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Newly Imposed Limitations on Citizens' Right to Sue for Standing in a Procedural Rights Case

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NOTES

NEWLY IMPOSED LIMITATIONS ON CITIZENS' RIGHT TO SUE FOR STANDING IN A PROCEDURAL RIGHTS CASE

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INTRODUCTION

The National Environmental Policy Act of 1969 ("NEPA") requires that federal agencies "include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on the environmental impact of the proposed action."¹ This statement is commonly known as an Environmental Impact Statement ("EIS").

As NEPA does not provide for a private right of action, citizens have brought suits against federal agencies, to enforce compliance with NEPA, under the Administrative Procedure Act ("APA").² Under the APA, an individual has standing to sue an agency if he or she is adversely affected by an agency action.³

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1. 42 U.S.C. §§ 4321-4370d (1996).

2. 60 Stat. 237 (enactment repealed; provisions codified as amended in scattered sections of 5 U.S.C.).

Despite NEPA's broad provisions designed to safeguard the environment, it fails to provide citizens a private right of action that would allow them to challenge agency noncompliance and to enforce NEPA provisions. Thus, litigants can gain judicial review only if they comply with the Administrative Procedure Act (APA), which enables people who are adversely affected by agency action to obtain judicial recourse.

Silvia L. Serpe, Note, *Reviewability of Environmental Impact Statements on Legislative Proposals After Franklin v. Massachusetts*, 80 CORNELL L. REV. 413 (1995) (citations omitted).

3. 5 U.S.C. § 702 provides in pertinent part, "A person suffering

Over time, the standard for citizen suits has been refined by the courts. Under the standard recently articulated by the D.C. Circuit in *Florida Audubon Society v. Bentsen*,⁴ however, a citizen will have to overcome an almost insurmountable hurdle to establish standing to compel an agency to prepare an EIS to fulfill its duties under NEPA. Under *Florida Audubon*, a plaintiff must show that a “. . . demonstrated particularized injury is fairly traceable to the agency act allegedly implicating the EIS. And it requires . . . that this challenged act [be] *substantially probable* to cause the demonstrated particularized injury.”⁵

This differs from the two-part test previously set forth by the D.C. Circuit in *City of Los Angeles v. National Highway Traffic Safety Administration*.⁶ It also puts the D.C. Circuit in direct conflict with both the Ninth Circuit⁷ and the Tenth Circuit.⁸ The latter specifically rejected the *Florida Audubon* analysis, stating that, “[t]o the extent that the D.C. Circuit’s standard requires a plaintiff to establish something more than set out here, it is contrary to the intent and essence of the National Environmental Policy Act and is, therefore, rejected.”⁹

This Note argues that the standard to establish standing set forth by the D.C. Circuit in *Florida Audubon Soc’y v. Bentsen* will make it virtually impossible for a citizen to compel a government agency to prepare an EIS as required by statute. By erecting this barrier to citizen enforcement of NEPA, the D.C. Circuit is abdicating its responsibility to enforce this act. Instead of showing deference to the other branches of government, the new standard established by the court would thwart the Congressional goal of, “establish[ing] . . . a national policy to guide Federal ac-

legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”

4. 94 F.3d 658 (D.C. Cir. 1996).

5. *Id.* at 665 (emphasis added) (citations omitted).

6. 912 F.2d 478 (D.C. Cir. 1990).

7. *See Idaho Conservation League v. Mumma*, 956 F.2d 1508 (9th Cir. 1992); *infra* Part III.B.2.

8. *See Committee to Save the Rio Hondo v. Lucero*, 102 F.3d 445 (10th Cir 1996).

9. *Id.* at 451.

tivities which are involved with or related to the management of the environment or which have an impact on the quality of the environment.”¹⁰ Moreover, outright rejection of this standard by the Tenth Circuit is further evidence that this new standard is contrary to the spirit of NEPA.

Part I of this Note describes NEPA and how courts have allowed suits to enforce this act. Part II examines how courts have granted standing in citizen suits involving NEPA and outlines how the doctrine of standing has developed in NEPA litigation. Part III argues that under the new standard to establish standing set forth in *Florida Audubon*, it will be virtually impossible to grant standing to any citizen bringing suit to enforce the provisions of NEPA. This Note concludes that the *Florida Audubon* standard should be rejected and that the courts should evaluate standing under an analysis similar to the one provided by *Rio Hondo v. Lucero*.¹¹

I. NEPA POLICY

A. *Environmental Impact Statements*

The National Environmental Policy Act of 1969 (“NEPA”)¹² is the country’s “basic national charter for protection of the environment.”¹³ Congress enacted NEPA specifically to “declare a national policy which will encourage productive and enjoyable harmony between man and his environment.”¹⁴ Under NEPA, all agencies of the federal government are required to include in every recommendation or report on proposals for legislation and other major federal action significantly affecting the quality of the environment, a detailed statement of the environmental impact of the proposed action, or an “EIS.”¹⁵

10. 115 CONG. REC. 19,010 (1969).

11. 102 F.3d 445 (10th Cir. 1996).

12. Pub. L. 91-190, 83 Stat. 852 (codified as amended in scattered sections of 42 U.S.C.).

13. *City of Los Angeles v. National Highway Traffic Safety Admin.*, 912 F.2d 478, 491 (quoting 40 C.F.R. § 1500.1(a)).

14. 115 CONG. REC. 19,008 (1969).

15. See 42 U.S.C. § 4332(2)(c) (1996); see also Lawrence Gerschwer, *Informational Standing Under NEPA: Justiciability and the Environmental Decisionmaking Process*, 93 COLUM. L. REV. 996, 996 (1993).

The EIS is crucial to achieving the objectives of NEPA, because it requires an agency to consider all relevant information regarding the environment before setting forth on a course of action.¹⁶ The EIS enables an agency to predict and possibly avoid an environmental crisis by studying the possible effects of the agency's action.¹⁷ In fact, if a project does involve "serious but nonobvious environmental impacts, agency failure to prepare an EIS may mean that the last opportunity to eliminate or minimize these impacts, in accordance with NEPA's broad objectives, has been lost."¹⁸ Therefore, it is essential that a governmental agency prepare the EIS in a timely fashion so that it will not only be valuable to the agency during its decisionmaking process, but will also satisfy Congress' objectives.¹⁹

The EIS is a procedural obligation created to ensure that agencies accord proper weight to the environmental consequences of their actions.²⁰ Two purposes of the impact statement

16. *See, e.g.,* *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1359 (9th Cir. 1994) ("NEPA does not require [that we] decide whether an [environmental impact statement] is based on the best scientific methodology available, nor does NEPA require us to resolve disagreements among various scientists as to methodology. Our task is to ensure that the . . . procedures resulted in a reasoned analysis and disclosure of the evidence before it.") (alteration in original) (citations omitted); *Forelaws on Board v. Johnson*, 743 F.2d 677, 681 (9th Cir. 1985) ("[T]he principal purposes of NEPA include making consideration of environmental concerns a part of the decision-making process.") (citations omitted).

