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Loggers or Woodpeckers: Who's Endangered Now: Region 8 Forest Service Timber Purchasers Council v. Alcock

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LOGGERS OR WOODPECKERS: WHO'S ENDANGERED NOW?:
REGION 8 FOREST SERVICE TIMBER PURCHASERS
COUNCIL V. ALCOCK

I. INTRODUCTION

Recent measures adopted by the United States Forest Service to protect endangered species in national forests have angered timber companies nationwide. Because of restrictions placed on logging in areas where endangered species live, timber sales have declined and lumber prices have risen. This situation has caused a

1. For a discussion of the recent measures taken by the Forest Service to protect the endangered red-cockaded woodpecker in the Southern region, see infra notes 17-23 and accompanying text. See also Woodpecker Chapter of Wildlife Habitat Management Handbook, Admin. Record 95 (Forest Service 1985).

For examples of recent measures taken in other parts of the country to protect endangered species in those regions, see Tom Kenworthy, Timber Plan Brings Little Peace to Oregonians, Wash. Post, July 4, 1993, at A8 [hereinafter Kenworthy, Timber Plan] (discussing government's plan to limit timber cutting in Northwest to protect endangered spotted owl); John Lancaster, House Votes to Limit Logging in Vast Alaskan Tract, Wash. Post, July 14, 1989, at A6 (discussing measures taken in Alaska's national forest to limit logging in preservation effort).

2. See, e.g., Timber Firms Fighting Woodpecker Protection, Miami Herald, Sept. 11, 1990, at B4 (discussing clash between supporters of Southeast's endangered red-cockaded woodpecker and local loggers). See also Scott Armstrong, Congress to Decide Timber Dispute, Christian Sci. Monitor, Sept. 15, 1989, at 8 (discussing analogous clash between environmentalists and loggers in Northwest over protectionist measures for endangered spotted owl). The Northwest timber industry "contends that conservationists are putting trees and owls before people and that a continued ban on logging would undermine the economies of hundreds of mill towns throughout the [Northwest]." Id.

loss of jobs, industry, and social well-being in the surrounding timber communities. Meanwhile, the Forest Service is constantly trying to balance protecting endangered species, a national priority, with maintaining the economic well-being of Americans who depend on logging in national forests for their livelihood.

In Region 8 Forest Service Timber Purchasers Council v. Alcock, the United States Court of Appeals for the Eleventh Circuit considered whether timber companies had standing to sue the United States Forest Service. The timber companies alleged that the Forest Service changed its policy for protecting the red-cockaded woodpecker, an endangered species, without properly following the procedures established under the Endangered Species Act (the "Species Act"), the National Environmental Policy Act ("NEPA")

4. See Tom Kenworthy, Interior Secretary at Center of Storm Over Handling of Owl Controversy, WASH. POST, Mar. 22, 1992, at A8 [hereinafter Kenworthy, Interior Secretary] (officials predicting loss of 31,000 jobs in logging communities surrounding endangered spotted owl because of limit on timber harvesting). For a discussion of quality of life injuries, including loss of jobs and tax base erosion, see infra notes 85-89 and accompanying text.

5. See Mark A. Stein, Lawsuits Cut Into Timber Industry Future, MIAMI HERALD, Aug. 6, 1989, at A22 (discussing plight of timber industry in Oregon and expected plant closings). It is logical to expect that the policy recently enacted for the red-cockaded woodpecker will have detrimental effects on the surrounding communities similar to those felt by communities surrounding the spotted owl habitat. For further discussion of the recent policy adopted by the Forest Service to protect the red-cockaded woodpecker, see infra notes 17-23.

6. See Lou Cannon, Saw-Toothed Despair Leaves Mark on Northwestern Loggers, WASH. POST, July 27, 1991, at A3 (stating that decline of timber industry in Washington state, sparked by protection of northern spotted owl, has resulted in increased domestic violence, alcoholism, mental health breakdowns, juvenile crime, and attempted juvenile suicide); Kenworthy, Timber Plan, supra note 1, at A8 (discussing impact on logging towns, including increased rate of family breakups and suicides in anticipation of rising unemployment).

7. See Endangered Species Act of 1973 §§ 2-18, 16 U.S.C. §§ 1531-44 (1988) [hereinafter Species Act]. The Species Act "declare[s] ... the policy of Congress [to be] that all Federal departments and agencies shall seek to conserve endangered species." Species Act, 16 U.S.C. § 1531(c)(1). Furthermore, "[e]ach Federal agency shall ... insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species." Id. § 1536(a)(2). See also Tennessee Valley Auth. v. Hill, 437 U.S. 153, 158 (1978) (noting that Congress intended protection of endangered species to be afforded highest priority).


9. Region 8 Forest Serv., 993 F.2d at 802.

10. For a discussion of the red-cockaded woodpecker's listing on the endangered species list, see infra note 18.


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and the National Forest Management Act ("NFMA"). The court held that the timber companies did not have standing to challenge the policy change of the Forest Service. As the standing issue may arise in the future, particularly in light of the on-going spotted owl controversy in the Pacific Northwest, this case has important precedential value and may prevent other disgruntled loggers from challenging similar Forest Service actions in the future.

This Note analyzes the decision in *Region 8 Forest Service*, and the consequences of the holding on the timber industry. Section II of this Note provides the factual background of the legal dispute. Section III summarizes and examines the relevant environmental legislation applied in the instant case. Next, Section IV discusses the *Region 8 Forest Service* holding, and then highlights possible flaws in the court's reasoning. Finally, Section V considers the decision's impact, focusing on the potential effect on the national timber industry.

