interest it seeks to protect is germane to the organization’s purpose, and (3) neither the claim asserted nor the relief requested requires the member to participate.¹³ In many public lands and natural resources cases, organizations’ ability to allege and maintain standing depends on their demonstration of concrete and particularized injuries to their members at specific places and with respect to specific

the litigation). The Supreme Court did not consider additional affidavits filed by the plaintiffs in the district court: “If respondents had not met the challenge to their standing at the time of judgment, they could not remedy the defect retroactively.” *Id.* at 495 n.6. Plaintiffs had filed these additional affidavits after settlement of the claim to which the previous affiant’s declaration related, in response to the government’s *first* challenge to the plaintiff’s standing. *See id.* at 508-09 (Breyer, J., dissenting).

9. *See, e.g.,* Friends of Santa Clara River v. U.S. Army Corps of Eng’rs, 887 F.3d 906, 917 (9th Cir. 2018) (“because the need to satisfy Article III requirements persists throughout the life of the lawsuit, if circumstances change such that plaintiffs before us no longer possess standing, we must dismiss the affected claims”); Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 629 F.3d 387, 394-97 (4th Cir. 2011) (holding that plaintiffs maintained standing on appeal through members Jones and McCullough after member Shealy, upon whom standing was based in the district court, died prior to the date of judgment); Powder River Basin Res. Council v. Babbitt, 54 F.3d 1477, 1485, 26 ELR 20789 (10th Cir. 1995) (holding that because defendant’s payment of attorney fees to plaintiff remedied the injury upon which standing was originally based, plaintiff lacked standing to pursue other claims on appeal); Carr v. Alta Verde Indus., Inc., 931 F.2d 1055, 1061, 21 ELR 21005 (5th Cir. 1991) (reevaluating standing based on different members’ affidavits on appeal where defendants settled with, and stipulated to voluntary dismissal of, members upon whom plaintiff’s standing was originally based).
10. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

11. 405 U.S. 727, 2 ELR 20192 (1976).

12. 549 U.S. 497, 37 ELR 20075 (2007).

13. Hunt v. Washington State Apple Adver. Comm’n, 432 U.S. 333, 343 (1977); Warth v. Seldin, 422 U.S. 490, 510-11 (1975).

resources affected by the challenged actions.¹⁴ *Summers v. Earth Island Institute* makes it clear that standing to challenge public lands regulations of wide applicability must be supported by showing of injury to plaintiffs' members at at least one site affected by the regulations throughout the entire litigation.¹⁵

However, this leaves a number of open questions for plaintiffs: How many specific locations need to be addressed by affidavits of organizations' members to sustain standing to challenge actions that affect multiple areas or projects? To what extent does an affidavit addressing injuries to particular lands from part of a project support a challenge to the rest of the project or to impacts on areas not used or visited by the plaintiff? How geographically proximate must the members' uses be to the affected resources/parcels of land in order to constitute the type of injury that courts have recognized as concrete and particularized?

A. Injury at Specific Locations

In interpreting the Supreme Court's standing doctrines for public lands litigation, the U.S. Court of Appeals for the Ninth Circuit (and several others) has long relied on a concept of "geographic nexus."¹⁶ Plaintiffs must show their connection to specific geographic areas where the injury occurs, rather than their use of a larger land area.

For example, in *Wilderness Society v. Rey*,¹⁷ the Ninth Circuit held that in order to have standing an organization must show injury to a member using or visiting a *specific area* within a national forest affected by regulations that limited the applicability of procedures to appeal certain types of resource management actions. Although the Wil-

derness Society proffered declarations describing members' extensive past and planned future recreational use of the Umpqua National Forest (where such projects were occurring) and other western national forests, no declaration stated the likelihood of the members encountering an area of that forest directly *affected* by a logging activity subject to the allegedly defective regulations. Not tying any member's imminent injury to a specific site *within* a forest affected by a project or future project subject to the regulations was fatal to the plaintiff's claim of standing.¹⁸

Where the challenged action affects multiple units of public land, it is good practice to demonstrate injury in more than one such affected area, but plaintiffs need not demonstrate this for all. In *Jayne v. Sherman*, the Ninth Circuit recognized the standing of an environmental organization challenging the U.S. Forest Service's decision to approve Idaho's petition to implement the "Idaho Roadless Rule" in place of the Forest Service's previously applicable 2001 Roadless Rule.¹⁹ The plaintiff submitted declarations describing its members' use and enjoyment of numerous specific national forest roadless areas in Idaho that allegedly afforded greater protections under the previous rule.²⁰ The court found these affidavits satisfied the requirement of a "geographic nexus between the individual asserting the claim and the location suffering an environmental impact." The plaintiffs were, the court observed, not required to show that their members had visited *each* roadless area affected by the rule in order to challenge the rule.²¹

In *WildEarth Guardians v. U.S. Department of Agriculture*,²² the plaintiff asserted its members' recreational use of specific areas affected by joint Animal and Plant Health Inspection Service (APHIS)-Nevada Department of Wildlife predator control activities as a basis to challenge the adequacy of an environmental assessment (EA) for the program in Nevada.²³ The challenged EA incorporated by reference a nationwide programmatic environmental impact statement (PEIS) previously prepared by APHIS to assess the environmental impacts of its ongoing wildlife damage control *nationwide*.²⁴ The court found the plaintiff's injuries in the Nevada areas sufficient to support standing to challenge the EA assessing the Nevada predator damage management program, as well as

14. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 889, 20 ELR 20962 (1990) (need to show member's use of specific lands affected by challenged action, not "unspecified" portions of an immense tract of territory); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564-67, 22 ELR 20913 (1992) (requiring specific and timely plans to travel to and observe the endangered species at issue, as "geographic remoteness" prevented finding that concrete injury to members was "certainly impending"); *Summers*, 555 U.S. at 494 (standing linked to geographically placed injury is necessary and must be maintained throughout the litigation).

15. *Summers*, 555 U.S. 488.

16. The term "geographic nexus" (originally "geographical nexus") was first applied by the Ninth Circuit to evaluate standing in a challenge brought under the National Environmental Policy Act (NEPA), in which the court stated that the plaintiffs' alleged injury must have a "sufficient geographical nexus to the site of the challenged project." *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975). "Geographic nexus" has since been applied in numerous NEPA and natural resources cases. See *WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1154 (9th Cir. 2015); *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1081, 45 ELR 20114 (9th Cir. 2015); *Jayne v. Sherman*, 706 F.3d 994, 999, 43 ELR 20003 (9th Cir. 2013); *Center for Food Safety v. Vilsack*, 636 F.3d 1166, 1172 (9th Cir. 2011); *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 485 (9th Cir. 2011); *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 971, 33 ELR 20263 (9th Cir. 2003); *Cantrell v. City of Long Beach*, 241 F.3d 674, 679, 31 ELR 20438 (9th Cir. 2001); *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1283, 27 ELR 20622 (9th Cir. 1996); *Douglas County v. Babbitt*, 48 F.3d 1495, 1500, 25 ELR 20631 (9th Cir. 1995). The term has also been used in the U.S. Court of Appeals for the Tenth Circuit and the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit. *Committee to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 449, 27 ELR 20576 (10th Cir. 1996); *Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 667, 27 ELR 20098 (D.C. Cir. 1996).

17. 622 F.3d 1251 (9th Cir. 2010).

18. *Id.* at 1257. The need to link a plaintiff's alleged injury claim to a specific area or project site was also emphasized by the U.S. Court of Appeals for the Seventh Circuit in *Bensman v. U.S. Forest Serv.*, 408 F.3d 945, 35 ELR 20111 (7th Cir. 2005). Past visits by one employee to two national forests were not sufficient given, among other things, vagueness of future plans, while another's recreational use of the specific project area in the Mark Twain National Forest "about a half dozen times" and plans to return were determinative in supporting his claim for standing. "He has demonstrated an interest in the particular area in question here, rather than just the forest as a whole." *Id.* at 963.

19. *Jayne*, 706 F.3d at 997-98.

20. Identifying specific Idaho roadless areas, an affiant member stated his past use and his plans "to return to these roadless areas every spring and every fall for as long as I am physically able." *Id.* at 999.

21. *Id.*

22. 795 F.3d 1148 (9th Cir. 2015) (reversing district court's order dismissing the case for lack of standing, and remanding for further proceedings).

23. *Id.* at 1152.

24. *Id.* at 1152-53.

the government's reliance on the nationwide PEIS: "The fact that the PEIS also applies to programs in states for which WildEarth has not submitted member declarations does not prevent WildEarth from challenging the continued use of the PEIS."²⁵

In *Cottonwood Environmental Law Center v. U.S. Forest Service*, plaintiffs established a sufficient geographic nexus to support their standing to challenge federal actions affecting 11 national forests.²⁶ In 2007, the Forest Service amended forest plans for 18 national forests to include the Northern Rocky Mountains Lynx Management Direction (Lynx Amendments), which prescribe specific guidelines and standards for permitting activities likely to have an adverse effect on Canada lynx. Two years later, the U.S. Fish and Wildlife Service (FWS) revised the critical habitat designation of Canada lynx under the Endangered Species Act (ESA)²⁷ to include portions of 11 of the national forests. Cottonwood challenged the Forest Service's failure to reinstate ESA §7 consultation with FWS on the Lynx Amendments to address this revised critical habitat designation.²⁸ As a basis for standing, Cottonwood submitted member affidavits recounting their extensive use of the Custer, Flathead, Gallatin, and Helena National Forests for lynx-related observation and recreation activities, including within specific project areas that have applied, or will apply, the management direction in the Lynx Amendments.²⁹ The court was satisfied with the plaintiffs' demonstration of a connection to four out of the 11 national forests affected by the Lynx Amendments to establish a sufficient "geographic nexus" to support standing.³⁰

The U.S. Court of Appeals for the Tenth Circuit applied similar reasoning in *Southern Utah Wilderness Alliance v. Palma*.³¹ Southern Utah Wilderness Alliance (SUWA) challenged the Bureau of Land Management's (BLM's) suspension of 39 oil and gas leases in two special tar sand areas (STSAs) in Utah.³² It alleged that inevitable future

drilling under the affected leases "will have dramatic, lasting negative impacts including destruction of prehistoric and historic cultural resources, degradation of air quality and pristine night skies, loss of wildlife habitat, and loss of wilderness values and characteristics."³³ SUWA submitted declarations of its member employee showing numerous visits to the STSAs at issue.³⁴ The district court held the affidavits insufficient to support standing because they did not identify specific visits to *each* of the 39 leases at issue, nor imminent plans to return to each. The court of appeals reversed, finding the affiant's recreational and aesthetic interests in the lands within the STSAs sufficient to support standing, and explaining that "neither our court nor the Supreme Court has ever required an environmental plaintiff to show that it has traversed each bit of land that will be affected by a challenged agency action."³⁵

The U.S. Court of Appeals for the District of Columbia (D.C.) Circuit has recognized that even use of a small area (and injury to interests in these areas) can, in an appropriate context, supply standing to challenge a decision affecting vast areas. In *Center for Sustainable Economy v. Jewell*,³⁶ the plaintiff challenged the Secretary of the Interior's leasing program for the outer continental shelf, alleging a biased final EIS and inadequate opportunity for public comment at the draft EIS stage.³⁷ The court found that two center members—one a commercial shrimper in the Gulf of Mexico who makes significant recreational use of Gulf waters and coastlines, the other an employee at an environmental nonprofit in Alaska who makes significant use of Cook Inlet and other Alaskan waters—had demonstrated injury to their economic and aesthetic interests sufficient to support the center's claim of associational standing.³⁸ Though the outer continental shelf leasing program applies to an area "nearly equal in size to the Australian continent," center members' connection to portions of the Gulf and Alaskan regions served as the basis of standing to challenge the entire leasing program.³⁹

25. *Id.* at 1155.

26. 789 F.3d 1075, 1078, 45 ELR 20114 (9th Cir. 2015) (finding Cottonwood has associational standing and affirming district court's ruling that the Forest Service violated §7 of the Endangered Species Act (ESA) by failing to reinstate consultation after the U.S. Fish and Wildlife Service (FWS) designated lynx critical habitat on national forest land).

27. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.

28. Cottonwood Envtl. Law Ctr, 789 F.3d at 1079.

29. *Id.* at 1080.

30. *Id.* at 1081. The court further held that plaintiffs had standing to challenge the "programmatic management direction" based on their procedural injury "without also challenging an implementing project that would cause discrete injury." *Id.* See also *Center for Food Safety v. Salazar*, 898 F. Supp. 2d 2012 (D.D.C. 2012) (in challenge to FWS' decision to allow genetically modified corn and soybeans on refuge lands, declarations for 11 refuges in Region 3 were sufficient to support claims for all Region 3 (54 refuges); plaintiffs do not have to establish standing for each refuge). *But see* *Appalachian Voices v. Bodman*, 587 F. Supp. 2d 79 (D.D.C. 2008) (denying standing to organizations challenging U.S. Department of Energy/Treasury Department failure to comply with NEPA and ESA in extending nationwide tax credits to nine clean coal projects, limiting standing to only the single plant for which members showed sufficient localized injury; ultimately no standing on that site for lack of traceability of the injury to the action challenged).

31. 707 F.3d 1143, 43 ELR 20009 (10th Cir. 2013).

32. The STSAs at issue are the Circle Cliffs STSA, encompassing an area of approximately 230 square miles, and the Tar Sand Triangle STSA, covering approximately 215 square miles. *Id.* at 1148.

33. *Id.* at 1152.

34. *Id.* at 1149.

35. *Id.* at 1154.

36. 779 F.3d 588, 45 ELR 20046 (D.C. Cir. 2015).

37. *Id.* at 592-93.

38. *Id.* at 596.

39. *Id.* See also *Center for Biological Diversity v. Kempthorne*, 588 F.3d 701, 706, 40 ELR 20280 (9th Cir. 2009) (plaintiffs' members have sufficient geographically specific injury to challenge permitted taking of polar bears in the Beaufort Sea and North Coast of Alaska); *League of Conservation Voters v. Trump*, No. 3:17-cv-00101, 2018 WL 1365408, 48 ELR 20050 (D. Alaska Mar. 19, 2018) (standing to challenge Executive Order that would allow seismic studies in previously withdrawn areas of Chukchi and Beaufort Seas). The D.C. Circuit has also recognized that standing to challenge a program or regulatory decision affecting species can be supported by well-crafted affidavits addressing specific populations that may be affected by the challenged actions. In *Center for Biological Diversity v. Environmental Prot. Agency*, 861 F.3d 174, 183 (D.C. Cir. 2017), the court found that the plaintiffs' members' regular visits and intentions to return to the respective habitats of the valley elderberry longhorn beetle and the Mitchell's satyr butterfly where use of the challenged pesticide is likely was a sufficient injury to support standing, in an action challenging registration of the approval of the pesticide—which may be used in many other settings and purposes. *Id.* at 184 (sufficient "geographical nexus"). See also *Oceana v. Pritzker*, 75 F. Supp. 3d 469, 480, 44 ELR 20271 (D.D.C. 2014) (plaintiff's member owns a home, which she plans to continue to visit "on a yearly basis," on the

The issue of when an injury at a specific site confers sufficient standing to challenge a widespread or national agency action affecting the public lands has largely been resolved by the federal courts in favor of recognizing standing. However, it is important for plaintiffs to ensure that they make sufficient demonstration of standing to support a remedy affecting other land management units, particularly given the government's propensity to challenge both standing and the scope of any remedy.⁴⁰

B. Connected Actions

The D.C. Circuit has also addressed the establishment of injury necessary to support litigation challenges to connected actions. In *Sierra Club v. Federal Energy Regulatory Commission*,⁴¹ the court found that standing to challenge related pipeline approvals was not contingent on demonstration of an injury connected to "each bit of land" at issue. The Sierra Club challenged the adequacy of the EIS prepared by the Federal Energy Regulatory Commission (FERC) evaluating the impacts of a certificate approving construction of three connecting natural gas pipelines.⁴² As the basis of standing for its National Environmental Policy Act (NEPA) claim, the Sierra Club submitted statements of one member alleging that the Sabal Trail pipeline, which will cross through his property, would expose him to increased noise, impairing his enjoyment of daily activities, and that trees shading his house would be permanently removed in preparation for construction.⁴³ The owner of the Hillabee Expansion pipeline asserted that, because the plaintiff only demonstrated injury as to the Sabal Trail pipeline, it lacked standing to challenge the approval of the others. However, the court found that because of FERC's characterization of the project as a single, integrated proposal from the outset of its environmental review, establishment of injury caused by one pipeline segment was

sufficient to support standing to challenge the certificate order as a whole.⁴⁴

C. Proximity to Site of Activity-Producing Injury

Following *Lujan v. National Wildlife Federation*,⁴⁵ the courts have given substantial attention to plaintiffs' proximity to the site of the alleged injury. A plaintiff claiming aesthetic or recreational injury from environmental damage must use an area affected by the challenged activity, and not an area that is only generally in its vicinity.⁴⁶ Courts recognize that different types of injury may be experienced at varying distances.