17. *See City of Los Angeles*, 912 F.2d at 496.

18. *City of Davis v. Coleman*, 521 F.2d 661, 670 (9th Cir. 1975); *see also Rio Hondo*, 102 F.3d at 448 ("By focusing the agency's attention on the environmental consequences of its actions, the National Environmental Policy Act 'ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.' " (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)).

19. *See Rio Hondo*, 102 F.3d at 452 ("Under the National Environmental Policy Act, an injury results not from the agency's decision, but from the agency's uninformed decisionmaking.").

20. *See Douglas County*, 48 F.3d at 1498; *see also Rio Hondo*, 102 F.3d at 448 ("While the National Environmental Policy Act itself does not mandate the particular decisions an agency must reach, it does mandate the necessary process the agency must follow while reaching its

are (1) "to inject environmental considerations into the federal agency's decisionmaking process,"²¹ and (2) "to inform the public that the agency has considered environmental concerns in its decisionmaking process."²²

Under the statute, an agency must first conduct an environmental assessment ("EA") to decide whether the impact on the environment would warrant an EIS.²³ The EA must be timely enough to make a contribution in the decisionmaking process and cannot be used merely to rationalize decisions previously made.²⁴

An agency will then commence the "scoping process" to determine the scope of the issues to be addressed and to identify the significant issues related to a proposed action.²⁵ If the agency decides not to prepare an EIS on the basis of the EA, then the agency must prepare a finding of "no significant impact."²⁶

B. *Evaluating an EIS*

In several cases, courts have formulated standards to evaluate either the adequacy of an EIS²⁷ or an agency's decision not to prepare an EIS.²⁸ In reviewing an individual's challenge to an agency action, a court may only review the procedural dictates of

decisions.").

21. *Catron County Bd. of Comm'rs, N.M. v. United States Fish & Wildlife Serv.*, 75 F.3d 1429, 1434 (10th Cir. 1996).

22. *Id.*

23. *See Douglas County*, 48 F.3d at 1498; *see also* 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1508.9 (1994).

24. *See City of Los Angeles*, 912 F.2d at 485; *see also* 40 C.F.R. § 1502.5 (1998).

25. *See* 40 C.F.R. § 1501.7 (1998).

26. *See* 40 C.F.R. § 1501.4 (1996).

27. *See, e.g., Salmon River*, 32 F.3d 1346; *Resources Limited v. Robertson*, 35 F.3d 1300 (9th Cir. 1993); *Portland Audubon Soc'y v. Babbitt*, 998 F.2d 705 (9th Cir. 1993); *Seattle Audubon Soc'y v. Espy*, 998 F.2d 699 (9th Cir. 1993); *Idaho Conservation League*, 956 F.2d 1508.

28. *See, e.g., Foundation on Economic Trends v. Lyng*, 943 F.2d 79 (D.C. Cir. 1991); *Public Citizen v. National Highway Traffic Safety Admin.*, 848 F.2d 256 (D.C. Cir. 1988); *Forelaws on Board*, 743 F.2d 677; *City of Davis*, 521 F.2d 661.

NEPA, and not the agency's substantive decision.²⁹

1. The Standard to Evaluate the Adequacy of an EIS

Before reviewing the adequacy of an EIS, a court must examine several factors pertaining to the EIS preparation and implementation. There are regulations involved in implementing an EIS:

First, the regulations require a 'rigorous analysis' of alternatives to the proposed plan, including a 'substantial treatment' of these alternatives in comparison to the proposed plan. Second, the regulations require an agency undertaking an EIS to 'insure [sic] the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements.' Additionally, the regulations require that the analysis be undertaken with an 'interdisciplinary approach' to 'insure [sic] the integrated use of the natural and social sciences and the environmental design arts.' NEPA also requires consideration in an EIS of the 'ecological effects of a proposed action.'³⁰

The Ninth Circuit employs a two-part test to evaluate whether an agency has followed these regulations.³¹ This test asks (1) whether the EIS contains a "reasonably thorough discussion of the significant aspects of the probable environmental consequences,"³² and (2) whether the agency has "taken a 'hard look' at a decision's environmental consequences."³³ If the court is sat-

29. See Matthew William Nelson, *NEPA and Standing: Halting the Spread of "Slash-And-Burn" Jurisprudence*, 31 U.C. DAVIS L. REV. 253 (1997) ("Therefore, while environmental groups can challenge the procedural adequacy of an EIS, they cannot use the courts to impose or require any particular result."); see also William M. Orr, *Florida Audubon Society v. Bentsen: An Improper Application of Lujan to a Procedural Rights Plaintiff*, 15 PACE ENVTL. L. REV. 373, 379 (1997) ("Since NEPA imposes only procedural requirements on governmental agencies, NEPA lawsuits typically challenge shortcomings in EIS preparation procedures." (internal citations omitted)).

30. *Sierra Club v. Marita*, 46 F.3d 606, 616 (7th Cir. 1995) (citations omitted).

31. See *Seattle Audubon*, 998 F.2d at 703 (citing *Idaho Conservation League*, 956 F.2d at 1519).

32. *Id.*

33. *Id.*

ified that the agency has sufficiently examined the possible environmental consequences, it will uphold the agency's EIS.

