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Standing and Environmental Litigation: Sierra Club v. Morton

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STANDING AND ENVIRONMENTAL LITIGATION:

SIERRA CLUB v. MORTON

In Sierra Club v. Morton, the United States Supreme Court for the first time directly considered the issue of standing for an environmental protection group. Previously many of the lower federal courts had become progressively more liberal in granting standing to sue to groups seeking to prevent environmental injury and other "in-

2. Id.
3. In Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), an environmental protection group was a party to an action brought under the Administrative Procedure Act, 5 U.S.C. §§ 701-06 (1970), but the issue of standing was not raised. 405 U.S. at 734 n.7.
4. See, e.g., West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232, 235 (4th Cir. 1971) (standing to challenge the administration of the Monongahela National Forest granted to a non-profit membership corporation dedicated to preserving natural, scenic and historic areas in the West Virginia highlands); Environmental Defense Fund, Inc. v. HEW, 428 F.2d 1083, 1085 (D.C. Cir. 1970) (environmental organization seeking "to assure the preservation or restoration of environmental quality on behalf of the general public" had standing to review a decision of the Secretary of Health, Education and Welfare refusing to establish a "zero tolerance" for DDT residues in or on raw agricultural commodities); Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093, 1096-97 (D.C. Cir. 1970) (same organization, alleging a devotion to environmental protection, accorded standing to review a decision of the Secretary of Agriculture refusing to cancel the registration for DDT); Citizens Comm. for the Hudson Valley v. Volpe, 425 F.2d 97, 102-05 (2d Cir.), cert. denied, 400 U.S. 949 (1970) (environmental organizations, "as responsible representatives of the public," were granted standing to seek a declaration that the issuance of a permit authorizing the construction of an expressway was beyond the scope of the issuing agency's authority); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 615-16 (2d Cir. 1965) (conservationist organization, requesting that orders of the FPC granting a license to construct a power plant be set aside, was afforded standing because it had "exhibited a special interest" in the aesthetic, conservation, and recreational aspects of power development); Cape May County Chapter, Inc., Izaak Walton League v. Macchia, 329 F. Supp. 504, 509-13 (D.N.J. 1971) (environmental and conservation organization was accorded standing to seek a declaratory judgment and injunctive relief respecting the preservation and protection of marine related resources because it was a local chapter of a renowned environmental group that would "resolutely press forward" in the action); Upper Pecos Ass'n v. Stans, 328 F. Supp. 332, 333-34 (D.N.M. 1971) (environmental association whose stated purpose was "to preserve and improve the quality of the environment in the Upper Pecos Valley" was given standing to challenge the granting of funds by the Economic Development Administration for a road project in northern New Mexico); Honchok v. Hardin, 326 F. Supp. 988, 989 n.1, 991 (D. Md. 1971) (individuals and a conservation organization alleging an interest in the preservation of a "viable habitat and environment" were accorded standing to seek a declaratory judgment and an injunction prohibiting the Secretary of Agriculture from permitting mining operations in a na-
commercial-recreational area in the valley. The proposal of Walt Disney Enterprises, Inc. was accepted and Disney was accorded a three year permit to conduct surveys and explorations in the valley in furtherance of its preparation of a complete master plan for the resort.

The master plan, submitted by Disney and approved by the Forest Service in January, 1969, provided for an expenditure of $35 million on the construction of a complex of motels, restaurants, swimming pools, parking lots and other structures designed to accommodate 14,000 visitors daily. The complex was to occupy 80 acres of the valley pursuant to a 30 year use permit issued by the Forest Service. A revocable special use permit was to be issued allowing other facilities, including ski lifts, ski trails, a cog-assisted railway, and utility installations, to be erected on the mountain slopes and other areas of the valley. Access to the resort was to be provided by a highway 20 miles in length to be constructed by the state of California, a section of which would have traversed Sequoia National Park. Also crossing the park would have been a high power line needed to supply the resort with electricity. Both the highway and the power line required the approbation of the Department of Interior.

The Sierra Club, distraught with the prospect of so vast a development of the wilderness area, unsuccessfully sought a public hearing on the matter in 1965. In June, 1969, the club instituted an action in the United States District Court for the Northern District of California, requesting a declaratory judgment that the proposed development con-

10. 405 U.S. at 729.
11. Id. The authority to issue such permits is provided by 16 U.S.C. § 497 (1970).
12. 405 U.S. at 729. This represents an expenditure of over 10 times that anticipated by the Forest Service. In general the Disney complex was gargantuan compared to the anticipations of the Forest Service when issuing its prospectus. Id. at 743-44 n.5 (Douglas, J., dissenting); Petitioner's Brief, supra note 8, at 9-10.
13. 405 U.S. at 729.
14. Id.
15. Id. This road was subsequently deleted from the California state highway system. Ch. 1051, § 1, [1972] 6 West's Cal. Legis. Serv. 2108, amending CAL. STR. & H. CODE ANN. § 576 (West 1969). This action will apparently result in the maintaining of the existing secondary road and the inability of the developer to gain the necessary access to the Mineral King area for the large number of expected users.
16. 405 U.S. at 729.
17. The authority to approve the construction of power lines and roads in national parks is vested in the Department of Interior by 16 U.S.C. §§ 5, 8 (1970). However, the Sierra Club contended that a permit for construction of a power line could not be issued without specific congressional authorization. See note 19 infra.
18. 405 U.S. at 730.
juries of a non-economic nature to interests that are widely shared.\textsuperscript{95} The Sierra Club Court, however, in a 4-3 decision\textsuperscript{9} written by Justice Stewart and joined in by Chief Justice Burger and Justices Marshall and White, put a halt to the liberalizing trend in the lower courts by denying the Sierra Club, a conservation organization, standing to maintain a suit for a declaratory judgment and an injunction restraining federal officials from approving an immense recreational development in the Mineral King Valley in the Sequoia National Forest.\textsuperscript{7}

The Mineral King Valley, an area of profound natural beauty located in the Sierra Nevada Mountains of northern California, is a semi-wilderness region used almost exclusively for recreational purposes.\textsuperscript{8} Because the valley is part of the Sequoia National Forest, its supervision is administered by the United States Forest Service.\textsuperscript{9} In 1965 the Forest Service published a prospectus, inviting bids from private developers for the construction and operation of a year-round

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\item [5.] \textsuperscript{405} U.S. at 734. Injuries to public health, safety, aesthetics and convenience have often been referred to as "public nuisances" in state actions. W. Prosser, The Law of Torts 583-85 (4th ed. 1971). However, the expression has not been applied in federal cases, since the suits are either brought under a federal statute or on constitutional grounds. In state tort actions, absent statutory authorization, neither private individuals nor groups are allowed standing to protest public nuisances absent some type of injury different in kind from that caused to the public at large. \textit{id.} at 586-87. See note 107 infra.
\item [6.] Justices Powell and Rehnquist took no part in the consideration or decision of the case.
\item [7.] \textsuperscript{405} U.S. at 730, 741.
\item [8.] \textit{id.} at 728. In its proposal for development of the area Walt Disney Productions described the Mineral King Valley as follows:

Unsurpassed in natural splendor, Mineral King is perhaps more similar to the European Alps than any other area in the United States. Altitudes range from 7,800 foot valley to surrounding mountains that reach the 12,400 foot level. The High Sierra wonderland, located in Sequoia National Forest, is generously endowed with lakes, streams, cascades, caverns and matchless mountain vistas. Brief for Petitioner at 7, Sierra Club v. Morton, 405 U.S. 727 (1972) [hereinafter cited as Petitioner's Brief].

\end{itemize}
travened federal laws and regulations governing conservation of national parks and forests and seeking preliminary and permanent injunctions restraining the Secretary of the Interior, the Secretary of Agriculture, and various other federal officials from granting their approval or issuing necessary permits. The Sierra Club sued as a membership corporation alleging injury to its aesthetic, conservational, and recreational interests, invoking the judicial review provisions of the Administrative Procedure Act. The club claimed standing to sue because of its "special interest in conservation and in the maintenance of the national parks, game refuges and forests of the country." The district court rejected the respondents' challenge to the Sierra Club's standing to sue and, finding that there was a threat of irreparable injury, granted a preliminary injunction pending a resolution of the case on the merits.

