IUCN Environmental Law Paper No. 2

STANDING TO SUE IN ENVIRONMENTAL LITIGATION IN THE UNITED STATES OF AMERICA

DAVID D. GREGORY

International Union
for Conservation of Nature and Natural Resources,
1110 Morges, Switzerland
1972

IUCN ENVIRONMENTAL LAW PAPER No. 2

STANDING TO SUE IN ENVIRONMENTAL LITIGATION IN THE UNITED STATES OF AMERICA

DAVID D. GREGORY

INTERNATIONAL UNION
FOR CONSERVATION OF NATURE AND NATURAL RESOURCES
1110 MORGES, SWITZERLAND
1972

CONTENTS

FOREWORD

As part of its general concern with maintaining environmental quality, IUCN has established in Bonn an Environmental Law Centre. Over a period of years, the Centre has gathered legislative and regulatory texts relating to the environment and this documentation is now probably the largest collection of its kind existing anywhere.

The staff of the Centre is analyzing the material in its possession for a variety of purposes, and legally-trained personnel from various jurisdictions have been invited to participate in this programme. The present series of reports has been instituted as a medium for publication of the results of such analytical work and related studies in environmental law.

The initial paper in the series will be concerned with new concepts and procedures that might have application in jurisdictions other than those in which they originated. It is hoped that these studies may stimulate action to adapt the new ideas for use in other legal regimes.

A discussion of German law on standing to sue forms the subject of IUCN Environmental Law Paper No. 3, and has been written by Eckard Rehbinder.

The project concerned with the preparation of this present paper has been funded by the World Wildlife Fund German Appeal.

THE AUTHOR

David D. Gregory received a B.A. in 1964 from Duke University and attended Princeton Theological Seminary for one year thereafter. In 1968, Mr. Gregory received an LL.B. from the University of Maine Law School, where he was a research assistant to Professor O.E. Delogu, as well as being the Editor-in-Chief of the Maine Law Review. In these capacities Mr. Gregory had the opportunity to write and coauthor numerous articles for publication, including several on land-use controls. In 1968, David Gregory joined the Civil Rights Division of the United States Department of Justice, where he was appointed Director of the Office of Planning and Special Appeals in 1970. Mr. Gregory is presently working on an LL.M. degree at the Harvard University Law School.

IUCN PREFACE

In the past decade, since the acute strain which mankind has placed on the environment has been appreciated by a growing number of people in various countries, concerned individuals and groups have attempted to point out what they considered to be oversights or, in some instances, the short-sightedness, of policies, plans and official action. When these individuals chose to invoke the legal forum as one of the avenues proper in this struggle, they were confronted with many problems. The legal system itself, with its requirements and limitations of the substantive law, proved the source of many of the difficulties these people and groups faced. The requirements for, and chances of, success in bringing legal proceedings against environmental abuses varies from country to country, and from jurisdiction to jurisdiction within the countries. In every jurisdiction ,however, one of the fundamental hurdles faced by anyone seeking legal redress which can be discerned is the necessity to get into the court room. One cannot invoke the power and prestige of the juridical forum merely because one feels aggrieved. Before a court will even consider whether the merits of the complaint justify a decision favourable to the person initiating the action, that person must demonstrate that there is a sufficient relationship between himself and the activity he seeks to condemn.

In Anglo-Saxon law, as well as other legal systems, this relationship has, over the centuries, evolved around concepts of damage - damage to one's property, to one's reputation, to one's freedom, and, of course, to one's pocket book. Those persons and organizations now spearheading the legal attack against environmentally ill-considered decisions of Government, or unjustifiable activities of industry, are placed in the awkward position of having to fit their complaint into one of the traditional, acceptable moulds. Their arguments for recognition as parties which correctly exhibit this requisite relationship on more novel grounds, and their successes and failures have prompted new concern and new examination of the concept of standing to sue; new trends have appeared, especially in the USA.

As the airing of today's environmental issues depends frequently on the initiative of individuals and organizations not traditionally recognized by the court as proper parties to bring the complaint, IUCN feels that an examination of this more basic issue properly precedes examination and analysis of the substantive law. Since all legal regimes demand a relationship between the complainor and his complaint, an analysis of this relationship, this capacity

to sue, as it exists in major legal regimes, is most instructive. By examining this area of law in its natural setting, the difficulties, arguments and policies surrounding this concept can be exposed to aid the reader in understanding the problems of other jurisdictions, and perhaps suggesting ideas which can be adapted to fit the requirements of his own legal regime.

This project is a continuing one. The first legal regime examined is that as it exists in the USA. The reason for this choice is that the evolution of US law of standing in relation to environmental problems is in rapid flux, and that the new trends in the USA are the most far-sighted ones presently appearing and, therefore, can be looked at as an example of what can be achieved elsewhere.

We do not pretend that the evolution of one legal regime can be transferred to another. We think, however, that the major policy issues at stake - independent of the legal technicalities involved - are of interest to any country's legal system, and of international significance because the same conflict will be present in nearly all nations considering to allow environmental litigation on a broader scale.

Therefore, the study of the standing to sue in environmental litigation in the USA focuses, as the author remarked, "on that aspect of standing which is not merely a product of one legal system". It is not a legal brief written for lawyers in which the intricacies of the evolution of standing is traced. The author has rightly chosen to develop the conflict in claims between the government and public-interest organizations.

Studies on this issue will continue and further publications will present other positions on this matter. We hope, finally, to have encouraged the reader to examine productively his own system in the light of the others.

IUCN, December 1971.