2. Review of an Agency's Decision Not to Prepare an EIS

Under NEPA, an agency's decision not to prepare an EIS will be overturned if the decision was "arbitrary, capricious or an abuse of discretion."³⁴ The D.C. Circuit articulated a four-part test to determine whether an agency's decision should be overturned:

- (1) Whether the agency took a 'hard look' at the problem;
- (2) whether the agency identified the relevant areas of environmental concern;
- (3) as to the problems studied and identified, whether the agency made a convincing case that the impact was insignificant; and
- (4) if there was an impact of true significance, whether the agency convincingly established that changes in the project sufficiently reduced it to a minimum.³⁵

In addition to these guidelines, the decision not to prepare an EIS will be considered unreasonable if the agency, "fails to supply a convincing statement of reasons why potential effects are insignificant."³⁶ Courts have applied this test to compel agencies to complete an EIS before taking action.³⁷

C. *Citizen Suits Under NEPA*

There is no explicit provision allowing a private right of action under NEPA;³⁸ therefore, citizens' suits are brought under section 10A of the Administrative Procedure Act ("APA").³⁹ The

34. *City of Los Angeles*, 912 F.2d at 499.

35. *Id.* at 499-500.

36. *Id.* at 500 (citations omitted).

37. *See, e.g., Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983) (holding that the United States Forestry Service and the Department of the Interior had not complied with the EIS requirement of NEPA when the agencies issued oil and gas leases.); *S.W. Neighborhood v. Eckard*, 445 F. Supp. 1195 (D.D.C. 1978) (holding that the Government Services Administration should have prepared an EIS before entering into a lease for a building that would result in 2,300 federal office workers entering the neighborhood each day).

38. *See* 42 U.S.C. § 4332 (1996).

39. 5 U.S.C. § 702 (1996); *see also* Matthew Porterfield, *Public Citizen v. United States Trade Representative: The (Con)fusion of APA Standing*

APA provides that "a person suffering legal wrong because of agency action or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."⁴⁰ There are additional factors that determine whether a plaintiff will get judicial review under the APA.⁴¹

To sue under the APA, a plaintiff is required to "identify the 'agency action' affecting his interests and must demonstrate that the 'interest sought to be protected is arguably within the zone of interests to be protected or regulated by the statute.'"⁴² Satisfying the test also establishes the minimum standing requirements set forth under Article III of the Constitution.⁴³

II. THE DOCTRINE OF STANDING

Standing requirements ensure that the litigants have such a " 'personal stake in the outcome of the controversy' as to guarantee that 'the dispute sought to be adjudicated' will be presented in an adversary context,"⁴⁴ to guarantee that the case adequately informs the court of the effects of its decisions,⁴⁵ and to determine whether the litigant is the proper party to invoke the

and the Merits Under NEPA, 19 HARV. ENVTL. L. REV. 157, 160 (1995) ("Plaintiffs generally rely upon the APA for standing when they are attempting to compel federal agency compliance with statutes such as NEPA that do not contain their own judicial review provisions." (citations omitted)).

40. 5 U.S.C. § 702.

41. See, e.g., Serpe, *supra* note 2, at 418-19.

(1) whether review is precluded by statute or agency action is committed to agency discretion by law, (2) the action must be by a "federal agency" and (3) suits brought under the general review provision of the APA must challenge a final agency action.

Id.

42. *Foundation on Econ. Trends*, 943 F.2d at 82.

43. See *Salmon River*, 32 F.3d at 1354.

44. Yumée A. Shim, *Mountain States Legal Foundation v. Glickman: When A Tree Falls In The Forest, Is Anything Left (Of) Standing?*, 15 TEMP. ENVTL. L. & TECH. J. 277, 285 (1996).

45. See William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222 (1988).

power of the court.⁴⁶

Standing is one of the "justiciability" doctrines arising from Article III of the Constitution which limits federal court jurisdiction to actual "cases or controversies."⁴⁷ The case or controversy requirement serves to identify disputes appropriately reviewable under the judicial process.⁴⁸ The underlying question is whether "the plaintiff has a legal right to judicial enforcement of an asserted duty."⁴⁹ Therefore, to establish standing a litigant must fulfill two requirements. First to satisfy Article III, the party bringing suit must show: (1) actual or threatened injury (2) suffered as a result of the defendant's conduct which (3) is fairly traceable to the challenged action and (4) is likely to be redressed by a favorable decision.⁵⁰

The second requirement is satisfaction of certain prudential limitations imposed by the courts.⁵¹ These include the requirement that the injury not be a common grievance shared equally by all or a large class of citizens,⁵² that the legal rights and interests are the plaintiff's own and not a third party's,⁵³ and that the complaint lies within the "zone of interests" protected by the rel-

46. See Lawrence Gerschwer, *Informational Standing Under NEPA: Justiciability and the Environmental Decisionmaking Process*, 93 COLUM. L. REV. 996, 1006 (1993).

47. U.S. CONST. art. III.

48. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992).

49. Fletcher, *supra* note 44, at 229.

50. See *Valley Forge Christian College v. Americans United for Separation of Church & State Inc.*, 454 U.S. 464, 472 (1982).

51. See Gerschwer, *supra* note 45, at 1009; see also *Allen v. Wright*, 468 U.S. 737, 751 (1984).

Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal right, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.

Id.

52. See *Allen*, 468 U.S. at 751 (citing *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

53. See *id.*

evant statute or constitutional provision.⁵⁴ Through case law, the courts have refined and given definition to the concept of standing.⁵⁵

A. *How Citizen Suits Have Evolved in NEPA Litigation*

A citizen must demonstrate standing before bringing a suit to enforce the requirements of NEPA. Over time courts have shown increasing reluctance to grant standing to citizens, making it more difficult for courts to reach the merits of environmental cases.

1. The Standard Pre-*Lujan*

In *Association of Data Processing Serv. Orgs. v. Camp*,⁵⁶ the Supreme Court set forth a two-part test to evaluate standing. Under this test, the plaintiff must show that the challenged action has caused him "injury in fact, economic or otherwise,"⁵⁷ and that his interest is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."⁵⁸ This standard was further developed in *Valley Forge Christian College v. Americans for Separation of Church & State*,⁵⁹ in which the Supreme Court articulated a three-part test to determine whether a plaintiff has standing. Under that test, the plaintiff must show: (1) a distinct and palpable injury that is (2) fairly traceable to the challenged action, and (3) relief from the injury must be likely to follow from a favorable decision.⁶⁰

2. The Standard Enunciated in *Lujan*

The Supreme Court addressed the standing inquiry again in *Lujan v. Defenders of Wildlife*.⁶¹ The statute at issue in *Lujan*⁶² re-

54. *See id.* (citing *Ass'n of Data Processing Services Org. v. Camp*, 397 U.S. 150, 153 (1970)).