In response to the Government's appeal, the Court of Appeals for the Ninth Circuit reversed. The court of appeals disagreed with the district court's rejection of the respondents' challenge to the Sierra Club's standing to sue and, finding that there was a threat of irreparable injury, granted a preliminary injunction pending a resolution of the case on the merits.

19. The Sierra Club alleged (1) that the special-use permit allowing construction of the resort in authorizing use of 13,000 acres violated the maximum acreage restriction placed upon it by 16 U.S.C. § 497 (1970) and that the Forest Service had no authority to issue a revocable use permit; (2) that granting of the proposed permit for the highway through Sequoia National Park would violate 16 U.S.C. § 1 (1970), authorizing the Secretary of the Interior "to promote and regulate the use" of national parks and "to grant privileges, leases, and permits for the use of the land" in the parks, in that it would not serve any of the purposes of the park, as well as violate 16 U.S.C. §§ 41, 43 (1970), in that it would destroy timber and other natural resources protected by 16 U.S.C. § 1 (1970); (3) that by failing to hold adequate public hearings on the proposed project, the Forest Service and the Department of Interior had violated their own regulations; and (4) that 16 U.S.C. § 45c (1970) required congressional authorization for the issuance of a permit to erect a power transmission line within a national park. Id. at 730 n.2.

20. Id. at 730.

21. The Club alleged no unique material interest. Indeed, in a brief filed with the United States Supreme Court, it asserted:

Under the decisions of this Court, a litigant need not, and therefore should not, resort to artifice by alleging injury to an inconsequential but unique material interest when injury to the litigant's aesthetic, conservational or recreational interest is the real reason for the lawsuit.

The Government seeks to create a "heads I win, tails you lose" situation in which either the courthouse door is barred for lack of assertion of a private, unique injury or a preliminary injunction is denied on the ground that the litigant has advanced private injury which does not warrant an injunction adverse to a competing public interest. Counsel have shaped their case to avoid this trap. Reply Brief for Petitioner at 6, Sierra Club v. Morton, 405 U.S. 727 (1972) [hereinafter cited as Petitioner's Reply Brief].


23. 405 U.S. at 730.

24. Id. at 731. The district court opinion is not reported.

district court's accordance of standing to the Sierra Club, finding that "[t]here is no allegation in the complaint that members of the Sierra Club would be affected by the actions of defendants-appellants other than the fact that the actions are personally displeasing or distasteful to them."\textsuperscript{26} The court then remarked:

We do not believe such club concern without a showing of more direct interest can constitute standing in the legal sense sufficient to challenge the exercise of responsibilities on behalf of all of the citizens by two cabinet level officials of the government acting under Congressional and Constitutional authority.\textsuperscript{27}

As an alternative holding, the court of appeals found the Sierra Club had not made an adequate showing of irreparable injury and probable success on the merits\textsuperscript{28} and vacated the preliminary injunction granted by the district court.\textsuperscript{29}

Upon petition of the Sierra Club, the United States Supreme Court granted certiorari.\textsuperscript{30} Speaking for the majority of the Court, Justice Stewart held the Sierra Club's allegations that it had "exhibited a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country,"\textsuperscript{1} that one of its principal purposes was "to protect and conserve the national resources of the Sierra Nevada Mountains,"\textsuperscript{2} and that its interests would be aggrieved by the administrative acts of the defendants failed to disclose an injury sufficiently direct to grant it standing to seek judicial review of those acts.\textsuperscript{3} The majority maintained that a party seeking judicial review under the Administrative Procedure Act must have suffered a direct injury to itself, economic or otherwise, and that a mere organizational interest in a problem was not sufficient to confer standing under the act.\textsuperscript{34} Since the Sierra Club had alleged only an organiza-
tional interest in the area of environmental protection, it was denied standing to sue. The majority intimated no view on the merits of the case.

Justices Blackmun, Brennan and Douglas dissented. Justice Blackmun decried the rigidity and inflexibility of the majority’s opinion and urged reversal of the judgment of the court of appeals and approval of the district court’s judgment on the condition that the Sierra Club amend its complaint to meet the majority’s standing requirements. Alternatively, Justice Blackmun proposed an expansion of the traditional concepts of standing. This proposal would confer standing to litigate environmental issues upon an organization with well recognized attributes and purposes in the environmental area.

Justice Brennan, in an extremely brief dissent, merely noted his agreement with Justice Blackmun’s alternative proposal and indicated a desire to reach the merits, which he considered to be substantial. Justice Douglas, while indicating agreement with Justice Blackmun’s views, argued that the best approach would be to fashion a federal rule allowing environmental issues to be litigated before federal courts in the name of the inanimate object about to be despoiled. This would not be significantly different, Justice Douglas reasoned, than customary judicial appointments of guardians ad litem, executors, conservators, receivers, or counsel for indigents.

The sole question considered by the Court in Sierra Club was whether the Sierra Club had alleged facts entitling it to judicial review of the challenged administrative action. The Sierra Club relied on section 10 of the Administrative Procedure Act, which 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.

Prior to the enactment of legislation providing for judicial review, the courts were very reluctant to grant standing to protest federal agency action. For example, in Tennessee Electric Power Co. v.

35. Id. at 739-41.
36. Id. at 741.
37. Id. at 755-57.
38. Id. at 757.
39. Id. at 755.
40. Id. at 741.
41. Id. at 750 n.8.
42. Id. at 731.
TVA, a private electric company was denied standing to sue to enjoin competition by the Tennessee Valley Authority even though a serious financial injury was threatened. The Court explained that no "legal right" was being invaded by the agency action, a legal right being defined as "one of property, one arising out of contract . . . or one founded on a statute which confers a privilege."\(^45\)

The early decisions reflected the Court's tendency to leave the regulation of federal agencies entirely in the hands of the legislature. The critical need for legislation providing for judicial review of agency action and Congress' recognition of this need was apparent from the 1937 Report of President's Committee on Administrative Management, which was considered in the House of Representatives during the debates on the Administrative Procedure Act.\(^46\) The Report noted:

> There is a conflict of principle involved in their [the agencies'] make-up and functions . . . They are vested with duties of administration . . . and at the same time they are given important judicial work . . . The evils resulting from this confusion of principles are insidious and far reaching . . . Pressures and influences properly directed toward officers responsible for formulating and administering policy constitute an unwholesome atmosphere in which to adjudicate private rights. But the mixed duties of the commissions render escape from these subversive influences impossible.\(^47\)

As a result of such considerations, Congress in 1946 enacted the Administrative Procedure Act, including the judicial review provision relied upon by the Sierra Club in the instant case.\(^48\)

Unfortunately, the crucial terms "legal wrong", "adversely affected", and "aggrieved" were left undefined in the act, and early cases under the act continued to utilize the strict "legal interest" approach. For example, in *Kansas City Power and Light Co. v. McKay*,\(^49\) wherein

\(^44\) 306 U.S. 118 (1939); accord, Alabama Power Co. v. Ickes, 302 U.S. 464, 479 (1938), wherein the Court held that a private electric company did not have standing to protest the loaning of money by the U.S. government to municipalities in competition with the private company because no "legal injury" was threatened.

\(^45\) 306 U.S. at 137-38.


\(^47\) Id.


a private electric company sought to enjoin federal officers and agencies from carrying out a federally supported power program which threatened to compete with its business, the District of Columbia Court of Appeals held that such economic injury would not qualify the company as an aggrieved party under the Administrative Procedure Act because no "legal rights" were being invaded. The court, reasoning in a circle, explained that a "legal wrong" is "such wrong as particular statutes and the courts have recognized as constituting grounds for judicial review."