CHAPTER 1

INTRODUCTION

Perhaps more than in any other nation, environmental organizations in the United States are seeking to increase the effectiveness of their role in environment defence by taking their arguments to court. It should go without saying that success will never depend upon the strength of conviction in the rightness of the claim. A necessary, albeit still insufficient, ingredient is "craftsmanlike lawyering . . . to go with our enthusiasm for the 'good cause'",[1] one aspect of which is close attentiveness to technical legal rules and the policies they represent. While those rules may bear no special relationship to the protection of the environment, significant environmental consequences may turn upon the way they are implemented in any given case. One of the many such areas of the law will be discussed in this paper, the requirement known as standing to sue. Oversimply, it means that, in order to consider the merits of a plaintiff's claim, a court must be satisfied that he is a proper party to assert that claim.[2] The contours of this narrow standing requirement were crucial, as we shall see, in the courts' disposition of such matters as the potential environmental impact of a multi-million dollar recreational development on government-owned wildland, the potential impact of a filling operation on the ecology of a bay and its marshland, and the potential environmental consequences of constructing a hydro-electric facility on a major waterway.

It is appropriate to discuss standing to sue in the American federal court system for the simple reason that that is where the issues are being explored and the developments taking place.[3] But this focus calls also for a warning. The American federal law of standing may be unique in its confused, haphazard complexity; and we are far from suggesting that it be adopted by other nations having a system of judicial review. Indeed, it is impossible to state exactly what that law is, for the Supreme Court has rendered no definitive decision on the extent to which public-interest organizations have standing to initiate environmental litigation.[4] Developments in the federal standing law do, nevertheless, suggest the possibility of expanding in a constructive way the roles of citizens and courts in promoting attention to environmental values; and, because that law is being increasingly developed in an environmental context, it provides a useful means for isolating some issues relevant to environment protection which will be at stake when other legal systems set about, in a similar context, to answer the technical question: Who has standing to sue?

For the most part, the burden of those who would systematize or simplify the American federal law of standing has been to refine or discard altogether the traditional rule that standing depends upon a party's demonstrating an infringement of his legal interests, implying the need to show not only injury but also violation of a legal right.[5] An alternative most frequently urged is to accord standing to any person who has in fact sustained an injury. Such a rule would not, of course, ensure entitlement to a remedy. An injured party would simply be afforded an opportunity to demonstrate upon trial that his injury had been wrongfully inflicted and ought to be remedied, and a court would be invited to approach those questions more compendiously than might seem possible under a threshold standing rubric. To a lesser extent, attention has been directed to the kind of injury necessary to sustain standing. An economic harm, while not invariably regarded as a sine qua non of standing, has been traditionally favoured by the courts.[6] In 1970 the Supreme Court of the United States addressed itself to some of these questions in Association of Data Processing Services v. Camp, saying

> The first question [in determining standing to sue] is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise . . .
>
> The "legal interest" test goes to the merits. The question of standing is different. It concerns . . . the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question . . . That interest, at times, may reflect "aesthetic, conservational, and recreational" as well as economic values.[7]

We have here an indication by the Supreme Court of a shift away from a merits-centred, legal interest standard toward a more inclusive standard of injury in fact (although the "zone of interests" prong will inevitably require attention to the merits of an action). Under the American system of precedent, the Data Processing decision can be expected to provide a major portion of the legal context within which the Court will consider the standing of environment-protection organizations. But, as we shall see, that question is substantially more complicated than those decided in Data Processing. For the narrowest issue raised by organizations' initiating public-interest litigation relates not so much to subduing the legal interest standard as to the meaning of injury in fact, even assuming, as the Supreme Court's dicta suggest, that an injury need not be economic in character. More importantly, it should become apparent that content is

unlikely to be given to the concept of injury by some form of ordinary-language analysis of the word but will instead represent a judgment on a broader and more basic issue of policy.

The particular elements of standing to sue in any legal system simply constitute the context in which the policy issues must be resolved. Our thesis is that the question of standing of environment-protection and similar organizations presents a fundamental conflict in claims to public representation. Traditional democratic theory teaches that government is the appropriate authority to make such value judgments as may be necessary or desirable concerning public needs and public good; and while theories may differ as to the source of that authority, it may well constitute a necessary working principle for any modern state. Environmental lawsuits now being litigated in the United States, on the other hand, are typically initiated against government agencies by environment-protection organizations whose asserted standing rests squarely upon their own claims as appropriate representatives of the public interest. In the discussion of standing to sue which follows we shall consider how the American federal courts have dealt with this competition between organized groups of private citizens and their government. The particular outcome in the United States is, at this moment, still in doubt; and we shall explicate both the decisions suggesting that the conflicts is irreconcilable and the decisions which have sought ways of accommodating the competing claims. By focusing on that aspect of standing which is not merely a product of one legal system, IUCN hopes to facilitate consideration by other nations of the possibility of enabling public interest litigation in environmental matters.

CHAPTER 2

We turn first to the two most important decisions which have denied standing to environment-protection organizations: Sierra Club v. Hickel[8] and Alameda Conservation Association v. California,[9] both decided by the United States Court of Appeals for the Ninth Circuit. The underlying controversies, while probably not strictly limiting the court's holdings, illustrate the kind of environmental values that may hang in the balance of a technical standing to sue controversy.

Sierra Club v. Hickel involved a proposed development of Mineral King Valley, a government-owned national forest and game refuge (administered by the United States Department of Agriculture) adjoining Sequoia National Park (administered by the Department of Interior). In 1965 the US Department of Agriculture invited private developers to submit proposals for constructing a recreational area in the valley. Having considered several submissions, the Department gave preliminary approval to a plan of some magnitude submitted by Walt Disney Productions.