55. *See id.*

56. 397 U.S. 150 (1970).

57. *Id.* at 152.

58. *Id.* at 153.

59. 454 U.S. 464 (1982).

60. *See id.* at 472.

61. 504 U.S. 555 (1992).

quired the Secretary of the Interior to use certain criteria to create a list of species which are either endangered or threatened, and to define the critical habitats of those species.⁶³ This statute was initially read to include actions taken in foreign nations, but was eventually revised to include only actions taken in the United States or on the high seas.⁶⁴ Shortly after the statute was reinterpreted, the respondents sued the Secretary of the Interior, seeking a declaratory judgement stating that the new regulation was in error, and asking for an injunction to restore the initial interpretation of the statute. The Court denied standing to these groups on several grounds.

First, in focusing on the affidavits of two of the members of the environmental groups, the Court held that these two respondents could not demonstrate the actual or imminent requirement of the standing doctrine. The Court stated that the respondents only had an uncertain future plan to visit the habitats of the endangered species abroad.⁶⁵

Moreover, a plurality of the Court found that the respondents failed to show redressability because they did not attack specific decisions to fund particular projects, but instead challenged generalized government action.⁶⁶ Finally, the Court held that the respondents failed to demonstrate the injury-in-fact requirement necessary to show standing, because they were raising a generalized grievance, "claiming only harm to . . . every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits [any specific individuals] than it does the public at large"⁶⁷

Finally, the Supreme Court enumerated what it described as the "irreducible constitutional minimum of standing":⁶⁸

First, the plaintiff must have suffered an "injury in fact" — an invasion of a legally protected interest which is (a) concrete

62. Endangered Species Act of 1973 § 4, 16 U.S.C. § 1533 (1996).

63. *See Lujan*, 504 U.S. at 555.

64. *See id.* at 557.

65. *See id.* at 563.

66. *See id.* at 568 (plurality opinion).

67. *See id.* at 573.

68. *See id.* at 560.

and particularized,⁶⁹ and (b) be “actual or imminent, not ‘conjectural’ or ‘hypothetical’.”⁷⁰ Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be “fairly traceable to the challenged cause of action of the defendant, and not the result of the independent action of some third party not before the court.”⁷¹ Third, it must be “likely” as opposed to “merely speculative,” that the injury will be “redressed by a favorable decision.”⁷²

This standard is both rigid and elastic: “. . . rigid in that it unequivocally requires the plaintiff to make a particularized demonstration of a redressable injury caused by the unlawful conduct alleged in the complaint . . . elastic in allowing Congress to expand or confine the types of legal injury that may be alleged.”⁷³ Additionally, the party invoking federal jurisdiction bears the burden of establishing the elements of standing.⁷⁴

Plaintiffs who bring suit after *Lujan* have a stricter burden to establish that the challenged government action caused the specific injury-in-fact.⁷⁵ A series of cases followed in which courts found that environmental plaintiffs had standing under this analysis.⁷⁶

69. See, e.g., *Allen*, 468 U.S. at 756; *Warth*, 422 U.S. at 508.

70. See *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

71. See *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976).

72. *Id.* at 38.

73. Robert B. June, *The Structure of Standing Requirements for Citizen Suits and the Scope of Congressional Power*, 24 ENVTL. L. 761, 771 (1994).

74. See *Defenders of Wildlife v. Wellton Mohawk Irrigation & Drainage Dist.*, No. 96-16434, 1997 WL 377172 (9th Cir. July 7, 1997).

75. See *Portland Audubon*, 998 F.2d at 707. But see William M. Orr, *Florida Audubon Society v. Bentsen: An Improper Application of Lujan to a Procedural Rights Plaintiff*, 15 PACE ENVTL. L. REV. 373, 386 (1997) (“Although the Court did not use the term, it recognized that a showing of a geographical nexus creates a concrete interest. Therefore, such a showing would satisfy the standing requirement of injury in fact.”)

76. See, e.g., *Catron County*, 75 F.3d 1429; *Douglas County*, 48 F.3d 1495; *Sierra Club*, 43 F.3d 606; *Salmon River*, 32 F.3d 1346; *Resources Limited*, 35 F.3d 1300; *Portland Audubon*, 998 F.2d 705; *Seattle Audubon*, 998 F.2d 699.

B. *Narrowing the Lujan Standard: Florida Audubon Society v. Bentsen*

In 1996, the D.C. Circuit evaluated a question of standing in *Florida Audubon Soc'y v. Bentsen*,⁷⁷ and articulated a new standard which places a higher burden on an environmental plaintiff to bring suit in procedural cases. This new standard, in the words of the dissent, "imposes so heavy an evidentiary burden on appellants to establish standing that it will be virtually impossible to bring a NEPA challenge to rulemakings with diffuse impacts."⁷⁸ Even the majority noted that "a plaintiff seeking to challenge a governmental action with alleged diverse environmental impacts may have some difficulty meeting this standard."⁷⁹

The court held that Diane Jensen, the Florida Audubon Society, the Florida Wildlife Federation, and the Friends of the Earth did not have standing to sue the Secretary of the Treasury and the Commissioner of the Internal Revenue Service for authorizing a tax credit for the use of ethyl tertiary butyl ether ("ETBE"), a fuel additive, without preparing an EIS.⁸⁰ The plaintiffs argued that the tax credit, authorized by the Internal Revenue Service for use of ETBE as a fuel alternative, would increase the market for ETBE, which in turn would stimulate production of corn, sugar cane, and sugar beets; necessary ingredients from which ETBE is derived. Following from this reasoning, the increased crop production would result in more agricultural cultivation with its "accompanying environmental dangers, in regions that border wildlife areas appellants (or their members) use and enjoy."⁸¹

The court rejected the appellants' notion that the asserted areas (Minnesota, Michigan or Florida) would necessarily be affected by the tax credit; therefore, they did not demonstrate injury sufficient for standing.⁸² The court further found that the threatened harm was not imminent. The court used a relaxed

77. 94 F.3d 658 (D.C. Cir. 1996).

78. *Id.* at 674 (Rogers, J., Edwards, J., Wald, J., and Tatel, J., dissenting).

79. *Id.* at 666.

80. *Id.* at 662.