The relevant distance determination depends in part upon the type of injury alleged. For example, a member living one-half mile from a permitted liquefied natural gas terminal site has standing to challenge the certificate based on construction noise, and other outdoor effects.⁴⁷ In *Sierra Club v. Franklin County Power of Illinois, LLC*,⁴⁸ the U.S. Court of Appeals for the Seventh Circuit found that a member's recreational use of a lake three miles from a proposed power plant site supports standing to challenge a permit based on air pollution and haze effects even though the extent of pollution is unclear. The Tenth Circuit, in one of its most-cited standing decisions, recognizes that water users downstream from a seasonal ski resort have standing to challenge approval of expanded summer activities and uses at the resort even though challengers are a dozen miles downstream.⁴⁹ It is clear that in most instances, adjacent

island on which she studies and observes specific populations of loggerhead sea turtles).

40. Recently, Attorney General Jefferson Sessions, in a memorandum on nationwide injunctions (not standing) cited *Lujan v. National Wildlife Federation* for the proposition that the "appropriate relief" in an Administrative Procedure Act (APA) case challenging an agency action on the basis of a flawed regulation, or even challenging the validity of the regulation itself, should not be to set aside the rule. Rather, the Attorney General argued, only the concrete action as applied to the plaintiff should be set aside. Memorandum from Attorney General Jeff Sessions, to the Heads of Civil Litigating Components—U.S. Attorneys, Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions 7-8 (Sept. 13, 2018) (discussing APA remedies and arguing for narrow equitable relief). Because this memo guides the U.S. Department of Justice and U.S. attorneys, it should be anticipated that this extension of *Lujan* may be encountered in future litigation brought by public interest plaintiffs.
41. 867 F.3d 1357, 47 ELR 20104 (D.C. Cir. 2017) (finding that Sierra Club has associational standing to challenge the certificate order, and remanding to the Federal Energy Regulatory Commission (FERC) for preparation of an EIS consistent with this opinion).
42. *Id.* at 1363-64. These three natural gas pipelines—the Hillabee Expansion pipeline, Florida Southeast Connection pipeline, and Sabal Trail pipeline—are part of the Southeast Market Pipelines Project, extending nearly 500 miles from eastern Alabama across southwest Georgia to central Florida. The three segments of the project have different owners, but share the purpose of supplying Florida's natural gas market.
43. *Id.* at 1365; 42 U.S.C. §§4321-4370h, ELR STAT. NEPA §§2-209.

44. *Id.* at 1366-67. The court evaluates this as a question of severability, relying on the principle that "where there is substantial doubt that the agency would have adopted the same disposition regarding the unchallenged portion if the challenged portion were subtracted, partial affirmance is improper" (citing *Epsilon Elecs., Inc. v. U.S. Dept. of Treasury*, 857 F.3d 913, 929 (D.C. Cir. 2017) (quoting *North Carolina v. Federal Energy Regulatory Comm'n*, 730 F.2d 790, 795-96 (D.C. Cir. 1984))).
45. 497 U.S. 871, 20 ELR 20962 (1990).
46. *Id.* at 881. See *Bensman v. U.S. Forest Serv.*, 408 F.3d 945, 35 ELR 20111 (7th Cir. 2005) (use of specific trail area within national forest necessary to support standing to challenge appeal procedures). See *Pollack v. U.S. Dept. of Justice*, 577 F.3d 736, 39 ELR 20183 (7th Cir. 2009) (no standing to challenge alleged lead pollution from gun range near Lake Michigan, where plaintiffs alleged only that they watched birds along the Illinois portion of the lake (a vast shoreline stretching 70 miles), and that they drank water from the lake supplied by their municipality, 13 miles south of the alleged entry point of any pollutants from the range); *Confederated Tribes of the Grand Ronde Cmty. of Or. v. Jewell*, 75 F. Supp. 3d 387, 416 (D.D.C. 2014) (finding no standing for Indian tribe asserting injury to aesthetic and recreational interests and cultural connections to lands within Clark County, Washington, in challenge to U.S. Department of the Interior's (DOI's) decision to take land into trust for a rival tribe's planned casino; historic and cultural connections mostly to sites three to 10 miles from challenged site; plaintiff must show plans to make use of specific sites upon which projects may take place and demonstrate interest in the parcel itself, not in the county generally).
47. *Sierra Club v. Federal Energy Regulatory Comm'n*, 827 F.3d 36 (D.C. Cir. 2016) (plaintiff's alleged injury of noise from construction of terminal would hinder her enjoyment of her home 0.5 mile away sufficient to support standing). See also *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978 (8th Cir. 2011) (light, noise, and dust pollution from construction of plant site 0.72 mile from the plaintiff's property establishes a cognizable injury to plaintiff's recreational and aesthetic interests).
48. 546 F.3d 918, 39 ELR 20271 (7th Cir. 2008).
49. *Committee to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 27 ELR 20576 (10th Cir. 1996) (standing for members living 12-15 miles downstream from and in the same watershed in NEPA challenge to Forest Service ap-

and nearby *landowners* have particularly strong bases for asserting standing.⁵⁰

The proximity of the plaintiff affiant to the site of activity may affect the level of proof courts require with respect to particular claims of injury. In general, the farther away the plaintiff is, the greater the evidentiary requirement.⁵¹

Courts evaluating proximity issues with respect to water pollution claims look at traceability of pollutants rather than at resulting harm, following the Supreme Court's approach in *Friends of the Earth v. Laidlaw Environmental Services*.⁵² The Court determined that to support an injury-in-fact under the CWA, it is sufficient that "a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms."⁵³ The plaintiffs need only show that the alleged pollutants reached the portions of the waterway they used, thus affecting their activities—not that the pollutants were present in such concentrations as to produce health effects or injury to biological resources.⁵⁴

proval of summer operations and amended special use permit for ski area, where the residents use the waters for irrigating, fishing, and recreation, and may be affected by both quantity and quality and impacts of resort development activities).

50. See *Pye v. United States*, 269 F.3d 459, 32 ELR 20280 (4th Cir. 2001) (adjacent landowners have standing to challenge road improvements authorized by U.S. Army Corps of Engineers (the Corps) permit, where these may affect sites on adjacent property eligible for listing on National Register of Historic Places); *Ouachita Riverkeeper v. Bostic*, 938 F. Supp. 2d 32 (D.D.C. 2013) (standing to challenge pipeline passing within 100 feet of member's land under Corps nationwide permit; need not show actual history of leaks nor past injury attendant to construction).
51. See *Pollack*, 577 F.3d at 746 (Cudahy, J., concurring) ("Perhaps what we can say here, then, is that the farther the plaintiff is from the 'area of injury,' the more evidence he generally must put forth to prove that he is 'among the injured.'").
52. 528 U.S. 167, 30 ELR 20246 (2000).
53. *Id.* at 183. Some of the plaintiffs lived near the river, others within two miles and made use of the river.
54. See, e.g., *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 387 (4th Cir. 2011) (member's guiding canoe trips at confluence of streams 16.5 miles downstream from pollutant discharge sufficient for standing); *American Canoe Ass'n, Inc. v. Murphy Farms, Inc.*, 326 F.3d 505 (4th Cir. 2003) (standing based on members' recreational and aesthetic use of waters subject to sometime contamination from hog farm discharges); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 162 (4th Cir. 2000) (en banc) ("Gaston Copper exceeds its discharge permit limits for chemicals that cause the types of injuries Shealy alleges and . . . Shealy's lake lies within the range of that discharge."); *American Canoe Ass'n v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 34 ELR 20129 (6th Cir. 2004) (fishing and canoeing recreational use of river 12 miles downstream from discharge point sufficient to support standing where waterway has some evidence of pollution); *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 35 ELR 20043 (3d Cir. 2005) (residence within one-quarter mile of a Resource Conservation and Recovery Act site; pollution of portions of Hackensack River used by plaintiffs for walking/recreation); *Public Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 72, 20 ELR 21216 (3d Cir. 1990) (pollutants entering waterway contribute to plaintiffs esthetic injury). *Cf. Pollack*, 577 F.3d at 741 (without evidence that lead pollution from bullets traveled 13 miles south from point of entry to the point on Lake Michigan from which member's drinking water is drawn, member's "intention to drink water and his fear that his water has been contaminated" does not give rise to standing); *Friends of the Earth v. Crown Cent. Petroleum Corp.*, 95 F.3d 358, 27 ELR 20193 (5th Cir. 1996) (members' recreational use of lake located 18 miles and three tributaries downstream from point of discharge from refinery not sufficient to establish injury without evidence that

D. Right of Entry

Courts have determined that plaintiffs need not establish a legal right to enter the site at issue as a prerequisite for standing, so long as the injury they assert is experienced at a location that they are entitled to use.

In *Cantrell v. City of Long Beach*,⁵⁵ the Ninth Circuit considered claims involving the U.S. Department of Defense's destruction of ficus trees that served as habitat for several bird species, connected to the planned use of a closed naval station as a commercial marine container terminal. Plaintiff bird-watchers described their repeated visits to areas in and around the naval station to observe the birds, and their specific plans to do so in the future, claiming that their recreational and aesthetic interests would be directly and concretely affected by destruction of the birds' habitat.⁵⁶ Holding that plaintiffs had standing to pursue their NEPA claim, the court stated that plaintiffs' absence of a legal right to enter the closed station or to stand immediately adjacent to the station and gaze over the property line at the birds in their habitat was irrelevant. Their desire to view the birds at the naval station from publicly accessible locations outside the station was sufficient to establish injury.⁵⁷

The same reasoning was applied by the D.C. Circuit to the Sierra Club's challenge to the removal of the privately owned Blair Mountain Battlefield in West Virginia from the National Register of Historic Places.⁵⁸ Plaintiffs alleged that this decision would subject the battlefield to increased surface mining impacts, harming their educational and aesthetic interests.⁵⁹ Defendants argued that the absence of plaintiffs' legal entitlement to set foot on the battlefield prevented a showing of injury.⁶⁰ Rejecting this argument, the court explained that any legal right to make a physical entry onto the battlefield was unnecessary to establish a cognizable injury; plaintiffs' members' interest in observing the landscape from surrounding areas or enjoying the battlefield while on public roads was sufficient to support standing.⁶¹

In *American Bottom Conservancy v. U.S. Army Corps of Engineers*,⁶² the Seventh Circuit recognized the plaintiff's standing to challenge permits to fill 18.4 acres of wetlands on private land one-half mile outside of a state park. The court observed, in the words of Judge Richard Posner, that birds, butterflies, and other wildlife using the wetland

the pollutants actually reached the lake); *Public Interest Research Group of N.J., Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 27 ELR 21340 (3d Cir. 1997) (plaintiffs lost standing at penalty stage after trial court found that, although defendants unlawfully discharged pollutants and plaintiffs curtailed use of river sufficient to support standing at liability stage, the discharge caused no harm: "[T]he reduction in a person's recreational activity cannot support the injury prong of standing when a court also concludes that a polluter's violation of an effluent standard has not harmed the affected waterway and that it, in fact, poses no threat to that waterway.").

55. 241 F.3d 674, 31 ELR 20438 (9th Cir. 2001).

56. *Id.* at 680.

57. *Id.* at 680-81.

58. *Sierra Club v. Jewell*, 764 F.3d 1, 44 ELR 20193 (D.C. Cir. 2014).

59. *Id.* at 4.

60. *Id.* at 6.

61. *Id.*

62. 650 F.3d 652, 41 ELR 20206 (7th Cir. 2011).

complex will likely disperse, “in which event they will no longer be within the visual field of the affiants, or die.”⁶³

The U.S. Court of Appeals for the Fourth Circuit recently held that plaintiffs challenging the adequacy of NEPA analysis of the hydrologic effects of a natural gas pipeline crossing federal lands in Virginia had standing to bring suit even though their alleged injury-in-fact (to scenic resources) was to their view of forests on private land not owned by the National Park Service.⁶⁴

II. Increased Risk of Harm as Injury

In most public land and natural resources cases, it is not difficult to identify injury-in-fact to aesthetic, recreational, and other interests that is actual or imminent—particularly where the harms (noise, light, pollution, destruction or relocation of wildlife populations, loss of access to recreational uses, loss of cultural and historic resources) are well-understood. However, where the challenged action involves a more lengthy chain of causation or a less familiar type of injury (release of genetically modified organisms, changes in inspection regimes) it can present challenges for standing.

The D.C. Circuit has held that in cases alleging the possibility of an increased “risk” of harm, a plaintiff must show “both (i) a substantially increased risk of harm and (ii) a substantial probability of harm with that increase taken into account.”⁶⁵ However, in demonstrating that they have been harmed by increased risk, plaintiffs “cannot manufacture standing merely by inflicting harm on themselves” by incurring avoidance costs that are “simply the product of their fear.”⁶⁶ In contrast, well-known risks of challenged activities, such as possible leaks from petroleum pipelines, will be recognized without a heightened showing.⁶⁷ Likewise, a “substantial probability of injury” is shown where mining had occurred previously in the vicinity of an area being removed from the National Register of Historic Places; therefore, mining is likely to occur following the complained of action.⁶⁸

Risk of *economic injury* from a challenged action has also been held to a fairly low standard to satisfy the “probability of harm” requirement. In a recent challenge to the designation of critical habitat for an endangered species, the D.C. Circuit held that a trade association had standing to challenge the designation based on a “substantial probability” that the challenged action will cause a decrease

in the supply of raw material (timber) from a particular source—this is even though finding a replacement supply may cause the plaintiff’s members to incur only a minimal cost (more than zero).⁶⁹ Under this reasoning, a similar environmental standing claim by companies providing recreational services in and near areas of the public lands and waters could likely be readily supported, even though other areas remain available to them.⁷⁰

III. Procedural Injury Claims

Many natural resources and public lands cases involve procedural claims. These include claims such as failure to follow the requirements of NEPA or to conduct consultation under the ESA before taking a federal action. The federal courts have emphasized that a procedural injury is not itself an injury-in-fact for purposes of standing unless it produces some more concrete and particularized injury to a plaintiff. “[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing.”⁷¹

Moreover, there must be a causal connection between the procedural deficiency and the concrete and particularized injury. The D.C. Circuit has observed in a NEPA case alleging a procedural deficiency “an adequate causal chain must contain at least two links: one connecting the omitted EIS to some substantive government decision that may have been wrongly decided because of the lack of an EIS and one connecting that substantive decision to the plaintiff’s particularized injury.”⁷²

The Supreme Court has recognized that a person accorded a procedural right to protect a concrete interest “can assert that right without meeting all the normal standards for redressability and immediacy.”⁷³ It is sufficient for redressability that remedying the claimed procedural defect results in an “opportunity” to achieve possible redress of the concrete injury. When a litigant is “vested with a procedural right,” that litigant “has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.”⁷⁴

The D.C. Circuit has explained this in a number of instructive decisions. There is redressability where requir-

63. *Id.* at 657.

64. *Sierra Club v. U.S. Dep’t of the Interior*, 899 F.3d 260 (4th Cir. 2018) (although pipeline will be buried and not visible in park, nevertheless scenic injury was fairly traceable to the approval of the route traversing the federal lands and was redressable as a different route might result from revised NEPA analysis).

65. *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 914-15 (D.C. Cir. 2015) (regulatory case challenging changes to regime for poultry inspection, allegedly leading to increased risk of foodborne illnesses).

66. *Id.* at 919.

67. *Ouachita Riverkeeper v. Bostick*, 938 F. Supp. 2d 32, 41-42 (D.D.C. 2013) (pipelines are known to pose hazard of leaks, and hence plaintiff’s concern with siting of pipeline near its land is sufficient to support standing).

68. *Sierra Club v. Jewell*, 764 F.3d 1, 7, 44 ELR 20193 (D.C. Cir. 2014).

69. *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 7, 47 ELR 20061 (D.C. Cir. 2017) (it is enough for standing that some of plaintiff’s members obtained some of their timber from the 9.5 million acres of designated forest lands, and that it is unlikely that the company can “fully replace” the source of supply at “zero additional cost”).