In recent cases, however, the courts have taken a more liberal approach toward judicial review of agency action. In *Hardin v. Kentucky Utilities Co.*, a private utility company sought to enjoin the Tennessee Valley Authority from competing with its business. The Court held that the utility's business interest was a legally protected one because the relevant regulatory statute, the Tennessee Valley Authority Act, was designed to protect private utilities from competition. The Court allowed standing under "familiar judicial principles," finding that the use of a specific statute providing for judicial review was unnecessary.

Finally, in *Association of Data Processing Service Organizations, Inc. v. Camp* and *Barlow v. Collins*, both decided on the same day in 1970, the Court eliminated the need for showing that a legal right was being invaded or that the legislative intent of a regulatory statute was to allow standing to a particular class of persons. The plaintiffs in *Data Processing*, relying upon the Administrative Procedure Act, protested a ruling by the Comptroller of the Currency that permitted national banks to make their data processing equipment available to other banks and to bank customers, alleging that such competition from national banks would result in loss of profits to the data

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50. *Id.* at 932.
51. *Id.* Professor Davis points out that "[c]ircular reasoning is very common, for one of the questions asked in order to determine whether a plaintiff has standing is whether the plaintiff has a legal right, but the question whether the plaintiff has a legal right is the final conclusion, for if the plaintiff has standing his interest is a legally-protected interest, and that is what is meant by a legal right." 3 K. *Davis, Administrative Law Treatise* 217 (1958).
52. 390 U.S. 1 (1968).
55. 390 U.S. at 7.
processing industry.\textsuperscript{58} The plaintiffs in \textit{Barlow} were tenant farmers who claimed that the Secretary of Agriculture had improperly adopted certain regulations which left them economically at the mercy of their landlords.\textsuperscript{59} Noting that the question of whether a legal right had been invaded was applicable to the merits of the case rather than to the question of standing,\textsuperscript{60} the Court in \textit{Data Processing} adopted a new two-step approach to standing, holding first that a plaintiff would have to meet the constitutional "case or controversy" requirement\textsuperscript{61} by alleging "that the challenged action had caused him injury in fact, \textit{economic or otherwise},"\textsuperscript{62} and second that the plaintiff's interests must be "arguably within the zone of the interests to be protected or regulated by the statute . . . in question."\textsuperscript{63} The Court noted that the second part of the test was merely a restatement of the Administrative Procedure Act's grant of power to sue to persons "aggrieved" by action under some "relevant statute,"\textsuperscript{64} and the plaintiffs in both \textit{Barlow} and \textit{Data Processing} were granted standing to sue.\textsuperscript{65}

Although the injuries in both \textit{Data Processing} and \textit{Barlow} were economic ones, the Court in \textit{Data Processing} had noted that the interest which the plaintiff is seeking to protect "may reflect 'aesthetic, conservational, and recreational' as well as economic values."\textsuperscript{66} In view of the new test established by \textit{Data Processing} and \textit{Barlow}, the Sierra Club Court had to determine whether the Sierra Club had alleged injury sufficient to qualify as "injury in fact." The injury alleged by the Club was to its aesthetic, conservational, and recreational interests.\textsuperscript{67} This injury would be incurred by reason of the change in the uses to which the Mineral King Valley would be put and the concomitant change in the aesthetics and the ecology of the area. In

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\item \textsuperscript{58} 397 U.S. at 151-52.
\item \textsuperscript{59} 397 U.S. at 162-63.
\item \textsuperscript{60} 397 U.S. at 153.
\item \textsuperscript{61} U.S. Const. art. III, § 2. The \textit{Data Processing} Court noted that "'[I]n terms of Article III limitations . . . the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context . . . .'" 397 U.S. at 151-52, \textit{quoting} Flast v. Cohen, 392 U.S. 83, 101 (1968).
\item \textsuperscript{62} 397 U.S. at 152 (emphasis added).
\item \textsuperscript{63} \textit{Id.} at 153.
\item \textsuperscript{64} \textit{Id.} The Sierra Club took the position that the preservation of the Sierra Nevada Mountains was the object of several statutes specifically relating to Sequoia National Park and the Sequoia National Game Refuge, and that the preservation of the national parks, forests, and game refuges in general was the object of various other federal statutes. See note 19 supra.
\item \textsuperscript{65} 397 U.S. at 158; 397 U.S. at 164.
\item \textsuperscript{66} 397 U.S. at 154, \textit{quoting} Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 616 (2d Cir. 1965).
\end{itemize}
acknowledging that such injury may qualify as "injury in fact," the Court said:

We do not question that this type of harm may amount to an "injury in fact" sufficient to lay the basis for standing under § 10 of the APA [Administrative Procedure Act]. Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process. 68

The Court noted, however, that the only parties actually harmed by the injury to the Mineral King Valley were those who used the area. 69 The Sierra Club, rather than allege that its activities or the activities of its members would be affected by the development of Mineral King, 70 or that its members used Mineral King, 71 relied solely upon the theory that the suit was a "public" action involving environmental questions and, as such, the Club's longstanding concern and expertise in this area should give it standing as a "representative of the public." 72 The Court refused to adopt such an approach: "[T]he 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." 73

67. See note 21 supra and accompanying text.
68. 405 U.S. at 734. This language indicates a departure from the more restrictive view of harm or injury expounded in Frothingham v. Mellon, 262 U.S. 447 (1923), wherein the Court held that a federal taxpayer lacked standing under the case or controversy requirement, U.S. Const. art. III, § 2, to challenge the legality of a federal expenditure because the taxpayer's interest was "shared with millions of others" and was "comparatively minute and indeterminable." Id. at 487. In order to have standing, the Court required the challenger to show "that he has sustained or is immediately in danger of sustaining some direct injury . . . and not merely that he suffers in some indefinite way in common with people generally." Id. at 488. Flast v. Cohen, 392 U.S. 83 (1968), later held that taxpayers have standing to challenge the constitutionality of federal expenditures by showing "that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power . . . ." Id. at 102-03. The Flast case is symptomatic of the recent trend in the federal courts toward recognition of injury to definite interests, even if minute, unquantifiable or widely shared, as being sufficient for standing purposes. See W. Prosser, The Law of Torts 587 n.68 (4th ed. 1971); K. Davis, Administrative Law Treatise § 22.09-5 (Supp. 1970); note 4 supra.
69. 405 U.S. at 735.
70. Id.
71. In an amici curiae brief filed by the Wilderness Society and others it was stated that the Sierra Club sponsored pack trips originating at Mineral King. However, the Sierra Club refused to rely upon this activity for standing purposes. Petitioner's Reply Brief, supra note 21, at 6.
73. 405 U.S. at 734-35.
Certain lower court decisions had shown a propensity to liberalize the law of standing to sue and had conferred standing upon parties as “representatives of the public.” 74 Two exemplary cases are *Scenic Hudson Preservation Conference v. FPC*75 and *Office of Communication of the United Church of Christ v. FCC.*76

In *Scenic Hudson*, conservationist organizations and three local towns asked the court to set aside orders of the FPC granting a license to Consolidated Edison to build a power plant on the Hudson River.77 The court granted standing to each of the plaintiffs and said:

In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of “aggrieved” parties . . . .78

Although not an environmental law action, *United Church of Christ* parallels *Scenic Hudson* on the standing issue. The plaintiffs in *United Church of Christ* charged television station WLBT with discriminatory programming. They filed with the FCC a timely petition to intervene in a license renewal proceeding in order to present evidence and arguments opposing the station’s renewal application.79 The Commission dismissed the petition and, without a hearing, granted a restricted and conditional renewal of the license.80 The Court of Appeals for the

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74. See, e.g., cases cited in note 4 supra. However, the Ninth Circuit has consistently resisted such a tendency. In *Alameda Conservation Ass’n v. California*, 437 F.2d 1087 (9th Cir. 1971), the court of appeals held that the Association, which was formed for the protection of the public interest in the waters of the San Francisco Bay, did not have standing in behalf of its members to protest certain landfill operations that would contract the outline of the Bay because it failed to allege injury to itself. Four of the individual members of the Association, who sued in their own behalf for threatened property damage, were allowed standing. The court refused to recognize that the relationship between the organization and its members was sufficient to allow the Association to sue on their behalf. *Id.* at 1091. See text accompanying notes 159-60 infra.

