
Lynn Robinson O'Donnell

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NEW RESTRICTIONS IN ENVIRONMENTAL LITIGATION:  
STANDING AND FINAL AGENCY ACTION AFTER  
LUJAN V. NATIONAL WILDLIFE  
FEDERATION

1. INTRODUCTION

The impetus behind federal legislation relating to protection of the environment was the realization by Congress that state legislation and the common law were insufficiently addressing the significant and pressing health risks posed by pollution. 1 Similarly, Congress recognized that the steady destruction and exploitation of public lands threatened the public health and welfare as well as the future of the nation. 2 It was in response to

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1. See, e.g., Clean Air Act §§ 101-403, 42 U.S.C. § 7401-7642 (1988). In section 101 of the Clean Air Act, Congress finds "that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution." 42 U.S.C. § 7401. The legislative history of the Clean Air Act shows that Congress perceived air pollution as "a serious national problem" which required "appropriate action." H.R. REP. No. 508, 88th Cong., 1st Sess., reprinted in 1963 U.S. CODE CONG. & ADMIN. NEWS 1260. This action took the form of the Clean Air Act which "completely revised existing law and made more explicit the authority of the Department of Health, Education, and Welfare," a federal agency. Id. Congress also instituted two new programs to further its objectives. The first consisted of federal grants to state, regional, and local air pollution control agencies. The second consisted of federal assistance and participation in air pollution abatement actions. Id. See also infra note 2.

2. Section 102 of the Federal Land Policy and Management Act (FLPMA) sets forth the policy of the Act. 43 U.S.C. § 1701 (1988). This policy states that:

(1) the public lands be retained in Federal ownership, unless . . . , it is determined that disposal of a particular parcel will serve the national interest; . . .

(6) judicial review of public land adjudication decisions be provided by law; . . .

(8) the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use; . . .

(12) the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 . . . .

Id.

These objectives reflect the congressional intent indicated in the legislative history to create a coherent system of public land laws which will balance environ-
these latter concerns that Congress enacted the National Environmental Policy Act (NEPA) of 1969 and the Federal Land Policy and Management Act of 1976 (FLPMA). In accordance with the general congressional intent underlying federal environmental legislation, the federal courts, in accordance with United States Supreme Court guidance, have applied a liberal interpretation of judicial review under the Administrative Procedure Act (APA).


Section 2 of the National Environmental Policy Act of 1969 (NEPA) sets forth the Act’s purpose:

To declare a national policy which will encourage productive and enjoyable harmony between man and his environment to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.


Section 101 of the Act sets forth the Congressional policy in enacting NEPA:

The Congress, recognizing the profound impact of man's activity on the natural environment, particularly the profound influences of [inter alia] resource exploitation . . . and recognizing . . . the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures . . . to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans.

Id. § 4331.


5. See, e.g., Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) (where Court found that judicial review is available except with respect to agency actions and decisions which are committed to agency discretion by law. Court found that this exception to judicial review represented narrow exception and thereby broadened scope of judicial review under APA).

6. Administrative Procedure Act §§ 1-10(e), 5 U.S.C. §§ 551-706 (1988) [hereinafter APA]. When an environmental statute does not expressly provide for judicial review, judicial review is generally available under the APA. Section 10(a) of the APA provides a right of judicial review to any “person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute . . .” Id. § 10(a), 5 U.S.C. § 702.
Historically, the Supreme Court has upheld this congressionally-born philosophy of expanding judicial review to facilitate a supervisory role over agencies by private citizens and citizen organizations. In *Lujan v. National Wildlife Federation*, the Supreme Court placed new restrictions on procedural requirements relating to standing and final agency action under the APA which will circumscribe the ability of environmental groups to challenge agency actions. The Court concluded that the injury must be specifically alleged, that is, the environmental group member must assert use and/or enjoyment of the specific land threatened by agency action whereas previously, use and/or enjoyment of land in the vicinity of the threatened land was sufficient. The Court reiterated that standing to challenge agency decisions is limited to final agency action and significantly tailored the definition of final agency action to consist solely of those actions which flow directly from a particular agency regulation. These Supreme Court conclusions will have an impact on how an environmental group must allege injury in order to survive summary judgment and on what constitutes agency action within the scope of challenge. There is a question as to whether these newly formulated procedural requirements set forth by the Supreme Court are consistent with congressional intent and precedent regarding judicial review of environmental agency decisions. This restrictive approach toward environmental litigation may reflect the conservatism which increasingly characterizes the constituency of the Supreme Court and may be an early indicator of what the Court will demand of environmental litigants in the coming decades.

Section 10(c) of the APA states that judicial review is limited to "agency action made reviewable by statute and final agency action ...." *Id.* § 10(c), 5 U.S.C. § 704.


9. See *supra* note 6.


11. SCRAP, 412 U.S. at 683-90 (holding that allegation of use of surrounding lands was sufficient to establish injury-in-fact under section 10(a) of APA); Sierra Club v. Morton, 405 U.S. 727, 731-41 (1973) (holding environmental group must allege that challenged action will adversely affect organization and/or individual members by asserting use of lands in issue).

II. BACKGROUND

A. Standing Under the APA Before Lujan

Section 10(a) of the APA requires that a challenger of a federal agency action must be "adversely affected or aggrieved" by the agency action. This requirement establishes standing for purposes of the APA. In *Sierra Club v. Morton*, a conservation organization sought to restrain federal officials from approving a ski resort in a national forest. The Court expanded on its previous holding that requisite injury to establish standing under the APA consisted of alleging an injury-in-fact where that injury related to an interest within the zone of interests which the statute at issue sought to protect. In *Sierra Club* the Court affirmed the principle that destruction or degradation of scenery and wildlife which would impair future use and enjoyment of the park was sufficient to establish injury-in-fact under section 10(a). The Court proceeded to clarify the injury-in-fact test, stating that it required that the challenger must be among those injured. In short, the conservation organization could acquire representational standing only by alleging that some or all of its members actually used the national forest for recreational or other purposes. These

13. 5 U.S.C. § 702. Section 10(a) 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." *Id.*

14. Standing satisfies the constitutional case or controversy requirement of Article III. U.S. Const, art. III, § 2, cl. 2. To establish standing, plaintiff must show a personal stake in the outcome of the case. This is accomplished by showing injury in fact. J. NOWAK, R. ROTUNDA & J.N. YOUNG, CONSTITUTIONAL LAW § 2.12, 74 (1983).


16. *Id.* at 728-30. This case represents the first time that the United States Supreme Court addressed the issue of standing in regard to environmental organization plaintiffs who allege a noneconomic injury.