70. *See, e.g., Voyageur Outward Bound Sch. v. United States*, No. 18-cv-01463 (D.D.C. filed June 21, 2018) (challenge to reinstatement of two expired mining leases in Superior National Forest near Boundary Waters Canoe Area Wilderness).

71. *Summers v. Earth Island Inst.*, 555 U.S. 488, 496, 39 ELR 20047 (2009).

72. *WildEarth Guardians v. Jewell*, 738 F.3d 298, 306, 44 ELR 20001 (D.C. Cir. 2013).

73. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992), *quoted in Summers*, 555 U.S. at 496.

74. *Massachusetts v. Environmental Prot. Agency*, 549 U.S. 497, 518, 37 ELR 20075 (2007).

ing a federal agency to reconsider environmental concerns via court-ordered NEPA compliance *could* cause the agency to change its mind.⁷⁵ Likewise, notwithstanding the government's assertion that a "serious possibility" exists that a pesticide registration order would remain unchanged following a court-ordered effects determination and consultation, there remains a possibility that it could reach a different conclusion (e.g., by modifying the registration order).⁷⁶ In the latter case, the court said:

A procedural-rights plaintiff need not show that "court-ordered compliance with the procedure would alter the final [agency decision]." . . . [A]ll the [plaintiff] need show is that a revisit of the registration order that includes an effects determination and any required consultation would redress Center members' injury because the [the U.S. Environmental Protection Agency] EPA *could* reach a different conclusion.⁷⁷

The court even found redressability in a challenge to the U.S. Department of the Interior's (DOI's) withdrawal of a letter identifying adverse air quality impacts of a proposed coal-fired power plant on visibility within a national park. If the letter were issued, the state environmental permitting agency would have had to consider it and explain its permitting decision in writing.⁷⁸

Sometimes, courts use similar analysis in connection with the "causation" element rather than redressability.⁷⁹ The D.C. Circuit readily found procedural standing in a case challenging alleged procedural deficiencies in the five-year leasing plan for the outer continental shelf.⁸⁰ The court recognized petitioners' particularized interest in enjoyment of the indigenous animals of areas listed in the leasing program, and causation in that adoption of an "irrationally based Leasing Program could cause a substantial increase in the risk to their enjoyment of the animals affected by the offshore drilling." (But it found certain other NEPA and ESA claims in the same case not ripe, as more properly evaluated once leasing proposals had been developed.)⁸¹

However, the U.S. Court of Appeals for the Sixth Circuit found no standing to assert a procedural injury in a NEPA case where the claimed procedural injury (designation of land use zones allegedly not supported by analysis

in the EIS) did not cause or contribute to the plaintiff's members' claim of harm from water pollution and development impacts from other zones.⁸²

A district court in D.C. has said that "procedural standing" applies only where the allegedly defective procedure *preceded* the agency's final action that harmed the plaintiffs. The procedural injury cannot be that the agency failed to create a subsequent procedure that plaintiffs would have benefitted from.⁸³ On the other hand, the Seventh Circuit recognized an environmental organization's procedural standing where the claim was that a general permit for stormwater created a notice of intent process that would unlawfully deprive its members of a claimed notice and hearing opportunity.⁸⁴

Although a procedural claim must be supported by concrete and particularized injury, the establishment of such an injury opens the door to many substantive lines of challenge to the governmental action.

Specifically, it is well-established that a plaintiff organization that successfully establishes standing based on a concrete and particularized injury is not limited to legal claims that address only that set of environmental interests. Especially in the case of procedural claims, the plaintiffs may raise any inadequacies and failures that could result in redress of their injuries even though based on other subjects. For example, recreational and aesthetic injuries often support organizations' standing to challenge deficiencies in NEPA analysis of climate change impacts of the action under review.⁸⁵

Because the remedy for such deficiencies may include an injunction against the action, or a remand for consideration of the issues that might lead to a different decision by the agency, the plaintiff's recreational or aesthetic or other injury is sufficient to sustain the "case or controversy" required by Article III.

75. *WildEarth Guardians*, 738 F.3d at 306.

76. *Center for Biological Diversity v. Environmental Prot. Agency*, 861 F.3d 174 (D.C. Cir. 2017).

77. *Id.* at 185 (citations omitted). See also *WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1154 (9th Cir. 2015) (when injury-in-fact is from procedural failure, plaintiff need not show that requiring the procedure would "certainly alleviate" the injury).

78. *National Parks Conservation Ass'n v. Manson*, 414 F.3d 1, 35 ELR 20140 (D.C. Cir. 2005).

79. See *Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 36 ELR 20187 (11th Cir. 2006) (plaintiff need not show that the allegedly defective EIS resulted in an outcome that would definitely harm species, but rather that the failure harmed the plaintiff's interest in having necessary information taken into account).

80. *Center for Biological Diversity v. U.S. Dep't of the Interior*, 563 F.3d 466 (D.C. Cir. 2009) ("Petitioners may bring both their [Outer Continental Shelf Lands Act-] and NEPA-based climate change claims under their procedural standing theory").

81. *Id.*

82. *Friends of Tims Ford v. Tennessee Valley Auth.*, 585 F.3d 955 (6th Cir. 2009).

83. *WildEarth Guardians v. Salazar*, 859 F. Supp. 2d 83, 90-92 (D.D.C. 2012) (BLM's denial of petition to recertify coal leasing region is not a procedural injury where the plaintiff complains of the lack of the creation of procedural opportunities that would follow from certification, rather than the omission of a required procedure).

84. *Texas Indep. Producers & Royalty Owners Ass'n v. Environmental Prot. Agency*, 410 F.3d 964, 35 ELR 20117 (7th Cir. 2005). The court found no basis for the claim on the merits.

85. *Sierra Club v. Federal Energy Regulatory Comm'n*, 867 F.3d 1357, 1366, 47 ELR 20104 (D.C. Cir. 2017) (injury to concrete aesthetic and recreational interests gives Sierra Club standing to object to any deficiency in the EIS, including climate change); *WildEarth Guardians v. Jewell*, 738 F.3d 298, 305-06, 44 ELR 20001 (D.C. Cir. 2013) (direct claim of injury to particular plaintiffs and members from climate change is not sufficiently concrete and particularized to support standing, but injury to members' recreational and aesthetic interest from claims of local pollution are sufficient to allow challenges to other inadequacies in the EIS, including climate change). "It is sufficient for standing purposes that the 'aesthetic injury follows from an inadequate EIS whether or not the inadequacy concerns the same environmental issue that causes their injury.'" *Id.* at 306 (citing *Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 668, 27 ELR 20098 (D.C. Cir. 1996) (en banc)).

IV. Informational Injury Claims

The federal courts have recognized standing to maintain claims based on “informational” injury to organizations and individuals. In *Public Citizen v. U.S. Department of Justice*⁸⁶ and *Federal Election Commission v. Akins*,⁸⁷ the Supreme Court held that the federal government’s failure to provide certain statutorily required information constituted a sufficient injury to confer Article III standing.

“Informational standing” is a specific subset of procedural injury that does not always require the showing of an additional injury. The Supreme Court has declared that the U.S. Congress has authority to confer rights and delineate claims for relief where none existed before. The denial of information to which Congress has created a statutory right “constitutes a sufficiently distinct injury to provide standing to sue.”⁸⁸

The Supreme Court further explained the doctrine in a 2016 decision involving litigation between two *private* parties: “the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. . . . [A] plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified.”⁸⁹ But, said the Court, the informational injury must nevertheless still be “concrete and particularized.”⁹⁰ Particularized injury may be shown by indicating how the information is or may be useful to the plaintiff, or relates to an impairment of the plaintiff’s interest; concrete injury seems to be limited to some showing that the information is material.⁹¹ However, it is likely that bare enforcement of a right to information under the Freedom of Information Act (FOIA) is sufficient without alleging that a plaintiff will suffer additional harms without the information.⁹²

In the environmental standing context, informational injury arises often in association with other claims of procedural injury, or as an alternative form of standing where the substantive injury is less clear. In general, the inquiry seems to involve two factors: demonstration of the plaintiff’s entitlement to the information as a matter of law, and

some ability to use the information, including using it in ordering the plaintiff’s (or its members’) own affairs.

In *Friends of Animals v. Jewell*,⁹³ the D.C. Circuit evaluated the plaintiff’s standing to challenge federal legislation directing FWS to reinstate a captive-breeding blanket exemption rule.⁹⁴ Citing *Akins*, the court of appeals held that the plaintiff had standing to maintain its informational injury claim. Because of the exemption, plaintiffs will no longer have access to the information that FWS would otherwise have been required to provide plaintiffs concerning each individual application for “take” of an endangered antelope. Nor would plaintiffs have the information FWS would have received in connection with each such permit application.⁹⁵ Thus, the government action denies the plaintiff “information relating to permitted takes of U.S. captive-bred herds of the three antelope species” previously available to it in the permit process—a process it regularly participates in. That previously provided information helped the plaintiff to “meaningfully participate in the Act’s permitting process as well as engage in related advocacy efforts to protect the three antelope species.”⁹⁶ Thus, denial of the information granted by the statute is an “injury in fact” to this plaintiff sufficient to confer standing.⁹⁷

86. 491 U.S. 440, 449 (1989) (Federal Advisory Committee Act).

87. 524 U.S. 11, 20-25 (1998) (Federal Election Campaign Act). Because “the informational injury at issue is directly related to voting, the most basic of political rights” it is “sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts.” *Id.* at 24-25.

88. *Public Citizen*, 491 U.S. at 449.

89. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549-50 (2016) (involving the accuracy obligations of a web search service under the Fair Credit Reporting Act).

90. *Id.* at 1548 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 22 ELR 20913 (1992)).

91. In *Spokeo*, the Court remanded the case to the Ninth Circuit to determine whether the inaccurate information disseminated by the defendant allegedly in violation of federal law was material (e.g., not just an incorrectly reported zip code).

92. Bradford C. Mank, *The Supreme Court Acknowledges Congress’ Authority to Confer Informational Standing in Spokeo, Inc. v. Robins*, 94 WASH. U. L. REV. 1377, 1379 (2017). See *Public Citizen*, 491 U.S. at 449 (“Our decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records.”); 5 U.S.C. §552.

93. 824 F.3d 1033, 1041 (D.C. Cir.), *cert. denied*, 137 S. Ct. 388 (2016).

94. The legislatively reinstated rule had been struck down in an earlier case. *Friends of Animals v. Salazar*, 626 F. Supp. 2d 102, 39 ELR 20134 (D.D.C. 2009). In that case, the district court had found informational injury to the plaintiff, because the challenged rule exempting breeders of endangered antelope species from the need to obtain individual “take” permits deprived the plaintiff of its statutory right to information it relies on for conservation via participation in the case-by-case ESA §10(c) processes; the court enjoined the rule. Congress subsequently enacted legislation directing FWS to reinstate the rule.

95. 16 U.S.C. §1539(c):

The Secretary shall publish notice in the Federal Register of each application for an exemption or permit which is made under this section. Each notice shall invite the submission from interested parties, within thirty days after the date of the notice, of written data, views, or arguments with respect to the application . . . Information received by the Secretary as a part of any application shall be available to the public as a matter of public record at every stage of the proceeding.

This is a distinct informational requirement, unlike that found by the D.C. Circuit not to support informational standing in *American Soc’y for the Prevention of Cruelty to Animals v. Feld Entm’t, Inc.*, 659 F.3d 13, 22-24 (D.C. Cir. 2011). There, the court held that a violation of §9 of the Act could not give rise to an informational injury because §9 did not require the release of any information but merely prohibited categories of behavior harmful to species protected under the Act.

96. *Friends of Animals*, 824 F.3d at 1041.

97. *Id.* at 1042 (however, plaintiff lost on the merits). See also *Environmental Integrity Project v. McCarthy*, 139 F. Supp. 3d 25, 45 ELR 20183 (D.D.C. 2015) (finding informational standing to challenge EPA’s withdrawal of a proposed rule that would have required concentrated animal feeding operations (CAFOs) to provide information to EPA under the CWA §308, where the statute gives the public access to records and information under §308). The district court found that this met the “three standards” for informational standing: a statutory right to the information, denial of the information because of the defendant’s action, and evidence that the denied information would be useful to the plaintiff. On the last of these findings, the court relied on showings that the plaintiff’s members must laboriously gather information on their own, if they can obtain it at all, and that lacking such information they cannot make informed decisions and so refrain from using waterways affected by CAFOs. *Id.* at 37.

In an unrelated case also called *Friends of Animals v. Jewell*,⁹⁸ decided the same year, the D.C. Circuit found no standing based on informational injury where the plaintiff challenged the Secretary of the Interior's missing of a 12-month deadline to issue a finding on a petition to list tortoise species under the ESA.⁹⁹ The court explained that "[t]he complaint's only cause of action alleges that '[t]he Secretary failed to make a finding indicating whether the petitioned action was warranted within twelve months after receiving the petition[s] to list.'" ¹⁰⁰ However, the purpose of the deadline provision is to prevent agency foot-dragging, said the court, while the disclosure provision is intended "to explain the Secretary's finding . . . and to set the stage for the next steps in the listing process."¹⁰¹ Because no explanation is due yet, "[e]ssentially, Friends of Animals has invoked informational standing prematurely. At this stage in the administrative process, Friends of Animals is not entitled to any information."¹⁰²

The informational injury must directly arise from the action depriving the plaintiffs of the information to which they are allegedly entitled. In *WildEarth Guardians v. Salazar*,¹⁰³ a district court found the procedural chain between the action complained of and the alleged informational injury too incomplete and tenuous to support informational standing. Plaintiffs contended that they were being denied information on coal production and markets that they would have been able to obtain if BLM had designated the Powder River Basin a coal production region in accordance with their petition. But a long-range market analysis following such designation is not directly required to be prepared by BLM or disclosed to plaintiffs, although, if prepared, it might be available under FOIA. Moreover, plaintiffs' reliance on a decades-old flow chart outlining the steps of a regional leasing process is no substitute for a statutory provision "explicitly creating a right to information."¹⁰⁴ Plaintiffs cannot rely for their informa-

tional injury claim on a sequence of events distinct from the action directly at issue in the case.¹⁰⁵

However, where there is an express statutory entitlement to information, the court will follow the legal chain where the connection is direct. In *Waterkeeper Alliance v. Environmental Protection Agency*,¹⁰⁶ the D.C. Circuit found informational injury despite the need to trace the connection between two sets of interconnected statutory provisions. The statutory requirement for public disclosure of hazardous substance releases under the Emergency Planning and Community Right-to-Know Act (EPCRA)¹⁰⁷ supported the petitioner's informational injury claim in a challenge to EPA's exemption of concentrated animal feeding operations (CAFOs) from reporting under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).¹⁰⁸ The court reasoned that EPA's rule dropping the CERCLA reporting requirement had the automatic effect of thwarting EPCRA-required public disclosure, as the statutes make CERCLA-reportable releases also reportable and publicly disclosed under EPCRA.¹⁰⁹

While informational standing claims can be important where there is a clear statutory entitlement to information, procedural standing claims cannot be bootstrapped into informational standing claims merely because the procedures themselves convey some information. In *Wilderness Society, Inc. v. Rey*,¹¹⁰ the Ninth Circuit found no informational standing in a case where environmental plaintiffs challenged regulations exempting certain Forest Service decisions from notice and comment and from administrative appeals under the Forest Service Decisionmaking and Appeals Reform Act (ARA).¹¹¹

Notice, of course, is a form of information (information that certain projects are being proposed), however Congress's purpose in mandating notice in the context of the ARA was not to disclose information, but rather to allow the public opportunity to comment on the proposals . . . Similarly, although an appeal might result in the dissemination of otherwise unavailable information, the statute does not contemplate appeals for this purpose, but to allow the public an opportunity to challenge proposals with which they disagree. In other words, the ARA grants the public a right to process and to participation. Even though these rights necessarily involve the dissemination of information, they are not thereby tantamount to a right to information.¹¹²

There was no injury to the plaintiff's information interests. "The difficulty with [the Wilderness Society's] analysis is that it simply reframes every procedural deprivation

98. 828 F.3d 989 (D.C. Cir.), *reh'g en banc denied* (2016).

99. The court of appeals summarized the test for informational injury: A plaintiff suffers sufficiently concrete and particularized informational injury where the plaintiff alleges that: (1) it has been deprived of information that, on its interpretation, a statute requires the government or a third party to disclose to it, and (2) it suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure.