Of interest in its application to the *Sierra Club* case is the court’s comment, “If the Association here had a recreational operation which it conducted and which the defendants interfered with, it could assert it . . . or if it operated a conservation program, an interference with that operation would establish standing.” 437 F.2d at 1091.

75. 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966).

76. 359 F.2d 994 (D.C. Cir. 1966).

77. 354 F.2d at 611.

78. *Id.* at 616.


80. 359 F.2d at 997.
District of Columbia Circuit, in an opinion written by then Judge Warren Burger, reversed, holding that, “[i]n order to safeguard the public interest in broadcasting . . . some ‘audience participation’ must be allowed in license renewal proceedings.”81 The plaintiffs, as spokesmen for the listening public, were held to have standing.82

The Sierra Club itself had successfully obtained standing as a “representative of the public interest” prior to the instant case. In *Citizens Committee for the Hudson Valley v. Volpe*,83 the plaintiffs, including the Sierra Club, sought a declaratory judgment and an injunction to prevent the issuance by the Army Corps of Engineers of a permit authorizing a dredge and fill operation for the construction of a portion of the Hudson River Expressway.84 The Court of Appeals for the Second Circuit, relying on *Scenic Hudson* and *United Church of Christ*, held that the plaintiffs had standing as responsible representatives of the public interest in environmental resources:

We hold, therefore, that the public interest in environmental resources—an interest created by statutes affecting the issuance of this permit—is a legally protected interest affording these plaintiffs, as responsible representatives of the public, standing to obtain judicial review of agency action alleged to be in contravention of that public interest.85

The court reasoned that the plaintiffs had demonstrated the genuineness of their concern for this legally protected interest by the substantial expense and effort they had undergone in instituting and maintaining the suit to protect it.86

The Federal District Court for the District of Colorado, also relying on *Scenic Hudson* and *United Church of Christ*, granted standing to the Sierra Club in *Parker v. United States*,87 another environmental action. The plaintiffs, including the Sierra Club, requested a declaratory judgment and an injunction to prevent a proposed sale by the United States of timber from a national forest,88 alleging that certain statu-
tory procedures protecting the public's interest in the scenic and recreational aspects of public lands had not been met. The court found the plaintiffs to be proper parties to bring the action since they were "advancing the public interest" and had a "special interest in the values which Congress sought to protect" by enacting the statutes in question.89

The Sierra Club Court refused to follow the theory advanced by some of these lower court decisions. Because the Sierra Club had alleged merely an organizational interest in the environmental problem in general, rather than a direct injury to itself or its members, the Court refused to grant it standing to sue.90 Justice Stewart, writing for the majority, believed that cases like Citizens Committee for the Hudson Valley and the instant case, wherein plaintiffs relied on their concern and expertise in the litigated matter rather than on an individualized injury, reflected a misunderstanding of cases involving "public actions" in the area of administrative law.91 This misunderstanding, Justice Stewart believed, was founded initially upon an incorrect reading of the Court's decision in Scripps-Howard Radio, Inc. v. FCC,92 wherein the licensee of a Cincinnati, Ohio, radio station had sought a stay of an order of the FCC allowing another radio station in a neighboring city to change its frequency and increase its power.93 The FCC opposed the issuance of the stay order, claiming that the court of appeals lacked the power to grant a stay at the behest of a competitor94 because such action was not provided for in the Communications Act of 1934.95 The Supreme Court nevertheless held the court of appeals had the requisite power:

The Communications Act of 1934 did not create new private rights. The purpose of the Act was to protect the public interest in communications. By § 402(b)(2) Congress gave the right of appeal to persons "aggrieved or whose interests are adversely affected" by Commission action. But these private litigants have standing only as representatives of the public interest. That a court is called upon to enforce public rights and not the interests of private property does not diminish

16 U.S.C. § 528 et seq. (1970), and the Wilderness Act, 16 U.S.C. § 1131 et seq. (1970), were alleged to have been violated.
89. 307 F. Supp. at 687.
90. 405 U.S. at 741.
91. Id. at 736.
92. 316 U.S. 4 (1942).
93. Id. at 4-5.
94. Id. at 5.
its power to protect such rights.\textsuperscript{96}

The majority in \textit{Sierra Club}, however, dismissed the italicized sentence as dictum,\textsuperscript{97} "since Scripps-Howard was clearly 'aggrieved' by reason of the economic injury that it would suffer as a result of the Commission's action."\textsuperscript{98} Justice Stewart believed that the \textit{Scripps-Howard} Court itself had recognized that standing to \textit{assert} the rights of the public is premised initially on a showing of personal injury sufficient to confer standing to \textit{sue},\textsuperscript{99} as evidenced by the \textit{Scripps-Howard} Court's reliance on \textit{FCC v. Sanders Brothers Radio Station}.\textsuperscript{100}

In \textit{Sanders} a radio station, invoking the judicial review provisions of the Communications Act of 1934,\textsuperscript{101} objected to the FCC's granting of a permit for the erection of a rival station, alleging, \textit{inter alia}, that there was an insufficiency of advertising revenue to support an additional station.\textsuperscript{102} Thus the radio station's asserted basis for standing was the competitive injury it would suffer by the licensing of another radio station in its listening area. The \textit{Sanders} Court held that section 402(b)(2) of the Communications Act of 1934,\textsuperscript{103} providing for review of the Commission's actions by any person aggrieved by such action, gave the station standing to appeal:

\begin{quote}
Congress had some purpose in enacting [the Act]. It may have been of the opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license.\textsuperscript{104}
\end{quote}

The \textit{Sierra Club} Court therefore concluded that \textit{Sanders} and \textit{Scripps-Howard} taken together indicated that a person must allege direct personal injury to himself before he will be accorded standing to sue, but that once he has properly invoked the court's jurisdiction he may as-

\begin{thebibliography}{10}
\bibitem{96} 316 U.S. at 14-15 (citations omitted and emphasis added).
\bibitem{97} 405 U.S. at 736.
\bibitem{98} Id. at 737.
\bibitem{99} Id. n.11.
\bibitem{100} 309 U.S. 470 (1940), cited in Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 14 (1942).
\bibitem{102} 309 U.S. at 471.
\bibitem{103} Communications Act of 1934, ch. 652, § 402(b)(2), 48 Stat. 1093 (1934), \textit{as amended}, 47 U.S.C. § 402(b)(6) (1970). Section 402(b) provided \textit{inter alia} for an appeal to the United States Court of Appeals for the District of Columbia by any person aggrieved or whose interests were adversely affected by any decision of the Commission granting or refusing an application for a license or permit. \textit{Id.}
\bibitem{104} 309 U.S. at 477.

sert the rights of the public which have allegedly been invaded by the agency's action.105

105. 405 U.S. at 737. This construction of Sanders and Scripps-Howard is not universally accepted. Professor Jaffe, in expounding his view of the two cases, said:

Judge Frank in the well-known Associated Industries case believed, correctly in my opinion, that under Sanders as reinforced by Scripps-Howard it is not a necessary element of the constitutional requirement of case or controversy that the plaintiff have any interest. It is enough that the statute authorizes him to represent the public interest as a "private Attorney General." We have seen that the common law in both England and the United States permits any citizen to enforce public rights. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 517 (1965) (footnote omitted).

Professor Jaffe is referring to the case of Associated Indus. v. Ickes, 134 F.2d 694 (2d Cir.), vacated on suggestion of mootness, 320 U.S. 707 (1943), wherein an industry association was granted standing to protest a decision made by the Secretary of the Interior purporting to increase minimum prices for bituminous coal. The court said:

The Court, in the Sanders and Scripps-Howard cases, as we understand them, construed the "person aggrieved" review provision as a constitutionally valid statute authorizing a class of "persons aggrieved" to bring suit in a Court of Appeals to prevent alleged unlawful official action in order to vindicate the public interest, although no personal substantive interest of such persons had been or would be invaded. Id. at 705 (footnote omitted).

It was in the Associated Industries case that Judge Frank coined the now famous phrase, "private Attorney Generals." Id. at 704.