17. See companion cases, Data Processing Service v. Camp, 397 U.S. 150 (1970) and Barlow v. Collins, 397 U.S. 159 (1970) (holding that standing to obtain judicial review under APA was established where plaintiffs alleged that challenged action caused injury-in-fact and where that alleged injury was to interest which was within zone of interests which statute sought to protect).

18. *Sierra Club*, 405 U.S. at 734. The Court also noted that environmental interests are often shared by many individuals rather than just a few and that this fact does not defeat standing. *Id.*

19. *Id.* at 735. The ultimate goal of this requirement was to attain consistency with the constitutional requirement of having a direct stake in the outcome of the case and to ensure that judicial review was predicated on real injury rather than mere value preferences. *Id.* at 740.

20. *Id.* at 735. Representational standing allows organizations to sue for injured members. An organization may properly allege representational standing "so long as the nature of the claim and of the relief sought does not make
members would then allegedly suffer the direct injury that section 10(a) requires for judicial review. Because the petitioner "failed to allege that it or its members would be affected in any of their activities or pastimes" by the proposed development, the Court held that petitioner failed to assert injury-in-fact, and therefore lacked standing to challenge the development.

One year later, in United States v. Students Challenging Regulatory Agency Procedures (SCRAP), the standing issue with regard to environmental lawsuits again came before the Court. In this suit, environmental groups sought to enjoin enforcement of Interstate Commerce Commission (ICC) orders which allowed railroads to collect surcharges on freight rates. Fearing that this surcharge would discourage the use of recyclable materials and thereby adversely affect the environment, SCRAP and other environmental groups alleged that the ICC violated section 102(2)(c) of NEPA by failing to file a detailed environmental impact statement before issuing these orders. In its complaint, SCRAP asserted that its members used the forests, streams, mountains, and other resources in the Washington metropolitan area for recreational purposes and that such use would be affected by the negative environmental impact caused by the nonuse of recyclable goods which would result from the rate increase. The Supreme Court held that these allegations sufficiently established standing under the APA to survive a motion to dismiss.

Thus, after Sierra Club and SCRAP it was apparent that in order to gain judicial review under the APA, an environmental organization was required to assert that the agency action would

the individual participation of each injured party indispensable to proper resolution of the cause ...." Warth v. Seldin, 422 U.S. 490, 511 (1975).

21. Sierra Club, 405 U.S. at 735.
22. Id. at 741. However, the Court reiterated that aesthetic and environmental well-being as well as economic well-being can constitute injury. Id. at 734.
24. Id.
25. Id. at 676. The plaintiffs claimed that because the 2.5% surcharge would also apply to the shipment of recyclables, the surcharge would discourage the use of recyclable materials and encourage the use of new raw materials which adversely affect the environment via mining, lumbering and other activities. The environmental group members alleged that they would be forced to pay more for finished products and that their use of forests and streams would be impaired due to the exploitive activities. United States v. Students Challenging Regulatory Agency Procedures, 346 F. Supp. 189, 192-95 (D.D.C. 1972).
26. SCRAP, 412 U.S. at 676.
27. Id. at 685.
28. Id. at 689-90.
adversely affect its members' use of public lands. In short, where use was asserted, standing was established.

B. Final Agency Action Before *Lujan*

In addition to lack of standing, judicial review may be denied on the basis of untimeliness. Untimeliness may be present where the agency action is not ripe for review, where the agency action is not final or where administrative remedies have not been exhausted. These separate concepts can be closely related and may overlap. Section 10(c) of the APA provides that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." Therefore, where the agency action is not expressly made reviewable by the statute, a court will generally deny review on the basis of lack of ripeness, or more broadly, untimeliness, unless the court finds final agency action. Thus, in the administrative law context, a finding of final agency action is crucial to surviving the ripeness doctrine, or more broadly, timeliness, and thus, to obtaining judicial review.

The watershed case interpreting the concept of ripeness with respect to federal agency action is *Abbott Laboratories v. Gardner*.


30. Ripeness is established by showing that significant hardship will result if judicial review is denied and that the issues presented constitute questions of law, as opposed to questions of fact, and are therefore fit for judicial resolution. Fitness for judicial review generally requires that the agency action is final because the courts are unwilling to interfere in the administrative process until the agency action or decision has taken a final and concrete form. Similarly, the courts will generally refuse judicial review where plaintiff has failed to exhaust administrative remedies. See B. Schwartz, *Administrative Law* §§ 9.1; 8.5, 8.8-8.9; 8.30 (1984).

31. For a discussion of what constitutes final agency action, see infra notes 48-58 and accompanying text.

32. The exhaustion of the administrative remedies rule requires a plaintiff to seek redress from the agency itself before resorting to the courts. This prevents undue interference by the courts in the administrative process and unnecessary judicial review where administrative relief is available. However, it should be noted that the courts apply this rule in a discretionary fashion. A court may waive the exhaustion requirement, for example, where the injury is severe and irreparable or where it is clear that exhaustion would be futile because the agency has declared that no such relief will be given. See B. Schwartz, *Administrative Law* §§ 8.30-8.31 (1984).

33. For example, ripeness may be defeated by a finding of no final agency action or a failure to exhaust administrative remedies. See generally R.J. Pierce, S.A. Shapiro & P.R. Verkuil, *Administrative Law and Process* § 5.7 (1985).

34. 5 U.S.C. § 704.

At issue in this case was a Food and Drug Administration (FDA) regulation which required pharmaceutical companies to indicate the established scientific name of a drug every time it used the drug trade name in labeling and print advertising. The pharmaceutical company plaintiffs sought and received from the United States District Court of Delaware a declaratory judgment that the regulation was invalid. The United States Court of Appeals for the Third Circuit reversed on the basis that the challenge was not ripe. The Supreme Court reversed the Third Circuit and set forth definitive guidelines on what constitutes final agency action for the purpose of obtaining judicial review under the APA.