Id. at 992. The court further noted:

The scope of the second part of the inquiry may depend on the nature of the statutory disclosure provision at issue. In some instances, a plaintiff suffers the type of harm Congress sought to remedy when it simply "[s]eeks and [is] denied specific agency records." *Pub. Citizen*, 491 U.S. at 449-50. In others, a plaintiff may need to allege that nondisclosure has caused it to suffer the kind of harm from which Congress, in mandating disclosure, sought to protect individuals or organizations like it.

Id.

100. *Friends of Animals*, 828 F.3d at 993.

101. *Id.*

102. *Id.* at 990. "The Secretary's alleged failure to make a 12-month finding within the statutorily mandated timeframe may have caused Friends of Animals some other cognizable injury in fact," said the court, but the organization did not support its standing with such a claim of injury. *Id.* at 995.

103. 859 F. Supp. 2d 83, 42 ELR 20166 (D.D.C. 2012).

104. *Id.* at 93.

105. *Id.*

106. 853 F.3d 527, 47 ELR 20062 (D.C. Cir. 2017).

107. 42 U.S.C. §§11001-11050.

108. 42 U.S.C. §§9601-9675, ELR STAT. CERCLA §§101-405.

109. *Id.* at 533-34.

110. 622 F.3d 1251 (9th Cir. 2010).

111. The court also denied associational standing based on inadequate affidavits of member's use of specific forests. *Id.* at 1256-57.

112. *Id.* at 1259.

in terms of informational loss.”¹¹³ *Rey* cited with approval the Seventh Circuit’s decision in *Bensman v. U.S. Forest Service*,¹¹⁴ which found that the agency’s denial of the plaintiff’s administrative appeal on procedural grounds did not deprive the plaintiff of any *information* to which he was entitled, so there was no independent ground for informational standing.¹¹⁵

The broadest of the informational standing cases is the Sixth Circuit’s decision in *American Canoe Ass’n v. City of Louisa Water & Sewer Commission*.¹¹⁶ There, the court recognized that an informational injury could be understood in terms of depriving a plaintiff of information needed to order his or her own affairs in the use of a river and in advocating for clean water. The court identified injury-in-fact from the lack of information (monitoring and reporting on discharges from a sewage treatment plant) to which plaintiffs were statutorily entitled.¹¹⁷

V. Standing Under the “Zone of Interests” Test

Article III standing is not the only relevant standing consideration. The Supreme Court has also recognized other limits on standing. In 2012, the Court explained that it has

long held that a person suing under the [Administrative Procedure Act¹¹⁸] APA must satisfy not only Article III’s standing requirements, but an additional test: The interest [plaintiff] asserts must be “arguably within the *zone of interests* to be protected or regulated by the statute” that [the plaintiff] says was violated.¹¹⁹

The Court further observed, “[W]e have always conspicuously included the word ‘arguably’ in the test to indicate that the benefit of any doubt goes to the plaintiff.”¹²⁰ The “zone of interests” test is “not meant to be especially demanding,” given Congress’ evident intent in the APA to “make agency action presumptively reviewable.”¹²¹ The

zone-of-interests test applies to claims brought under the APA and under other statutes.¹²² It forecloses suit only when a plaintiff’s “interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.”¹²³ This “lenient approach,” said the Court, is an “appropriate means of preserving the flexibility of the APA’s omnibus judicial-review provision,” which permits lawsuits against the federal government to address violations of numerous federal statutes that may not themselves create causes of action.¹²⁴

The Supreme Court has for decades described the zone-of-interests test as a “prudential” standing test,¹²⁵ doing so as recently as 2012.¹²⁶ But in 2014, a unanimous Court renounced that formulation, characterizing the inquiry instead as determining whether Congress authorized this class of plaintiffs to have a cause of action to seek review under the statute in question.¹²⁷ The Court reformulated the analytic description in an apparent attempt to ground the test in something firmer than “prudence.”¹²⁸ While changing the terminology, however, the Court did not alter any of the underlying inquiries established in its prior cases elucidating the test. Among these, the Court has emphasized, are that the zone of interests must be determined “not by reference to the overall purposes of the Act in question, but by reference to the particular provision of law upon which the plaintiff relies.”¹²⁹ Moreover:

[T]he breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the “generous review provisions” of the APA may not do so for other purposes.¹³⁰

In the public lands and natural resources context, the zone-of-interests test has rarely been an impediment to plaintiffs. In *Bennett v. Spear*, the Supreme Court found that the claims of irrigation districts and ranchers were within the zone of interests both of the ESA citizen suit provision and of the ESA via the APA in a case challenging a biological opinion related to operation of a water project.

113. *Id.* at 1260.

114. 408 F.3d 945, 35 ELR 20111 (7th Cir. 2005).

115. *Id.* at 958. The Seventh Circuit had, in a prior case, found informational standing as well as procedural standing in a challenge to the Forest Service’s failure to prepare an EA when adopting new procedures under NEPA, although plaintiffs lost on the merits. *Heartwood, Inc. v. U.S. Forest Serv.*, 230 F.3d 947, 952 n.5, 31 ELR 20217 (7th Cir. 2000).

116. 389 F.3d 536, 34 ELR 20129 (6th Cir. 2004).

117. “If monitoring and reporting requirements are imposed, the Act requires that the information collected be available to the public unless disclosure would expose a trade secret. 33 U.S.C. §1318(b).” *Id.* at 539. Judge Cornelia Kennedy, concurring and dissenting in *American Canoe*, would have found that the organization did not have informational standing independent of representational standing based on injury to water quality and use of the waterway by the plaintiff’s members. *Id.* at 547. The D.C. Circuit in *Friends of Animals v. Jewell*, 828 F.3d 989, 994 (D.C. Cir. 2016), references “the Sixth Circuit’s apparent conflation of informational and organizational standing.”

118. 5 U.S.C. §500-559.

119. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224, 42 ELR 20126 (2012) (quoting Association of Data Processing Serv. Orgs., *Inc. v. Camp*, 397 U.S. 150, 153 (1970)) (emphasis supplied). *Camp* first formulated the zone-of-interests test as a standing doctrine.

120. *Patchak*, 567 U.S. at 224.

121. *Id.*

122. *Bennett v. Spear*, 520 U.S. 154, 27 ELR 20824 (1997) (ESA and APA); *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014) (Lanham Act).

123. *Clarke v. Securities Indus. Ass’n*, 479 U.S. 388, 399 (1987).

124. *Lexmark*, 572 U.S. at 130.

125. *Bennett*, 520 U.S. at 161.

126. *Patchak*, 567 U.S. at 212.

127. *Lexmark*, 572 U.S. at 127 (“Whether a plaintiff comes within ‘the “zone of interests”’ is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff’s claim.”).

128. *Id.* at 128 (“Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied . . . it cannot limit a cause of action that Congress has created merely because ‘prudence’ dictates.”).

129. *Bennett*, 520 U.S. at 175-76. “In determining whether the petitioners have standing under the zone-of-interests test to bring their APA claims, we look . . . to the substantive provisions of the ESA, the alleged violations of which serve as the gravamen of the complaint.” *Id.* at 175.

130. *Id.* at 163 (citing *Clarke v. Securities Indus. Ass’n*, 479 U.S. 388, 400 n.16 (1987)).

As for the plaintiffs' APA claims, the Court found that the ESA's requirement for FWS to use "the best scientific and commercial data available" serves the "obvious," albeit implied, objective of the law to "avoid needless economic dislocation."¹³¹ In *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, the Court recognized the claims of a nearby resident affected by DOI's taking lands into trust for an Indian tribe to facilitate economic development, finding that §465 of the Indian Reorganization Act raised issues of land use, economic development, and "potential conflicts of land use which may arise."¹³² Interestingly, the Court looked to the Bureau of Indian Affairs' (BIA's) regulations for further support in interpreting the "interests" with which the relevant statutory provisions are concerned.¹³³

The key zone-of-interests inquiry in cases against the federal government seems to be whether the court can infer that Congress arguably *intended* the agency to take into account the interests the plaintiff asserts when the agency took the action at issue.

This means that where a statute severely bounds agency discretion, or a decision is non-discretionary, it may be more difficult to find that a particular claim is within the zone of interests. Some recent Ninth Circuit cases bear this out.

In 2018, the Ninth Circuit in *Havasupai Tribe v. Provenzio*¹³⁴ ruled that the Grand Canyon Trust's challenge to valid existing rights (VER) determinations by the Forest Service potentially allowing uranium mining in an area withdrawn from mineral location by the Secretary of the Interior was within the zone of interests of the Federal Land Policy and Management Act (FLPMA), but not the General Mining Law of 1872.¹³⁵ The court determined that FLPMA's articulation of purposes for a withdrawal include the Trust's asserted environmental concerns when considering a VER determination.¹³⁶ Although the Forest Service consulted the General Mining Law—a law that is not concerned with environmental interests, but only with defining competing economic interests in public land—the Trust's claim "remains a claim under FLPMA."¹³⁷

The discretionary versus non-discretionary nature of a decision at issue was relevant in another Ninth Circuit case,

Pit River Tribe v. Bureau of Land Management.¹³⁸ The court held that the tribe's environmental, historic, and cultural interests were *not* within the zone of interests of the section of the Geothermal Leasing Act that provides for "continuation" of certain producing leases for 40 years, because that determination is a non-discretionary or "ministerial" act that does not include such factors. BLM must grant the continuation if it finds that the lease is producing in commercial quantities. "BLM is not permitted to consider environmental factors in making lease continuation decisions and any environmental review would be superfluous."¹³⁹ However, the court found that the plaintiff's interests were within the zone of interests of a separate subsection of the law providing for discretionary "extensions" of leases for up to five years. Said the court: "Because BLM must coordinate environmental review under NEPA and [the National Historic Preservation Act] NHPA before granting lease extension under §1005(g) . . . Pit River's claim falls within §1005(g)'s zone of interest and Pit River has stated a claim under §1005(g)."¹⁴⁰

In effect, if there is a discretionary decision to which NEPA, NHPA, ESA, and related analyses attach, it is very likely that claims will fall within the zone of interests.¹⁴¹ Environmental and conservation group plaintiffs are rarely troubled by the zone-of-interests inquiry when litigating claims under these statutes, but occasionally it will trip up commercial interests.¹⁴² Other statutes that include public policy considerations in a decisional context will usually satisfy this generally undemanding test, including claims

131. *Id.* at 176-77.

132. 567 U.S. 209, 226, 42 ELR 20126 (2012).

133. *Id.* ("The Department's regulations make this statutory concern . . . crystal clear.")

134. No. 15-15754, 48 ELR 20182 (9th Cir. Oct. 25, 2018), *new opinion withdrawing* 876 F.3d 1242 (9th Cir. 2017).

135. 43 U.S.C. §§1701-1736, 1737-1782, ELR STAT. FLPMA §§102-603; 30 U.S.C. §22. The court separately rejected on the merits plaintiffs' NEPA and National Historic Preservation Act (NHPA) counts, which it found plaintiffs did have standing to bring.

136. *Provenzio*, slip op. at 23.

137. *Id.* In the panel's previous (withdrawn) opinion, the court had characterized FLPMA as providing insufficient content to provide a standard and so looked to the General Mining Law alone. 876 F.3d at 1253 (withdrawn). Both the new opinion and the withdrawn opinion characterized the zone of interests of the General Mining Law as limited to rewarding and encouraging economic interests in discovery and exploitation of valuable minerals. Precedents under the Mining Law address only claims brought by the United States or rival mineral claimants, not those with other interests.

138. 793 F.3d 1147 (9th Cir. 2015).

139. *Id.* at 1159.

140. *Id.* at 1149. The court found that by creating this discretion, Congress did intend to create a cause of action encompassing Pit River's claims.

141. Committee to Save the Rio Hondo v. Lucero, 102 F.3d 445, 27 ELR 20576 (10th Cir. 1996) (NEPA zone of interest covers recreational, aesthetic, and conservation interests in river waters and nearby lands affected by Forest Service's decisions concerning summertime use of ski area on national forest lands); *Pye v. United States*, 269 F.3d 459, 32 ELR 20280 (4th Cir. 2001) (owners of land next to African-American cemetery are within zone of interests of NHPA, as regulations authorize the Corps to condition use of nationwide permits by road project to take into account project effects on historic sites).

142. *Triumvirate, LLC v. Zinke*, No. 3:18-cv-0091-HRH, 2018 WL 2770634, slip op. at *17 (D. Alaska May 1, 2018) (challenge by competitor to heli-hiking permits does not satisfy the zone of interests for NEPA; human health and safety concerns from excess use of contested area are injury-in-fact, but not sufficiently tied to protection of the physical environment to fall within NEPA's zone of interests). *See also* *Ecosystem Inv. Partners v. Crosby Dredging, LLC*, 729 F. App'x 287, 48 ELR 20047 (5th Cir. 2018) (wetland bank has Article III standing but is not within the zone of interests of NEPA on claim that Corps of Engineers should have purchased its wetland credits rather than build its own mitigation: "We conclude that [Ecosystem Investment Partners] EIP has not pleaded facts showing an injury within NEPA's zone of interest. From its assertions in its complaint, we discern no environmental injury to EIP (or anyone else for that matter).") *But see* *Otay Mesa Prop. v. U.S. Dep't of the Interior*, 144 F. Supp. 3d 35 (D.D.C. 2015) (landowner/developer is within NEPA's zone of interest in challenge to critical habitat designation, as NEPA includes "the natural and physical environment and the relationship of people with that environment" not limited to economic interests); *and see* *Battle Mountain Band of the Te-Moak Tribe of W. Shoshone Indians v. Bureau of Land Mgmt.*, 302 F. Supp. 3d 1226 (D. Nev. 2018) (intervenor mine operator is within zone of interests of NHPA, where law is intended to facilitate review of the operation and mine operator is a consulting party).

under FLPMA¹⁴³ and the Coastal Zone Management and Marine Mammal Protection Acts.¹⁴⁴ Federal laws that require taking into account local laws and compliance with state and local requirements have been held to provide a sufficient zone of interest to support standing for municipal governments and citizen groups challenging various infrastructure decisions.¹⁴⁵

The U.S. Court of Appeals for the First Circuit found tribe members within the zone of interests of NEPA, NHPA, and ESA in a challenge to the BIA's approval of a lease of Passamaquoddy tribal land to a developer for construction of a liquefied natural gas terminal.¹⁴⁶ The court also found the claims to be within the zone of interests of the Indian Long-Term Leasing Act:

The federal government's duty under the Leasing Act, through the BIA, is to ensure that the parties to a lease of Indian land have given adequate consideration to the impacts of the lease on, inter alia, neighboring lands and the environment . . . The land owners presumably have a vested interest in a lease's approval, so . . . Congress surely intended, therefore, for other tribe members whose interests would be adversely affected by the lease's impacts to complain of the agency's action.¹⁴⁷

Interestingly, the court bolstered its interpretation of the zone of interest by referencing the BIA's regulations for appeal.¹⁴⁸

143. *Provencio*, 48 ELR 20182 (9th Cir. Oct. 25, 2018) (environmental group has standing to challenge VER determination under FLPMA). *Utah v. Babbitt*, 137 F.3d 1193, 28 ELR 20561 (10th Cir. 1998) (state has standing to challenge alleged de facto amendment of land use plan under FLPMA). *Triumvirate*, 2018 WL 2770634 (BLM does not contest zone-of-interest standing under FLPMA of competitor to challenge heli-hiking decision).

144. 16 U.S.C. §§1361-1421h, ELR STAT. MMPA §§2-410. *City of Sausalito v. O'Neill*, 386 F.3d 1186, 34 ELR 20121 (9th Cir. 2004) (city's claims challenging National Park Service general management plan are within zone of interests of the Coastal Zone Management Act, which explicitly seeks to protect and restore coastal zone and enlists cooperation of local governments, and of the Marine Mammal Protection Act, which recognizes protection of animals for aesthetic and recreational as well as economic concerns tied to the presence of marine mammals). The court also found the city's claims within zone of interests for the Migratory Bird Treaty Act, the Concessions Management Improvement Act, and the Omnibus Parks and Public Lands Management Act, for injury to similar interests and as a party "adversely affected or aggrieved" under the latter two acts for effects on business, housing, and congestion, but ruled against the city on the merits on these claims.

145. *Richland-Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs*, 279 F. Supp. 3d 846, 864 (D. Minn. 2017) (state agency and joint authority claims against flood control project are within zone of interests of Water Resources Reform and Development Act where the federal law requires compliance with state laws and regulations: "[B]y requiring state permits, Congress reiterated its consistent view that flood control projects relating to navigable water must be completed in 'cooperation with States, their political subdivision and localities thereof.'"); *Myersville Citizens for a Rural Cmty. v. Federal Energy Regulatory Comm'n*, 783 F.3d 1301, 1316-17 (D.C. Cir. 2015) (claims concerning natural gas compressor station are within zone of interests of the Clean Air Act and the Natural Gas Act, as each of these include concerns for preservation of state and local authority for environmental and land use regulation, and thus claims of depressed property values, increased noise and air pollution, visual blight, and heightened safety risks).