II. FACTS

In *Region 8 Forest Service*, several timber companies challenged the Forest Service's revision of a policy governing the tree-cutting under timber contracts within a certain radius of the endan-


14. Region 8 Forest Serv., 993 F.2d at 811.


16. The plaintiff, Southern Timber Purchasers Council (formerly Region 8 Forest Service Timber Purchasers Council), is a coalition of purchasers of national forest timber in the South. Region 8 Forest Serv., 993 F.2d at 802. Members of the Council include Hankins Lumber Company, Inc., Hood Industries, Inc., and Hunt Plywood Company, Inc. (the "timber companies"). Id. The timber companies held contracts with the Forest Service to harvest timber in national forests in the Southern Region. Id. Those contracts included an endangered species clause which allowed the Forest Service to cancel or unilaterally alter the contracts "if the protection measures prove[d] inadequate." Id. at 803-04 (citing contract).

17. Id. at 803. The first phase of the three-phase strategy developed by the Forest Service involved strictly limiting the permissible methods for timber cutting within three-fourths of a mile of a woodpecker colony. Id. This policy was "applicable to all awarded and pending timber contracts, advertised timber sales and proposed timber sales." Id.
gered\textsuperscript{18} red-cockaded woodpecker's habitat.\textsuperscript{19} In 1985, in compliance with NFMA and the Species Act,\textsuperscript{20} the Forest Service adopted a recovery plan for the woodpecker in an attempt to prevent further loss of the species.\textsuperscript{21} Despite the efforts made under the plan, however, the woodpecker population continued to decline.\textsuperscript{22} Thus, in 1989, the Forest Service initiated a new strategy for protecting the species by restricting timber harvesting to a more limited area of the national forests.\textsuperscript{23} The timber companies, each of which had contracted with the United States government to harvest timber,\textsuperscript{24} challenged the Forest Service's adoption of this new policy, claiming that the move violated the Species Act, NEPA, and NFMA.\textsuperscript{25}

\textsuperscript{18} See 50 C.F.R. § 17.11(h) (1992) (containing the official listing of the red-cockaded woodpecker as endangered by the Department of Interior). The red-cockaded woodpecker was listed as "endangered" in 1970 after extensive clearing of Southeastern pine forests brought the woodpecker to near extinction. \textit{Region 8 Forest Serv.}, 993 F.2d at 803. The majority of remaining woodpecker clans live in various national forests in the South. \textit{Id.}

\textsuperscript{19} \textit{Region 8 Forest Serv.}, 993 F.2d at 803.

\textsuperscript{20} For a discussion of the consultation and management plan procedures required of the Forest Service for any actions that may affect an endangered species, see infra notes 31-42 and accompanying text.


\textsuperscript{22} \textit{Region 8 Forest Serv.}, 993 F.2d at 803. As a result, the Forest Service began receiving litigation threats by environmental groups such as the Sierra Club Legal Defense Fund. \textit{Id.} The Sierra Club threatened to take legal action "if the Forest Service continued its alleged 'inadequate management practices' for protecting the [w]oodpecker." \textit{Id.} Ironically, these threats came after the Forest Service had informally consulted with the Fish and Wildlife Service regarding plan revisions. \textit{Id.} The consultation closely followed an injunction ordering the Forest Service to take certain measures to protect the woodpecker in national forests in Texas. \textit{Id.} at 803 n.1.

\textsuperscript{23} \textit{Id.}, at 803. For a discussion of the new strategy, see supra note 17.

\textsuperscript{24} \textit{Id.} The timber companies' contracts provided that "all disputes arising under or relating to" the contracts were "to be resolved in accordance with the Contract Disputes Act [CDA]." \textit{Id.} For a discussion of CDA and its relevance to the jurisdiction of the \textit{Region 8 Forest Service} court, see infra notes 43-45 and accompanying text.

\textsuperscript{25} \textit{Id.} at 802. The United States District Court for the Northern District of Georgia dismissed the timber companies' claim under NEPA for lack of standing. \textit{Id.} The court also entered summary judgment for the government on the timber companies' claims under the Species Act and NFMA for lack of standing. \textit{Id.} The Eleventh Circuit in \textit{Region 8 Forest Service} affirmed the district court's dismissal of the NEPA claim and entry of summary judgment on the Species Act claim. \textit{Id.} However, the court vacated the district court's entry of summary judgment on NFMA with instructions to dismiss the claim for lack of jurisdiction. \textit{Id.}
In order to establish standing to sue the Forest Service, the plaintiffs needed to demonstrate that injury-in-fact had occurred. The timber companies alleged that they had suffered economic, quality of life, environmental, and procedural injuries. The United States Court of Appeals for the Eleventh Circuit found that the timber companies had not suffered injury-in-fact and held that they lacked standing to sue the Forest Service for alleged violations of the Species Act, NEPA, or NFMA.

III. BACKGROUND

A. Pertinent Environmental Legislation

In effect since 1969, NEPA ostensibly encourages harmony between man and the environment. NEPA's main goal is to balance the productive and recreational uses of the environment. Under NEPA, the Forest Service must prepare an environmental impact statement for each forest plan it promulgates or intends to amend.

Congress passed the Species Act in 1973, intending to require that all federal agencies help conserve species listed as "endangered" or "threatened." The Species Act requires the Forest Service to consult with the Fish and Wildlife Service to ensure that

26. Region 8 Forest Serv., 993 F.2d at 805. For a full discussion of the requirements necessary to establish standing, see infra notes 46-55 and accompanying text.

27. Id. Initially, the timber companies claimed to suffer only economic, environmental, and procedural injuries as a result of the Forest Service's failure to fully implement the Woodpecker Chapter of the Handbook and its adoption of the new policy in violation of the Species Act, NEPA, and NFMA. Id. After the district court dismissed their NEPA claim for lack of standing, the timber companies filed a motion for reconsideration. Id. Along with this motion, the companies included several affidavits which contained new allegations of "quality of life" injuries. Id. Thus, the timber companies ultimately alleged four types of injury-in-fact. For a complete discussion of each injury alleged by the timber companies, see infra notes 72-105 and accompanying text.