> Disney's proposal includes a village incorporating major hotels and lodges for over 3,000 overnight guests, ten restaurants, a chapel, theater, general store, five story parking facility, hospital and sewage treatment facilities. Other facilities would include power plants, and associated installations, swimming and ice skating facilities, twenty ski lifts, a cog assisted railroad, avalanche dams and stream control features, and a development scheme which would require "extensive bulldozing and blasting in most lower areas and extensive rock removal at high elevations" and the "grooming and manicuring" of most slopes.[10]

As an adjunct to this development, a two- and three-lane access highway would be constructed and power lines would be installed, both of which would traverse the adjacent national park.

The Sierra Club, a non-profit conservation organization, filed suit against the Departments of Agriculture and Interior, requesting preliminary and permanent injunctions enjoining the agencies from "taking any action whatsoever toward the implementation of said Development Plan . . . or any other development of like or similar nature thereto."[11] The complaint alleged that the development would be detrimental to the natural qualities of the forest and park

and that the action of the various agencies had been both inconsistent with procedural regulations and beyond their authority. Holding that the complaint raised substantial and serious questions, the trial court granted a preliminary injunction, which would prevent the development from proceeding until a full trial on the merits could be held. The government appealed without awaiting trial on the merits, contending among other things that the Sierra Club had no standing to sue.

In the second case, Alameda Conservation Association v. California, the controversy concerned the filling and industrial development of submerged lands and wetlands on San Francisco Bay. The Alameda Conservation Association, joined by some of its members who owned and resided on property adjoining or nearby the bay and its lagoons, sued to enjoin the filling operations.

> The Association and the individual plaintiffs allege that, by reason of the Company's activity in filling in the Bay, the waters of the Bay are being polluted; the quantity of shellfish, finfish, waterfowl and other wildlife is being substantially reduced; the value of the Bay as a facility for the production of salt is being diminished; the Bay is becoming less desirable and less suited for pleasure-boating and other recreations; by reason of the reduction in navigable waters and the construction of dikes and other obstacles, the Bay is becoming less useful for the purposes of commercial transportation; and the climate in the adjacent area is being adversely affected by the substantial reduction in the water-surface area in the Bay.[12]

A. Injury in Fact. In both Sierra Club and Alameda the Ninth Circuit held that the environmental organizations had no standing to sue. Stated in the narrowest terms, the holding of the court in both cases was that the organizations had no standing to sue because they had sustained no injury in fact. Acknowledging the claims that the Sierra Club had "for many years taken a special interest in the conservation and sound maintenance of the national parks and forests and particularly lands on the slopes of the Sierra Nevada mountains,"[13] and that the Alameda Conservation Association had "as one of its purposes the protection of the public interest in the waters of the San Francisco Bay,"[14] the court was principally occupied with the questions: In what manner can corporations be said to have been injured? and can acts inconsistent with an organizations's special environmental concerns constitute injury in fact to that organization? As to the first question the court said in Sierra Club:

> The complainant [Sierra Club] does not assert that any of its property will be damaged, that its organization or members will be endangered or that its status will be threatened.[15]

And as to the second question:

> Certainly [the Sierra Club] has an "interest in the sense that the proposed course of action indicated by the [government] does not please its officers and board of directors and through them all or a substantial number of its members. It would prefer some other type of action or none at all . . .
>
> We do not believe such club concern without a showing of more direct interest can constitute standing in the legal sense . . .[16]

This search for a traditional, tangible injury to an organization's status or property also formed the court's narrowest holding in Alameda:

> The Association does not assert that any of its rights or properties are being infringed or threatened . . .
>
> . . . The corporation does not allege that it owns land bordering or near the bay at all. It does not assert that it has any property interests of any kind real or personal which would sustain "injury in fact", economic or otherwise, as a result of any of the defendants' activities . . .
>
> . . . If the Association here had a recreational operation which it conducted and which the defendants interfered with, it could assert it; if its physical surroundings were made unattractive, this aesthetic infringement would create standing; or if it operated a conservation program, an interference with that operation would establish standing.[17]

In short, the conservation association was held to lack standing because "[i]t is simply not hurt in any practical way which entitles it to call upon the courts for redress or protection."[18]

Requiring injury in fact as a prerequisite to standing can have several possible functions. It could serve as a means of cutting off litigation based upon speculative harms or effects so far from being generally viewed as injuries at all that it would be improper for a court to depart from the

general understanding by recognizing them. ("[A]esthetic, conservational, and recreational" values in 19th century America are arguably examples.) But this function will not ordinarily be pertinent to environment-protection litigation today, just as it could not be pertinent to Sierra Club and Alameda. The plaintiffs there clearly alleged provable, recognized injury and, especially in Sierra Club, injury of no mean proportion.

The emphasis in the Ninth Circuit's holding is not so much on injury per se as on the uniqueness of the injury. This additional element could serve to distinguish a proper plaintiff from a larger class of potential litigants on the theory that one who is uniquely injured is most likely to present the best challenge to the injury-producing activity. Such a limitation could promote adversity between the parties as a necessary condition to the proper functioning of the adjudicative process[19] and, in systems having doctrines analagous to stare decisis and res judicata, promote fairness among the members of the injured class. But, again, this function is not pertinent to the kind of litigation contemplated by environmental organizations. Organizations which have demonstrated an interest in environment protection may well be the best litigants, and the arguments to that effect are well known. They may have resources unavailable to individuals to support rigorous litigation; they may be more likely to undertake litigation discounting the promise of no financial return or even recoupment of expenses.