146. *Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 37 ELR 20241 (1st Cir. 2007).

147. *Id.* at 29. However, the court found no basis for a claim by individuals based on general Indian trust responsibility.

148. *Id.*

Some care is needed in pleading claims involving multiple statutes and alleged injuries. The D.C. Circuit rejected a challenge brought by a riverkeeper group to FERC licensing of a natural gas pipeline.¹⁴⁹ The court found that the asserted injuries were largely associated with protecting the group's members from eminent domain. While the petitioner did demonstrate Article III standing, the court found that the claims did not fall within the zone of interests of the Natural Gas Act, nor NEPA nor the CWA (which it regarded as providing the only content for the Natural Gas Act claim) because the alleged harms were not environmental, but rather focused on loss of property rights of members. Even the NEPA claims were supported, said the court, only by claims of economic loss and sentiment about loss of trees, and the CWA §401 procedural claims were not connected to allegations of interests in avoiding resulting harm to waterways.

Because Gunpowder did not argue that its members would suffer any environmental harm—indeed, it expressly disclaimed the need to do so—we conclude the petitioner does not come within the zone of interests protected by the NEPA. . . . Gunpowder does not come within the zone of interests protected by the [Clean Water Act] because it did not allege its members would suffer any environmental harm.¹⁵⁰

The majority notes the importance of petitioners needing to plead and support zone-of-interests claims in the opening brief, certainly a practice tip for those in the D.C. Circuit.

One aspect of zone-of-interests standing is the sometimes-connected question of when a plaintiff may seek to vindicate what is essentially a third party's interest.¹⁵¹ In

149. *Gunpowder Riverkeeper v. Federal Energy Regulatory Comm'n*, 807 F.3d 267, 45 ELR 20141 (D.C. Cir. 2015).

150. *Id.* at 274-75. Judge Rogers, dissenting and concurring in the result, noted that environmental interests could be inferred from the affidavits and record, but that petitioners had not expressly argued zone of interests for its Clean Water and NEPA claims (where it could have made the case) and argued it only for the Natural Gas Act.

No doubt, petitioner presented a zone-of-interests analysis only for the Natural Gas Act, see Reply Br. 2-4, but in so doing, petitioner conveyed more than enough to make clear that its interests came within the environmental statutes' zones of interest. The court is "not limited to the particular legal theories advanced by the parties." [citations omitted]. Where the correct analysis is as clear as it is here, there is no reason for the court not "to identify and apply the proper construction of governing law." [citation omitted]. The reason petitioner focused on its members' property rights likely stems from its view that it only had to present a zone-of-interests analysis under the Natural Gas Act because that statute provided the cause of action.

Id. at 278. She would have found standing, but would have ruled against petitioners on the merits.

151. In *Lexmark*, the Supreme Court observed:

The limitations on third-party standing are harder to classify; we have observed that third-party standing is "closely related to the question whether a person in the litigant's position will have a right of action on the claim," [internal citations omitted], but most of our cases have not framed the inquiry in that way. *See, e.g., Kowalski v. Tesmer*, 543 U.S. 125, 128-129 (2004) (suggesting it is an element of "prudential standing"). This case does not present any issue of third-party standing, and consideration of that doctrine's proper place in the standing firmament can await another day.

Wilderness Society v. Kane County,¹⁵² a panel of the Tenth Circuit initially found that environmental plaintiffs were within the zone of interests of the Constitution's Supremacy Clause in their challenge to a county's removal of signs in the Grand Staircase-Escalante National Monument and the county's erection of signs purporting to authorize vehicle use of monument lands.¹⁵³ However, in *Wilderness Society v. Kane County* (IV),¹⁵⁴ the en banc court vacated this decision, finding that the organization lacked prudential standing as it was essentially trying to vindicate the property-right interests of a third party (the United States) not party to the suit.

[Plaintiff's] claims turn on the superiority of the federal government's property claim. If the County possesses valid R.S. 2477 rights of way in the roads, then its actions do not necessarily conflict with the BLM's management decisions. On the other hand, if the County does not possess rights of way in the roads, then the BLM's final decisions trump and invalidate the County's actions.¹⁵⁵

So, while in the first round of this case the panel resorted to "zone of interest" analysis, the en banc court hung its analysis on another branch of what remains for the time being "prudential" standing—the third-party doctrine.¹⁵⁶

In procedural terms, federal courts' application of the zone of interest has generally migrated toward an understanding that it implicates Rule 12(b)(6) of the Federal Rules of Civil Procedure (failure to state a claim) as the locus of the determination,¹⁵⁷ rather than Rule 12(b)(1) (lack of jurisdiction). This is in keeping with the modern understanding that it is the statute that matters, and that federal courts must actually exercise jurisdiction to determine whether a claim is valid (as opposed to "arguable").¹⁵⁸

Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 127 n.3 (2014).

152. 581 F.3d 1198 (10th Cir. 2009), *vacated*, 632 F.3d 1162 (10th Cir. 2011) (en banc).

153. "The Supremacy Clause is at least arguably designed to protect individuals harmed by the application of preempted enactments. Accordingly, the environmental plaintiffs have prudential standing." *Id.* at 1217. In dissent, Judge McConnell would have found that plaintiffs lacked both standing and any cause of action under the clause.

154. 632 F.3d 1162, 1170 (10th Cir. 2011) (en banc).

155. *Id.* at 1171.

156. *Lexmark*, 572 U.S. at 127 n.3. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11-12 (2004), *abrogated by Lexmark*, 572 U.S. 118 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)) (enumerating the prudential standing branches: the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances better addressed in representative branches of government, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked).

157. *Lexmark*, 572 U.S. at 127; *Battle Mountain Band of the Te-Moak Tribe of W. Shoshone Indians v. Bureau of Land Mgmt.*, 302 F. Supp. 3d 1226 (D. Nev. 2018); *Triumvirate, LLC v. Zinke*, No. 3:18-cv-0091-HRH, 2018 WL 2770634 (D. Alaska May 1, 2018).

158. See *Lexmark*, 572 U.S. at 127 n.4, and cases cited therein (including favorable citation to Judge Brett Kavanaugh's dissent in *Grocery Mfrs. Ass'n v. Environmental Prot. Agency*, 693 F.3d 169, 183-85, 42 ELR 20180 (D.C. Cir. 2012) (arguing that zone of interests should not be construed as jurisdictional in the D.C. Circuit). See also Micah J. Revell, *Prudential Standing, the Zone of Interests, and the New Jurisprudence of Jurisdiction*, 63 EMORY L.J. 221 (2013) (advocating that zone-of-interests test not be understood as

VI. Organizational Standing

An organization may satisfy the injury-in-fact requirement for standing either by demonstrating that its members have suffered injury and that it may sue on their behalf or, alternatively, that the organization itself has suffered an injury. Where an organization claims standing on behalf of its members, it has "associational" standing. Associational standing is appropriate where (1) an association's members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.¹⁵⁹ In contrast, where an organization maintains standing on its own behalf, it has "organizational" standing. The standards for organizational standing depend on a more circumstantial analysis of injury that focuses on impacts to the organization's ability to carry on its activities.

The seminal organizational standing case is *Havens Realty Corp. v. Coleman*.¹⁶⁰ In *Havens*, the Supreme Court evaluated the standing of Housing Opportunities Made Equal (HOME) to maintain a suit against Havens Realty for injunctive relief under the Fair Housing Act. HOME alleged that Havens' racially discriminatory steering practices "frustrated" the fair housing services provided by the plaintiff.¹⁶¹ In its analysis, the Court stated that if, as alleged, the actions of the apartment complex had "perceptibly impaired" HOME's ability to provide counseling and referral services to clients, there could be "no question that the organization has suffered injury in fact."¹⁶² This "concrete and demonstrable injury to the organization's activities" with the resulting "drain on its resources," said the Court, "constitutes more than simply a setback to the organization's abstract social interests."¹⁶³ Lower courts have used this formulation to develop a framework for evaluating organizational standing claims.

Like an individual, an organization must show "an actual or threatened injury in fact that is fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by a favorable court decision."¹⁶⁴ While courts have repeatedly noted that the same inquiry is conducted for an organization as for an individual, the way in which an organization establishes an injury may be different. Generally, an organization must allege and provide evidence that "discrete programmatic concerns"¹⁶⁵ are being directly

jurisdictional, although not anticipating the Court's subsequent discard of the "prudential" characterization of the test).

159. *Warth v. Seldin*, 422 U.S. 490, 510-11 (1975).

160. 455 U.S. 363 (1982).

161. *Id.* at 379.

162. *Id.*

163. *Id.* (referencing *Sierra Club v. Morton*, 405 U.S. 727, 739, 2 ELR 20192 (1972)).

164. *American Soc'y for the Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 24 (D.C. Cir. 2011).

165. See *id.* at 26 (citing *National Treasury Employees Union v. United States*, 101 F.3d 1423, 1430 (D.C. Cir. 1996) ("an effect on an organization's lobbying efforts, absent direct conflict with the organization's mission, was insufficient to establish standing").

and adversely affected by the defendant's actions."¹⁶⁶ The D.C. Circuit has developed a two-part test for evaluating organizational standing. The court first asks "whether the defendant's allegedly unlawful activities injured the plaintiff's interest in promoting its mission." If so, the court will then ask "whether the plaintiff used its resources to counteract that injury."¹⁶⁷ However, in order to amount to a cognizable organizational injury-in-fact, the defendant's conduct must cause "an inhibition of the organization's daily operations."¹⁶⁸

The D.C. Circuit's application of its two-part test has played out in a series of recent cases. In *American Society for the Prevention of Cruelty to Animals v. Feld Entertainment*,¹⁶⁹ the court identified two "important limitations" on the scope of standing under *Havens*. First, an organization seeking to establish standing must show a "direct conflict between the defendant's conduct and the organization's mission." If the "challenged conduct affects an organization's activities, but is neutral with respect to [the] substantive mission," said the court, it is "entirely speculative" whether the action actually impairs the organization's activities.¹⁷⁰ Second, an organization may not "manufacture the injury" from its expenditure of resources on the litigation itself.¹⁷¹ While noting that defendants' practices in elephant handling were contrary to the plaintiff's mission, the court found that there was no showing that the defendant's activities conveyed a message that the plaintiff had to overcome. Plaintiff failed to show the "causation" element of an injury-in-fact.¹⁷²

The court further developed its doctrine of organizational standing in *People for the Ethical Treatment of Animals v. U.S. Department of Agriculture (PETA)*.¹⁷³ In *PETA*, the U.S. Department of Agriculture (USDA) was alleged to have "perceptibly impaired" PETA's mission by failing to include birds in its processes for identifying and rectifying mistreatment of animals, and thus "precluded PETA from preventing cruelty to and inhumane treatment of [birds] through its normal process of submitting USDA complaints" and by "depriving [it] of key information that it relies on to educate the public."¹⁷⁴ Essential to the success of PETA on standing (although it lost on the merits), was

the court's finding that the plaintiff had "alleged an inhibition of [its] daily operations, an injury both concrete and specific to the work in which they are engaged."¹⁷⁵ PETA met the second element by demonstrating that it had, in consequence, expended resources to counter the alleged injury by taking other, less effective actions to redress injury to birds. USDA argued that PETA failed to overcome the circuit's "conflict with mission" limitation, as USDA does not mistreat animals nor do its actions directly result in mistreatment. The court stated that USDA's "conduct" does conflict with the mission, and that the limitation exists only to ensure that the organizational injury is not "entirely speculative."¹⁷⁶ The court found that PETA's alleged harms were not speculative, because the alleged "lack of redress for its complaints and a lack of information for its membership . . . does hamper and directly conflict with" the plaintiff's mission.¹⁷⁷ If USDA were to apply its general welfare standard to birds, it would employ the same mechanisms that it applies to other species. Thus, USDA "plainly impairs PETA's activities in a non-speculative manner" by requiring PETA to divert its limited resources to "counteract and offset" the asserted deficiency.¹⁷⁸ The *PETA* case shows the importance of specificity in pleading and how crucial it is to draw a connection between the defendant's action or non-action and the organization's action in response.

The court further explained organizational standing in *Food & Water Watch v. Vilsack*,¹⁷⁹ in which an organization challenged a new food inspection system for poultry processors that could allegedly result in more foodborne illnesses. The court distinguished between organization claims that "their activities have been impeded" and those who "merely allege that their mission has been compromised," emphasizing that only the former type of injury can give rise to organizational standing.¹⁸⁰ Where Food & Water Watch's (FWW's) primary purpose was already education on food safety, and it alleged that the defendant's actions would cause its previous advocacy efforts "to go to waste" and that it would have to increase its normal education efforts, the court found the alleged injury insufficient. The court determined that the plaintiff, in challenging a new inspection system for poultry processors, must show more than a frustration of its purpose. An injury to activities exists only where an organization "expends resources to educate its members and others" that "subjects [it] to operational costs beyond those normally expended."¹⁸¹ The court distinguished *PETA*, in which the organization was

166. *People for the Ethical Treatment of Animals v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1093, 45 ELR 20150 (D.C. Cir. 2015) (quoting *American Legal Found. v. Federal Commc'ns Comm'n*, 808 F.2d 84, 92 (D.C. Cir. 1987)).

167. *American Socy for the Prevention of Cruelty to Animals*, 659 F.3d at 25.

168. *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (2015) (internal citations omitted); see also *Turlock Irrigation Dist. v. Federal Energy Regulatory Comm'n*, 786 F.3d 18, 24 (D.C. Cir. 2015) (finding that "an organization must allege that the defendant's conduct perceptibly impaired the organization's ability to provide services in order to establish injury in fact").

169. 659 F.3d 13 (D.C. Cir. 2011).

170. *American Socy for the Prevention of Cruelty to Animals*, 659 F.3d at 25 (citing *National Treasury Employees Union*, 101 F.3d at 1430).

171. *Id.* See also *Center for Law & Educ. v. U.S. Dep't of Educ.*, 396 F.3d 1153 (D.C. Cir. 2005) (noting that "to hold a lobbyists/advocacy group has standing . . . with no injury other than injury to its advocacy would eviscerate standing doctrine's actual injury requirement").

172. *American Socy for the Prevention of Cruelty to Animals*, 659 F.3d at 27-28.

173. 797 F.3d 1087, 1094, 45 ELR 20150 (D.C. Cir. 2015).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 1095.

178. *Id.*

179. 808 F.3d 905 (D.C. Cir. 2015).

180. *Id.* at 905, 919 (emphasis added) (citing *Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*, 469 F.3d 129, 133 (D.C. Cir. 2007)) (internal quotations omitted).

181. *Food & Water Watch*, 808 F.3d at 905, 919 (emphasis added). Mere expenditures on lobbying or attempting to overcome adverse perceptions or to achieve particular desired results are not "operational costs beyond those normally expended." *Environmental Working Group v. U.S. Food & Drug Admin.*, 301 F. Supp. 3d 165, 172-73, 48 ELR 20049 (D.D.C. 2018).

deprived of access to formal processes for redress and to specific investigatory information it could use to protect birds, and consequently had to expend additional resources to fill the void; in contrast, the court found that FWW had alleged nothing more than an abstract injury.¹⁸²

The D.C. Circuit's organizational standing jurisprudence closely links the organizational injury-in-fact to the unlawful government action. However, Judge Patricia Millett, who participated in both *PETA* and *Food & Water Watch*, wrote separately in each to note that while both decisions were consistent with the law of the circuit, she believes that the court should in an appropriate case revisit its organizational standing doctrine, as she believes it has become more lenient to organizations than is warranted. Judge Millett argues that the circuit has allowed organizational standing to stray from *Havens* by allowing organizations to claim injury based on their expenditures to *substitute* for a governmental failure to *take actions against a third party*, rather than limited to expenditures that vindicate a plaintiff's own injuries.¹⁸³

In general, the D.C. Circuit's development of organizational standing doctrine emphasizes the importance of identifying specific impairments of the plaintiff's activities, and the incurring of extra-operational costs to offset those impairments—essentially a form of procedural and economic injury.