First, the Court laid down general propositions relating to the propriety of judicial review of administrative agency decisions. The Court began its analysis on the premise that Congress intended the APA to cover a "broad spectrum of administrative actions" and that the APA's "generous review provisions" should be given a "hospitable interpretation." The Court held that judicial review should be restricted only where there was "clear and convincing evidence" of contrary legislative intent. The Court stated that the rationale underlying the ripeness doctrine is to "protect . . . agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Possible hardship to parties which would result from withholding judicial review should also be considered in determining ripeness. The Court held that where the issue presented is fit for judicial resolution and where the agency action will require an immediate and significant change in the plaintiff's conduct, judicial review under

36. Id. at 137-38.
38. Abbott Laboratories v. Celebrezze, 352 F.2d 286 (3d Cir. 1965). The Third Circuit reversed without reaching the merits. The court held that pre-enforcement review was unauthorized under the statutory scheme of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-392 (1988), and, therefore, beyond the jurisdiction of the District Court. The Third Circuit also held that relief was unavailable under section 10 of APA, 5 U.S.C. §§ 701-704, because no case or controversy existed at the time of the challenge. Id.
40. Id. at 140-41.
41. Id.
42. Id. at 141 (quoting Rusk v. Cort, 369 U.S. 367, 379-80 (1962)).
44. Id. at 149. For a discussion of hardship to the parties, see infra note 63 and accompanying text.
the APA must be permitted.45

An issue is fit for judicial resolution if the issue is a legal issue and if the regulation constitutes final agency action.46 The Supreme Court further clarified these two elements. Where the challenger contends that the agency action was taken in contravention of statutory authority, that is, the agency misconstrued the statute, the issue is a legal one.47 The Court refrained from a similarly clear-cut definition of final agency action. Instead, it looked to case law and established a flexible definition.48 Examples of final agency action include the following: a regulation promulgated by agency order where compliance causes injury that is cognizable by a court of equity;49 an order which has no authority except to give notice of how the agency interprets its Act and which has effect only if a particular action is eventually brought against a particular defendant;50 and a regulation which announces policy that any agency will restrict licensing even though no specific application which would be the recipient of such restriction is before the agency.51 Based on its liberal interpretation of final agency action, the Court upheld pre-enforcement review of the FDA regulation in *Abbott Laboratories*.52

Additional support for liberal interpretation of the final agency action requirement is found in *Columbia Broadcasting System*,

45. *Id.* at 153.
46. *Id.* at 149-50.
47. *Abbott Laboratories*, 387 U.S. at 149.
48. *Id.* at 149-50.
49. *Id.* at 150 (citing *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 418-19 (1942)). In *Columbia Broadcasting*, plaintiff had challenged FCC regulations promulgated by an order which required the FCC to refuse to grant a license to any broadcasting station which entered into certain specific types of contracts with a broadcasting network. 316 U.S. at 408. Plaintiff contended that the regulations impaired contractual relations with broadcasting stations as well as its ability to carry on its nationwide broadcasting network. *Id.* at 408.
51. *Abbott Laboratories*, 387 U.S. at 151 (citing *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 198 (1956)). In *Storer Broadcasting*, respondent challenged FCC rules which prohibited the granting of broadcasting licenses to any applicant who already owned multiple stations. 351 U.S. at 193. Respondent argued that these rules conflicted with the FCC's statutory mandates to grant broadcasting licenses where the public interest would be served and to provide applicants with a hearing before denial of an application. *Id.* at 195.
52. *Abbott Laboratories*, 387 U.S. at 156.
Inc. v. United States. There the Court noted that "[t]he particular label placed on the agency's action is not determinative of a federal court's authority to review, for it is the substance of what the agency has purported to do and has done which is decisive." In Toilet Goods Association, Inc. v. Gardner, the Court applied the Abbott Laboratories two-fold inquiry and found that judicial review was unwarranted. In this case the Court recognized that the issue of whether the regulation exceeded the agency's statutory authority was a purely legal issue. The Court also concluded that the challenge related to final agency action because it was formally promulgated after notice and comment. Despite these findings, the Court concluded that the two-fold inquiry was outweighed by other considerations.

Specifically, the regulation in question served as notice that the agency Commissioner may order inspections of cosmetic manufacturing facilities, and that agency certification of cosmetic additives may be denied if inspections are refused by cosmetic manufacturers. At the time of this pre-enforcement suit, therefore, a court had no way to determine whether or when inspections would actually be ordered or what reasons the Commissioner might give to justify an inspection. Without this knowledge, the Court could not determine whether the regulation was justified by statutory authority. A specific application of the regulation would be required to make this determination.

54. Id. at 416. See supra note 49.
55. 387 U.S. 158 (1967). Cosmetic manufacturers and distributors brought an action for declaratory and injunctive relief against the Secretary of Health, Education, and Welfare and the Commissioner of the Food and Drugs Administration. Plaintiff argued that the Commissioner had exceeded his statutory authority, which had been delegated by the Secretary, by promulgating regulations which allowed the agency to suspend certification for the manufacture of color additives where a manufacturer refused to permit agency inspection of facilities. Id. at 159-62.
56. Id. at 160-61.
57. Id. at 163.
58. Id. at 162.
60. Id.
61. Id.
62. Id. The Court stated that statutory justification would depend on whether Congress refused to include specific authorization for inspections in the Act and on whether the statutory scheme in general justified promulgation of the regulation. Id. Consideration of the latter, in turn, would depend on such factors as an understanding of the kinds of enforcement problems encountered by the FDA, the need for such agency supervision to accomplish the goals of the Act, and the safeguards utilized to protect trade secrets. Id. at 163-64. The
In addition, the Court found that the degree and nature of the regulation’s present effect on plaintiffs did not constitute sufficient hardship to warrant judicial review because plaintiffs’ primary conduct would not be affected and no irremediable adverse consequences would result from requiring the challenge to be predicated on an inspection refusal, that is, on specific application of the regulation. 63 Most importantly, the Supreme Court noted that the penalty for noncompliance with the regulation would be a suspension of certification services. 64 This suspension could then be challenged through an administrative procedure. 65 Thus, the Court rejected judicial review where administrative remedies had not been exhausted. 66

III. DISCUSSION

A. Facts

In Lujan v. National Wildlife Federation, 67 the environmental organization challenged the validity of the land withdrawal review program carried out by the Bureau of Land Management (BLM). 68 The purpose of this program is to manage public land use. Acting pursuant to this program, the BLM engaged in a systematic review of federally-owned lands which led to cancellation of protective classifications of public lands, particularly those which prohibited mining and/or mineral leasing. 69 As a result of court stated that judicial consideration of these factors would be more firmly grounded in the context of a specific application of the regulation than on the basis of a generalized challenge. Id. at 164.