81. *Id.*

82. *Id.* at 667.

standard to determine imminence. Under the standard, the party asserting the claim under NEPA need only show that there is a risk of serious environmental harm, and not a certainty.⁸³

Previously, in *City of Los Angeles v. National Highway Traffic Safety Admin.*,⁸⁴ the court articulated a different, two-pronged test. The first prong required the plaintiff to show that the "agencies['] failure to prepare an EIS creates a risk that serious environmental harms will be overlooked."⁸⁵ The second prong required that the plaintiff show that he "has a sufficient geographical nexus to the site of the challenged project that he may be expected to suffer whatever environmental consequences the project might have."⁸⁶

Under *Florida Audubon*, the first prong of the new test mandates that the plaintiff have a particularized injury,⁸⁷ a threshold requirement under the *Lujan* standard set forth in 1992.⁸⁸ Under the second prong of the new test, however, the injury must be demonstrable.⁸⁹ To qualify as a particularized injury the plaintiff must show that the "demonstrably increased risk of serious environmental harm shown actually threatens the plaintiff's particularized interest."⁹⁰ As the majority explains, this new standard replaces the previous standard, which did not explicitly state that the governmental action must subject a particularized interest of the plaintiff to increased risk.⁹¹

The third prong of the new standard requires that the demonstrable particularized injury be fairly traceable to the agency action.⁹² This is a well-established principle under the doctrine of standing.⁹³ This prong requires a causation analysis linking the government decision that may have wrongly omitted the EIS to

83. See *id.* at 678; see also *Sierra Club*, 46 F.3d at 611-12; *Salmon River*, 32 F.3d at 1355 n.14.

84. 912 F.2d 478 (D.C. Cir. 1990).

85. *Id.* at 492.

86. *Id.*

87. See 94 F.3d at 666.

88. See 504 U.S. 555, 559.

89. See 94 F.3d at 666.

90. *Id.* at 667.

91. *Florida Audubon*, 94 F.3d at 667.

92. See *id.* at 666.

93. See, e.g., *Lujan*, 504 U.S. at 572.

the plaintiff's particularized injury.⁹⁴ Under the fourth prong of the test, however, the D.C. Circuit read the causation analysis as a requirement that it must be *substantially probable* that the agency action will cause the demonstrable injury asserted by the plaintiff.⁹⁵

The fourth prong of the test erects a virtually insurmountable hurdle for plaintiffs to establish standing in NEPA cases. In *Florida Audubon*, Ms. Jensen established the requisite "geographical nexus" to the injury, as noted by the dissent.⁹⁶ This nexus is established through her experience on several Minnesota environmental task forces, state environmental advisory groups, and the State Board of Water and Soil Resources. Through her experiences, Ms. Jensen concluded that local farmers are likely to abandon crop rotation to develop land to take advantage of the tax credit. This, in turn, would result in the susceptibility of these lands to erosion.⁹⁷ Additionally, she found that obtaining greater yields from the farmland through increased use of pesticides and fertilizer resulted in threatening wildlife habitats through soil erosion and water pollution.⁹⁸ Moreover, Ms. Jensen referred to meetings in which State representatives advised her that the ETBE tax credit is likely to increase corn farming in Minnesota and that an EIS could result in the destruction of market opportunities for Minnesota corn.⁹⁹ Finally, Ms. Jensen asserted that the tax credit would affect her drinking water because of the increased use of the possible carcinogenic pesticide atrazine, which has been found in groundwater and drinking water.¹⁰⁰

The EIS was intended to provide "full and fair discussion of significant environmental impacts and [to] inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality

94. See *Florida Audubon*, 94 F.3d at 669.

95. See *id.*

96. *Id.* at 677 (Rogers, J., dissenting).

97. See *id.*

98. See *id.*

99. See *id.*

100. See *id.* at 678.

of the human environment.”¹⁰¹ The purpose of the EIS is to discover the possible effects that the agency action will have on the environment. Thus, NEPA is concerned with conditional and indirect harms. If the environmental harms were certain there would be no need for an EIS, because the effect of the agency action on the environment would be known.¹⁰² In fact, by forcing a citizen to undertake the exact investigation that they are asking the federal agency to conduct, a court is essentially shifting the burden placed on the agency under NEPA to the citizen.¹⁰³

If, however, the purpose of the EIS is to study and consider any effects an agency action will have on the environment,¹⁰⁴ then an appellant’s injury-in-fact consists of the agency’s failure to prepare an EIS.¹⁰⁵ Since the appellees did not prepare an EIS before granting a tax credit, they may have put her at risk. If Congress viewed this risk as significant enough to mandate assessment, it cannot be dismissed as simply speculative. By virtue of statute, Congress can create rights, and can elevate injuries to legally cognizable rights, the invasion of which creates standing.¹⁰⁶ Therefore, protection of the risks of not preparing an EIS is a right created by Congress that establishes the basis for standing in this case.

Congress granted the tax credit to include the use of blends of gasoline and ETBE.¹⁰⁷ Presumably, Congress granted the tax credit to provide an incentive for the use and production of

101. 40 C.F.R. § 1502.1 (1996).

102. See *Rio Hondo*, 102 F.3d at 448-49 (“The injury of an increased risk of harm due to an agency’s uninformed decision is precisely the type of injury the National Environmental Policy Act was designed to prevent.”).

103. See Nelson, *supra* note 28.

104. See 115 CONG. REC. 19,008 (1969.)

105. The Ninth Circuit has recognized that a failure to prepare an EIS can constitute an injury-in-fact. Specifically, the court stated that, “[t]he asserted injury is that environmental consequences might be overlooked and reasonable alternatives ignored as a result of deficiencies in the final EIS and ROD.” *Idaho Conservation League*, 956 F.2d at 1518.

106. See *Lujan*, 504 U.S. at 576.

107. See *Florida Audubon*, 94 F.3d at 662.

ETBE.¹⁰⁸ The D.C. Circuit held that the appellant's interests were too speculative because they could not demonstrate that individual corn or sugar farmers in these areas would affirmatively respond to the tax credit by increasing production.¹⁰⁹ The court found that the plaintiffs did not demonstrate injury sufficient for standing, because they were unable to identify the individual farmers who would be affected by the tax credit.