In *American Canoe Ass'n v. City of Louisa Water & Sewer Commission*, in considering an informational injury claim by organizations, the Sixth Circuit determined that no additional showing of need for the information is required.¹⁸⁴ The court recognized organizational standing, noting that the organizations' lack of access to the information "stymied" their "monitoring and reporting obligations to their members" and their ability to advocate based on the missing information.¹⁸⁵

VII. Standing of States

In *Massachusetts v. Environmental Protection Agency*¹⁸⁶ the Supreme Court in a 5-4 decision declared that the state of Massachusetts had standing to sue EPA for its decision not to regulate greenhouse gas emissions from new motor vehicles. The Court found that petitioners had a concrete procedural interest in "the right to challenge agency action

unlawfully withheld."¹⁸⁷ It further observed that states "are not normal litigants for the purposes of invoking federal jurisdiction"¹⁸⁸ and noted the "special position and interest" of Massachusetts.¹⁸⁹ Quoting from *Georgia v. Tennessee Copper Co.*,¹⁹⁰ the Court drew a comparison between Georgia's "independent interest in all the earth and air within its domain" and "Massachusetts' well-founded desire to preserve its sovereign territory" in the present case.¹⁹¹ The Court noted that in exchange for statehood, Massachusetts had given up certain abilities to exercise its own police powers to reduce in-state motor vehicle emissions, via likely federal preemption.¹⁹² As these "sovereign prerogatives" had been "lodged in the federal government," and Congress had in turn directed EPA to protect Massachusetts (among others) by prescribing air pollution standards, the state had an obvious stake.¹⁹³ Given procedural rights under the Clean Air Act (CAA) and Massachusetts' "stake in protecting its quasi-sovereign interests," the Court found that the state is entitled to "special solicitude in our standing analysis."¹⁹⁴ However, concrete injuries must still be alleged. The Court noted that even though the harms of climate change are "widely shared," Massachusetts had alleged specific injuries resulting from the potential loss of coastal property and of its territory as a result of periodic storm surge events; and as owner of a substantial portion of the coastal lands, it had also alleged "a particularized injury in its capacity as a landowner."¹⁹⁵

Dissenting, Justices John Roberts, Antonin Scalia, Clarence Thomas, and Samuel Alito would have found that the state lacked standing on all three Article III elements, while finding no basis for "special solicitude" for states as modifying or informing standing doctrine.¹⁹⁶ The majority replied that the dissenters too narrowly read the Court's precedents to limit state standing.¹⁹⁷ The Chief Justice's dissent also advanced the broad concept that the

187. *Id.* at 517-18.

188. *Id.* at 518.

189. *Id.*

190. *See, e.g.*, *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907).

191. *Massachusetts*, 549 U.S. at 519.

192. *Id.*

193. *Id.*

194. *Id.* at 520.

195. *Id.* at 523. "Where a harm is concrete, though widely shared, the Court has found injury in fact." *Id.* at 522 (quoting *Federal Election Comm'n v. Akins*, 524 U.S. 11, 24 (1998)). The Court also found that Massachusetts had met the standards for causation and redressability, citing its precedents on procedural injuries.

196. *Id.* at 537. The dissenters further characterized *Tennessee Copper* as a *parens patriae* case in the original jurisdiction of the Supreme Court and having no bearing on standing (at least vis-à-vis the federal government). *Id.* at 538 (Roberts, C.J., dissenting). The dissenters maintained that prior case law does not allow states to bring actions against the federal government either in *parens patriae* nor to assert a quasi-sovereign interest against the federal government, as opposed to a direct injury. *Id.* at 539. In general, states do not have standing as *parens patriae* to bring an action against the federal government. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982); *Massachusetts v. Mellon*, 262 U.S. 447 (1923).

197. *Massachusetts v. Environmental Prot. Agency*, 549 U.S. at 520 n.17. Distinguishing *Mellon*, 262 U.S. 447, the majority notes that there the state was attempting to interpose to protect its citizens *against the operation of a federal law*, rather than asserting its own quasi-sovereign rights. It further noted that *Mellon* expressly did not involve claims concerning "physical domain" or "quasi-sovereign rights actually invaded or threatened." *Id.* at 484-85.

182. *Food & Water Watch*, 808 F.3d at 921. *See id.* at 925 (Henderson, J., concurring) ("PETA suffered a cognizable injury in fact because it spent resources to remedy alleged governmental nonfeasance, which deprived PETA of information to which it was allegedly entitled.")

183. *People for the Ethical Treatment of Animals*, 797 F.3d at 1100-01 (Millett, J., dubitante); *Food & Water Watch*, 808 F.3d at 387 (Millett, J., concurring).

184. *American Canoe Ass'n v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 34 ELR 20129 (6th Cir. 2004).

185. *See id.* at 545. The defendants were allegedly under a legal obligation to provide information on pollutant discharges. In light of this requirement, the Sixth Circuit held that the plaintiffs alleged need for the information was "all that they should have to allege to demonstrate informational standing." *Id.* The D.C. Circuit in *Friends of Animals v. Jewell*, 828 F.3d 989, 994 (D.C. Cir. 2016), criticized in passing "the Sixth Circuit's apparent conflation of informational and organizational standing."

186. 549 U.S. 497, 516, 37 ELR 20075 (2007).

alleged climate change injury is fundamentally “nonjusticiable” as it involves assertion of a broad-ranging grievance whose proper redress is the province of the other two branches of government.¹⁹⁸

The scope of “special solicitude” matters.¹⁹⁹ This is because courts have held that states cannot bring *parens patriae* actions to protect their citizens against actions by the federal government, as “there the United States rather than the state, represents the people’s interest.”²⁰⁰ However, states may bring actions asserting their own interests—which may include environmental and resource and property interests, as well as interests in governmental functions.²⁰¹

The “special solicitude” formulation has had some effect in public lands and natural resources cases, but does not displace the need for concrete and particularized interests. In *Wyoming v. U.S. Department of the Interior*,²⁰² the Tenth Circuit denied standing to the state and one of its counties in a challenge to snowmobile regulations in a national park. The court held that the state’s claims of economic injury were not supported, and that the alleged displacement of snowmobilers from Yellowstone National Park, which Wyoming said could lead to more use of state-owned lands, adversely affecting its “sovereign and proprietary” interests, was not supported by showing of any resulting burdens on its provision of services or on its management of its fish and wildlife resources. While Wyoming seeks “special solicitude,” said the court, this still requires a “concrete injury,” which the state has not shown.²⁰³

The Ninth Circuit, however, recognized California’s standing to assert a NEPA claim to challenge a forest management plan framework, based on its territorial and

resource interests, relying on *Massachusetts*.²⁰⁴ California has, the court found,

unquestionably asserted a well-founded desire to protect both its territory and its proprietary interests both from direct harm and from spill-over effects resulting from action on federal land, including ownership and trusteeship over wildlife, water, State-owned land, and public trust lands in and around the Sierra Nevada. Therefore, the State of California has concrete and particularized interests protected by the application of NEPA to the 2004 Framework.²⁰⁵

The nature of the injury to states may differ from other litigants, because of their range of interests and authorities. Recent litigation by states has advanced numerous concrete bases for standing under *Massachusetts*. These include state trusteeship of natural resources under state constitutions and legislation; state “ownership” of the wildlife within its borders; states’ interest in ecotourism and related economic activities; proprietary land ownership interests; operation of public educational and scientific research institutions; quasi-sovereign interests in lands, waters, and resources; responsibility for protection of public health and safety; and responsibility for responding to environmental impairments and natural hazards using state resources.²⁰⁶

VIII. Standing of Tribes

Tribes are generally subject to the same Article III and prudential standing requirements as private plaintiffs.²⁰⁷ In lands cases, they typically must show the same type of geographical nexus test applied by the courts to other parties.²⁰⁸

However, some courts have applied a form of “special solicitude” to tribes under *Massachusetts*.²⁰⁹ In evaluating

198. *Massachusetts v. Environmental Prot. Agency*, 549 U.S. at 535 (Roberts, C.J., dissenting) (characterizing the case as a broad societal claim asserted under a “rather narrow” statutory provision).

199. Prof. Richard Fallon argues persuasively that the “special solicitude” aspect of the majority opinion in *Massachusetts v. Environmental Protection Agency* may have been chiefly a contribution by Justice Anthony Kennedy and needed to attract his support for the majority opinion written by Justice John Paul Stevens, which extensively quoted Justice Kennedy’s opinions. Richard H. Fallon Jr., *The Fragmentation of Standing*, 93 Tex. L. Rev. 1061, 1103-04 (2014).

200. *Citizens Against Ruining the Env’t v. Environmental Prot. Agency*, 535 F.3d 670, 676, 38 ELR 20189 (7th Cir. 2008) (citing *Mellon*, 262 U.S. 447, and distinguishing *Massachusetts v. Environmental Prot. Agency*, 549 U.S. 497). The *Citizens Against Ruining the Environment* court denied standing to Illinois’s attorney general to challenge an EPA failure to object to permits issued by the state of Illinois itself. See also *Cheyenne & Arapaho Tribes v. First Bank & Tr. Co.*, 560 F. App’x 699, 705 (10th Cir. 2014):

To bring a *parens patriae* action, a “State must express a quasi-sovereign interest.” *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, ex rel. Barez, 458 U.S. 592, 607 (1982). Quasi-sovereign interests “consist of a set of interests that the State has in the well-being of its populace.” *Id.* at 602. They should be determined on a case-by-case basis, but “fall into two general categories”: “the health and well-being—both physical and economic—of [a state’s] residents in general,” and the State’s “interest in not being discriminatorily denied its rightful status within the federal system.” *Id.* at 607.

201. *Davis v. Environmental Prot. Agency*, 348 F.3d 772 (9th Cir. 2003) (California the object of EPA’s denial of waiver related to reformulated gas).

202. 674 F.3d 1220 (10th Cir. 2012).

203. *Id.* at 1238 (citing *Delaware Dep’t of Natural Res. & Envtl. Control v. Federal Energy Regulatory Comm’n*, 558 F.3d 575, 579 n.6 (D.C. Cir. 2009)) (state must still show injury-in-fact).

204. *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1178, 41 ELR 20193 (9th Cir. 2011):

States are also not “normal litigants for the purposes of invoking federal jurisdiction.” [*Massachusetts v. Environmental Protection Agency*]. On the other hand, “well-founded desire to preserve [a state’s] sovereign territory” “support[s] federal jurisdiction,” which may be further reinforced by ownership of “a great deal of the territory alleged to be affected” by a challenged federal action. *Id.* A political body may also uniquely “sue to protect its own ‘proprietary interests’ that might be ‘congruent’ with those of its citizens,” including “responsibilities, powers, and assets.” *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1197 [34 ELR 20121] (9th Cir. 2004).

205. *Id.* at 1179 (internal quotation marks omitted). The court found that California had asserted a sufficient concrete interest in the effects of logging on old forest species, and its ownership of “large tracts of land” throughout the Sierra Nevada to maintain its NEPA claims.

206. See, e.g., *New York v. U.S. Dep’t of the Interior*, No. 1:18-cv-08084 (S.D.N.Y. filed Sept. 5, 2018) (eight states challenging DOI’s reinterpretation of the Migratory Bird Treaty Act, and asserting different interests based on state laws, constitutions, precedents, and state institutions and land ownership interests).

207. See, e.g., *Pit River Tribe v. Bureau of Land Mgmt.*, 793 F.3d 1147 (9th Cir. 2015).

208. See, e.g., *Confederated Tribes of the Grande Ronde Cmty. of Or. v. Jewell*, 75 F. Supp. 3d 387 (D.D.C. 2014) (no standing to challenge DOI’s decision to take land into trust for rival tribe’s casino, where aesthetic, recreational, and cultural interest are to sites three to 10 miles from subject site).

209. See *Otoe-Missouria Tribe of Indians v. New York State Dep’t of Fin. Servs.*, 974 F. Supp. 2d 353, 357-58 (S.D.N.Y. 2013), *aff’d*, 769 F.3d 105 (2d

the Quapaw Tribe's standing to bring claims against mining companies for damages, a district court noted that "the requirements of Article III will be satisfied if the Tribe demonstrates that it has *parens patriae* standing" to protect its natural resources, citing *Massachusetts*.²¹⁰ "Indian tribes, like states and other governmental entities, have standing to sue to protect sovereign or quasi-sovereign interests."²¹¹

An injury to tribal sovereignty can confer Article III standing. The Southern District of New York found that the Otoe-Missouria Tribe had standing to challenge New York's limitations on lending practices because the state action infringed on tribal sovereignty.²¹² While the court applied traditional Article III standing requirements, it noted that

[w]hen the party suing is a Native American tribe, actual infringements on [the] tribe's sovereignty constitute a concrete injury sufficient to confer standing . . . [based on] the substantive interest which Congress has sought to protect in tribal self-government. This rule exists because tribes, like states, are afforded special solicitude in [a court's] standing analysis.²¹³

Although the tribe had standing, the district court denied its motion for preliminary injunction,²¹⁴ and the U.S. Court of Appeals for the Second Circuit affirmed but did not address standing.²¹⁵

In contrast, the Northern District of California found that the Native Eskimo Village of Kivalina was not entitled to "special solicitude" and did not have standing to sue energy producers for climate change impacts.²¹⁶ The plaintiff was unable to establish the causation element under Article III.²¹⁷ The Ninth Circuit affirmed on the basis that

Cir. 2014); Nicholas A. Fromherz & Joseph W. Mead, *Equal Standing With States: Tribal Sovereignty and Standing After Massachusetts v. EPA*, 29 STAN. ENVTL. L.J. 130 (2010) (arguing that tribes should receive the same "special solicitude" granted to states). *But see* Canadian Lumber Trade Alliance v. United States, 517 F.3d 1319, 1337 (Fed. Cir. 2008) (mentioning but deferring judgment on the question of whether tribes are entitled to "special solicitude"); Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 882, 39 ELR 20236 (N.D. Cal. 2009), *aff'd on other grounds*, 696 F.3d 849, 42 ELR 20195 (9th Cir. 2012) (finding that plaintiff is not entitled to "special solicitude" and lacked standing on basis of inadequate causation).

210. Quapaw Tribe of Okla. v. Blue Tee Corp., 653 F. Supp. 2d 1166, 1178, 39 ELR 20050 (N.D. Okla. 2009) (holding that the tribe had standing to proceed with natural resource damages only on those claims related to resources within its quasi-sovereign authority).

211. *Id.* at 1179.

212. *See Otoe-Missouria Tribe*, 974 F. Supp. 2d at 357-58.

213. *Id.* (internal quotations and citations omitted) (citing Mashantucket Pequot Tribe v. Town of Ledyard, 722 F.3d 457, 463 (2d Cir. 2013)) (holding that tribes are afforded "special solicitude," that state tax on slot machines infringed on tribal sovereignty, and therefore constituted an injury sufficient to establish standing); *Massachusetts v. Environmental Prot. Agency*, 549 U.S. 497, 520, 37 ELR 20075 (2007).

214. *Otoe-Missouria Tribe*, 974 F. Supp. 2d at 361.

215. *Otoe-Missouria Tribe v. New York State Dep't of Fin. Servs.*, 769 F.3d 105, 107 (2d Cir. 2014) (affirming denial of preliminary injunction on the basis that plaintiffs did not sufficiently show that the regulation of lending activity occurred on tribal lands).

216. Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 882, 39 ELR 20236 (N.D. Cal. 2009) (finding that the rationale for granting "special solicitude" to states "is predicated on the rights a State relinquishes to the federal government when it enters the Union" and therefore did not apply to the plaintiff (internal citation omitted)).

217. *Id.*

the CAA preempted the tribe's federal common-law claims and did not decide on standing or the applicability of "special solicitude."²¹⁸

IX. Standing in Administrative Tribunals

Standing issues also arise in public lands cases in the federal administrative process. While Article III considerations do not apply, as access to these tribunals is defined by statute and regulation, similar doctrines have appeared.

A. Interior Board of Land Appeals

The Interior Board of Land Appeals (IBLA) is a body within DOI's Office of Hearings and Appeals (OHA) charged with hearing public lands disputes. IBLA has jurisdiction to review a variety of decisions, including those of BLM, Bureau of Ocean Energy Management, Bureau of Safety and Environmental Enforcement, BIA, and others.²¹⁹ DOI regulations at 43 C.F.R. §4.410 define the scope of IBLA's jurisdiction.²²⁰ In general, an individual or organization that is (1) a party to the case, and (2) adversely affected by an agency decision has standing to appeal the decision to IBLA.²²¹

1. Party to a Case

The DOI regulation at 43 C.F.R. §4.410(b) explains that a "party to a case"

is one who has taken action that is the subject of the decision on appeal, is the object of that decision, or has otherwise participated in the process leading to the decision under appeal, e.g., by filing a mining claim or application for use of public lands, by commenting on an environmental document, or by filing a protest to a proposed action.