More importantly, there may, by definition, be no undifferentiated harm and thus no other available plaintiff. Who uniquely suffers from destruction of a breeding-ground for waterfowl? from an eagle's being poisoned with pesticides? or from otherwise harming an endangered species? The Sierra Club decision itself indicates that there will be circumstances in which no conventional, differentiated harm can be discerned although the complaint alleges derogation of widely accepted environmental values. What would be the effect of pouring more than thirty-five million dollars into Mineral King Valley for recreational development? An affidavit filed in support of the Sierra Club's complaint alleged that

> the owners of 160 acres of land in the Silver City area within three miles of the area of Developer's proposed project are planning a residential-commercial development which will include condominium apartments and a motel lodge with a capacity of 1,000 persons overnight, a shopping center and a service station. On May 1, 1969, the "Visalia Times-Delta" reported that this project, under consideration by Tulare County, will cost 20 million dollars.[20]

Whether a property owner who stood to gain so much would have standing to enjoin the development is problematical; somewhat more certain is the irresistability of the temptation to profit. That seeking a proper plaintiff was not the function of the Ninth Circuit's unique injury standard accounts for the court's disregarding the argument that a specialized, public-interest organization might be the only party which could reasonably be expected to litigate the legality of official decisions in derogation of nature. "The right to sue," the court said, "does not inure to one who does not possess it, simply because there is no one else willing and able to assert it."[21]

A unique injury standard tells us something quite different in the context of so-called public-interest litigation,for it is no more than another way of saying that the plaintiff seeks to represent the public interest. The kind of injury asserted as a basis for various litigation can often be seen, it is true, as a subordination of one positive value to another; but this characteristic is of the essence of environmental litigation. It is easy for us to view a judgment between competing values in traditional injury terms when, in the absence of some remedy, it would foist the cost of promoting one good (industrial development, for example) on to a small class representing the other. Environmental litigation is different; we see both the costs and benefits as accruing to society. The environmental plaintiff seeks, not fair compensation, but a reversal of priorities. Unlike a landowner whose ability to enjoy his property is diminished by nearby industrial development, an environment-protection plaintiff presents his case as a competition between two values, not as a matter of cost distribution (in Sierra Club, recreation versus conservation). On this level the need for an authoritative decision-maker, a final source of judgment between competing values, is acute. The simple truth is: Someone must decide. This is the nexus between the Ninth Circuit's narrow holding on injury and what we have called the underlying issue of policy.

B. Public Representation. If the only issue presented had been whether the Sierra Club and Alameda Conservation Association had sustained unique injuries, the Court of Appeals need have said no more than that they had not. The court's additional observations in Sierra Club indicate a more fundamental rationale for the decision. First, having characterized the Sierra Club's asserted concern on behalf of the public in preserving the national forest as a mere disagreement with the government, the court said, "On the other hand, the United States Ski Association, the Far West Ski Association, claiming 109,000 supporters [several thousand more than the Sierra Club membership], and the County of Tulare in which the development will be located, favor the action."[22] This statement relates less to injury than to

the organization's claim that it represented the public interest. If the views of various segments of the public differ as to a particular matter, who can be said to be the proper public representative? The court made its answer plain in its second observation. The court emphasized that the government agencies whose decisions were at issue were properly authorized to make decisions for the conservation of nature, and the Sierra Club was asserting that the agencies had acted wrongfully in discharging their duty to decide. "[The agencies] are charged by Congress pursuant to a constitutional mandate with direct responsibility for the protection and conservation of the national parks and forests."[23] The Sierra Club's special interest in conservation, even though particularly focused on the Sierra Nevada mountains, was said to be an insufficient basis "to challenge the exercise of responsibilities on behalf of all the citizens by two cabinet level officials of the government acting under Congressional and Constitutional authority."[24]

From these observations, it seems fair to say that, while the court's narrow holding in Sierra Club was on the absence of unique injury, that holding was founded upon policy considerations concerning public representation. The content of those considerations was succinctly stated by the court in Alameda.

> Standing is not established by suit initiated by this association simply because it has as one of its purposes the protection of the "public interest" in the waters of San Francisco Bay. However well-intentioned the members may be, they may not by uniting create for themselves a super-administrative agency or a parens patriae official status with the capability of over-seeing and of challenging the action of the appointed and elected officials of the state government . . .
>
> Were it otherwise the various clubs, political, economic and social now or yet to be organized, could wreak havoc with the administration of government, both federal and state.[25]

Let there be no doubt that the problem identified by the Ninth Circuit Court in these remarks is a substantial and basic one. As in the Sierra Club case, many specialized organizations can be expected to take varying positions on questions committed to government decision; and a function of government is to be a definitive decision-maker exercising its responsibility on behalf of all citizens. Viewed in this way, the Ninth Circuit's opting in favour of the government's claim as representative of the public interest is a wise, if not inevitable, result. The counsel of the court can be summarized in this manner: Neither organizations, on account of any specialized, public-spirited concerns, nor

courts may pre-empt the government's authority to determine the public's interest in resolving conflicts among competing values.

Standing was denied to public-interest organizations in order to preserve the integrity of the government's role as public representative; but does it follow that to grant standing would derogate from that authority? It may be fruitful to consider what we mean when we say that government agencies are the appropriate representatives of the public-interest.