64. Id. at 164-65.
65. Id. at 165.
66. Id.
68. Id. at 3179. Section 202 of the FLPMA requires the BLM to develop land use plans for all public lands, regardless of previous classifications and/or withdrawals. 43 U.S.C. § 1712. Thus, the BLM is authorized to modify existing classifications and to revoke withdrawals. Id. This authority is implemented by way of regulations which specifically define the land use plans mandated by FLPMA as Resource Management Plans. Id. In 1981, the BLM engaged in a systematic review of classifications and withdrawals as part of its land withdrawal review program. National Wildlife Federation v. Burford, 835 F.2d 305, 308-09 (D.C. Cir. 1987). See also Lujan, 110 S. Ct. at 3179. The Bureau of Land Management, a subagency of the Department of Interior, is charged with land management responsibilities in accordance with comprehensive guidelines set forth in the FLPMA, 43 U.S.C. §§ 1701-1784. These guidelines include procedures for the development, maintenance, and revision of land use plans. FLPMA §§ 210-214, 43 U.S.C. §§ 1711-1723.
this program, substantial public lands (160 million of 167 million acres reviewed under the program) were opened to a variety of previously prohibited or restricted activities and uses.\textsuperscript{70} In addition to the reclassifications, BLM revoked withdrawals covering 20 million acres.\textsuperscript{71} National Wildlife Federation (NWF) alleged that these BLM actions violated NEPA\textsuperscript{72} and the FLPMA.\textsuperscript{73}

National Wildlife Federation sought declaratory relief stating that the land withdrawal review program violated the above-mentioned applicable law.\textsuperscript{74} NWF also sought an order reinstating all pre-program classifications and withdrawals and enjoining any action inconsistent with those designations.\textsuperscript{75} A preliminary injunction for these purposes was also sought.\textsuperscript{76}

\textsuperscript{70} Id.
\textsuperscript{71} Id.
\textsuperscript{72} Some historical background regarding federal public land management policy should be noted. Until the mid-1900's, federal policy consisted largely of disposal. \textit{Id.} at 307. Up until this time, the government transferred ownership of vast acreages to private citizens, states, counties, cities and companies for various purposes including homesteading and railroad construction. \textit{Id.} In the 1930's, the federal government shifted its policy away from disposal and toward retention and management. \textit{Id.} These new objectives were accomplished by classifications and withdrawals. \textit{Id.} Classifications designate public lands for retention and frequently segregate the lands from disposal laws. \textit{Id.} Withdrawals directly remove designated lands from disposal. \textit{Id.} Thus, reclassification and revocation of withdrawals expose protected lands to disposal and the operation of the public land law. \textit{Id.} at 307.
\textsuperscript{73} \textit{National Wildlife Federation,} 835 F.2d at 309. In section 101 of NEPA, Congress states its environmental policy and goals:

[It is the continuing policy of the Federal Government . . . to use all practicable means and measures . . . in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.]

42 U.S.C. § 4331.
\textsuperscript{74} Id.
\textsuperscript{75} \textit{National Wildlife Federation,} 835 F.2d at 309. NWF alleged that the program violated several provisions of FLPMA. \textit{Id.} First, it alleged that the Department of Interior (Department) violated its duties under FLPMA by failing to prepare plans in connection with its withdrawal revocations and classification terminations. \textit{Id.} See also FLPMA § 202, 43 U.S.C. § 1712. Second, NWF alleged that the Department "violated FLPMA by revoking withdrawals and terminating classifications . . . without prior submission of a recommendation to the President or the Congress." \textit{National Wildlife Federation,} 835 F.2d at 309. See also FLPMA §§ 202, 204, 43 U.S.C. §§ 1712, 1714. NWF also alleged that "the Department violated FLPMA by failing to provide any opportunity for public involvement in the Department's land status decisions." \textit{National Wildlife Federation,} 835 F.2d at 309. See also FLPMA § 202(f), 43 U.S.C. § 1712(f).
\textsuperscript{76} \textit{Id.}
B. Procedural History

The United States District Court for the District of Columbia granted a preliminary injunction, suspending all post-program classification terminations and withdrawal revocations and enjoining the agency from taking further action inconsistent with pre-program land use designations.

On appeal, the United States Court of Appeals for the District of Columbia affirmed the preliminary injunction. The court held that NWF had representational standing and had adequately exhausted administrative remedies. Finally, the court held that the injunction was supported by the district court's determination of NWF's likelihood of success on the merits as well as by other factors.

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The district court found substantial likelihood of success on the merits in regard to NWF's allegations that the Department had violated its duties under FLPMA by failing to prepare plans in connection with its withdrawal revocations and classification terminations and that FLPMA violations had been committed when the Department failed to provide opportunity for public involvement in the land status changes. Id. at 277-78. Additionally, the court found that NWF members would be irreparably injured by the agency's lifting of protective land restrictions. Id. at 278-79. Harm to third parties (i.e., potential purchasers, lessees, etc. of the public lands) was determined to be insufficient to justify denial of the injunction. Id. at 279. Finally, the court concluded that the injunction was in the public interest. Id. at 280.

This represents the preliminary injunction as modified after the agency moved for clarification of the injunction. See National Wildlife Federation v. Burford, 676 F. Supp. at 284-86.


80. Id. at 312-18. See supra note 20 and accompanying text for further discussion of representational standing. See supra notes 32-33 and accompanying text for further discussion of the exhaustion of administrative remedies principle.

81. Id. at 319-27. Other factors considered by the district court were the threat of irreparable injury to the plaintiff, the possibility of substantial harm to other parties which would result from issuance of the injunction and the public interest. Id. at 318-27.
The case again came before the D.C. Circuit court on petition for rehearing. The court of appeals denied the petition and directed the parties and the district court to proceed with litigation.

The district court granted the agency's motion for summary judgment, holding that NWF lacked standing. NWF appealed and the court of appeals held that its prior determination that NWF had standing sufficient to withstand a motion to dismiss acted as law and, therefore, the district court was bound to that determination for purposes of ruling on summary judgment. Thus, the court held that summary judgment was precluded by the existence of material issues of fact as to whether affidavits of NWF members had demonstrated injury-in-fact in sufficient detail to grant NWF standing. In short, the district court was required to consider the case on its merits.

C. The Supreme Court's Opinion

The Supreme Court granted certiorari and reversed the court of appeals. The Court found that the affidavits, upon which the association based its representational standing, failed to sufficiently demonstrate that the NWF members' interests were actually affected by the agency actions taken under the land withdrawal review program. The Court also addressed the issue of final agency action. The majority concluded that the program did not constitute final agency action for the purposes of judicial review under the APA. In the absence of standing and final agency action, judicial review was unwarranted.

The court also found that the injunction did not impermissibly affect the rights of absent third parties, but this holding is not relevant for purposes of this Casenote. For further discussion of this holding, see id. at 315-16.