While commenting on an environmental document makes an individual or organization a party to a case, it is not the only means of becoming a party. Participation in the consultation process for §106 of the NHPA can also be relevant to a party's status.²²²

2. Adverse Effect

While it is typically easy to determine whether an individual or organization is a party to a case, it is significantly more challenging to determine whether the party is adversely affected by the decision. 43 C.F.R. §4.410(d) explains that "[a] party to a case is adversely affected . . . when that party has a legally cognizable interest, and the

218. Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 858, 42 ELR 20195 (9th Cir. 2012).

219. *See* DOI OHA, *About the Interior Board of Land Appeals*, <https://www.doi.gov/oha/organization/ibla> (last visited Oct. 21, 2018).

220. These regulations outline the requirements for parties to establish standing in IBLA, and do not apply to review of resource management plans, which is governed by the "protest procedures" outlined at 43 C.F.R. §1610.5-2.

221. *Id.* §4.410. Note exceptions to this procedure provided in *id.* §4.410(a), (e).

222. *See* Ojo Encino Chapter of the Navajo Nation, 192 IBLA 269, 275 (2018).

decision on appeal has caused or is substantially likely to cause injury to that interest.” IBLA case law offers helpful insight into the interest and injury required to establish standing.

a. Legally Cognizable Interest

Parties must show a legally cognizable interest in the land or resource that is the subject matter of the decision. A legally cognizable interest may be an economic or property interest, or “cultural, recreational, and aesthetic use and enjoyment of the affected public lands.”²²³ However, “a mere interest in a problem or concern with the issues involved is not sufficient to establish standing.”²²⁴ Additionally, the appellant must show that it held the interest at the time of the decision it seeks to appeal.²²⁵

b. Injury to Interest

Parties must then show specific evidence establishing a causal relationship between the agency action and alleged injury to the legally cognizable interest.²²⁶ The party must assert “colorable allegations, supported by specific facts set forth in an affidavit, declaration, or other statement” supporting the causal relationship, injury, and interest.²²⁷ While the party is not required to show that the injury is certain, the threat must be more than hypothetical.²²⁸ Specific evidence of causation is critical, as the appellant must demonstrate a connection between its activities and interests, and the lands subject to the decision on appeal, and [the IBLA has] held that an appellant does not have standing when it does not establish that it “has used or in the future will use” the lands impacted by the decision on appeal.²²⁹

IBLA applies a specific standing requirement to parties challenging oil and gas lease sales: to establish standing, appellants must demonstrate an injury associated with each individual parcel.²³⁰ IBLA has noted that parties that

can show an adverse effect related to only a portion of the parcels in an oil and gas lease sale would have standing to challenge actions on those particular parcels.²³¹

Notably, IBLA does not apply this requirement to land exchanges that involve multiple parcels. In *The Coalition of Concerned National Park Retirees*,²³² IBLA distinguished standing to challenge oil and gas lease sales from challenges to multi-parcel land exchanges. In *John R. Jolley*,²³³ IBLA determined that “a person challenging a multiple parcel land exchange need not allege use of each parcel of public land involved in the exchange in order to satisfy this Board’s standing requirements.”²³⁴ IBLA reasoned that an interest in only a portion of the parcels was sufficient because each parcel in the land exchange is an integral part of the proposed exchange. In contrast, each parcel in an oil and gas lease sale is not essential to the sale and each parcel is offered separately.²³⁵

c. Organizational and Associational Standing

Organizations can show adverse effect by two alternative methods. An organization must demonstrate either that (1) the organization itself has a legally cognizable interest that is substantially likely to be injured by the decision, or (2) one or more of its members has a legally cognizable interest in the decision, coinciding with the organization’s purposes, that is substantially likely to be injured by the decision.²³⁶ These correspond to the federal courts’ doctrines of organizational standing and associational standing.

An organization seeking to establish standing based on an injury to the organization itself “must demonstrate a nexus between the challenged action and the claimed injury to the organization’s mission and ongoing activities.”²³⁷ This

demonstrates standing as to each particular parcel to which its appeal relates.

(citing *Biodiversity Conservation Alliance*, 183 IBLA 97, 108 (2013)):

Further, since the BLM decision at issue involves the leasing of several parcels of land for oil and gas purposes, each of the appellants must show an adverse effect as a result of the leasing of each parcel to which it objects, in order to be recognized as having standing to appeal the decision to lease that parcel. As we said in *Wyoming Outdoor Council*, 153 IBLA 379, 384 (2000): “[W]hile an individual or a group has the right under 43 C.F.R. §4.450-2 to protest all parcels offered at a lease sale, dismissal of such a protest does not guarantee the right to appeal the dismissal decision as to all parcels.” Rather, standing to appeal must be demonstrated as to “each particular parcel to which the appeal relates.” 153 IBLA at 384.

231. A scenario in which a party could show injury related to some, but not all, parcels in an oil and gas lease sale was discussed in *The Coalition of Concerned Nat’l Park Retirees*, 165 IBLA 79 (2005), where environmental groups challenged a 27-parcel oil and gas lease sale. The initial declarations only provided evidence to support standing as to three (out of 27) parcels. *Id.* at 83. Eventually, with supplemental submissions (related to viewshed impacts) the organizations established standing for all 27 parcels. *Id.* at 87. However, this case suggests that it may be possible to have standing to challenge a subset of parcels within a lease sale.

232. *Coalition of Concerned Nat’l Park Retirees*, 165 IBLA 79.

233. *John R. Jolley*, 145 IBLA 34 (1998).

234. *Id.* at 37.

235. *Coalition of Concerned Nat’l Park Retirees*, 165 IBLA at 83.

236. See *WWP*, 192 IBLA 72, 78 (2017).

237. *Id.* See also *Board of County Comm’rs of Pitkin County, Colo.*, 186 IBLA 288, 305 (2015) (finding that an organization and municipal government

223. *San Juan Citizens Alliance*, 193 IBLA 51, 54 (2018). See also *Cascadia Wildlands*, 188 IBLA 7, 9-10 (2016); *The Fund for Animals, Inc.*, 163 IBLA 172, 176 (2004) (suggesting that while an organization could possibly have an interest in “seeing” wild horses, the organization lacked standing to challenge a BLM decision related to a wild horse gather because it failed to demonstrate the adverse effect of the decision); *Western Watersheds Project*, 192 IBLA 72, 77 (2017) (*WWP*); *Western Watersheds Project*, 187 IBLA 316, 321 (2016).

224. *Ojo Encino Chapter*, 192 IBLA at 273. See also *WWP*, 192 IBLA at 77.

225. *WWP*, 192 IBLA at 77. See also *Wilderness Workshop*, 189 IBLA 221, 224 (2017).

226. *Cascadia Wildlands*, 188 IBLA at 10 (citing *Native Ecosystems Council*, 185 IBLA 268, 273 (2015); *The Fund for Animals, Inc.*, 163 IBLA at 176; *Fred E. Payne*, 159 IBLA 69, 73 (2003)).

227. *Id.*

228. *WWP*, 192 IBLA at 77; *Klamath-Siskiyou Wildlands Ctr.*, 190 IBLA 295, 300 (2017).

229. *Ojo Encino Chapter*, 192 IBLA at 273 (citing *Theodore Roosevelt Conservation P’ship*, 178 IBLA 201, 208 (2009)).

230. *WWP*, 192 IBLA at 79:

When BLM decides to lease oil and gas resources underlying several parcels of land, each appellant must show that its legally cognizable interests are substantially likely to be injured as a result of the leasing of each parcel to which it objects; in this way, an appellant

requires a showing of a “concrete and demonstrable injury to the organization’s activities that consequently drains the organization’s resources.”²³⁸ Mere interest in the problem is not sufficient.²³⁹ The organization must show that the decision causes the organization to engage in activities and expenditures it would not otherwise engage in, other than bringing the appeal, resulting in a drain on resources that would not otherwise occur.²⁴⁰

An organization establishing standing via its members must demonstrate that one or more members has a legally cognizable interest in his or her own right, which coincides with the organization’s purpose.²⁴¹ Organizations must support the interest and anticipated injury by submitting evidence such as “an affidavit, declaration, or other statement by a member or members attesting to the fact that they use the lands or resources at issue and that this use is or is substantially likely to be injured by the decision.”²⁴²

3. Intervenors

As defined in 43 C.F.R. §4.406(b)(1), “intervenors” are parties who “would be adversely affected if the Board reversed, vacated, set aside, or modified the decision.” The standard for “adverse effect” is the same as that described above for appellants.²⁴³

4. Administrative Case Law

Several recent cases show how these doctrines are applied. In *San Juan Citizens Alliance*, IBLA found that an organization representing community recreation and economic interests did not have standing to appeal BLM’s decision to approve issuance of a modified special recreation permit for a private outfitter.²⁴⁴ The alliance argued that the modified permit would adversely affect the recreational interest of its members in the permit area, but IBLA

determined that the Alliance’s description of the organizations’ missions and long-standing interest in BLM’s management of the public lands did not show that the Alliance is substantially likely to be injured by BLM’s decision to grant the modified special recreation permit. We also determined that the Alliance did not identify an individual member of any of the organizations who has visited the area that will be subject to Silverton Guides’ modified special recreation permit.²⁴⁵

lacked standing to challenge BLM oil and gas lease sale decision because they could not show drain on resources).

238. *WWP*, 192 IBLA at 78.

239. *Id.*

240. *See id.* at 84; *Pitkin County*, 186 IBLA at 309; *Front Range Equine Rescue*, 187 IBLA 269, 283-84 (2016) (finding that an organization lacked standing when it asserted only a general interest in BLM’s management of wild horses on federal lands and failed to provide colorable allegations of adverse effect).

241. *Cascadia Wildlands*, 188 IBLA 7, 10 (2016).

242. *Id.* (citing *WildEarth Guardians*, 183 IBLA 165, 170 (2013)).

243. *See, e.g.*, *Shell Gulf of Mex. Inc.*, 187 IBLA 290, 291 (2016).

244. *San Juan Citizens Alliance*, 193 IBLA 51, 58 (2018).

245. *Id.* at 54.

In *Ojo Encino Chapter of the Navajo Nation*, IBLA found that the chapter did not have standing to appeal BLM’s decision to issue oil and gas leases.²⁴⁶ The chapter was a party to the case because it had submitted scoping comments, participated in the §106 consultation process, and otherwise coordinated with BLM during the environmental review.²⁴⁷ However, the chapter did not adequately show that its members would be adversely affected and therefore did not have standing to appeal. The chapter was concerned that the oil and gas lease sale would increase traffic on roads in the vicinity of tribal lands. However, the chapter did not provide sufficiently specific evidence of the anticipated adverse effects on its members.²⁴⁸

In *Klamath-Siskiyou Wildlands Center*, IBLA found that while two environmental organizations did not have standing to challenge a timber sale, one did.²⁴⁹ All three environmental organizations had protested the timber sale and were therefore parties to the case, but only the Klamath-Siskiyou Wildlands Center (KS Wild) established that it would be adversely affected by the decision. All three organizations asserted an interest in protecting forestland resources; appellants submitted a declaration from a member of KS Wild explaining his definite plans to spend considerable time in the area proposed for the timber sale, and that his interest in the ecological, recreational, and aesthetic values of the forest would be directly harmed by the timber sale. Through this declaration,

KS Wild has identified a member with a legally cognizable interest—an interest in recreating in and enjoying intact forests—that coincides with KS Wild’s purposes to preserve and restore biological diversity in southwest Oregon forests. Mr. Nawa’s declaration includes colorable allegations that implementation of the [timber sale] is substantially likely to injure his recreational and aesthetic interests in native biodiversity in intact forests. Therefore, KS Wild has standing to appeal. . . .²⁵⁰

In contrast, the other organizations did not establish standing. Mr. Nawa was not a member of the other organizations, and they did not separately establish that the organizations themselves would be adversely affected. The other organizations did not present any information indicating that their representatives had ever visited or used the affected lands.

246. *Ojo Encino Chapter of the Navajo Nation*, 192 IBLA 269, 270 (2018).

247. *Id.* at 275.

248. IBLA found:

Here, *Ojo Encino* provides only general statements about its members’ and the Chapter’s use of roads in the area. Although traffic will likely be increased as a result of oil and gas development on the parcels, *Ojo Encino* does not identify any specific instances when the Chapter or a member or members have used such roads. Nor does *Ojo Encino* provide any specific information detailing which roads the Chapter and its members use or where these roads are in relation to each parcel.

Id. at 279. Note that standing must be established separately for each parcel in an oil and gas lease.

249. *Klamath-Siskiyou Wildlands Ctr.*, 192 IBLA 291, 298-99 (2018).

250. *Id.* at 299.

While both of these groups have expressed their interest in protecting Oregon forests for their aesthetic values and ecosystems, neither of them has alleged or demonstrated that any of their ongoing activities are negatively impacted, now or in the future, by BLM's decision to approve the [timber sale]. They have not shown that their missions will be frustrated or their resources drained because of this particular timber sale.²⁵¹

Similarly, in *Western Watersheds Project*, two of three environmental organizations challenging a BLM oil and gas lease sale did not have standing, while one did.²⁵² The Center for Biological Diversity established standing through a declaration of one of its members that described in detail her time spent in the area proposed for leasing.

Based on Ms. Kilmer's detailed description of her recreational and aesthetic interest in the lease parcels and the maps showing the location of her activities in relation to those parcels, we conclude that Ms. Kilmer has demonstrated a legally cognizable interest that is substantially likely to be injured by the sale of all nine lease parcels.²⁵³

In contrast, the Western Watersheds Project (WWP) and American Bird Conservancy (ABC) neither showed an adverse effect to a member nor the organizations themselves. The declarations submitted by members of these organizations were missing "any current tie to the lease parcels that are the subject of this appeal."²⁵⁴ The declarations lacked specific dates that the members had visited or planned to visit the lease parcel areas and were therefore unable to support standing. Additionally, WWP and ABC failed to establish standing for the organizations overall. IBLA found that they

have not alleged or shown that their missions will be frustrated or their resources drained because of the lease sale. Although WWP and ABC have expended resources to challenge the lease sale before this Board, that is not the type of expenditure that the Board and Federal courts allow to show organizational standing; instead, WWP and ABC would need to show that they are undertaking activities that they would not otherwise engage in but for the lease sale. But neither has connected this particular lease sale to an effect on their activities, and their longstanding concern and efforts related to sage grouse generally are not sufficient to confer standing on each organization in its own right.²⁵⁵

In *Cascadia Wildlands*, IBLA found that an environmental organization did not have standing to challenge a BLM decision regarding a timber sale.²⁵⁶ The organization claimed generally that the BLM decision would harm

recreational pursuits in the project area. IBLA found the group's declarations insufficient because

[a]ppellants have not identified which of their members actually use the timber sale area; they refer only generically to "members and staff" of their organizations. Appellants have not identified any specific instances in the past when a member or members have used the area, nor have they documented their members' use in a supporting statement of any kind.²⁵⁷

"Furthermore, Appellants' assertion that their members will engage in future recreational use is vague and unconnected to the land subject to the timber sale, which Appellants have not identified with any particularity."²⁵⁸ IBLA found that without specific information about use in the area, the organization did not establish a legally cognizable interest in the land.

5. Relationship to Article III Doctrine

While IBLA distinguishes its administrative review from the Article III requirements for federal court jurisdiction, the IBLA standing requirements draw heavily from Article III doctrine.²⁵⁹ For example, IBLA has explicitly adopted the "drain on resources test" as a method of establishing organizational standing from federal court precedent, namely *Havens*.²⁶⁰

We have long acknowledged that the Department's requirement of standing is properly informed by the judicial requirement of "injury in fact," noting that decisions by Federal courts concerning judicial standing "provide a useful guide as to the types of interests which have been deemed relevant and the concerns which are properly considered in adjudicating administrative appeals."²⁶¹

IBLA in *Pitkin County* applied the drain on resources test as defined through federal court precedent.²⁶²

In *San Juan Citizens Alliance*, the alliance argued that IBLA inappropriately applied Article III standing requirements as an administrative body. The alliance claimed that IBLA "injected limitations from Article III jurisprudence that apply to the federal courts, but are inapplicable to participation in administrative procedures carried out by the IBLA."²⁶³ In particular, it objected to the requirement to provide affidavits and similar statements from members to demonstrate a legally cognizable interest, arguing that while Article III courts could require that showing, "IBLA inquiry into membership serves no cognizable government

251. *Id.* at 300.