28. Region 8 Forest Serv., 993 F.2d at 811. For a discussion of the court's analysis and reasoning in rejecting each of the four claims of injury, see infra notes 72-105 and accompanying text.


33. Id. § 2(c)(1), 16 U.S.C. § 1531(c)(1). To determine if a species is "endangered," the Secretary of Interior or the Secretary of Commerce must follow an application procedure for exemption. Id. § 3, 16 U.S.C. § 1532; see also 50 C.F.R. § 452 (1992) (listing procedural rules for making exemption determination).

34. Id. §§ 402.13-.14 (1992). The consultation is a two-step process. First, there is an informal consultation. Id. § 402.13. If it is determined that the action is not likely to affect an endangered species, the consultation process ceases. Id.
any action it takes "is not likely to jeopardize the continued existence of any endangered species . . . or result in the destruction . . . of [the] habitat of such species."35

One year later Congress passed NFMA36 in an attempt to balance environmental and industry-related interests.37 NFMA requires the Forest Service to promulgate land and resource management plans for each of the national forests.38 In connection with these plans, the forest service must establish the anticipated level of timber sales.39 The land and resource management plans must be developed to "provide for multiple use . . . and . . . include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness."40 NFMA further specifies that land management plans must ensure that timber harvesting and clear-cutting are performed in a manner consistent with the protection of wildlife.41 If any proposed action is inconsistent with the management plan in effect, the Forest Service must formally adopt a plan amendment in order to authorize the proposed action.42

Frequently, suits brought under the Species Act, NEPA, or NFMA involve private parties that entered into contracts with the

However, if officials conclude that the action is likely to adversely affect an endangered species, formal consultation ensues. Id. § 402.14.

37. NFMA § 2(3), 16 U.S.C. § 1600(3). "[T]o serve the national interest, the renewable resource program must be based on a comprehensive assessment of present and anticipated uses, demand for, and supply of renewable resources from the Nation's public . . . forests . . . through analysis of environmental and economic impacts." Id.

One of the fundamental purposes of the National Forest System is to "furnish a continuous supply of timber for the use and necessities of citizens of the United States." 16 U.S.C. § 475 (describing extent of Forest Service's statutory authority). NFMA requires the Forest Service to provide timber through a timber sale process. NFMA § 13, 16 U.S.C. § 1611. Generally, private companies bid for the right to harvest a specific volume and type of timber in a particular forest, and the highest bidder is awarded a timber contract. 16 U.S.C. § 472a; see also 36 C.F.R. § 223.3 (1992) (authorizing sale of seized forest products to highest bidder).

38. NFMA § 6, 16 U.S.C. § 1604. The Forest Service must coordinate its plans with "the land and resource management planning processes of State and local governments and other Federal agencies." Id. § 6(a), 16 U.S.C. § 1604(a).

39. Id. § 6(f)(2), 16 U.S.C. § 1604(f)(2). The forest plans must also include guidelines for identifying the suitability of lands for timber harvest. Id.

40. Id. § 6(e)(1), 16 U.S.C. § 1604(e)(1). NFMA also provides that land management plans be developed to "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives." Id. § 6(g)(3)(B), 16 U.S.C. § 1604(g)(3)(B).

Forest Service or some other governmental agency. In this situation the Contract Disputes Act ("CDA") controls. Congress passed the CDA in 1978 to divest all district and circuit courts of jurisdiction over any contracts entered into with the government. Essentially, the CDA forces parties with grievances arising out of a contract with the government to bring the action in the United States Federal Claims Court for relief.

B. The Doctrine of Standing

Article III of the United States Constitution enables federal courts to adjudicate only actual "cases" or "controversies." This limitation requires that every litigant have standing to sue. In order for there to be standing, a litigant must be "entitled to have the court decide the merits of the dispute." The United States Supreme Court has interpreted this to mean that a party must have a sufficient personal stake in a controversy to justify a judicial resolution of the case.

In *Valley Forge Christian College v. Americans for Separation of Church and State, Inc.*, the United States Supreme Court set forth three requirements that a plaintiff must satisfy to establish standing. First, the plaintiff must have suffered injury-in-fact.

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44. McDonnell Douglas Corp. v. United States, 754 F.2d 365, 370-71 (Federal Cir. 1985). CDA provides that "[u]nless otherwise specifically provided herein, [CDA] applies to any express or implied contract ... entered into by an executive agency for ... the disposal of personal property." CDA § 4(a), 41 U.S.C § 602(a).
46. U.S. CONST. art. III, § 2, cl. 1; see also Allen v. Wright, 468 U.S. 737, 750 (1984) (limiting federal court jurisdiction to settling "cases and controversies").
51. Id. at 472.
52. Id. The injury-in-fact "must be an invasion of a legally protected interest which is (a) concrete and particularized and (b) 'actual or imminent', not 'conjectural' or 'hypothetical'." *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992) (citations omitted).
ond, there must be a causal connection between the challenged conduct and the injury.\textsuperscript{53} Finally, it must be likely that a favorable decision by the court will redress the injury complained of by the party.\textsuperscript{54} All three elements must be present to establish standing.\textsuperscript{55}

\textsuperscript{53} Valley Forge Christian College v. Americans for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982); see also Defenders of Wildlife, 112 S. Ct. at 2136. In other words, the injury must be "fairly traceable" to the conduct of the defendant and cannot be the result of an independent act of a third party. Id.

\textsuperscript{54} Valley Forge, 454 U.S. at 472. Redressability must be "likely," not merely "speculative." Defenders of Wildlife, 112 S. Ct. at 2136. Beyond the three basic constitutional requirements, the Supreme Court identified three prudential principles to consider when addressing the issue of standing. Valley Forge, 454 U.S. at 474. First, a "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Id. (quoting Warth v. Seldin, 422 U.S. 490, 499 (1975)). Second, federal courts will not adjudicate "abstract questions of wide public significance" even if the plaintiff has alleged injury sufficient to meet the constitutional requirements. Id. at 475 (quoting Warth, 422 U.S. at 499-500). Third, the plaintiff's complaint must fall within the "zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Id. (quoting Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970)).