C. *How Other Circuits Have Addressed the Analysis*

1. The Tenth Circuit: *Rio Hondo v. Lucero*

After the D.C. Circuit decided *Florida Audubon Soc'y v. Bentsen*, the Tenth Circuit, in *Committee to Save the Rio Hondo v. Lucero*,¹¹⁰ examined a similar challenge to citizens' standing in a procedural rights case and granted standing to the plaintiffs. In *Rio Hondo*,¹¹¹ the Tenth Circuit evaluated whether the Committee to Save the Rio Hondo had standing to challenge the Carson National Forest Service's decision to allow summertime use of the Taos Valley Ski Area.¹¹² Members of the Committee submitted affidavits, claiming they used and enjoyed the land and water surrounding the Ski Area for recreation and irrigation. Additionally, the affiants claimed their use and enjoyment of the area's land and water would be damaged by the year-round operation of the Ski Area.¹¹³

The Ski Area operates under term and special-use permits issued by the Carson National Forest Service ("Forest Service").¹¹⁴ The Ski Area proposed a plan to the Forest Service in 1981, which included an EIS in accordance with NEPA. The Ski Area later proposed an amendment to this plan to allow for summertime use of the facilities, which was not accounted for in the original EIS prepared for the Forest Service. In response to this amendment, the Forest Service prepared an EA, and reached a

108. *See id.*

109. *See id.* at 667.

110. 102 F.3d 445 (10th Cir. 1996).

111. *Id.*

112. *Id.* at 446.

113. *Id.* at 447.

114. *See id.*

finding of "no significant impact," thereby excusing the preparation of an EIS. The Committee then brought an action in federal court claiming:

[T]he Forest Service's approval of the amended master development plan and special use permit was either a 'major Federal action significantly affecting the . . . environment' requiring the Forest Service to prepare an environmental impact statement, or the approval was a 'substantial change' to the plan, requiring the Forest Service to prepare a supplemental environmental impact statement.¹¹⁵

The District Court found that the Committee to Save the Rio Hondo ("the Committee") did not have standing to challenge the Ski Area's decision to allow summertime use of the facilities, and granted summary judgment to the Ski Area.¹¹⁶ The Committee then appealed the case which brought the issue before the Court of Appeals.¹¹⁷ The Tenth Circuit reversed this decision, and remanded the case for consideration on the merits.¹¹⁸

The court evaluated the Committee's standing under the three-pronged analysis set forth in *Lujan v. Defenders of Wildlife*,¹¹⁹ and, in so doing, specifically rejected the standing analysis applied by the D.C. Circuit in *Florida Audubon Soc'y v. Bentsen*.¹²⁰ In addition to establishing standing through the constitutional requirements, the court held that the Committee had to show that they were "adversely affected or aggrieved . . . within the meaning of a relevant statute."¹²¹ To establish that the Committee was adversely affected, they had to demonstrate an "injury-in-fact" falling within the "zone of interests" protected by NEPA.¹²² The court found that the "injury-in-fact" prong was satisfied in a two-part analysis:

(1) [T]he litigant must show that in making its decision without following the National Environmental Policy Act's proce-

115. *Id.* at 447.

116. *See id.*

117. *See id.* at 446.

118. *See id.*

119. 504 U.S. 555, 560 (1992). For a full discussion of Constitutional standing requirements set forth in this case see *supra* Part II.A.2.

120. 94 F.3d 658 (D.C. Cir. 1996).

121. *Rio Hondo*, 102 F.3d at 448 (citing *Lujan*, 497 U.S. at 883 (alteration in original)).

122. *Id.*

dures, the agency created an increased risk of *actual, threatened or imminent* environmental harm; and (2) the litigant must show that the increased risk of environmental harm injures its concrete interests by demonstrating either its *geographical nexus* to, or actual use of the site of the agency action.¹²³

In examining the Committee's injury-in-fact, the court looked to the purpose of NEPA "to protect and promote environmental quality."¹²⁴ The court found that the Committee satisfied the requirement for injury-in-fact, because "injury of alleged increased environmental risks due to an agency's uninformed decisionmaking may be the foundation for injury-in-fact under Article III."¹²⁵ The court also found, through the plaintiff's affidavits, that the Committee established an increased risk of environmental harm to their concrete interests.¹²⁶ Therefore, the Forest Service's alleged procedural failure to complete an EIS affected the plaintiff's concrete interest in using the land in the affected area, thus establishing injury-in-fact.

Establishing causation is the second prong of the standing analysis established in *Lujan v. Defenders of Wildlife*.¹²⁷ The court analyzed causation by showing that "[i]n the context of a National Environmental Policy Act claim, the injury is the increased risk of environmental harm to concrete interests, and the conduct complained of is the agency's failure to follow the National Environmental Policy Act's procedures."¹²⁸ This inquiry contradicts the inquiry conducted by the D.C. Circuit in *Florida Audubon Soc'y v. Bentsen*,¹²⁹ in which the plaintiff had to establish the substantial probability that the challenged act would cause the demonstrated particularized injury.¹³⁰

The Tenth Circuit claimed that the D.C. Circuit's causation analysis was misplaced, and that the latter court was confusing an analysis that would be better placed in the "likelihood of harm" prong of the analysis, rather than in the causation prong.¹³¹ The Tenth Circuit noted that in determining causation, a court

123. *Id.* at 449 (emphases added).

124. *Id.* at 448; *see also supra* Part I.A.

125. *Rio Hondo*, 102 F.3d at 449.

126. *See id.*

127. 504 U.S. 555 (1992).

128. *Rio Hondo*, 102 F.3d at 451.

129. 94 F.3d 658 (D.C. Cir. 1996).

130. *See id.* at 669.

131. *See Rio Hondo*, 102 F.3d at 451.

should merely look at the relation between the risk of the plaintiff's harm and the alleged agency failure to prepare an EIS in accordance with NEPA. The court also noted that:

To require that a plaintiff establish that the agency action will result in the very impacts an environmental impact statement is meant to examine is contrary to the spirit and purpose of the National Environmental Policy Act. The National Environmental Policy Act was not intended to require the plaintiff to show with certainty, or even with a substantial probability, the result of agency action; those examinations are left to an environmental impact statement.¹³²

Therefore, the Tenth Circuit rejected the additional hurdle erected by the D.C. Circuit in situations in which a citizen attempts to compel a government agency to comply with the mandates of NEPA.