Justice Harlan apparently adopted the Jaffe position in his dissenting opinion in Flast v. Cohen, 392 U.S. 83 (1968), where he maintained:

It does not, however, follow that suits brought by non-Hohfeldian plaintiffs are excluded by the "case or controversy" clause of Article III of the Constitution from the jurisdiction of the federal courts. This and other federal courts have repeatedly held that individual litigants, acting as private attorneys-general, may have standing as "representatives of the public interest." Id. at 120.

The phrase "non-Hohfeldian plaintiffs" is Professor Jaffe's, adopted from W. HOHFEld, FUNDAMENTAL LEGAL CONCEPTIONS (1913). The Hohfeldian plaintiff advances the personal and proprietary interests of the traditional plaintiff, while the non-Hohfeldian plaintiff asserts representative and public interests.

Justice Harlan went on to say that "certain of the cases may be explicable as involving a personal, if remote, economic interest," 392 U.S. at 120, thereby implying that the plaintiffs in the remaining cases advanced no private interest whatsoever. See id. at 131.

Professor Davis has strongly criticized these statements by Justice Harlan and Professor Jaffe, arguing that each of the cases relied upon involved a plaintiff with an individual interest of his own. K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.09-6 (Supp. 1970). Even Professor Davis, however, did not argue that "injury in fact" to oneself is constitutionally required, although he and several other authorities have assumed, perhaps due in part to Justice Douglas' introduction of the "injury in fact" test immediately after his discussion of Article III in Data Processing, that the test is derived from the case or controversy requirement. Id. § 22.00-1, at 706; see Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 152-53 (1970); Barlow v. Collins, 397 U.S. 159, 164 (1970); id. at 167-68 (Brennan, J., concurring in the result and dissenting).

The Sierra Club Court itself, while disagreeing with the Jaffe-Harlan position on statutory and policy grounds, seemingly supported their position insofar as constitutional requirements are concerned:

Congress may not confer jurisdiction on Art. III federal courts to render advisory
The Court seemed to feel that this very distinction had been incorporated in the Administrative Procedure Act. Having noted the lower courts' trend toward broadening the type of injury that could be alleged in support of standing under the Administrative Procedure Act and other statutes authorizing judicial review of federal agency action, Justice Stewart stated:

But broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.

opinions, or to entertain “friendly” suits, or to resolve “political questions,” because suits of this character are inconsistent with the judicial function under Art. III. But where a dispute is otherwise justiciable, the question whether the litigant is a “proper party to request an adjudication of a particular issue” is one within the power of Congress to determine. 405 U.S. at 732 n.3 (citations omitted), quoting Flast v. Cohen, 392 U.S. 83, 100 (1968).

This language standing alone could reasonably be interpreted as being related merely to the question of standing to assert an issue once standing to sue has properly been invoked. However, each and every one of the authorities cited by the Court stands for the proposition that the Constitution does not require a personal interest to be asserted by the plaintiff. One of the citations was to the page containing the statement by Justice Harlan quoted above. Flast v. Cohen, 392 U.S. 83, 120 (1968) (Harlan, J., dissenting). The others were: FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 477 (1940); Associated Indus. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943); Berger, Standing to Sue in Public Actions: Is it a Constitutional Requirement?, 78 YALE L.J. 816, 837 et seq. (1969); Jaffe, The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff, 116 U. PA. L. REV. 1033 (1968). Berger, who shares the Jaffe-Harlan view, has said: “[T]he notion that the constitution demands injury to a personal interest as a prerequisite to attacks on allegedly unconstitutional action is historically unfounded.” Berger, supra, at 840.

The Court, then, may be prepared to limit Data Processing’s significance insofar as the case or controversy requirement is concerned to the only statement in the case which explicitly dealt with the issue, which merely noted that:

“[I]n terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.” Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 151-52 (1970), quoting Flast v. Cohen, 392 U.S. 83, 101 (1968).

 Cf. K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.00-4 (Supp. 1970). Justices Blackmun, Brennan and Douglas clearly do not consider the injury in fact test to be part of the case or controversy requirement, since they are willing to dispense with the test when environmental values are at stake. See text accompanying notes 117-19, 123-24, 135-40 infra.

106. See, e.g., cases cited in note 4 supra.

107. 405 U.S. at 738. A unique personal interest is required of a plaintiff bringing an environmental action under a public nuisance tort theory. In public nuisance actions the courts have repeatedly held that a private individual has no cause of action for the invasion of a public right unless his damage is distinguishable from that sustained by other members of the general public. See, e.g., Dozier v. Troy Drive-In-Theatres, Inc., 265 Ala. 93, 89 So. 2d 537 (1956); Taylor v. Barnes, 303 Ky. 562, 198 S.W.2d 297 (1946); Painter v. Gunderson, 123 Minn. 323, 143 N.W. 910 (1913); Alexander v.
Thus, while recent cases have conferred standing upon organizations demonstrating merely an organizational interest in the areas of the environment or consumer protection, the majority in *Sierra Club*, basing its decision on statutory grounds alone, was unwilling to do so, believing that "a mere interest in a problem" was not in and of itself sufficient to render the organization "adversely affected or aggrieved" under the Administrative Procedure Act. This refusal to confer standing upon a party alleging only a "special interest," the majority declared, would not insulate executive action from judicial review nor prevent the assertion of the public interest:

The test of injury in fact goes only to the question of standing to obtain judicial review. Once this standing is established, the party may assert the interest of the general public in support of his claims for equitable relief.

Since the Sierra Club had alleged only a "special interest" in environmental protection, it had not satisfied the "injury in fact" requirement.

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The Izaak Walton League is not a "Johnny-come-lately" or an *ad hoc* organization and its interest in the wilderness movement is continuing, basic and deep. It therefore has an "aesthetic, conservational and recreational" interest to protect. This gives it standing. . . . *Id.* at 1317.

109. The Court observed:

Where . . . Congress has authorized public officials to perform certain functions . . . and has provided by statute for judicial review of those actions . . . the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff. 405 U.S. at 732.

The general principle established in *Marbury v. Madison*, 5 U.S. (1 Cranch) 49 (1803), was that statutory grounds would be used to dispose of controversies where possible, and constitutional issues considered only as a last resort.

110. 405 U.S. at 739.

111. *Id.* at 740.

112. *Id.* n.15.
of *Data Processing* and hence was not entitled to assert the public interest.

113. *Id.* at 734-36. Finding that the Sierra Club had failed to meet this first requirement of *Data Processing*, the Court did not consider whether the Club had met the “zone of interest” requirement also mentioned in that case. *Id.* at 733 n.5. See text accompanying notes 60-66 *supra*.

There is some controversy over whether the “zone of interests” test is still necessary to establish standing under the Administrative Procedure Act. Justice Brennan, with whom Justice White joined, in a concurring and dissenting opinion for both *Data Processing* and *Barlow v. Collins*, argued that the injury in fact test was the only one necessary to determine standing. 397 U.S. 150, 168-69 (1970). According to Brennan:

> Before the plaintiff is allowed to argue the merits, it is true that a canvass of relevant statutory materials must be made in cases challenging agency action. But the canvass is made, not to determine *standing* but to determine an aspect of *reviewability*, that is, whether Congress meant to deny or to allow judicial review of the agency action at the instance of the plaintiff. *Id.* at 169 (footnote omitted).

Professor Davis agrees with the Brennan dissent, noting that the “law of standing . . . has long been too complex” and that one good way of simplifying it would be to use the injury in fact test alone to establish standing. K. Davis, *Administrative Law Treatise* § 22.00, at 703 (Supp. 1970).

The appellate court in *Sierra Club* declined to apply the zone of interest test because “the significance of the language [regarding the test in *Data Processing*] is not clear . . . [and] does not establish a test separate and apart from [injury in fact]. . . .” *Sierra Club v. Hickel*, 433 F.2d 24, 31 (1970).

*But see Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 46 (1970) (travel agent protesting competition by a bank held to be arguably within the zone of interests of the Bank Service Corporations Act).