Furthermore, there are three requirements that must be satisfied to establish "associational standing" after the core constitutional requirements and prudential components have been met: (1) the members of the association must have standing to sue in their own right; (2) the interests the organization seeks to protect must be pertinent to its purpose; and (3) the participation of the association's individual members must not be required in the lawsuit. Region 8 Forest Serv., 993 F.2d at 805 n.3. (citing Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977)). However, because the three core requirements of injury-in-fact, causation, and redressability were not satisfied in Region 8 Forest Service, the Eleventh Circuit only briefly mentioned these additional elements of associational standing. Region Forest Serv., 993 F.2d at 805 n.3.

\textsuperscript{55} Id. at 805. The threshold issue of standing is subject to de novo review. United States v. 5000 Palmetto Drive, 928 F.2d 373, 375 (11th Cir. 1991) (citing United States v. $38,000 in U.S. Currency, 816 F.2d 1538, 1544 (11th Cir. 1987)); United States v. Massell, 823 F.2d 1503, 1506 (11th Cir. 1987) (noting that on appeal, court must examine evidence in light most favorable to complaining party) (citing United States v. Torres, 720 F.2d 1506, 1510 (11th Cir. 1983)).

The nature of review also depends upon the stage in the proceedings at which standing is challenged. Defenders of Wildlife, 112 S. Ct. at 2136-37. When the defendant challenges the action via a motion to dismiss for lack of standing, "both the trial and reviewing courts must accept as true all material allegations of the complaint." Warth v. Seldin, 422 U.S. 490, 501 (1975). Courts are not restricted to the face of the complaint but may rely on affidavits submitted by the plaintiff to find standing. Id. When the action is challenged by a motion for summary judgment, however, the plaintiffs can no longer rest on their allegations "but must 'set forth' by affidavit . . . other 'specific facts' which will be taken to be true" for the purpose of summary judgment. Defenders of Wildlife, 112 S. Ct. at 2137 (citing Fed. R. Civ. P. 56(e)).
C. Standing in Prior Environmental Decisions

The issue of standing has arisen in several prior environmental decisions. Most of these cases involved environmental groups claiming that they had standing to challenge federal agency actions which had harmed the environment. Prior to 1972, it was uncertain whether environmental organizations had standing to sue when they were merely representing the public interest in protection of the environment. In 1972, the Supreme Court clarified some of this uncertainty in *Sierra Club v. Morton*.

In *Morton*, a conservation group sought standing to challenge a plan to construct a ski resort in a national forest; defendants argued that the plaintiff lacked standing. The Court held that organizations representing the public's environmental concerns would have standing to sue if the organization adequately alleged that its members used the affected national forest for recreational or other purposes.

In 1973, the Supreme Court further defined the injury-in-fact requirement in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*. The Court ruled that standing would not be denied simply because many other individuals could claim a similar injury. Both *Morton* and *SCRAP* demonstrate that careful pleading is necessary to establish standing.

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56. For a discussion of these decisions, see infra notes 59-70 and accompanying text.
57. See infra notes 59-70 and accompanying text.
58. 61A AM. JUR. 2d Pollution Control § 500 (1981).
60. Id. at 730-31.
61. Id. at 734-35. The conservation group in *Morton* was denied standing because it failed to "allege that it or its members would be affected in any of their activities or pastimes" by the proposed construction of the resort. Id. at 735. An allegation by Sierra Club in its pleadings that any of its members hiked or made use of the national forest would have been sufficient to establish injury-in-fact. *Morton* also represents the first time the issue of standing was addressed where an environmental organization alleged a non-economic injury. Id. at 734. The Court noted that "[a]esthetic 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," Id. Thus, *Morton* expanded the scope of injury-in-fact to include non-economic injuries. Id. at 738.
63. Id. at 687. In *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, a group of law school students formed an environmental association and challenged increases in freight rates set by the Interstate Commerce Commission ("ICC"). Id. at 678-79. The association alleged that the ICC surcharge would discourage the transportation and use of recyclable materials and therefore would adversely affect the association's use of the environment for recreational purposes. Id. at 685. The Court held that the group's allegations of af-
ing of both injury and use of the afflicted resource could easily satisfy the requirements of the standing doctrine as applied to environmental plaintiffs.

More recent Supreme Court decisions have established limits on standing for environmental groups. In a 1990 Supreme Court decision, *Lujan v. National Wildlife Federation*, an environmental organization challenged a Bureau of Land Management land-withdrawal program. In its decision, the Court required that the environmental group make very specific allegations to achieve standing.

In *Lujan v. Defenders of Wildlife*, a 1992 Supreme Court decision, environmental groups sought to challenge a regulation interpreting the Species Act to be inapplicable to actions undertaken in foreign nations. The Court rejected each of the plaintiffs' theories of alleged injury. Specifically, the Court stressed that it would not adopt a policy which would allow standing to all plaintiffs whose interest in the threatened animals was genuine or professional. This recent trend suggests that more exact pleading may be necessary for environmental plaintiffs to establish standing.