2. The Ninth Circuit

In various cases, the Ninth Circuit has also applied a more liberal test of standing for environmental plaintiffs. In one Ninth Circuit case, *Idaho Conservation League v. Mumma*,¹³³ a group of conservationists ("ICL") challenged the Idaho Panhandle Forest's ("IPNF") decision to recommend against wilderness designation of forty-three roadless areas within the forest.¹³⁴ ICL claimed that the IPNF had violated both the National Forest Management Act and NEPA.¹³⁵ The district court found that the ICL did not have standing. The Court of Appeals reversed the finding that the group had standing, but upheld the district court's decision on the merits.

In analyzing the claim of standing, the Ninth Circuit looked at three elements: "(1) *personal injury* (2) *fairly traceable* to the defendant's unlawful conduct and (3) likely to be *redressed* by the requested relief."¹³⁶ In evaluating the personal injury requirement, the court decided to look to the statutes to determine if the plaintiffs demonstrated an injury. The court reasoned that,

132. *Id.* at 452.

133. 956 F.2d 1508 (9th Cir. 1992).

134. *See id.* at 1510.

135. *See id.*

136. *Id.* at 1513.

[t]he right claimed by appellants is, among others, the right to have agencies consider all reasonable alternatives before making a decision affecting the environment, as required by NEPA. . . . 'NEPA is essentially a procedural statute designed to ensure that environmental issues are given proper consideration in the decisionmaking process,' injury alleged to have occurred as a result of violating this procedural right confers standing.¹³⁷

The court then dealt with the next two elements of the standing requirement together. The court found that causation concerned only whether the injury was dependent upon the agency's decision. In the instant case, the injury was that the "environmental consequences might be overlooked and reasonable alternatives ignored as a result of deficiencies in the final EIS and ROD."¹³⁸ Therefore, causation is satisfied because this injury would not have occurred but for IPNF's decision not to follow the mandates of the statutes at issue. Thus, the court found that ICL had satisfied all three prongs of the test, and reversed the denial of standing.¹³⁹

III. RECONCILIATION OF THE ANALYSES

In *Florida Audubon*, the court should not have dismissed Ms. Jensen's claim without reaching the merits of the case simply because her injuries were threatened rather than actual, nor should it have mattered that her risk of injury was contingent rather than certain.¹⁴⁰ NEPA is precisely aimed at identifying indirect and contingent harms that may be caused by agency action, by conducting research and handling investigations relating to ecological systems and environmental quality.¹⁴¹

Under *Florida Audubon*, environmental plaintiffs must identify an individual whose behavior will change as a result of an agency action. Thus, no individual would be able to bring suit in these types of cases. In *Florida Audubon* the injury was speculative by nature because the plaintiff was asking the Commissioner of the Treasury and the Commissioner of the Internal Revenue Service

137. *Id.* at 1514 (citing *Trustees for Alaska v. Hodel*, 806 F.2d at 1380, 1382 (9th Cir. 1986)).

138. *Id.* at 1518.

139. *Id.*

140. *See id.* at 1515.

141. *See* 115 CONG. REC. 19,008 (1969).

to assess the possible risks that authorizing the tax credit would pose to the environment.¹⁴² The court suggested that to obtain judicial review of an agency's decision not to prepare an EIS the plaintiff must show exactly who will respond to the agency action, and in what manner. If this requirement is mandated by the courts, then no plaintiff will be able to bring suit to compel a government agency to prepare an EIS.

Even if the court defines the injury more strictly, the causation analysis should be viewed more broadly. In an EIS case, the causal chain contains 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."¹⁴³ The court stated that even if the plaintiffs had suffered a demonstrated particularized injury, which the court held they did not, the plaintiffs did not show that the injury was fairly traceable to the tax credit.¹⁴⁴ Yet the court itself acknowledged that the production of ETBE had increased since the promulgation of the tax credit.¹⁴⁵

Accordingly, the appellant's injury should not have been considered too speculative based on this fact alone. The court should have read the chain of causation broadly enough to allow the plaintiff's standing, because the increase in production of ETBE is the link that connects the challenged acts to the asserted injury. Therefore, the court should have found that Diane Jensen had standing based on the fact that the particularized injury that she demonstrated was fairly traceable to the tax credit authorized by defendants.

If the appellants in *Florida Audubon* could not demonstrate standing, then it is difficult to envision any plaintiff establishing standing under the standard created by the D.C. Circuit. The only way for a plaintiff to satisfy the "substantially probable" prong of this standard is to actually be in harm's way before bringing suit. This does not comport with the intention of Con-

142. See *Florida Audubon*, 94 F.3d at 661.

143. *Id.* at 668.

144. See *id.* at 669.

145. See *id.* at 661.

gress in passing NEPA.¹⁴⁶ Additionally, this standard does not conform to the standard set out by the Supreme Court in *Lujan v. Defenders of Wildlife*,¹⁴⁷ because it ignores the right set out by Congress to protect people from the risk of overlooking serious environmental harms. The holding also puts the D.C. Circuit in conflict with both the Tenth Circuit, and the Ninth Circuit, which has frequently found standing in cases similar to this one.¹⁴⁸

If the D.C. Circuit had allowed *Florida Audubon* to go forward on the merits, the purposes of the standing requirement would still have been served. The facts in *Florida Audubon* are distinguishable from those under *Lujan*. The plaintiffs in *Lujan* could not demonstrate standing, because they only had "some day" intentions of returning to the site in question.¹⁴⁹ Additionally, the plaintiffs lacked standing, because the alleged injury would not be redressable by a favorable decision.¹⁵⁰ In *Florida Audubon*, the appellants actually lived in the site at risk. Accordingly, any injury caused by the agency's failure to prepare an EIS would be redressable by a favorable decision.

The appellants would have demonstrated standing under the previous formulations of the standing doctrine. Thus, under a broader reading of the standing doctrine, courts could find that environmental plaintiffs have standing to bring suit, while remaining faithful to the constitutional requirements set forth in *Lujan*. Therefore, the D.C. Circuit should adopt a standard that

146. See *supra* Part I.A.

147. 504 U.S. at 558.

148. See, e.g., *Florida Audubon*, 94 F.3d at 674 (citing *Douglas County*, 48 F.3d at 1499-1501; *Salmon River*, 32 F.3d at 1351-55; *Resources Limited*, 35 F.3d at 1302-03; *Portland Audubon*, 998 F.2d at 707-08; *Seattle Audubon*, 998 F.2d at 702-03; *Idaho Conservation League*, 956 F.2d at 1513-18). See also generally Nelson, *supra* note 28. The author distinguishes between the D.C. Circuit's and the Ninth Circuit's evidentiary burden to show injury-in-fact and causation. The author notes that the D.C. Circuit requires that environmental plaintiffs show a demonstratable increased risk of environmental harm threatening a particularized interest. However, the Ninth Circuit only requires an environmental plaintiff show that a federal agency might overlook an environmental consequence.