CHAPTER 3

The principal characteristics of public representation as that idea appears in the Sierra Club and Alameda decisions can be stated in such terms as finality, conclusiveness, authoritativeness, and singularity. It expresses the appropriateness of regarding the government decision as determinative of what best serves the public need when a value judgment among competing interests is required. The difficulty with a formulation on these terms is that it only points to the decision-making authority. It says little about how that authority is to be exercised in accordance with law.[26] Other federal court decisions have discerned in the idea of government as public representative not only a sign toward authority but also a source of obligation. Their analysis asks first whether the government's role as representative of the public interest implies a duty and then proceeds to enquire whether performance of that duty could be facilitated by allowing the participation of specialized, public-interest organizations. Thus, commencing with the Sierra Club - Alameda premise that the government is the proper authority to decide what the public interest requires, other courts have been led to an opposite result on the question of standing to sue.

The most important duty may be the duty to make informed decisions; and closely connected with this is the duty to allow public participation in the decision-making process. The most obvious duty is to exercise that decision-making authority in accordance with procedural limitations. In the following discussion we shall see how these duties are related to standing.

A. The Duty to Make Informed Decisions. One reason for preferring the government as ultimate decision-maker is that, unlike special-interest groups (including environment-protection organizations), government is not committed to a single-value system. Public representation implies that all relevant, substantial interests will receive due consideration even when a judgment is required in which some interests must necessarily be subordinated to others. While informed decision-making could be postulated as a universal need, the need to formalize it into an enforceable obligation is especially acute as government increases in complexity. Firstly, official authority to decide will have to be delegated by political representatives of the public to other agencies once removed from the political process; secondly, authority among those agencies will have to be divided and subdivided in order to make it manageable. A result of delegation, division, and subdivision of authority can be a tendency to create a complex of new single-value agencies, no longer designed by nature to bring all

relevant interests to bear upon any pending question. These simple considerations can be illustrated by the most important decision granting standing to public-interest organizations: Scenic Hudson Preservation Conference v. FPC,[27] decided by the United States Court of Appeals for the Second Circuit. The case involves a conflict between electrical power and conservation, a conflict committed for resolution to the Federal Power Commission.

It scarcely requires reflection to imagine that the quantity of electrical power needed to service a city the size of New York is enormous. By 1965 the available supply under prevailing methods of distribution had twice proven to be inadequate, resulting in massive New York City black-outs. To remedy this need, the power company serving the city proposed to construct a plant capable of supplementing the city's supply during peak-use periods. The project "would be the largest of its kind in the world," costing an estimated one hundred and sixty-two million dollars.[28] The proposal contemplated that a "powerhouse would draw approximately 1,080,000 cubic feet of water per minute" from the Hudson River, transferring it to a reservoir atop Storm King Mountain.[29] "In peak periods water would be released to rush down the mountain and power the generators," discharging "up to 1,620,000 cubic feet of water per minute into the River."[30]

The authority to license such projects in the United States is vested in a federal regulatory agency, the Federal Power Commission. Its licensing decisions are governed by a congressional statute providing that "[a]ll licenses . . . shall be on the following conditions":

> That the project adopted . . . shall be such as in the judgment of the commission will, be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes . . .[31]

The FPC concluded public hearings on the Hudson River project in November 1969 and took the matter under advisement. Two months later a consumers' group sought leave to intervene before the Commission in order to present expert evidence on the feasibility of an alternative proposal; this request was denied as untimely. Meanwhile, a state legislative committee on natural resources issued a report (in no way binding on the FPC) recommending further study of the proposed project. Alerted by the report of possible harm to the river's fish, Hudson River fishermen sought to intervene

to offer evidence of that potential danger; their request was likewise denied as untimely. The license was issued in March 1965, and supplementary hearings were scheduled for May 1965 to consider various fish-protection devices.

Two months later the Commission denied requests from an unincorporated association of conservation organizations and two towns located in the vicinity of the project, asking for reconsideration of the licensing order, reopening of the proceeding to receive additional evidence, and expansion of the supplementary hearings. The conservation association and the towns petitioned a court of appeals to review the Commission's orders and set aside the license.[32] The FPC contended that it was the proper representative of the public interest and argued, accordingly, that the conservation association had no standing to sue.

While the question of the conservation association's standing to obtain judicial review is, in one sense, a logically prior question, the court commenced with the question of duty, elaborating its concept of duty throughout its discussion of other issues. The court focused on the statutory phrases "comprehensive plan" and "recreational purposes," which appear to have been intended to authorize the FPC to undertake certain planning functions with respect to the use of waterways and to consider, among other things, possible recreational uses.[33] From this language, the court fashioned a duty to make informed decisions, to consider in a licensing proceeding "[t]he totality of a project's immediate and long-range effects, and not merely the engineering and navigation aspects"[34] in light of "all feasible alternatives."[35] "The Commission has an affirmative duty to inquire into and consider all relevant facts,"[36] specifically, recreational purposes which encompass "the conservation of natural resources, the maintenance of natural beauty, and the preservation of historic sites."[37]

The court's reasoning from power to duty is an interesting aspect of its opinion,[38] but more pertinent to our own inquiry is the manner in which the court concluded from its holding on duty that the conservation organizations had standing. The court said:

> In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.[39]

Public representation means more than mere authority. But how can government agencies discover the relevant interests? That the political process is an inadequate mechanism is suggested by the delegation of decision-making authority to the agency in the first place. One avenue is to require an agency to receive information profferred to it by responsible spokesmen; and, indeed, it is difficult to reconcile the obligation to consider competing interests with a notion of unlimited discretion to ignore available information. The breach of the Commission's duty in Scenic Hudson consisted precisely in its failure to consider the kind of information which the conservation organizations had sought to present.[40] If the Commission's duty includes the obligation to seek out and consider the environmental side-effects of proposed projects in light of the alternatives available, the standing of conservation organizations follows:

> In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development [i.e., in order to insure that it fulfills its duty], those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of "aggrieved" parties . . .[41]

The function of standing in the context of this duty is to facilitate the agency's performing its duty efficiently. Organizational representation in particular is administratively desirable because "[r]epresentation of common interests by an organization such as Scenic Hudson serves to limit the number of those who might otherwise apply for intervention and serves to expedite the administrative process."[42]

B. The Duty to Allow Public Participation. In Scenic Hudson the duty to hear the views and receive the information of specialized, public-interest organizations is inseparable from the greater duty to consider the potential environmental impact of agency action. The court in Scenic Hudson held that organizations having a demonstrated interest in preventing potential environmental harm and protecting its locus must be permitted to present evidence of adverse environmental consequences of proposed agency action. In other cases local public hearings, designed to enable receipt of information from persons most directly affected by proposed action, have been suggested as one means of discharging the duty to make informed decisions.[43] Public participation in agency proceedings can also be formulated as a separate duty, that is, a duty virtually coextensive with standing.

No clearer delegation of authority to represent the public interest could be found than in the enabling legislation for the Federal Communications Commission, which licenses broadcasting stations. As to license applications, the Commission is directed to "determine . . . whether the public interest, convenience, and necessity will be served by the granting of such application" and, if so, to issue a license. Office of Communication of United Church of Christ v. FCC[44] involved a proceeding before the Commission to consider renewal of a radio broadcasting license. Civil rights leaders and religious groups petitioned to intervene for the purpose of representing the public interest by presenting information of the radio station's racially discriminatory conduct in broadcasting. The FCC denied the petition on the ground that petitioners had sustained no significant injury which would differentiate them from the public generally. A license was issued, and the petitioners applied to the court to have the license set aside.

The arguments on review were directed to the issue of public representation, with the Commission arguing that its own authority to determine the public interest precluded granting standing to private representatives of the public interest. The decision was based on the view that the claims to public representation were not mutually exclusive. Public-interest organizations can serve to facilitate an agency's exercising its public-representation authority.

> Nor does the fact that the Commission itself is directed by Congress to protect the public interest constitute adequate reason to preclude the listening public from assisting in that task. The Commission of course represents and indeed is the prime arbiter of the public interest, but its duties and jurisdiction are vast, and it acknowledges that it cannot begin to monitor or oversee the performance of everyone of thousands of licenses.[45]

The court singled out organizations as particularly suited for assisting the government.

> The responsible and representative groups eligible to intervene cannot here be enumerated or categorized specifically; such community organizations as civic associations, professional societies, unions, churches, and educational institutions or associations might be helpful to the Commission. These groups are found in every community; they usually concern themselves with a wide range

> of community problems and tend to be representatives of broad as distinguished from narrow interests, public as distinguished from private or commercial interests.[46]

C. The Duty of Procedural Regularity. Finally, numerous statutes and regulations ordinarily govern the action of government agencies. The existence of statutory limitations suggests an element of public representation in addition to authoritativeness, namely, a duty of procedural regularity. This duty is also pertinent to the question of standing to sue. If an agency action is alleged to be unlawful in the sense that it is contrary to governing statutes and regulations, it seems anomalous to hold that a public-interest organization lacks standing on the ground that the agency is the final arbiter of the public interest.

An illustrative case is Citizens Committee for the Hudson Valley v. Volpe.[47] There the Corps of Army Engineers approved a state proposal to fill parts of the Hudson River for the purpose of constructing a six-lane highway. "The New York Department of Transportation proposes placing some 9,500,000 cubic yards of fill, bound by a rock wall, along a portion of the river's bank. The landfill would extend, at its widest point, approximately 1.300 feet (nearly a quarter of a mile) into the Hudson."[48] An action to enjoin construction was brought under the Administrative Procedure Act by an unincorporated association of local citizens, the Sierra Club, and a village through which the highway would pass. Federal statutes provide that

> construction of a bridge over or in navigable waterways now requires approval of the Corps of Engineers acting under the Secretary of the Army and the Secretary of Transportation; the construction of a dike requires the consent of Congress and the Corps of Engineers when authorized by the Secretary of the Army; the construction of a causeway requires the consent of Congress and the approval of the Secretary of Transportation.[49]

The substantive issue presented was whether this statute applied to fill proposals; for, if not, the Corps of Engineers would have exceeded its authority by having unilaterally approved the plan. In such circumstances, it seems appropriate to allow, as the court did, a public-interest action to test the procedural regularity of the government decision.

Sierra Club v. Hickel had some attributes of this kind of case. A congressional statute provided that permits for hotels and recreational facilities in national forests may be granted for no more than 80 acres and for no longer than

30 years. In Sierra Club over 1,000 acres would be used for development. The Department of Agriculture contemplated granting a so-called revocable permit to authorize use of the excess acreage. The Sierra Club plaintiffs argued that revocable permits, insofar as they were authorized at all, could authorize only short-term uses which could be ceased at will, not to allow permanent structures involving a great expenditure of money and incapable of being easily dismantled. Where, as here, the substantive question presented is whether an agency has obeyed the law, it may be difficult to be persuaded by the Ninth Circuit's fear of public-interest organizations' wreaking havoc with government agencies.