IV. *REGION 8 FOREST SERVICE TIMBER PURCHASERS COUNCIL v. ALCOCK*

A. The Eleventh Circuit's Analysis

In *Region 8 Forest Service*, the United States Court of Appeals for the Eleventh Circuit determined that the timber companies had

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65. Id. at 871.
66. Id. at 889. The court held that the environmental group failed to show that its members were "adversely affected or aggrieved" by agency action. Id. at 889 (referring to language of Administrative Procedures Act, 5 U.S.C. § 702 (1988)).
68. Id.
69. Id. at 2139-40. The environmental group advanced several novel standing theories, each of which was summarily rejected by the court. Id. The "ecosystem nexus" theory alleged that any user of a contiguous ecosystem affected by the action had standing to sue. Id. at 2139. The group's "animal nexus" approach argued that anyone with an interest in observing the endangered species anywhere on the planet had standing. Id. Under the "professional nexus" theory, anyone with a professional interest in the animals could sue. The Court dismissed these theories noting that "[s]tanding is not 'an ingenious academic exercise in the conceivable.' " Id. (quoting *SCRAP*, 412 U.S. at 688).
70. Id. at 2139-40.
not suffered injury-in-fact\textsuperscript{71} and, therefore, had no standing to sue. This section discusses each of the alleged injuries in detail and then analyzes the court's reasoning in finding the allegations insufficient to establish standing.

1. Alleged Economic Injuries

The timber companies first alleged three economic injuries, which they contended were the result of the Forest Service's implementation of the new woodpecker policy. They alleged: (1) a reduction in available timber under the existing contracts;\textsuperscript{72} (2) increased logging costs;\textsuperscript{73} and (3) a reduction in future timber supplies.\textsuperscript{74} The Region 8 Forest Service court reasoned that the first two economic injuries were not jurisdictionally cognizable by the court because they arose\textsuperscript{75} out of contracts with the United States government.\textsuperscript{76} Thus, the alleged injuries fell within CDA resolution procedures.\textsuperscript{77} Permitting timber companies to use these contractual injuries as a basis for standing in actions brought under the Species Act, NEPA, or NFMA would circumvent an express congressional mandate requiring that such contractual disputes be settled under the CDA.\textsuperscript{78}

\textsuperscript{71} Establishing injury-in-fact is just one of three requirements to establish standing. For a discussion of the three constitutional requirements for standing, see supra notes 52-55 and accompanying text.

\textsuperscript{72} Region 8 Forest Serv., 993 F.2d at 807.

\textsuperscript{73} Id.

\textsuperscript{74} Id.

\textsuperscript{75} See Megapulse, Inc. v. Lewis, 672 F.2d 959, 968 (D.C. Cir. 1982) (stating that whether action arose out of contract is determined by looking at source of rights asserted and type of relief sought). For a discussion of whether the economic injuries alleged in Region 8 Forest Service actually arose from the timber companies' contracts with the federal government, see infra notes 112-22 and accompanying text.

\textsuperscript{76} Region 8 Forest Serv., 993 F.2d at 807. The timber companies had contracts with the Forest Service, a federal agency, to cut timber in national forests in the South. Id. at 802.

\textsuperscript{77} Id. at 807. The timber companies' contracts provided that "all disputes arising under or relating to" the contracts were to be resolved in accordance with CDA, meaning that any action had to be brought in the United States Federal Claims Court. Id. Thus, since the district court was essentially stripped of its jurisdiction by this provision, the Eleventh Circuit consequently did not have appellate jurisdiction over the matter. Id.

Notwithstanding, the court reasoned that CDA would apply even in the absence of such a provision in the contracts. Id. at 807 n.10 (citing 41 U.S.C. § 602(a)(4) (1988) ("[CDA] applies to any express or implied contract . . . entered into by any agency . . . .''); see also North Side Lumber Co. v. Block, 753 F.2d 1482, 1486 (9th Cir. 1985) (holding timber contract falls within CDA), cert. denied sub nom. Bohemia, Inc. v. Block, 474 U.S. 919 (1985).

\textsuperscript{78} Id. See generally CDA §§ 2-15, 41 U.S.C. §§ 601-13; 28 U.S.C. § 1346(a) (allocating jurisdiction over any actions brought against government founded upon
The court held that the third alleged economic injury, a reduction in the amount of timber available for future contracts, also failed to establish standing. The Eleventh Circuit reasoned that the timber companies had no right to harvest a set amount of timber each year, nor did they have a right to compel the Forest Service to sell any timber to them in the future. Furthermore, the court noted that even if the timber companies did have a continuing harvest right to future timber, this alleged injury still failed to satisfy the third constitutional element of standing: there was no "substantial likelihood" that this injury would be redressed by the any Act of Congress or regulation of executive department to United States Federal Claims Court. The Region 8 Forest Service court distinguished a Tenth Circuit decision, National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971), rev'd, 486 F.2d 995 (10th Cir. 1973), cert. denied, 416 U.S. 993 (1974). See Region 8 Forest Serv., 993 F.2d at 808 n.11. The timber companies tried to use National Helium to support their argument that the CDA did not prohibit consideration by the court of their contract injuries in assessing whether they had standing. Id. In National Helium, a corporation brought suit alleging injuries from a termination of a contract with the government in violation of NEPA. National Helium, 455 F.2d at 652. The Tenth Circuit held that the termination was subject to the requirements of NEPA. Id. at 657. The Region 8 Forest Service court noted that the standing issue was not discussed in National Helium. Region 8 Forest Serv., 993 F.2d at 808 n.11. The Eleventh Circuit found National Helium distinguishable because it was possible in that case that the plaintiff had suffered a non-contractual injury sufficient to confer standing under NEPA. Id.

79. Id. at 808.

80. Id. See also NFMA §§ 6(e), 13(a), 16 U.S.C. §§ 1604(e), 1611(a). NFMA requires the Forest Service to determine timber harvest levels. The Forest Service is to set these levels to "limit the sale of timber from each national forest to a quantity equal to or less than a quantity which can be removed from such forest annually in perpetuity on a sustained-yield basis." Id. § 13(a), 16 U.S.C. § 1611(a). The Forest Service can control how much timber should be harvested annually; any quantity demanded or desired by any timber company for a particular year has no legal significance. See id.