Lower court decisions which have applied the zone of interest test include *City of Lafayette v. SEC*, 454 F.2d 941, 948 (D.C. Cir. 1971), and *Constructores Civiles de Centroamerica v. Hannah*, 459 F.2d 1183, 1188 (D.C. Cir. 1972), which noted:

> Although the Supreme Court’s requirement of injury to an interest “arguably within the zone of interests to be protected or regulated” has been the subject of much critical comment, and some . . . decisions indicate that injury in fact alone may suffice to establishing standing, [this court notes] that under either standard [plaintiff has standing]. *Id.*

It may be contended that the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-47 (1970), has expanded the class of plaintiffs who are arguably within the zone of interests to be protected or regulated under statute, according to the two-pronged test established in *Data Processing*, to anyone with an interest in the environment. In *Pennsylvania Environmental Council v. Bartlett*, 315 F. Supp. 238 (M.D. Pa. 1970), *aff’d* 454 F.2d 613 (3d Cir. 1971), the court held that the plaintiff environmental groups and individuals were within the zone of interests to be protected by NEPA, the Federal Aid Highway Act and the Department of Transportation Act because all of these were designed to protect the environment. *Id.* at 244-45. In *Upper Pecos Ass'n v. Stans*, 328 F. Supp. 332 (D.N.M. 1971), NEPA alone was invoked as a statute protecting an interest in the environment. See also *Natural Resources Defense Council v. Grant*, 341 F. Supp. 356, 368 (E.D.N.C. 1972) (interest of national and local environmental groups in protecting a public stream held to be within the zone of interests to be protected by NEPA).

NEPA did not become effective until January of 1970 (6 months after the *Sierra Club* case was filed in the trial court) and it has not yet been invoked in the case, even though there is authority that the Act applies to continuing projects commenced prior
Justice Blackmun disagreed with the majority and would have encouraged the lower court decisions. While admitting that “[i]f this were an ordinary case, I would join the opinion and the Court’s judgment and be quite content,” Justice Blackmun seemed to give environmental litigation top priority:

[T]his is not ordinary, run-of-the-mill litigation. The case poses—if only we choose to acknowledge and reach them—significant aspects of a wide, growing, and disturbing problem, that is, the Nation’s and the world’s deteriorating environment with its resulting ecological disturbances. Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?

Justice Blackmun would have conferred standing upon the Sierra Club by either of two alternatives. The first would have required the amending of the Club’s complaint to meet the majority’s standing requirements. The second would have entailed an expansion of the traditional concepts of standing to litigate environmental issues upon organizations with well-recognized interests in the area of environment. Justice Blackmun maintained that his second proposal was merely a slight liberalization of the law of standing to sue, since the Court “need only recognize the interest of one who has a provable, sincere, dedicated, and established status.”

Justice Blackmun felt that a slight relaxation of standing requirements in environmental litigation was needed in order to assure the

114. 405 U.S. at 755.
115. Id. at 755-56. Justice Blackmun gives five reasons why the holding of the majority in this particular case might prove catastrophic to the fate of the Mineral King Area: (1) the court of appeals’ reversal of the preliminary injunction will be upheld since the Supreme Court never reached the merits; (2) interim relief by the District Court is therefore now out of the question, and irreversible development of the Mineral King area will result; (3) the Sierra Club may either choose not to amend its complaint, or not be allowed to since this request for amendment would occur more than 3 years after the filing of the original complaint; (4) the pressure to get the project underway will mount; and (5) once underway, the momentum of such a gigantic project will be extremely difficult to halt. Id. at 756. Justice Blackmun’s willingness to entertain suits alleging environmental injury is noteworthy when contrasted with his reluctance to hear cases alleging constitutional violations. See Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 430 (1971).
116. 405 U.S. at 756.
117. Id. at 757.
118. Id. at 757-58.
adequate protection of public interests.\textsuperscript{119} The majority of the Court refused to allow such a relaxation, apparently out of fear that it would encourage a plethora of frivolous environmental lawsuits. This fear is evident in the following statement of the Court:

[If any group with a bona fide “special interest” could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so.\textsuperscript{120}]

Justice Blackmun did not share this fear that “Pandora’s box” would be opened, but rather believed that the courts would exercise appropriate restraints as they have in the past.\textsuperscript{121} Nor do various other authorities subscribe to this fear.\textsuperscript{122}

Both Justice Douglas and Justice Brennan shared the views of Justice Blackmun.\textsuperscript{123} Justice Douglas, however, advanced an additional basis for conferring standing to sue on the Sierra Club. Avoiding use of the tests for standing which he himself had established in the \textit{Data Processing} and \textit{Barlow} cases, Justice Douglas suggested the more

\begin{itemize}
\item 119. See \textit{id.} at 755. Such a relaxation may soon be forthcoming in California. A bill authorizing individuals to maintain environmental actions has been passed by the Assembly and currently awaits consideration by the Senate. A.B. 366, Cal. Legisl., Regular Sess. (1972), as amended through Jul. 28, 1972, would enact the California Conservation Act providing for specific legal and administrative proceedings to conserve and protect the environment from destruction and pollution. A portion of the bill provides:
\begin{quote}
Any person may maintain an action for equitable relief against any person for the protection of the natural resources of the state from pollution, impairment, or destruction. \textit{id.} § 536.11.
\end{quote}

The word “person” is given an expansive definition:

\begin{quote}
As used in this chapter, “person” includes any person, firm, association, organization, partnership, business trust, corporation, company, district, county, city and county, city, town, the state, and any of the agencies and political subdivisions of such entities. \textit{id.} § 536.5.
\end{quote}

In effect, A.B. 366 gives the private individual standing to sue to protect the environment without requiring that he allege a unique private injury.

120. 405 U.S. at 739-40.

121. \textit{Id.} at 758. Justice Blackmun did not elaborate on the form or content of these restraints.


\begin{quote}
We do not share the fear of some earlier decisions that liberalized concepts of “standing to sue” will flood the Courts with litigation. However, if that should be the price for the preservation and protection of our natural resources and environment against uncoordinated or irresponsible conduct, so be it. But such seems most improbable. Courts can always control the obviously frivolous suitor. \textit{id.} at 513.
\end{quote}

imaginative approach of allowing standing to the "inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers. . . ."\textsuperscript{124} This would lead to a treatment of the inanimate objects as quasi-persons and to a conferral of standing upon them to sue for their own preservation.\textsuperscript{125} Justice Douglas analogized to cases in admiralty which give standing to ships\textsuperscript{126} and noted that corporations, whose legal identity was once the subject of heated debate, are today given standing as a matter of course.\textsuperscript{127} He asserted that valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air should be treated similarly.\textsuperscript{128}

If considered as persons, such natural objects would obviously possess the "personal interest" required by the majority. The litigant representing the natural object, Justice Douglas reasoned, could be appointed much like guardians \textit{ad litem}, executors, conservators, receivers, or counsel for indigents are presently appointed.\textsuperscript{129} Thus, the natural object's inability to speak for itself would not impede the

\footnotesize{\textsuperscript{124} Id. at 741, citing Stone, \textit{Should Trees Have Standing?—Toward Legal Rights for Natural Objects}, 45 S. CAL. L. REV. 450 (1972) [hereinafter cited as Stone].

\textsuperscript{125} John M. Naff, Jr., has written a poem based on Justice Douglas' proposal in the A.B.A. Journal, 58 A.B.A.J. 820 (1972):

\textsuperscript{126} Id.

\textsuperscript{127} Id. at 742-43. Seemingly anticipating a reaction of astonishment, Justice Douglas noted that early jurists thought of the corporation as a highly artificial entity, but today suits on its behalf are very common. \textit{Id.} at 743 n.4.

\textsuperscript{128} Id. at 743.