149. See *Lujan*, 504 U.S. at 564.

150. See *id.* at 568.

would allow plaintiffs in *Florida Audubon* to have standing to proceed with their suit. The test should be a three-part standard that would address the requirements of injury-in-fact, causation and redressability as enunciated by the Supreme Court in *Lujan v. Defenders of Wildlife*. The D.C. Circuit would satisfy this standard if it adopted a standard similar to the one proposed by the Tenth Circuit in *Rio Hondo*.¹⁵¹

Under the first prong of the test, a litigant would satisfy injury-in-fact if he or she could show "that in making its decision without following the National Environmental Policy Act's procedures, the agency created an increased risk of actual, threatened, or imminent environmental harm,"¹⁵² including the harm created by the risk that serious environmental consequences will be overlooked if an agency either fails to prepare an EIS, or prepares an inadequate EIS. Allowing standing based on this type of risk of injury incorporates the injury hypothesized by both the Ninth Circuit,¹⁵³ and the D.C. Circuit's originally-contemplated formulation of the standing analysis.¹⁵⁴

Additionally, the plaintiff must prove either a geographical nexus to, or actual use of, the site in question, so that the litigant may be expected to suffer the consequences of the agency action. To ensure that the risk of harm will be to plaintiff's particularized interests, a court should require some sort of geographical nexus to the site that the agency action is expected to affect. Therefore, it is pertinent whether an agency's failure to

151. For an alternative solution to the circuit split see Nelson, *supra* note 28. Nelson proposes a solution that requires Congress to enact statutory definitions of injury-in-fact, causation, and redressability. Under this solution, the injury-in-fact prong would be satisfied if "the plaintiff can show a reasonable relationship (economic, recreational, aesthetic, or otherwise) to the area that the proposed action will potentially affect." *Id.* Causation would be satisfied "if the plaintiff can show that potential environmental harm may result from the agency's action and that this potential environmental harm will be addressed in the EIS." *Id.* The author asserts that the causation definition would cover the redressability analysis as well because, "redressability usually poses no injury in NEPA cases." *Id.*

152. See *Rio Hondo*, 102 F.3d at 449.

153. See *Idaho Conservation League*, 956 F.3d 1508.

154. See *City of Los Angeles*, 912 F.2d 478.

comply with NEPA's requirements has increased a risk of harm to the land used by the plaintiff asserting the injury.¹⁵⁵

To satisfy the causation prong of the analysis, a litigant should have to show that the injury is traceable to the agency action.¹⁵⁶ If a court allows definition of the injury prong as increased risk of harm due to an agency's failure to prepare an EIS, then the agency action is fairly traceable to the plaintiff's injury.¹⁵⁷ An environmental plaintiff should not be required to show that it is substantially probable that the agency action will cause the injury to the plaintiff, as required by the D.C. Circuit, because this will create an overly burdensome hurdle to environmental plaintiffs.

Finally, a plaintiff should have to show that it is likely that the injury will be redressed by a favorable decision.¹⁵⁸ In most NEPA cases this would mean that a favorable decision would merely compel the agency to perform an EIS, and would not require the agency to undertake specific changes to the proposed action.

CONCLUSION

In *Florida Audubon Soc'y v. Bentsen* the D.C. Circuit expanded upon the standard for standing established in previous cases and added an extra requirement that the challenged act be "substantially probable" to cause the demonstrated particularized in-

155. See Matthew C. Porterfield, *Agency Action, Finality and Geographical Nexus: Judicial Review of Agency Compliance with NEPA's Programmatic Environmental Impact Statement Requirement After Lujan v. National Wildlife Federation*, 28 U. RICH. L. REV. 619, 660 (1994).

156. See Nelson, *supra* note 28, at 253.

157. See *Rio Hondo*, 102 F.3d at 451-452

Certainly, under the injury in fact prong, a plaintiff cannot merely allege that some highly attenuated, fanciful environmental risk will result from the agency decision; the risk must be actual, threatened or imminent. However, once the plaintiff has established the likelihood of the increased risk for purposes of injury in fact, to establish causation, . . . the plaintiff need only trace the risk of harm to the agency's alleged failure to follow the National Environmental Policy Act's procedures.

Id.

158. See *id.* at 452 (citing *Lujan*, 504 U.S. at 561).

jury.¹⁵⁹ This new standard will make it virtually impossible for a citizen to challenge a government agency's decision either not to prepare an EIS, or to challenge the sufficiency of an EIS.¹⁶⁰ By requiring plaintiffs to demonstrate that a federal project will have a particular environmental result, the court is, in effect, asking the individual to conduct the same investigation he or she is asking the court to compel the agency to do.¹⁶¹ Moreover, in *Committee to Save the Rio Hondo v. Lucero* the Tenth Circuit rejected this additional burden placed on environmental plaintiffs, claiming that it frustrated the purposes and mandates of NEPA. Since "compliance with NEPA is a primary duty of every federal agency . . . fulfillment of this vital responsibility should not depend on the vigilance and limited resources of environmental plaintiffs."¹⁶²

If Congress passed NEPA with the intention of compelling government agencies to perform an EIS before embarking on a project to "avoid or minimize adverse impacts or enhance the quality of the human environment,"¹⁶³ then the courts should not frustrate this intent by creating an insurmountable burden on environmental plaintiffs to bring suit. The D.C. Circuit test for standing in *Florida Audubon* should be overturned, and the requirements for standing which are satisfied under the test in *Lujan v. Defenders of Wildlife*,¹⁶⁴ and reaffirmed in *Rio Hondo v. Lucero*,¹⁶⁵ should be applied in citizens' suits in procedural cases.

159. See *Florida Audubon*, 94 F.3d at 666.

160. See, e.g., *Resources Limited*, 35 F.3d 1300; *Portland Audubon*, 998 F.2d 705.

161. See *City of Davis*, 521 F.2d at 670-71.

162. See *id.* at 670-71.

163. 40 C.F.R. § 1502.1 (1996).

164. See *Lujan*, 504 U.S. at 555.

165. See *Rio Hondo*, 102 F.3d at 445.