81. Region 8 Forest Serv., 993 F.2d at 808 (citing Intermountain Forest Indus. Ass'n v. Lyng, 683 F. Supp. 1330, 1340 (D. Wyo. 1988) (holding timber companies have no right to future timber). The court in Region 8 Forest Service, relying on Choctaw Manufacturing Co. v. United States, 761 F.2d 609, 615 (11th Cir. 1985), rejected the timber companies' argument that they were in a position similar to that of a losing bidder on a government contract. Region 8 Forest Serv., 993 F.2d at 808 n.12. The court emphasized that losing bidders have a right to bid procedures that conform with applicable statutes and regulations and their bids cannot be arbitrarily rejected. Id. According to the court, however, the two scenarios are distinguishable because timber companies have no analogous right. Id.

82. Region 8 Forest Serv., 993 F.2d at 808. For a discussion of the three constitutional elements required for standing, see supra notes 46-55 and accompanying text. The third constitutional element is a "substantial likelihood" that the injury will be redressed by a favorable decision of the court. Id. (citing Duke Power Co. v. Carolina Envtl. Study Group, Inc., 498 U.S. 59, 75 n.20 (1978)).

83. See Duke Power Co. v. Carolina Envtl. Study Group, Inc., 498 U.S. 59, 75 n.20 (1978) (observing that precedent requires showing only "substantial likelihood" that requested relief will redress injury).
relief sought from the court, since greater timber availability in the future was "purely speculative." 84

2. Alleged Quality of Life Injuries

The timber companies also alleged that they had suffered injuries to their quality of life. 85 The three alleged quality of life injuries included: "(1) layoffs and income reductions; 86 (2) a decreasing tax base; 87 and (3) a loss in public services." 88 The Region 8 Forest Service court held that these injuries were "simply attenuated versions of the economic injuries . . . already considered" and summarily dismissed the timber companies' arguments. 89

3. Alleged Environmental Injuries

Next, the timber companies alleged environmental injuries. 90 They claimed to be "interested in developing [woodpecker preservation] strategies which [were] consistent with forest plans, scientifically defensible, and [did] not impose unwarranted restrictions on timber harvesting." 91 The court rejected this contention as insuffi-

84. Region 8 Forest Serv., 993 F.2d at 808. In national forests, the availability of timber for private parties depends on the land's condition, and the private parties' assurances that the tree-cutting methods will not prevent future replanting of trees. NFMA § 6(g)(3)(E)-(F), 16 U.S.C. § 1604(g)(3)(E)-(F). Future timber availability is based upon site-specific analysis and thus "may or may not be affected by either full implementation of the Woodpecker Chapter or by setting aside the Policy." Region 8 Forest Serv., 993 F.2d at 808; see also Asarco Inc. v. Kadish, 490 U.S. 605, 614 (1989) (denying standing where redressability of injury is pure speculation).

85. Region 8 Forest Serv., 993 F.2d at 809.
86. Id.
87. Id.
88. Id. In their appellate brief, the timber companies alleged that a loss in public services would occur because, by law, 25% of Forest Service timber profits are returned to local counties "for [the] benefit of the public schools and public roads." Id. at 809 n.13 (citing 16 U.S.C § 500). However, since this injury was alleged for the first time in the timber companies' appellate brief, the court could not consider it, as the court's scope of review was restricted to the complaint and the affidavits. Id. (citing Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 547 (1986) (facts supporting standing cannot be gleaned from briefs and arguments alone)).

89. Region 8 Forest Serv., 993 F.2d at 809. The court dismissed the quality of life injuries on the same two grounds that rendered the allegation of economic injury insufficient. Id. First, to the extent that the injuries arose out of the contracts, the issue had to be settled under the CDA and therefore in Federal Claims Court. Id. Second, to the extent that the injuries arose out of a loss of future timber sales, the timber companies had no such right to the timber. Id. For a full discussion of the court's dismissal of the economic injuries and reasoning, see supra notes 72-84.

90. Id.
91. Id.
cient to support standing since it alleged nothing more than a mere interest in the problem\textsuperscript{92} and the companies did not allege that a personal injury had been suffered.\textsuperscript{93}

The timber companies further claimed that their environmental interest in woodpecker preservation was partly motivated by their employees' interest in the outdoors.\textsuperscript{94} The doctrine of standing requires that plaintiffs assert their own rights and not rely on the rights of others.\textsuperscript{95} As the \textit{Region 8 Forest Service} court noted, exceptions to this limitation arise under limited circumstances,\textsuperscript{96} none of which were present in the instant case.\textsuperscript{97} Therefore, the

\textsuperscript{92. Id.; see Sierra Club v. Morton, 405 U.S. 727, 739 (1972) (stating that "mere interest in a problem, no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself" to confer standing).

\textsuperscript{93. Region 8 Forest Serv., 993 F.2d at 809. The alleged injury must be personal in order to give a plaintiff standing to sue. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979).

\textsuperscript{94. Region 8 Forest Serv., 993 F.2d at 809.

\textsuperscript{95. The timber companies were legal entities not synonymous with their employees. Thus, they were asserting the rights of others in arguing that their employees had an interest in the preservation of the woodpecker. For a discussion of the prudential limitations on standing, see supra note 54 and accompanying text. See also Warth v. Seldin, 422 U.S. 490, 499 (1975) (holding plaintiff must assert own rights and interests).

\textsuperscript{96. See Singleton v. Wulff, 428 U.S. 106, 113-16 (1976). Plaintiffs may rest upon the rights of another only if the following three requirements are met: (1) the plaintiff must have otherwise suffered injury-in-fact; (2) the plaintiff must advocate the third party's rights nearly as effectively as the third party would itself; and (3) there must be some obstacle to the third party asserting the right itself. \textit{Id.} at 114-16.