\textsuperscript{129} Id. at 750 n.8,}
maintenance of an action for its protection.\textsuperscript{130}

Justice Douglas would require, however, that the litigant representing the natural object have a meaningful relationship with it which would enable him to speak for the values which it represents.\textsuperscript{131}

Those who hike the Appalachian Trail . . . and camp or sleep there, or run the Allagash in Maine, or climb the Guadalupes in West Texas, or who canoe and portage the Quetico Superior in Minnesota, certainly should have standing to defend those natural wonders before courts or agencies, though they live 3,000 miles away. Those who merely are caught up in environmental news or propaganda and flock to defend these waters or areas may be treated differently. . . . [The] inarticulate members of the ecological group cannot speak. But those people who have so frequented the place as to know its values and wonders will be able to speak for the entire ecological community.\textsuperscript{132}

In thus attempting to narrow the category of permissible representatives, Justice Douglas came suspiciously close to the “user” approach adopted by the majority.\textsuperscript{133} By restricting the class of persons who may represent the inanimate objects to those who have visited the area where these objects are situated, he in effect would allow suits to be brought only by those plaintiffs whom the majority would consider to be injured in fact.\textsuperscript{134} One is thus led to wonder why Justice Douglas entitled his separate opinion a dissent rather than a concurrence on different grounds.

The answer, perhaps, is that Justice Douglas’ language says more than it was meant to say. After all, he concurred in the views expressed by Justice Blackmun,\textsuperscript{135} who would “recognize the interest of one who has a provable, sincere, dedicated, and established status”\textsuperscript{136} in the environmental area. Persons with such an interest could be

\textsuperscript{130} Professor Stone, who subscribes to this view, has said:

It is no answer to say that streams and forests cannot have standing because streams and forests cannot speak. Corporations cannot speak either; nor can states, estates, infants, incompetents, municipalities or universities. Lawyers speak for them, as they customarily do for the ordinary citizen with legal problems. One ought, I think, to handle the legal problems of natural objects as one does the problems of legal incompetents . . . . Stone, supra note 124, at 464.

\textsuperscript{131} 405 U.S. at 743.

\textsuperscript{132} Id. at 751-52.

\textsuperscript{133} See text accompanying notes 69, 73, 105-13 supra and note 162 infra.

\textsuperscript{134} Compare Justice Douglas’ dissenting opinion in Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942), where, in speaking of the appellant in that case, he said:

Unless he can show that his individual interest has been unlawfully invaded, there is merely \textit{damnum absque injuria} and no cause of action on the merits. \textit{Id.} at 21 (citations omitted).

\textsuperscript{135} 405 U.S. at 741.

\textsuperscript{136} \textit{Id.} at 757-58 (emphasis added).
considered to "have that intimate relation with the inanimate object about to be injured, polluted, or otherwise despoiled" which Justice Douglas would require in order for such persons to be legitimate spokesmen. Justice Blackmun read Justice Douglas' opinion in such a way:

[H]e makes only one addition to the customary criteria (the existence of a genuine dispute; the assurance of adversariness; and a conviction that the party whose standing is challenged will adequately represent the interests he asserts), that is, that the litigant be one who speaks knowingly for the environmental values he asserts.138

That this interpretation of Justice Douglas' opinion is at least partially correct is demonstrated by his willingness to accord standing to the Sierra Club despite its refusal to allege any use of the area by either itself or its members. He apparently agreed with the district court that the Sierra Club's uncontested allegation that "[o]ne of the principal purposes of the Sierra Club is to protect and conserve the national resources of the Sierra Nevada Mountains" made the Club "sufficiently aggrieved" to have 'standing' to sue on behalf of Mineral King [an area in the Sierra Nevada Mountains]."139

The most reasonable interpretation of Justice Douglas' opinion would probably place it midway between the positions adopted by the majority and by Justice Blackmun. Justice Douglas would allow litigants who speak knowingly for the ecology of a specific area, such as the Sierra Nevada Mountains, to represent any portion of that area threatened with environmental harm, regardless of whether or not the litigants were "users" of the particular portion being threatened; but he would not allow the same litigants to represent other areas with which they had no meaningful relationship, even if they had a sincere and established status in the environmental area in general.

If the Sierra Club Court's treatment of the past cases and its conclusions from that treatment are considered to be reasonable, although not unassailable, its opinion still leaves much to be desired. In a time when our environment urgently needs protection, the Supreme Court of the United States has overlooked an opportunity to approve and encourage decisions of lower courts indicating a desire to give that protection. Considering the Supreme Court's refusal to adopt the

137. Id. at 745.
138. Id. at 758.
139. Id. at 744.
140. Id.
141. See note 105 and text accompanying notes 74-105 supra.
liberalizing trend of the lower courts, it is questionable whether the Sierra Club can ever obtain standing when alleging only environmental injury. It is difficult to perceive how the Sierra Club, as an organization, can meet the majority's requirement of a direct injury in most situations. For example, the club's only hope of acquiring standing to sue in its own right in the instant case seems to hinge on the happenstance that it sponsors regular camping trips into the Mineral King area. If the threatened injury were to an area where no organized trips are sponsored, perhaps due to the Club's concern about over-use of the area, no "direct" injury could be shown. In essence, the majority justices would force an organization dedicated to preserving and enhancing our environment to actively encourage exploitation of that environment before they will accord it standing to sue on behalf of the environment.

However, the Sierra Club majority hinted that the Club could obtain standing through the rights of its members. In referring to the Wilderness Society's assertion that the Sierra Club and its members continually use the Mineral King area, the majority said:

These allegations were not contained in the pleadings, nor were they brought to the attention of the Court of Appeals. . . . Our decision does not, of course, bar the Sierra Club from seeking in the District Court to amend its complaint . . . .

This language suggests that the majority would have granted standing if the Sierra Club had relied on the injury to its members in being deprived of the right to continue using Mineral King in its wilderness state.

142. 405 U.S. at 735-36 n.8; see note 71 supra.
143. See 405 U.S. at 735-36 n.8.
144. Id.
145. The recent case of Aberdeen & Rockfish Ry. v. Students Challenging Regulatory Agency Procedures (SCRAP), 93 S. Ct. 1 (Burger, Circuit Justice, 1972), holds the possibility that the Supreme Court may have an opportunity to follow this theory in the future. There, a student organization challenged orders of the Interstate Commerce Commission permitting and extending a surcharge on railroad rates on the ground that the present rate structure discouraged the transporting of recyclable goods and that any uniform increase would further discourage recycling. In the view of the plaintiff, this would lead to increased environmental deprecation due to discarded recyclable goods and the unnecessary exploitation of natural resources. A three-judge court rejected the Government's contention that the plaintiff lacked standing under the Sierra Club decision, even though SCRAP was merely "an unincorporated association formed by five law students from the [George Washington University] National Law Center . . . in September 1971' whose 'primary purpose is to enhance the quality of the human environment for its members, and for all citizens . . . .'" Id. at 2 n.1, quoting SCRAP'S complaint. The court accorded SCRAP standing
Later in the opinion the majority cited *NAACP v. Button*\(^\text{146}\) and said, "It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review."\(^\text{147}\) The Court's reliance on *Button* seems inapposite. First, the *Button* case involved a "standing to assert" problem, but the *Sierra Club* Court speaks of it in a "standing to sue" context. Secondly, in *Button*, the NAACP was permitted to assert the rights of its members only after a showing that it had rights of its own to protect. The NAACP challenged a Virginia statute making it an offense for any person or organization to solicit business for an attorney. The NAACP claimed the statute contravened its right and the rights of its members and lawyers to associate for the purpose of aiding persons seeking legal redress for violations of their constitutional rights. The *Button* Court said:

> We think petitioner may assert this right on its own behalf, because, though a corporation, it is directly engaged in those activities, claimed to be constitutionally protected, which the statute would curtail. . . .
>
> We also think petitioner has standing to assert the corresponding rights of its members.\(^\text{148}\)

While several courts have conferred standing upon an organization invoking only the rights of its members, these courts have done so with

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\(^\text{147}\) 405 U.S. at 739.

\(^\text{148}\) 371 U.S. at 428 (citations omitted). The Supreme Court has traditionally held that a plaintiff cannot obtain standing by invoking only the rights of a third party. *See, e.g.*, Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 149-54 (1951); Tileston v. Ullman, 318 U.S. 44 (1943). The Court, however, has allowed an organization with an interest of its own to assert the rights of its members when those rights could not be asserted by the members themselves. *See, e.g.*, Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293 (1961); Bates v. City of Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958).