In Scenic Hudson, Church of Christ, and Hudson Valley we can observe the courts' attempting to meet the challenge of the ideas articulated in Sierra Club and Alameda in which the Ninth Circuit rejected the earlier precedent. To be sure, the effective ability of public-interest organizations to keep government decision-making within proper bounds is a major item at stake in the current controversy over whether they should be accorded standing. But the reality of government decision-making may be brought closer to democratic theory by allowing them to do so.

What can be concluded from the way in which the courts treated the standing issue in the foregoing cases? Firstly, it seems apparent that the traditional concept of injury bears little relevance to the more fundamental goal of facilitating the government's ability to perform its function as final representative of the public interest. In the last analysis, the question of standing depends on a pragmatic answer to whether public-interest organizations promise to help or hinder the decision-making process. The Ninth Circuit in Sierra Club expressed grave doubt about the propriety of permitting private organizations having specialized interest to interfere with the deliberations and decisions of government agencies properly authorized by law to exercise their own judgment on public needs and public good. The courts in Scenic Hudson, Citizens Committee for the Hudson Valley, and Church of Christ, on the other hand, expressed a different view. None disputed the authority and, indeed, the obligation of government agencies to act as the representative of the public interest. Yet on the facts of those cases, it appeared reasonable to conclude that specialized, public-interest organizations of private citizens could assist the agencies in performing that function well. Accordingly, standing was granted to those who by their activities and interests had demonstrated that they could provide such assistance.

Secondly, in each case the organizational litigants were joined by individuals, some of whom could be said to be more directly and traditionally injured than the organizations.

Whereas under the Ninth Circuit's rule, such an individual would alone be entitled to challenge agency action, the other courts singled out the organizations' standing for particular emphasis. This reflects a practical awareness of the need for organizational representatives and the superior ability of nonprofit organizations to assist those agencies charged with the ultimate responsibility to protect the public interest. "Interest groups are, in today's complex society, an indispensable part of an effective channel of communication between government and the persons whose conduct the government seeks to affect."[50] As the concurring judge acknowledged in the Alameda case,

> Where, as here, the case presents issues of public moment - where what is at the heart of the problem is an alleged injury common to a substantial segment of the public - it may well be that the common cause can better and more earnestly be presented through an association of those affected than through a collection of individuals each tendering his own modest share of the common injury.[51]

Finally, the governmental duties inhering in the role of public representation are modest. They do not dictate a result and should not ordinarily involve divesting government agencies of their decisional authority. Neither the courts nor the organizations to whom they have accorded standing should seek to pre-empt the government function. The Second Circuit in Scenic Hudson made it clear that "[t]his court cannot and should not attempt to substitute its judgment for that of the Commission"[52] and indicated that the scope of judicial review would vary according to the extent to which an agency's conclusions, its value judgments, had been "reached upon proper consideration of the relevant factors."[53] For organizational litigants, this means that they will not invariably prevail in court simply because, in their view, an agency has reached an erroneous result. Were it otherwise, the dangers foreseen by the court in Sierra Club and Alameda might be realized, and their result might well have to prevail. The duties are imposed not to determine the outcome but to purify the decision-making process. An agency's vision must be as broad as the potential consequences of its acts; the agency must listen to responsible spokesmen for the public and consider such information as they may have; and an agency must attend to the rules and regulations designed to give form to its activities. In short, an agency may not abdicate but must actively pursue its responsibility to represent the public interest.

CHAPTER 4

For nations in which it comes to be suggested that the concept of standing be broadened to enable environment-protection litigation by public-interest organizations, we suggest that the question be approached by inquiring what function standing rules perform in the context of public-interest litigation. A basic function of an astringent standing rule can be to free government agencies, which have decision-making authority to represent the public interest, from such inconvenience, delay, and extra public expenditures as may be occasioned by requiring them to defend in litigation. These are problems of administrative convenience and protecting the public fisc. They will necessarily attend allowing public-interest litigation against government agencies, but they may be outweighed by countervailing considerations and could be minimized by limiting the class of public-interest litigants to those most likely to initiate and conduct litigation responsibly. The Scenic Hudson and Church of Christ approaches seem reasonably designed to accomplish the latter goal. The decisions focus on those who have no personal stake, who are likely to be responsible litigants precisely because they have sustained no unique injury to property or status; organizations represent a distillation of individual concerns and are likely to have sufficient resources to be able to litigate; and organizations can be limited when appropriate to those who, by their prior activities and interests, have demonstrated a concern to prevent the kind of environmental harm alleged and protect its locus if any.

On the other hand, public-interest litigation promises to have the advantage of facilitating representation of the public interest by government. Fulfilling the duties to be informed, to hear the public, and to abide by lawful procedures enhance the government's responsible representation of the public, and providing a legal procedure for reviewing whether those duties have been carried out, assures that practice is consistent with theory. Not the least consideration is that judicial review can enhance public confidence in the government as a public-interest representative. At the same time, because the duties are modest and directed to the process of decision-making, the government's authority and discretion would not be shifted to either private organizations or courts except in the most egregious circumstances.

NOTES

Chapter 1

1. Halperin, "Conservation, Policy, and the Role of Counsel," 23 Maine L. Rev. 119, 141 (1971).

2. The greatest oversimplification is also a major premise for dealing with most standing questions, namely, that standing is a threshold issue separable from the merits, i.e., the cause of action and remedies appropriate to it. This contradiction may be related to the fact that most elements of federal standing law were derived from the substantive law of torts (injury from the damages requirement of negligence, unique injury from the public/private distinction in nuisance, and zone of interests from scope of the risk in negligence).