83. Id. at 890.
86. Id. at 430-31.
87. Id.
88. Lujan, 110 S. Ct. at 3185.
89. Id. at 3194.
90. Id. at 3187-88.
91. Id. at 3185-86.
92. Lujan, 110 S. Ct. at 3185-86. Lujan is a 5-4 decision with Justices Blackmun, Brennan, Marshall and Stevens dissenting. Justice Scalia authored the majority opinion. Id. at 3177.
In its discussion of standing, the Court reasoned that the two NWF affidavits failed to identify specific lands used by the affiants. This failure resulted in missing facts, particularly whether affiant used the adversely affected lands, which a court is not free to presume for the purpose of determining standing under the APA. Injury could not be sufficiently established unless the affiant identified use of a specific land which was subject to the agency action at issue.

It is well-settled that without injury, there is no standing. Similarly, it is well-settled that for purposes of obtaining judicial review under the APA, a plaintiff must demonstrate injury of a kind which the statute seeks to protect against. The majority concluded that the imprecision by which the NWF affidavits were characterized resulted in failure to establish injury for purposes of APA judicial review. The Court discounted its holding in SCRAP, by limiting it to its facts. It further distinguished SCRAP on the basis that it involved a motion to dismiss on the pleadings which requires less specificity with regard to alleged injury as op-

93. *Id.* at 3188.
94. *Id.*
95. *Id.* at 3187-88. The first affidavit read as follows:
My recreational use and aesthetic enjoyment of federal lands, particularly those in the vicinity of South Pass-Green Mountain, Wyoming have been and continue to be adversely affected in fact by the unlawful actions of the Bureau and the Department. In particular, the South Pass-Green Mountain area of Wyoming has been opened to the staking of mining claims and oil and gas leasing, an action which threatens the aesthetic beauty and wildlife habitat potential of these lands.

*Id.* at 3187 (quoting App. to Pet. for Cert. 191a).

The second affidavit was identical to the first except that the affiant asserted use of land in the vicinity of Grand Canyon National Park, the Arizona Strip and the Kaibab National Forest. *Id.* (quoting App. to Pet. for Cert. 187a).

It should be noted that NWF submitted four supplemental affidavits after the hearing on the summary judgment motion. These affidavits would presumably have satisfied the pleading requirements with respect to standing as set forth by the majority. However, the majority affirmed the appellate court's holding that these affidavits were untimely. The majority concluded that the district court's refusal to admit these supplemental affidavits did not constitute abuse of discretion under the APA because the affidavits were untimely under the applicable Federal Rules of Civil Procedure, and, therefore, the court was not compelled to admit them. *Id.* at 3191-93. See *infra* note 121 for the dissenting justices' position on the untimeliness of these affidavits.

96. *See e.g.*, Duke Power Co. v. Carolina Envl. Study Group, Inc., 438 U.S. 59 (1978) (holding that plaintiff must establish personal stake in outcome to demonstrate standing. This requires showing of distinct and palpable injury caused by challenged conduct).
97. *Lujan*, 110 S. Ct. at 3186.
98. *Id.* at 3189.
99. *Id.*
posed to a motion for summary judgment which requires greater specificity.\(^{100}\)

As noted above, the Court also reasoned that agency action taken pursuant to an informal program, that is, a program which the agency has not set forth in a formal policy, does not constitute final agency action.\(^{101}\) Instead, final agency action is limited to action taken pursuant to a specific regulation or order promulgated by the agency.\(^{102}\)

Thus, according to the Court agency programs are *per se* non-reviewable. They can be challenged only in a piecemeal fashion, and only when an action resulting from that program can be directly traced to a specific agency regulation or order.\(^{103}\) According to the *Lujan* court, flaws in agency programs should be redressed by the administrative agency itself or by Congress; such flaws are outside the scope of the courts.\(^{104}\) The Court describes this program as "the continuing (and thus constantly changing) operations of the BLM in reviewing withdrawal revocation applications and the classifications of public lands and developing land use plans as required by the FLPMA."\(^{105}\)

D. Critical Analysis

1. Standing

The standing requirements in *Lujan* seem to be inconsistent with previous precedent in environmental law.\(^{106}\) As noted above, *SCRAP* held that affiant use of the surrounding area which

\(^{100}\) *Id.*

\(^{101}\) *Lujan*, 110 S. Ct. at 3189.

\(^{102}\) *Id.* In a footnote to its opinion, the majority states:
If there is in fact some specific order or regulation, applying some particular measure across-the-board to all individual classification terminations and withdrawal revocations, and if that order or regulation is final . . . it can of course be challenged under the APA by a person adversely affected — and the entire 'land withdrawal review program,' insofar as the content of that particular action is concerned, would thereby be affected. But that is quite different from permitting a generic challenge to all aspects of the 'land withdrawal review program,' as though that constituted a final agency action.

*Id.* at 3189 n. 2 (emphasis added).

\(^{103}\) *Id.* at 3189-90.

\(^{104}\) *Id.* at 3190.

\(^{105}\) *Lujan*, 110 S. Ct. at 3189.

\(^{106}\) See United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972). For a discussion of these cases, see *supra* notes 15-28 and accompanying text. These cases hold that injury-in-fact is established for purposes of the APA where use of lands or surrounding lands is asserted.
was subject to the agency action was sufficiently specific for purposes of establishing standing.\textsuperscript{107} It may be possible, however, to limit the significance of the \textit{Lujan} holding regarding standing. To overcome this new obstacle, environmental associations simply must assert use of specific lands in their complaints, rather than using the previously acceptable "in the vicinity of" language. Thus, this holding will not necessarily be significantly troublesome to environmental plaintiffs in the long term. However, where an environmental organization plaintiff is unable to locate a member who can allege use of the specific area in question or where the adverse environmental impact caused by the agency action is widespread or diffuse, the \textit{Lujan} holding may create an insurmountable obstacle. It also creates an aura of doubt with regard to the certainty of how allegations must be worded which could discourage future suits in the environmental area. Additionally, the Supreme Court could conceivably change the rules again, thus rendering the \textit{Lujan} requirements insufficient.

Furthermore, there is nothing in the statutes to support the contention that standing should be limited in this way.\textsuperscript{108} Indeed, environmental legislation traditionally provides for and encourages public participation and private citizen enforcement.\textsuperscript{109} Thus, it is questionable whether the Court's holding is consistent with Congressional intent.\textsuperscript{110}

In his dissenting opinion, Justice Blackmun refutes the majority's effort to distinguish the \textit{SCRAP} holding.\textsuperscript{111} He concedes that the showing as to standing which is required to overcome a summary judgment is more extensive than that required to overcome a motion to dismiss.\textsuperscript{112} When a motion for summary judg-

\textsuperscript{107} \textit{SCRAP}, 412 U.S. at 669.