The Court has followed a similar theory in allowing non-organizational plaintiffs to assert the rights of third parties. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (doctor permitted to assert the rights of his patients); Barrows v. Jackson, 346 U.S. 249 (1953) (caucasian allowed to assert the rights of non-caucasians).
merely a perfunctory consideration of the accompanying problems and prior case law. An exemplary decision is that of *United Federation of Postal Clerks, AFL-CIO v. Watson*,\(^{149}\) wherein a union was accorded standing to challenge a decision of the Postmaster General by relying on the rights of its members. In granting the union standing the court said:

The courts have come increasingly to recognize the standing of associations to raise in some circumstances the rights of their members. Where the principle of avoidance of constitutional issues is not involved, the primary requisite for a grant of standing is an interest sufficient to insure "that the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor . . . ."\(^{150}\)

In making this statement, however, the court cited the *Button* case for support. The inappropriateness of this reliance on *Button* has been previously manifested. The court continued:

Thus, we have allowed associations to assert their members' interests when the "association is an authorized spokesman organized to promote these interests for its individual members." In such cases, absent evidence to the contrary, it is reasonable to assume that the representative speaks effectively for his constituency.\(^{151}\)

Another case granting standing to an organization relying on its members' rights is *Citizens Association of Georgetown v. Simonson*,\(^{152}\) wherein a neighborhood association sought judicial review of the reissuance of a liquor license. The court granted standing and stated: "Since the association is an authorized spokesman organized to promote these interests for its members, it too has standing to sue to protect their interests."\(^{153}\) The *Citizens Association* court, like the *United Federation of Postal Clerks* court, relied on the *Button* case for support. However, in addition to *Button*, the *Citizens Association* court relied on *NAACP v. Alabama ex rel. Patterson*.\(^{154}\) There, the NAACP was allowed to assert the rights of its members, but only because the members were unable to bring suit without sacrificing the


\(^{150}\) Id. at 469-70, quoting *Flast v. Cohen*, 392 U.S. 83, 106 (1968) (footnotes omitted).

\(^{151}\) Id. at 470 (footnotes omitted), quoting *Citizens Ass'n of Georgetown v. Simonson*, 403 F.2d 175, 176 (D.C. Cir. 1968), cert. denied, 394 U.S. 975 (1969).

\(^{152}\) 403 F.2d 175 (D.C. Cir. 1968), cert. denied, 394 U.S. 975 (1969).

\(^{153}\) Id. at 176 (citations omitted).

\(^{154}\) 357 U.S. 449 (1958).
very rights they sought to protect. It is therefore obvious that the Alabama case lends no more support than does the Button case.

In Holloway v. Bristol-Myers Corp.\textsuperscript{155} an individual plaintiff and two consumer associations sought a declaratory judgment, injunctive relief, and damages for the defendant's alleged false advertising. The court denied standing to all the plaintiffs, but as to the organizational plaintiffs said, "It is clear that an organization has standing to seek equitable relief on behalf of its own members."\textsuperscript{156} In making this statement the court cited, \textit{inter alia}, the Citizens Association case.

None of the aforementioned cases, promulgating the proposition that an organization can obtain standing through its members, are supported by the authority they cite. The cases also fail to consider the "case or controversy" problem such a proposition raises. The Data Processing opinion seems to indicate that the case or controversy requirement is only satisfied by an allegation of "injury in fact" to the party seeking judicial review.\textsuperscript{157} When an organization seeks judicial review alleging only the injury to its members, it alleges "injury in fact" to a third party and hence does not satisfy the case or controversy requirement. In the Sierra Club case the court of appeals intimated that it would have accorded the Sierra Club standing if it had alleged sufficient injury to its members.\textsuperscript{158} However, when the court of appeals was later actually confronted with such an allegation in Alameda Conservation Association v. California,\textsuperscript{159} it refused to confer standing upon the organization involved, saying:

Nor does the fact that the corporate purposes are akin to those of its members make the corporation the authorized spokesman for the purpose of asserting its members' constitutional rights. . . . If the Association here had a recreational operation which it conducted and which the defendants interfered with, it could assert it; if its physical surroundings were made unattractive, this aesthetic infringement would create standing; or if it operated a conservation program, an interference with that operation would establish standing. The point is that the standing

\textsuperscript{156} Id. at 23.
\textsuperscript{157} Association of Data ProcessingServ. Organizations, Inc. v. Camp, 397 U.S. 150, 152-54 (1970); see K. Davis, \textsl{Administrative Law Treatise} \S 22.00-1, at 706 (Supp. 1970). \textit{But see} note 105 supra. It is interesting to note that injury in fact to the Association \textit{itself}, rather than to its individual members, was not discussed in the Data Processing opinion. It is difficult to perceive how such injury in fact could have existed.
\textsuperscript{158} 433 F.2d at 33.
\textsuperscript{159} 437 F.2d 1087 (9th Cir.), \textit{cert. denied}, 402 U.S. 908 (1971).
necessary to assert as a litigant must be that of the litigant.\textsuperscript{160}

In its apparent willingness to allow the Sierra Club to rely solely upon the rights of its members for standing to sue, the *Sierra Club* Court overlooked the concomitant “case or controversy” problem and seemed to contradict its own requirement that “the party seeking review be himself among the injured.”\textsuperscript{161} Like the lower courts, the *Sierra Club* Court failed to consider the problems such an approach would create and cited authority which does not support its position.

The Court, in future cases, will apparently require that environmental issues be litigated by a “user” of the area in question. This is implied by the Court’s statement that:

The Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes by the Disney development. Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose . . . \textsuperscript{162}

But is this requirement wise? Justice Blackmun apparently thinks not, for he asserted:

[A]ny resident of the Mineral King area—the real “user”—is an unlikely adversary for this Disney-governmental project. He naturally will be inclined to regard the situation as one that should benefit him economically. . . . But that glow of anticipation will be short-lived at best. If he is a true lover of the wilderness—which is likely, or he would not be near Mineral King in the first place—it will not be long before he yearns for the good old days when masses of people—that 14,000 influx per day—and their thus far uncontrollable waste were unknown to Mineral King.\textsuperscript{165}

Either Justice Blackmun’s second alternative or Justice Douglas’ proposal would have been a better solution for the Court to adopt. Both would require a detailed examination of the credentials of the party seeking to represent the environment by the court in which a suit is filed. Justice Blackmun would require that the party be an organization possessed of “well-recognized attributes and purposes in the area of environment.”\textsuperscript{164} Justice Douglas would require that the party speak knowingly for the ecology of the area being threatened.\textsuperscript{165}

\textsuperscript{160} *Id.* at 1091 (citation and footnote omitted); *accord, L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 542-43 (1965).

\textsuperscript{161} See text accompanying note 73 *supra*.

\textsuperscript{162} 405 U.S. at 735 (emphasis added).

\textsuperscript{163} *Id.* at 759.

\textsuperscript{164} *Id.* at 757.

\textsuperscript{165} See text following note 140 *supra*. 
The proposal of Justice Douglas seems to neatly solve the environmental standing problem, in that it does not alter the traditional requirements, but merely permits a guardian to speak for an inanimate object meeting those requirements. However, the suggestions of both justices would make certain that only parties willing to vigorously assert all possible arguments on behalf of the environment would be chosen to represent it. The *Sierra Club* decision, a decision refusing to join the progressive holdings of lower courts liberalizing the law of standing, is a step backward toward inaccessibility of the courts in resolving environmental problems, a step that is contrary in principle to prior decisions of the Court.

_Brian C. Cuff_  
_Teresa A. Clark_

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166. See, e.g., cases cited in note 4 supra.  
167. See, e.g., Rusk v. Cort, 369 U.S. 367 (1962), where the Court held that only upon a showing of “clear and convincing evidence” of a contrary legislative intent should courts restrict access to judicial review. _Id._ at 379-80.