\textsuperscript{97. Region 8 Forest Serv., 993 F.2d at 810. The court held that the three requirements necessary for a plaintiff to rely on the rights of another were not satisfied. \textit{Id.} First, if asserting rights on behalf of their employees, the timber companies still must have suffered injury-in-fact; the court held they had not. \textit{Id.} Second, the relationship between the timber companies and their employees is not such that the employers would be nearly as effective proponents of the employees' interests as the employees themselves. \textit{Id.} To allow third-party standing, there must be a strong identity of interests between the third party and the litigating proponent. \textit{Id.} (citing Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 840-42 n.44 (1977) (holding parents had standing to assert rights of children); Griswold v. Connecticut, 381 U.S. 479, 481 (1965) (holding doctor had standing to assert rights of patients)). The Eleventh Circuit in \textit{Region 8 Forest Service} concluded this strong identity of interests was missing in the employer-employee relationship. 993 F.2d at 810. Finally, there was no obstacle to the employees of the timber companies in personally asserting their rights. \textit{Id.} The court distinguished the situation in \textit{Region 8 Forest Service} from a situation in which a group is truly unable to assert its own rights. \textit{See, e.g.,} NAACP v. Alabama, 357 U.S. 449, 458-59 (1958) (holding organization had right to assert claim on behalf of members to protect members from being compelled to disclose their affiliation with association in violation of First Amendment).
court found that the timber companies failed to establish a sufficient environmental injury to establish standing.98

4. Alleged Procedural Injuries

Finally, the timber companies sought to establish standing by alleging they suffered sufficient procedural injuries.99 The timber companies argued that the Forest Service's failure to follow the procedures mandated by the Species Act, NEPA, and NFMA100 denied them of their rights to information, participation, and informed decisionmaking.101

In analyzing the procedural injuries, the court followed the reasoning used by the Supreme Court in Lujan v. Defenders of Wildlife.102 In Defenders of Wildlife, the Court denied several environmental groups standing because the alleged injury to their procedural rights constituted nothing more than a "mere generalized grievance about government" which did not equate to "an Article III case or controversy."103 The Region 8 Forest Service court similarly held that the timber companies' alleged procedural injuries were nothing more than general grievances common to all citizens.104 Consequently, the court concluded that the timber companies failed to satisfy the injury-in-fact requirement necessary to establish standing for procedural injuries.105

B. Critical Analysis

In Region 8 Forest Service,106 the court held that the timber companies did not have standing to sue the Forest Service.107 In deny-
ing standing, the court rejected all four types of injury alleged by the timber companies.\textsuperscript{108} The court properly dismissed the alleged environmental injuries since they appeared tenuous. However, in dismissing the economic, quality of life, and procedural injuries, the court may have overlooked justiciable claims of injury made by the timber companies.

The court correctly denied the timber companies' claim of alleged environmental injury. The timber companies had claimed that the Forest Service interfered with their interest in developing a woodpecker preservation strategy.\textsuperscript{109} This interest was nothing more than an interest in ensuring that the woodpecker was not further protected.\textsuperscript{110} In addition, the timber companies claimed that they were interested in the strategy because of their employees' interest in the outdoors.\textsuperscript{111} Inconceivably, the timber companies argued that their employees' love of the outdoors and wildlife gave them standing to fight actions taken to protect that wildlife and the beauty of the outdoors. The circularity of this argument is clear. The timber companies attempted to use their asserted love of the outdoors to gain standing in court to fight for their right to destroy it. This alleged injury demonstrated no genuine concern for the environment and was justly dismissed by the court.

Nonetheless, the court may have erroneously dismissed the other three injuries. The court relied on the CDA to dismiss the claims of economic and quality of life injuries,\textsuperscript{112} emphasizing that the timber contracts were made with the government for logging on public lands.\textsuperscript{113} These contracts expressly provided for resolution under the CDA\textsuperscript{114} if the conflict related to any dispute "arising

\begin{footnotes}
\item[108.] \textit{Id.} at 811.
\item[109.] For a discussion of these alleged interests, see \textit{supra} notes 90-98 and accompanying text.
\item[110.] \textit{See Region 8 Forest Serv. Timber Purchasers Council v. Alcock}, 736 F. Supp. 267, 272 n.2 (N.D. Ga. 1990), \textit{aff'd in part and vacated in part}, 993 F.2d 800, \textit{cert. denied sub nom.} Southern Timber Purchasers Council v. Meier, \textit{— U.S. —,} 114 S. Ct. 683 (1994). This point is made clear in a footnote in the district court opinion: "This is akin to saying that [the timber companies want] to protect the woodpecker in order to get it off the endangered species list so that they can destroy its environment." \textit{Region 8 Forest Serv.}, 736 F. Supp. at 272 n.2. According to the district court, this argument admitted the timber companies' lack of genuine environmental interest. \textit{Id.} This alleged "environmental" interest was therefore not a cognizable injury under Article III. \textit{Id.}
\item[111.] \textit{Region 8 Forest Serv.}, 993 F.2d at 809.
\item[112.] For a discussion of the court's analysis, see \textit{supra} notes 72-89 and accompanying text.
\item[113.] \textit{Region 8 Forest Serv.}, 993 F.2d at 802.
\item[114.] For a discussion of the relevant CDA provisions, see \textit{supra} note 77 and accompanying text.
\end{footnotes}
under or relating to" the contracts. However, the court bypassed the real issue in determining whether the CDA applied: whether the injuries alleged actually "arose under or [were] related to" their contracts with the government. The timber companies did not allege breach of contract nor did they pursue contractual remedies. Instead, the timber companies sought relief for injuries suffered as a result of alleged violations of the Species Act, NEPA, and NFMA. The timber companies claimed that the Forest Service violated these acts by changing the woodpecker policy. Seeking this type of relief places the timber companies in a position similar to environmental plaintiffs suing the Forest Service for a change in policy that had an adverse affect on their lives. Because environmental plaintiffs had in prior cases been granted standing generously, as demonstrated by *Sierra Club v. Morton* and *SCRAP*, the timber companies in *Region 8 Forest Service* should have received the same liberality in achieving standing.