3. Standing law in the American states is generally more inclusive than the federal law. Some states allow taxpayer suits to challenge state expenditures and so-called citizen-mandamus actions to compel performance of a duty by state officers. See K. Davis, Administrative Law Treatise 756-62 (Supp. 1970); L. Jaffe, Judicial Control of Administrative Action, ch. 12 (1965).

4. Such a decision can be expected in Sierra Club v. Hickel (which we discuss below) presently pending before the Supreme Court.

5. See K. Davis, 3 Administrative Law Treatise 216-22, 291 (1958); id. at 703-04, 722 (Supp. 1970).

6. See Note, "The Law of Administrative Standing and the Public Right of Intervention," 1967 Wash. U.L.Q. 416, 418-20.

7. Association of Data Processing Services v. Camp, 397 U.S. 150, 153-54 (1970).

Chapter 2

8. 433 F.2d 24 (9th Cir. 1970).

9. 437 F.2d 1087 (9th Cir. 1971), followed, Citizens Council v. Resor (D. Ore. 1971); Brooks v. Volpe, (W.D. Wash. 1971).

10. Petition for Writ of Certiorari at 7 (record citations omitted).

11. Appendix to Petition at 10.

12. 437 F.2d at 1096 (opinion of Hamley, J.).

13. 433 F.2d at 29.

14. 437 F.2d at 1088 (Trask, J.).

15. 433 F.2d at 30.

16. Ibid.

17. 437 F.2d at 1089-91 (Trask, J.).

18. Id. at 1090; see id. at 1098 (Merrill, J.).

19. See Baker v. Carr, 369 U.S. 186, 204 (1962); Flast v. Cohen, 392 U.S. 83, 106 (1968).

20. Appendix to Petition at 36.

21. 433 F.2d at 32.

22. 433 F.2d at 30.

23. Id. at 29.

24. Id. at 30.

25. 437 F.2d at 1090 (Trask, J.).

Chapter 3

26. See Generally, L. Fuller, The Morality of Law (rev. ed. 1969).

27. 354 F.2d 608 (2d Cir. 1965).

28. Id. at 611.

29. Id. at 612.

30. Ibid.

31. 16 U.S.C. 803 (a).

32. 16 U.S.C. 8251 (a) provides that any person aggrieved by an order issued in a proceeding to which he is a party may apply for rehearing. If such a request is denied,the party aggrieved may obtain judicial review in a court of appeals. 16 U.S.C. 8251 (b).

33. A congressional report indicated "the present language 'plan for improving or developing . . . including recreational purposes' . . . was intended to add 'an express provision that the Commission may include consideration of recreational purposes.'" 354 F.2d at 614, n. 10 (emphasis added).

34. Id. at 620.

35. Ibid.. see id. at 617 ("There is no doubt that the Commission is under a statutory duty to give full consideration to alternative plans").

36. Id. at 620.

37. Id. at 614; see id. at 568.

38. While this jump may seem to some like legerdemain, the court was not without precedent, and its approach is not atypical of American courts. In an earlier matter, the FPC had denied a license for scenic and recreational reasons, and that action had been sustained by an appellate court. Id. at 614. Two earlier decisions had emphasized the Commission's duty to take into account considerations beyond "the horizons of the private parties." Id. at 621. Finally, the Commission itself had given increased weight to recreational considerations, see id. at 614, and, most importantly, had recognized that the issue in the Hudson River matter was "whether the project's effect on the scenic, historical and recreational values of the area are such that we should deny the application." Id. at 616. Inasmuch as this was, in the court's view a correct statement of the issue, its holding in the most technical sense was stated in terms of the adequacy of the record rather than the correctness of the standard.

39. Id. at 620.

40. Id. at 621.

41. Id. at 616 (emphasis added). An interesting question, beyond the question of whether the petitioners were "aggrieved," is whether they were "parties" within the meaning of the statute enabling judicial review. It appears that they had participated in no proceedings prior to their appeal except by filing an intervention petition and ancillary motions. But see Sierra Club v. Hickel, supra at 30. But the court's tacit construction of "party" also follows from its formulation of duty, for the FPC was held, in effect, to have erred by denying the petition to intervene,

thereby failing to consider the relevant information proffered by the petitioners, and thereby failing to make an adequate record.

42. Id. at 617. In Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971), the Supreme Court, too, stressed the duty of the agency, the Department of Transportation, to make an informed judgment and to consider all relevant factors. Moreover, several recent cases have followed Scenic Hudson in that the regulatory agencies have an affirmative duty to consider environmental effects of their decision: The Palisades Citizens Association, Inc. v. CAB, 420 F.2d 188 (D.C. Cir. 1969); Zabel v. Tabb, 430 F.2d 199, at 208 et seq. (5th Cir. 1970). It appears that the National Environmental Policy Act of 1969 would impose such an imperative mandate even in cases where no statute can reasonably be construed as imposing this duty: Zabel v. Tabb, op. cit. Calvert Cliffs' Coordinating Committee v. AEC, 2 ERC 1779 (D.C. Cir. 1971).

43. Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970).

44. 359 F.2d 994 (D.C. Cir. 1966).

45. Id. at 1003.

46. Id. at 1005 (emphasis added).

47. 302 F. Supp. 1083 (S.D.N.Y. 1969), aff'd, 425 F.2d 97 (2d Cir. 1970).

48. 425 F.2d at 100.

49. 302 F. Supp. at 1087.

50. National Automatic Laundry & Cleaning Council v. Schultz, F.2d (D.C. Cir. 1971).

51. 437 F.2d at 1097 (Merrill, J.).

52. 354 F.2d at 620.

53. Id. at 621.