\textsuperscript{108} FLPMA §§ 102(a)(5), (6), 202(f), 43 U.S.C. §§ 1701(a)(5), (6), 1712(f). Section 102(a)(5) of the FLPMA provides for participation of the public in the administration of public land statutes. 43 U.S.C. § 1701(a)(5). Section 202(f) requires participation of the public in the formulation of agency plans and programs. 43 U.S.C. § 1712(f). Section 102(a)(6) expressly provides for judicial review of public land adjudication decisions. 43 U.S.C. § 1701(a)(6). Thus, it is clear that Congress intended that the public be involved in the land management process.

\textsuperscript{109} See supra note 108. See also, e.g., Clean Air Act § 304, 42 U.S.C. § 7604. Section 304 of the Clean Air Act provides for private citizen suits against polluters and the federal agency authorized to enact the statute. \textit{Id.}

\textsuperscript{110} See supra notes 108-09.

\textsuperscript{111} \textit{Lujan}, 110 S. Ct. at 3195.

\textsuperscript{112} Id. Justice Blackmun states that "the difference between the two is that evidence is required in the summary judgment context whereas the litigant may rest upon the allegation in his complaint in the context of a motion to dismiss." \textit{Id.} (citing Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)).
ment is made, conclusory allegations which are unsupported by specific evidence are insufficient to establish the genuine issue of fact requisite to denial of summary judgment. Justice Blackmun, however, concludes that the NWF affidavits were adequate to defeat a motion for summary judgment. This conclusion is effectively supported by the fact that the “affidavits . . . were . . . sufficiently precise to enable Bureau of Land Management officials to identify the particular termination orders to which the affiants referred.” Furthermore, the affiants averred that their recreational use and aesthetic enjoyment of federal lands were adversely affected by the agency’s classification terminations. Therefore, Justice Blackmun found that particularly in view of the well-settled principle that in the summary judgment context, the facts must be viewed in the light most favorable to the party opposing summary judgment, the evidence presented to the district court was sufficient to raise a genuine issue of fact as to NWF’s standing to sue.

Finally, Justice Blackmun concluded that identification of the affected lands by specifically naming the parcel was unnecessary for standing purposes. The affidavits, when read as a whole, clearly identified the lands as those which were newly opened to increased mining. Justice Blackmun pointed out that the BLM repeatedly referred to the area at issue using the same language that the NWF affiant used in her affidavit. Thus, contrary to the majority’s contention, the complaint and affidavits did not require the court to “presume facts” to determine reviewability under the APA.

113. See id. (citing May v. Department of the Air Force, 777 F.2d 1012, 1016 (5th Cir. 1985); First Commodity Traders, Inc. v. Heinold Commodities, Inc., 766 F.2d 1007, 1011 (7th Cir. 1985); Maldonado v. Ramirez, 757 F.2d 48, 51 (3d Cir. 1985); Galindo v. Precision American Corp., 754 F.2d 1212, 1216 (5th Cir. 1985)).

114. Lujan, 110 S. Ct. at 3195-96.

115. Id. at 3196.

116. Id.

117. Id. at 3194-95.

118. Lujan, 110 S. Ct. at 3196.

119. Id.

120. Id.

121. Id.

It should be noted that Justice Blackmun also disagreed with the majority’s conclusion that four supplemental affidavits submitted by NWF which presumably would have satisfied the majority’s pleading requirements with respect to standing were properly rejected by the district court on the basis of untimeliness because they were submitted after the hearing on the summary judgment motion. Justice Blackmun characterized the untimeliness conclusion as an abuse of
Justice Blackmun also found sufficient record evidence to support NWF's asserted injury. He was persuaded that the agency actions would, in fact, lead to increased mining on formerly protected public lands resulting in environmental damage, thereby diminishing recreational use of those public lands. Justice Blackmun concluded that the affidavits created a genuine issue of fact as to the organization's injury.

2. Final Agency Action

The majority characterizes the agency's land withdrawal review program as agency actions which fail to satisfy the APA requirement for final agency action. The Court states that the entire program, which consists of more than a thousand individual classification terminations and withdrawal revocations, cannot be challenged by NWF on the basis of members who assert use of lands relating to only a few of those terminations/revocations. In addition, the Court implies that NWF is not entitled to challenge even those few terminations/revocations before the agency grants a mining permit. The Court labels the agency actions identified in the NWF affidavits as "rules of general applicability..." discretion on the ground that NWF showed adequate cause for its failure to file the affidavits prior to the hearing. Additionally, Justice Blackmun concluded that the late filing did not disserve the Federal Rules of Civil Procedure and that the delay caused the government no prejudice. 122. Lujan, 110 S. Ct. at 3194-95.

122. Lujan, 110 S. Ct. at 3194-95.
123. Id. at 3196.
124. Id. at 3189-91. Section 10(c) of the APA provides the following: Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that action meanwhile is inoperative, for an appeal to superior agency authority. 5 U.S.C. § 704.

The right to review is set forth in section 10(a): "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." 5 U.S.C. § 702.

125. Lujan, 110 S. Ct. at 3189-90.
126. See id. at 3190-91 n. 3. In a footnote, the majority indicates that the right to review would not occur until the agency granted a mining permit because it would only be at that time that it would be possible to determine that mining would, in fact, occur. Id. Thus, at that point, injury would be sufficiently established. Id.
... announcing ... the agency's intent to grant requisite permission for certain activities ... ."  

Thus, the Court cautions that individual terminations/revocations would not be ripe for challenge "until some further agency action or inaction more immediately harm[ed] the plaintiff ... ." The Court recognizes that this reasoning, which limits challenges to a case-by-case approach, leads to a frustrating result for environmental organizations because of their customary objective of across-the-board protection of the environment. But the Court maintains that this reasoning is consistent with tradition, that is, the courts may intervene only when "a specific 'final agency action' has an actual or immediately threatened effect."

Although the Court's reasoning may be technically valid, it can reasonably be characterized as somewhat myopic and possibly inconsistent with both precedent and the spirit of APA review, particularly with regard to environmental law. The flexible definition of final agency action set forth in *Abbott Laboratories* could reasonably be interpreted as encompassing the actions taken pursuant to the land withdrawal review program. In that case, the Court held that the final agency action definition extended to a regulation that announced agency policy in regard to how the agency would act should particular circumstances arise. Although the land withdrawal program is not a regulation, an analogy can be drawn in the sense that the terminations/revocations clearly announce the agency's policy and intent to open up previously protected lands to mining activities. Thus, the land withdrawal review program acts as a regulation; the agency is taking regulatory action in regard to protected federal lands by reclassifying them. As *Columbia Broadcasting System* set forth, it is the substance of the action, not its label, that is determinative of the propriety of judicial review. Thus, it would be fair to characterize the land withdrawal review program as final agency action for purposes of review under the APA.