In addition, the quality of life injuries alleged included loss of jobs, loss of public services, and a decrease in the tax base; these claimed harms constituted substantive injuries and were more than "mere attenuations of the economic injuries alleged." As with the economic injuries, the timber companies did not rely on the government contracts in alleging their quality of life injuries. Rather, their injury allegedly arose from the Forest Service's violation of the Species Act, NEPA, and NFMA. A federal policy change in disregard of proper procedural safeguards can harm the general quality of life. This harm can be particularly devastating in small logging towns surrounding national forests where most money, employment, and livelihood flows from the timber indus-

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115. *Region 8 Forest Serv.*, 993 F.2d at 807.

116. *Id.* at 802. The court attempted to distinguish *National Helium Corp. v. Morton*, 455 F.2d 650 (10th Cir. 1971), by speculating that it was at least "possible that the plaintiff [in that case] suffered a non-contractual injury." *Id.* at 808 n.11. However, the court in *National Helium* made it clear that the injury at issue arose under the plaintiffs' contracts. *National Helium*, 455 F.2d at 654.

117. For a discussion of the treatment of environmental plaintiffs with respect to the standing issue in prior decisions, see *supra* notes 56-70 and accompanying text.

118. For a discussion of these cases, see *supra* notes 59-63 and accompanying text. It is important to note, however, that the two recent Supreme Court decisions in *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990), and *Lujan v. Defenders of Wildlife*, 504 U.S. —, 112 S. Ct. 2130, 2136 (1992), may suggest a growing trend toward stricter standing requirements for environmental plaintiffs. For a discussion of these cases, see *supra* notes 64-70 and accompanying text.

119. *Region 8 Forest Serv.*, 993 F.2d at 809.

120. *Id.*
try.\textsuperscript{121} This alleged harm should have been sufficient to establish the timber companies' standing since it was an independent source of harm that did not arise out of their government contracts.\textsuperscript{122}

Finally, the procedural injuries alleged constituted more than "mere generalized grievances."\textsuperscript{123} The Forest Service was required to follow certain procedures under the Species Act, NFMA, and NEPA.\textsuperscript{124} In failing to follow these procedures, the Forest Service denied the timber companies their rights to information, participation, and informed decisionmaking. By virtue of holding contracts with the government, the timber companies were directly and adversely affected by the Forest Service's failure to adhere to procedural requirements. These injuries should have satisfied the injury-in-fact requirement for standing.\textsuperscript{125}

V. IMPACT

The issue presented in \textit{Region 8 Forest Service} is likely to arise in the future because timber companies throughout the United States are currently logging in national forest lands pursuant to government contracts.\textsuperscript{126} All of these forest lands contain endangered

\textsuperscript{121} For a discussion of logging areas, see \textit{supra} notes 1-6 and accompanying text.

\textsuperscript{122} This is not a comment, however, on how any action would be resolved on the merits if the standing issue were overcome. It may be fair to suggest that the timber companies would encounter difficulties proving violations of the three Acts by the Forest Service. In fact, with the rapid decline of the woodpecker population, the Forest Service may have been held in violation of any of the three Acts if it \textit{had not} changed the policy as it did. \textit{See}, e.g., Sierra Club v. Yeutter, 926 F.2d 429, 439 (5th Cir. 1991) (holding Forest Service violated Species Act by not changing plan to protect red-cockaded woodpecker where population was in rapid decline and headed for extinction). However, this Note strongly suggests that the timber companies' action should have proceeded beyond the standing issue to the merits.

\textsuperscript{123} \textit{Region 8 Forest Serv.}, 993 F.2d at 810. The court characterized the timber companies' alleged procedural injuries as "mere generalized grievances" not unique to the timber companies, but rather shared by all citizens. \textit{Id.}

\textsuperscript{124} \textit{Id.} at 803. Specifically, the Forest Service was required to formally consult with the Fish and Wildlife Service in order to change a policy already in effect and established in the Wildlife Habitat Management Handbook. \textit{Id.} For a discussion of these requirements, see \textit{supra} notes 29-42 and accompanying text.

\textsuperscript{125} For a discussion of the injury-in-fact requirement for standing, see \textit{supra} notes 46-55 and accompanying text.

wildlife protected by federal policies. If the Forest Service changes its policies without following the exact procedures prescribed by the Species Act, NEPA, or NFMA, any industry affected by those policy changes may attempt to file suit.

Currently, the Northwest region’s spotted owl controversy continues as timber companies and the government battle over whether logging interests should give way to the interests of the endangered owl. If the Forest Service changes its policy regarding the spotted owl without following the proper procedures, courts may again be faced with the issue of whether companies fighting the policy change will have standing to sue. In that respect, Region 8 Forest Service may have far-reaching precedential value if other federal circuit courts agree with the reasoning and outcome of the decision. Furthermore, this decision may discourage timber companies and other industries from asserting their right to sue. Disgruntled companies may fear that bringing a suit against the Forest Service would be futile, since any “real” injury suffered would not appear “real” enough to the court to satisfy even the preliminary standing requirements.

VI. Conclusion

Throughout the country there is growing concern over endangered wildlife and the destruction of the environment. Consequently, people whose livelihoods depend upon industries that threaten wildlife may simply have to alter their way of living to save the lives of endangered species. As one vice-president of a northwestern timber company stated succinctly: “[H]ere we are today with a wonderful old growth resource base, and what was once a blessing is now a curse.” For the thousands of timber communities throughout the country that once looked to the forests for

127. For a discussion of the Species Act, NEPA, and NFMA, three examples of federal legislation used to protect endangered wildlife in national forests, see supra notes 29-42 and accompanying text.


130. Kenworthy, Timber Plan, supra note 1, at A8.
wealth and survival, it may be time to begin looking somewhere else.

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