252. WWP, 192 IBLA 72, 80-84 (2017).

253. *Id.* at 80. Note that standing must be established separately for each parcel in an oil and gas lease.

254. *Id.* at 82.

255. *Id.* at 83-84.

256. *Cascadia Wildlands*, 188 IBLA 7, 11-12 (2016).

257. *Id.* at 11.

258. *Id.* at 12.

259. *But see* *Laser, Inc.*, 136 IBLA 271, 273 (1996) ("determinations of judicial standing, including the 'zone of interest' test, do not control adjudications of standing before this Board").

260. Board of County Comm'rs of Pitkin County, Colo., 186 IBLA 288, 308 (2015).

261. *Id.* at 307 (citing *In re Pac. Coast Molybdenum Co.*, 68 IBLA 325, 332 (1982)).

262. *Id.* at 308.

263. *San Juan Citizens Alliance*, 193 IBLA 51, 55 (2018).

interest.”²⁶⁴ However, IBLA found that “the Board may look to Federal court cases for guidance in interpreting our regulations,” and that there was no statute preventing it from following guidance from federal case law.²⁶⁵ The alliance did not demonstrate that IBLA made a legal error in applying board precedent.

B. Forest Service Administrative Review Procedures

The Forest Service does not have a separate adjudicatory body like OHA at DOI. The procedures for challenging Forest Service actions vary depending on the type of action in question.²⁶⁶ Thus, there is not the same development of a body of “standing” law. However, the regulations identify and define relevant concepts that affect the ability of parties to seek relief. Many Forest Service resource management decisions are subject to an opportunity for administrative review of unresolved issues. In some cases, the review occurs after environmental review has been completed but before a final decision has been made (pre-decisional objections), and in others, the review happens after the final decision (appeals).

I. Predecisional Objections

Land use planning (forest plan) decisions are reviewed in a predecisional objection process under 36 C.F.R. §§219.50 et seq. These procedures replaced previous appeal regulations located at 36 C.F.R. §217—there are limited appeal opportunities for planning actions undertaken during the transition period between planning rules. “Individuals and entities who have submitted substantive formal comments related to a plan, plan amendment, or plan revision during the opportunities for public comment as provided in subpart A during the planning process for that decision may file an objection.”²⁶⁷

Project-level implementation decisions documented in an EA or EIS are reviewed in a predecisional objection process under 36 C.F.R. §218. Any projects categorically excluded from documentation in an EA or EIS are excluded from the objection process.²⁶⁸ “Individuals and entities . . . who have submitted timely, specific written comments regarding a proposed project or activity that is subject to these regulations during any designated opportunity for public comment may file an objection.”²⁶⁹

Hazardous fuel reduction projects documented with a record of decision or decision notice, and authorized under

the Healthy Forests Restoration Act, are subject to an expedited objection process under 36 C.F.R. §218.26.

Objections are reviewed and responses provided by the “reviewing officer,” typically the next higher level line officer above the Forest Service official proposing to sign the project or land management plan decision.²⁷⁰ Reviewing officers resolve objections by meeting with the objector and providing a written response.²⁷¹ No further administrative review of a reviewing officer’s written response is available.²⁷²

2. Post-Decision Appeals

Written decisions regarding the issuance, approval, or administration of written authorizations for the occupancy and use of National Forest System lands can be subject to appeal under 36 C.F.R. §214. Appealable decisions include those relating to livestock grazing, mineral, special use permits, and the like.²⁷³ “Parties to an appeal under this part are limited to the holder, operator, or solicited applicants who are directly affected by an appealable decision, intervenors, and the Responsible Official.”²⁷⁴ Intervenor must “[b]e a holder, an operator, or a solicited applicant who claims an interest relating to the subject matter of the decision being appealed and is so situated that disposition of the appeal may impair that interest.”²⁷⁵ Appeals of occupancy and use decisions are decided by the next highest agency level. That appeal decision is subject to review at the discretion of the Forest Service official two levels above the official who made the written authorization.

X. Opportunities for Development in Standing Law

As standing law has become more complex and diversified into a tangle of doctrines and sub-doctrines,²⁷⁶ nevertheless the federal courts have offered some pathways for public lands litigators seeking to ensure that their clients can gain access to judicial remedies.

A. Geographical Nexus

The Supreme Court has been rigorous in requiring geographical proximity to support recreational- and aesthetic injury-based standing to challenge actions affecting public lands and resources. Our examination of the case law suggests that delineating different types of injuries and the areas over which they potentially apply can aid plaintiffs. Specifically, plaintiffs and their counsel should plan to identify various types of injury-in-fact associated with challenged

264. *Id.* at 56.

265. *Id.*

266. See generally U.S. Forest Service, *How Do Appeals Work?*, https://www.fs.fed.us/appeals/appeals_related.php (last visited Oct. 21, 2018); U.S. Forest Service, *How Do Objections Work?*, https://www.fs.fed.us/objections/objections_related.php#app_work (last visited Oct. 21, 2018); U.S. FOREST SERVICE, OPTIONAL APPEAL PROCEDURES AVAILABLE DURING THE PLANNING RULE TRANSITION PERIOD (2013), <https://www.fs.fed.us/emc/applit/includ/es/201307PlanAppealProceduresDuringTransition.pdf>.

267. 36 C.F.R. §219.53.

268. *Id.* §218.23.

269. *Id.* §218.5.

270. *Id.* §218.3 (for implementation-level objections).

271. *Id.* §218.11.

272. *Id.* §218.11(b)(2); *id.* §218.14.

273. *Id.* §214.4.

274. *Id.* §214.3.

275. *Id.* §214.11(a)(1).

276. See, e.g., Fallon, *supra* note 199; Evan Tsen Lee & Josephine Mason, *The Standing Doctrine’s Dirty Little Secret*, 107 Nw. U. L. REV. 169 (2012).

actions—recognizing that each of these impacts operates over a different geographic area. For example, visual impacts may be experienced at a distance of several or even many miles, noise impacts at a lesser distance unless in an area notable for its quiet, and air pollution in a region that is wider still. The Seventh Circuit's recognition of potential displacement effects on the presence or absence of wildlife may prove helpful in establishing a sufficient geographical nexus.²⁷⁷ This may be particularly important where the plaintiff or its members do not have physical access to a site, or where the plaintiff's members may not have visited the precise location of a challenged action such as salvage logging or gas drilling within a larger landscape. In effect, science and supporting data can support injury-in-fact and causation over larger areas.

Landowner plaintiffs and members have particularly good opportunities to demonstrate injury-in-fact for actions that may affect their use of their lands. The courts implicitly recognize that impacts are in some measure inflicted on landowners who are fixed in a particular place. And while they are not treated differently from recreational visitors under formal standing doctrine, the nature of the injury and its imminence may be more readily inferred. These injuries and risks to landowners range from close proximity to potential hazards (such as proximity to pipelines) to indirect effects on land uses and enjoyment resulting from more intensive land uses on public lands in the same watershed even if miles away. Courts seem particularly solicitous of landowners, not based so much on their economic interests, but on the likelihood that they will have continuing exposure to the alleged injuries-in-fact.²⁷⁸

Recognition of standing to challenge connected actions, as in *Sierra Club v. Federal Energy Regulatory Commission*,²⁷⁹ also offers opportunities for plaintiffs. Especially where plaintiffs lack members in some impact areas, the treatment of actions as the product of one decision can help support standing to challenge a larger set of actions. Indeed, advocates may in some circumstances consider urging that projects (or land designation decisions) be considered together in governmental decisionmaking if they anticipate that standing is likely to be an issue. Such an approach would also be consistent with much public lands and natural resource advocacy emphasizing the “cumulative impacts” of related or connected actions.²⁸⁰ The courts have readily recognized that establishment of injury with respect to portions of a project or with respect to impacts on particular units of public land can support standing to take on the other portions or units.

B. Risk and Economic Injury

In many public lands cases, injury-in-fact and causation, even when based on risk of injury, can be shown—especially in procedural injury cases.²⁸¹ However, where a specific allegation of injury-in-fact deals with health exposures or potential injuries based on a longer chain of causation, it will be important to establish the reasonable probability of the risk and the plaintiff's responses or precautions. Many types of behavior—choosing not to fish in polluted water, not hiking in active mining areas—are readily recognized. But challenges to changes in the status of lands that precede these effects (withdrawals, opening land for leasing or mineral location) will require some showing that activities incompatible with a plaintiff's uses are likely—such as exploration, seismic testing, and lack of protection for cultural resources. Prior similar actions in the same or similar areas can meet that standard.

Decisions dealing with replacement/substitution expenditures may present some additional opportunities for public lands plaintiffs—not just for extractive industries. Injury to specific places and resources is typically the foundation of environmental injury-in-fact claims, and does not require plaintiffs to demonstrate inconvenience or higher cost in finding other places to hike or fish or bird-watch. Moreover, no economic injury is required for Article III standing. Nor should courts be encouraged to impose such a standard. However, some standing claims may be bolstered or supplemented where the plaintiffs can show that there are non-zero costs for replacements (for access to fresh air, quiet, fishing, whitewater canoeing), especially where the status of large areas is being changed by a governmental action. Lack of access and greater travel expenses and inconvenience for local users may provide an avenue for development of standing law.

C. Procedural and Informational Injury

The case law makes it clear that in order to have standing to make a procedural claim, a plaintiff must show that a procedural failure or violation leads to the plaintiff's injury-in-fact. In many cases, the procedural claim (such as a NEPA failure to address climate change) need not relate to the injury-in-fact (such as loss of bird-watching habitat) in any substantive way so long as the resulting *remedy* from a favorable decision could redress the injury. Extending this decoupling of injury-in-fact to other sorts of procedural claims may present opportunities to make standing broader under other substantive statutes.²⁸²

277. *American Bottom Conservancy v. U.S. Army Corps of Eng'rs*, 650 F.3d 652, 41 ELR 20206 (7th Cir. 2011).

278. *Sierra Club v. Federal Energy Regulatory Comm'n*, 827 F.3d 36 (D.C. Cir. 2016); *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978 (8th Cir. 2011); *Committee to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 27 ELR 20576 (10th Cir. 1996).

279. 867 F.3d 1357, 47 ELR 20104 (D.C. Cir. 2017).

280. See 40 C.F.R. §1508.7 (cumulative impacts), §1508.25(a)(1) (connected actions).

281. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7, 22 ELR 20913 (1992); *Summer v. Earth Island Inst.*, 555 U.S. 488, 496, 39 ELR 20047 (2009) (standards of immediacy and redressability relaxed for procedural claims). Ripeness may present a hurdle, however. See *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 28 ELR 21119 (1998).

282. However, litigants will need to take care that the injuries they do assert are within the zone of interests of the law on which they base the substantive claims. *Gunpowder Riverkeeper v. Federal Energy Regulatory Comm'n*, 807 F.3d 267, 45 ELR 20141 (D.C. Cir. 2015).

Informational injury is likely to remain chiefly an ancillary claim in litigation brought under associational standing, which encompasses more types of injuries. However, it can be of value where a governmental action deprives an organization of information it previously relied on to carry out its activities. The case law shows that the courts are more receptive to informational injury claims where the missing information is needed to engage effectively with a governmental process at issue. Plaintiffs are more likely to be successful if they can show a use that enables them to engage effectively with governmental processes. The broadest interpretation of the usefulness element is that of the Sixth Circuit in *American Canoe Ass'n v. City of Louisa Water & Sewer Commission*,²⁸³ which goes beyond this to include general usefulness of information to the plaintiff's members in advocating for clean water.

Pure informational standing is most readily available under authorities such as FOIA, Federal Advisory Committee Act, or federal election law. There, the courts have found that Congress has conferred standing to vindicate important rights to information itself in order to support confidence in governmental functions. Identifying additional legal statutory foundations comparable to these warrants additional attention focused on expressions of congressional intent to vindicate basic and foundational interests. Perhaps, new federal legislation adding information disclosure requirements to federal laws could be drafted to support such claims in the future. For example, it may be that rights to information about one's own genome, or a region's resources, or law enforcement records fit this model. Declaring an enforceable right to information about our nation's land, public trust resources, and historic and cultural resources may benefit from legislative support as well as litigation.

D. Zone of Interests

The zone-of-interests test should not present difficulties in most public lands litigation, as *Bennett v. Spear*²⁸⁴ supports a liberal interpretation of the test for natural resources claims under the APA and ESA and a guide for other laws. Difficulties will arise primarily where a federal law at issue prescribes a non-discretionary act that specifically does not include consideration of interests of relevance to the plaintiff. Thus, a plaintiff seeking to come within the zone of interests should take care to plead aspects of the law relevant to its interests that either inform an exercise of discretion, or that are themselves elements or requirements of the non-discretionary action.

The role of regulations in assisting a court to interpret the scope of a statutory zone of interests is important. The Supreme Court expressly looked to and cited BIA regulations in *Patchak* when evaluating a claim by nearby residents to determine whether their claim was within the

zone of interests under the Indian Reorganization Act.²⁸⁵ Thus, where public lands advocates have the opportunity to influence rulemaking under a law addressing land designations or uses, it might be helpful to advocate for language that can support a future court's application of the zone-of-interests test when applying the statute.

E. Organizational Standing

Organizational standing is available where a plaintiff can demonstrate that a governmental failure or action places on a plaintiff a burden it must carry in order to be in as good a position in its operations as before the challenged action occurred. However, the doctrine is limited and the D.C. Circuit, which has contributed most to its development, may be nearing a point where reconsideration or retrenchment is possible. Nevertheless, the doctrine can be used and organizational standing may include such claims as the need for timely access to government-generated information otherwise unavailable to plaintiffs and essential to plaintiffs' functions. Claims based on untimely FOIA responses that hinder plaintiffs' ability to enforce the law or litigate related claims, loss of opportunities for participation in decisionmaking through unduly short or burdensome procedures, or governmental withholding of key resource information all fit within this framework. Government actions that limit public participation, render public hearings inaccessible, or further prevent organizations from effective engagement with ongoing decisions can be organizational injury sufficient to support standing.

F. State and Tribal Standing

States have gained only marginal benefit from the "special solicitude" formulation announced by the Supreme Court in *Massachusetts*.²⁸⁶ However, when connected with quasi-sovereign interests and territorial interests, the doctrine may assist in claims that involve issues of intermingled state and federal lands, state waters, submerged lands and bottoms, wildlife management, and public trust resources under state law. Current trends in natural resources litigation by states suggest that these bases for standing will continue to be recognized and may even expand, unless restrained by a future Supreme Court opinion.

Tribes have many specific interests that support standing, including sovereign and quasi-sovereign interests and treaty rights. The extension of the *Massachusetts* "special solicitude" to tribes has, however, only been recognized by the Second Circuit and some district courts. More important is the assertion of the types of treaty, culture, and territorial/governance claims under traditional standing law doctrines.

283. 389 F.3d 536, 34 ELR 20129 (6th Cir. 2004).

284. 520 U.S. 154, 27 ELR 20824 (1997).

285. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 226, 42 ELR 20126 (2012).

286. *Massachusetts v. Environmental Prot. Agency*, 549 U.S. 497, 37 ELR 20075 (2007).

Both states and tribes bring different types of injury-in-fact to the courthouse in ways that allow them to sustain claims that are not limited to those of the associational plaintiffs who typically rely on recreational and aesthetic injury. As land, water, and wildlife managers, and as entities whose governmental functions may be affected by federal decisions, they have maintained standing in many public lands cases—and indeed on many sides of public lands litigation.

G. Administrative Standing

Standing before IBLA is defined by regulation. If broader or different standing rules are desired, this is most easily done through rulemaking. Legislation can also affect both the availability of administrative review and standing to participate (as it has with changes and elimination of various Forest Service appeal procedures in recent years). It is worth noting that while becoming a “party” and demonstrating that one is “adversely affected” is not difficult in most instances, in recent years, IBLA has been

moving more closely toward the Article III three-part test, although it is not obliged to do so. In challenges to oil and gas leasing, IBLA is more rigorous than the federal courts, requiring appellants to demonstrate an injury associated with each individual parcel; in federal court, case law suggests that challenges can be made to a common action by showing injury related to one or more specific parcels.

XI. Conclusion

The law of standing demands increasing attention from counsel in terms of identifying locus of injury, type of injury, evidence of injury and causation, suitable affiants, and sufficient redundancy to ensure maintenance of standing through the entire course of a case. Nevertheless, it offers avenues for development and extension. The courts will remain open to those that can anticipate these needs early enough in planning for future litigation, and even earlier in the adoption of laws and regulations that may affect the definitions of injuries, procedures, and interests.