This argument is further supported by the Court's holding in *Abbott Laboratories* that judicial review should be restricted only where there is "clear and convincing evidence" of a contrary leg-

127. *Id.* at 3190.
128. *Id.*
130. *Id.*
131. See supra notes 35-52 and accompanying text.
islative intent. The legislative intent regarding judicial review of environmental agency actions has traditionally been broad. This tradition would suggest that the terminations/revocations taken pursuant to the land withdrawal review program constitute final agency actions which are reviewable. Relying on the Lujan majority's own language, it can reasonably be argued that the facts of the controversy relating to the land withdrawal review program actions have been "fleshed out" in the form of a concrete action which applies the program policy to the claimant's situation in a fashion that threatens to harm the plaintiff. The terminations/revocations of the protective land classifications represent concrete actions which threaten to harm NWF members by opening up public lands to mining and mineral leasing. Insofar as these actions were carried out under authority conferred by the FLPMA, if one of these actions contravenes the purpose of the statute, then all such actions, that is, the program itself, violates the FLPMA.

Finally, the Court cannot legitimately rely on Toilet Goods Association, where the Court found judicial review unwarranted until a specific application of the regulation occurred. Although the requirement of an inspection might be viewed as analogous to the majority's requirement of a permit grant, Toilet Goods Association can be distinguished. In that case, administrative remedies would be available to the plaintiff upon application of the agency regulation. In contrast, no such remedies exist for the NWF upon the BLM's granting of a permit. Upon that event, mining or some other exploitive activity would proceed. These activities would result in irremediable injury to the environment and to the NWF affiants.

In his dissent, Justice Blackmun reminds the Court that programmatic relief is available where an agency action which consists of a rule of general applicability is invalidated. He

133. Abbott Laboratories, 387 U.S. at 136. For a discussion of the Court's holding, see supra notes 40-52 and accompanying text.
134. For further discussion, see supra notes 6-7 and accompanying text.
135. Lujan, 110 S. Ct. at 3190.
137. Lujan, 110 S. Ct. at 3190.
138. Id.
139. Id. at 3201. Justice Blackmun states the following: In some cases, the 'agency action' will consist of a rule of general applicability; and if the plaintiff prevails, the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual. Under these circumstances a single plaintiff, so long as he is
distinguishes this from the instance in which a "lawful policy is applied in an illegal manner on a particular occasion," in which case, the plaintiff is not entitled to challenge other applications of the rule.\textsuperscript{140} After judicial review, the rule stands and only the particular application of it is invalidated.

In \textit{Lujan}, NWF contends that the land withdrawal review program which reclassifies federally-owned lands in order to open these lands to exploitive activities contravenes the FLPMA.\textsuperscript{141} The real injury threatened is not the loss of any particular land parcel but the systematic destruction of vast acres of many land areas throughout the nation. It is this result which is inconsistent with the statute. Thus, NWF must seek programmatic relief to forestall its injury and to show a statutory violation. In light of this reality, for the Court to require environmental organization plaintiffs to proceed on a case-by-case approach (i.e., by individual permit grants) effectively insulates the agency from defeat because the plaintiff will be hard-pressed to prove that any particular permit was granted in contravention of the FLPMA. It is the cumulative effect of the permit grants that causes the FLPMA and NEPA violations.

In the final analysis, it appears that the majority has latched onto the technicality that BLM actions did not arise from agency-promulgated regulations to defeat the final agency action requirement for judicial review. However, the program clearly constitutes an agency policy from which the terminations/revocations flow. These terminations/revocations then lead to the threatened injury of which NWF complains. Thus, it can be argued that reliance on this technicality is, at least misguided, and perhaps plainly inconsistent with respect to precedent and congressional intent. In one sense, the Court's reasoning is sound because case law has left a loophole into which this technicality fits. It is far less clear that Congress intended this technicality to be exercised, particularly in regard to environmental challenges which represent an area where judicial review has generally been available based on congressional intent to provide the private citizen with a participatory role in agency decision-making and actions.

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\textsuperscript{140} Id.

\textsuperscript{141} Id. \textit{Lujan}, 110 S. Ct. at 5182.
3. Impact

*Lujan v. National Wildlife Federation*\(^{142}\) will affect the ability of and the manner in which environmental organizations proceed with litigation.

The standing requirement as set forth in *Lujan* increases the plaintiff’s burden and sets a restrictive tone with respect to standing in the environmental litigation context. Its impact is already apparent.

In *People for the Ethical Treatment of Animals v. Department of Health and Human Services*,\(^{143}\) animal rights activists brought suit against federal agencies alleging NEPA violations on the basis of failure to prepare environmental impact statements.\(^{144}\) The Ninth Circuit affirmed summary judgment in favor of the agencies on the basis that the plaintiff’s complaint failed to identify specific areas where the organization members’ uses would be adversely affected.\(^{145}\) Relying on *Lujan*, the court stated that “averments which state only that the declarant uses unspecified portions of a large metropolitan area, on some portions of which hazardous substances might be transported or disposed” were insufficient to overcome summary judgment.\(^{146}\) The court was unwilling to presume that the areas which would be affected by the transportation and disposal of hazardous substances were the same areas used by the organization’s members.\(^{147}\)

The district court of Hawaii looked to *Lujan* in the preliminary injunction context in *Greenpeace USA v. Stone*.\(^{148}\) In this case, the plaintiffs moved for a preliminary injunction to enjoin the Army from transporting nerve gas munitions from its storage sites in West Germany to a United States territory located in the Pacific Ocean approximately 800 miles from Hawaii for disposal.\(^{149}\) In its denial of a preliminary injunction, the court stated


\(^{143}\) 917 F.2d 15 (9th Cir. 1990).

\(^{144}\) Id. at 16. Plaintiffs alleged that the federal agencies’ awards of research grants to animal research institutions would result in adverse environmental impacts by way of the transportation and disposal of hazardous or toxic substances incidental to animal research. Id. at 16.

\(^{145}\) The complaint alleged adverse effect on members’ use of the San Francisco Bay area for recreation, aesthetic and health purposes. Id. at 16.

\(^{146}\) Id. at 16.

\(^{147}\) *People for the Ethical Treatment of Animals*, 917 F.2d at 17.


\(^{149}\) Id. at 752. The disposal plan arose out of a 1986 agreement between President Reagan and West Germany to remove these munitions pursuant to a mandate by Congress that all chemical weapons be destroyed. Id.
that *Lujan* imposed more restrictive requirements in establishing standing under NEPA.\(^{150}\) The court noted that *Lujan* was not controlling in the preliminary injunction context as well as the fact that this case was unique in that the challenged federal action spanned the globe.\(^ {151}\) Nevertheless, the court found that the international organization's members' allegations of injury resulting from the transoceanic shipment of chemical weapons were insufficient to establish standing.\(^ {152}\) The court stated that it was impossible to determine whether any of the plaintiff members were in the vicinity which would be affected by the shipment because the route had not yet been fixed. The court stated that "[i]n light of the Supreme Court's recent emphasis on actual injury in *Lujan* . . . there is a serious question as to whether plaintiffs have standing to challenge the transoceanic portion of the defendant operation."\(^ {153}\)

In *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*,\(^ {154}\) environmental organizations brought suit under the Clean Water Act. Plaintiffs alleged violations of a National Pollution Discharge Elimination System permit.\(^ {155}\) The Third Circuit affirmed summary judgment in favor of the plaintiffs after concluding that the plaintiffs had established standing.\(^ {156}\) However, a concurring opinion filed by Circuit Judge Aldisert is significant. In his concurrence, Judge Aldisert expressed concern that the court's decision will not survive Supreme Court review after *Lujan* despite the fact that there was no question that the defendant had flagrantly and continuously violated its permit.\(^ {157}\) Judge Aldisert appealed to the Court to relax standing requirements in regard to environmental cases but

150. Id. at 756.

151. Id.


153. Id. at 757. The court also relied on the Ninth Circuit's requirement of some geographical nexus to the federal action. Id.

154. 913 F.2d 64 (3d Cir. 1990) [hereinafter PIRG].

155. Id. at 69. Section 301(a) of the Clean Water Act requires that all persons who discharge pollutants into navigable waters obtain a National Pollutant Discharge Elimination System (NPDES) permit which sets the levels at which pollutants may be lawfully discharged. 33 U.S.C. § 1311(a).

156. PIRG, 913 F.2d at 70-73. Plaintiff asserted generally in its complaint that its members resided in the vicinity of or owned property on or near the body of water into which the defendant was unlawfully discharging pollutants. Id. at 71. In supporting affidavits, affiants stated that they used the shores of the body of water for various recreational purposes and that they would use the water itself for recreational purposes if it were cleaner. Id.

157. Id. at 84-85.
sensed that *Lujan* indicates that the Court has moved in a different direction.\(^{158}\) He characterized the case as sending a "strong signal" that the Court may be unwilling to relax standing requirements in environmental cases.\(^{159}\) The Court’s refusal to accept general averments of injury led Judge Aldisert to question whether these environmental plaintiffs alleged injury sufficient to establish standing under *Lujan*.\(^{160}\) Judge Aldisert cautiously joined the majority with "qualms that are soothed somewhat by the notion that the evolving precepts of standing are perhaps expanded a bit when at stake are the great public policy considerations of insults to our environment."\(^{161}\)

These recent cases reveal that *Lujan* is already having an impact on the conferral of standing by the lower courts in environmental cases. It should be noted that to some extent, this obstacle is surmountable. In the future, an organization must simply assert use by its members of specific lands or waters subject to the agency action at issue. In those instances, where the organization can locate individuals who can aver such use of specific sites, the *Lujan* standing obstacle will be overcome. However, where no such individuals can be found or where the nature of the environmental injury resulting from the agency action is widespread or diffuse, *Lujan* will present an insurmountable obstacle and preclude challenge.

Similarly, the Court's ruling on final agency action is significant. In *Lujan*, the Court has rendered any action which does not directly arise from an agency-promulgated regulation nonreviewable, thus creating a loophole through which agencies can successfully avoid judicial review. After *Lujan*, by taking action pursuant to a program rather than a regulation, an agency can escape judicial review of its decision-making policies and actions.

In a recent decision, *Sierra Club v. Yeutter*,\(^{162}\) the United States Court of Appeals for the Tenth Circuit dismissed and vacated a judgment from the United States District Court for the District of Colorado.\(^{163}\) The environmental organization plaintiff alleged that the Secretary of Agriculture violated his statutory duties under the Wilderness Act by failing to claim federally reserved

\(^{158}\) Id. at 84.

\(^{159}\) Id.

\(^{160}\) PIRG, 913 F.2d at 84-85.

\(^{161}\) Id. at 89.

\(^{162}\) 911 F.2d 1405 (10th Cir. 1990).

\(^{163}\) Id. at 1407-08.
water rights in certain Colorado wilderness areas.\textsuperscript{164} The court of appeals relied on \textit{Lujan} as supporting authority.\textsuperscript{165} The court found the cases similar because both involved "challenges to the cumulative effect of numerous agency actions . . . [and] conjectural or speculative harms . . . ."\textsuperscript{166} Under \textit{Lujan}, the court held that the failure to reserve water rights did not constitute final agency action which was ripe for review.\textsuperscript{167} Based on this finding, the court dismissed the appeal, vacated the judgment and remanded with directions to dismiss the complaint on the ground that it was not ripe.\textsuperscript{168} Thus, it is apparent that \textit{Lujan} has had and will continue to have a restrictive impact on environmental litigation. It should be noted that this technicality will not necessarily totally insulate an agency from review. But it will certainly limit review; a program as a whole is unchallengeable. This case-by-case approach may prove to be prohibitively expensive to environmental organizations and interested private citizens. As noted above, a case-by-case approach may preclude success where it is the cumulative effect of a policy, e.g., many terminations/revocations, which renders the policy statutorily invalid. Finally, such an approach is ineffective in the accomplishment of the across-the-board environmental objectives that are characteristic of environmental organizations.

\section*{IV. CONCLUSION}

After \textit{Lujan}, to establish standing, environmental organizations must allege injury by asserting use of specific lands. Additionally, agency policy that is not carried out pursuant to agency-promulgated regulations is insulated from judicial review except to the extent that it can be reached in regard to a specific concrete action arising from an agency-promulgated regulation on a case-by-case approach. In \textit{Lujan}, the Court has sent a message which deviates from precedent and may not be consistent with congressional intent with regard to APA reviewability of administrative agency actions in the area of environmental legislation.

\textit{Lynn Robinson O'Donnell}

\begin{itemize}
\item \textsuperscript{164} Id. at 1408. Plaintiff claimed that the omissions violated 16 U.S.C. § 526 (1988). \textit{Id}.
\item \textsuperscript{165} Id. at 1420-21.
\item \textsuperscript{166} Yeutter, 911 F.2d at 1421.
\item \textsuperscript{167} Id.
\item \textsuperscript{168} Id.
\end{itemize}