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The Legal Rights of All Living Things

Stacey L. Gordon

Alexander Blewett III School of Law at the University of Montana, stacey.gordon@umontana.edu

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In 1971, Christopher D. Stone posed the question first to his students and then to a wider audience, “Should trees have standing?” 1 Although Stone's question initially was meant only to engage the students in his property law course, Justice William O. Douglas brought the question into the environmental law discourse when he cited Stone's article in the dissent in Sierra Club v. Morton: 2

The critical question of “standing” would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. Contemporary public concern for protecting nature’s ecological equilibrium should lead to the conferment of standing upon environmental objects to sue for their own preservation. 3

Stone wanted his students to consider changing societal values regarding what was ownable, who could own things, and the rights and duties associated with ownership—his point was that legal developments fuel shifts in societal consciousness and morality. 4 When his students grew bored, he asked them to ponder what the social consciousness would look like if nature had rights. 5

More than 40 years later, modern legal discourse still struggles with this question, and now the related one that is particularly relevant here—what would it look like if animals had rights? 6 Animals are protected as part of the environment by statutes like the Endangered Species Act. 7

Stacey L. Gordon is an associate professor at the University of Montana School of Law. She teaches animal law and legal research courses. Gordon is the chair of the Humane Society of Western Montana Legislative & Advocacy Committee, which advocates for companion animal welfare through education and legislation.

Act (ESA)\(^7\) and Marine Mammal Protection Act (MMPA).\(^8\) They are also protected in their own right by statutes like the Animal Welfare Act.\(^9\) Nevertheless, courts struggle with the practicalities of these questions at the same time society struggles with their moral implications.

Perhaps the more relevant question is not should trees have standing, but do trees—or non-human animals\(^10\)—have standing? Despite a few cases that have stated otherwise,\(^11\) animals do not have standing in U.S. courts to enforce their rights or even challenge actions that may injure them or already have injured them. In limited circumstances, people, either on their own or through organizations, have standing to protect the interests of animals, but that is far from guaranteed.

This chapter explores the nuances in the development of environmental standing, looking especially at the cases that can inform animal law. Because animals are part of the natural environment and some statutes protecting animals, like the ESA and MMPA, are often characterized as environmental law statutes, several of the critical cases are already animal law cases, including the fundamental case of *Lujan v. Defenders of Wildlife*.\(^12\) For the purposes of understanding the development of standing for natural objects, Part I examines these cases in addition to traditional environmental standing cases. Part II addresses the lessons learned from those cases with an eye toward increasing the success of standing arguments in the future. Part III discusses where the jurisprudence of animal law standing will likely diverge from environmental law in the future—the developing idea that as sentient beings, animals should have some sort of legal personhood status and thereby standing in their own right.

**Standing Jurisprudence**

“Standing” ensures that courts consider only actual “cases and controversies,” as required by Article III.\(^13\) In *Lujan*, the Court succinctly summarized the requirements of Article III standing: (1) the plaintiff must have suffered an injury that is concrete and particularized and is actual or imminent, not conjectural or hypothetical; (2) the injury must be fairly traceable to the defendant’s action; and (3) it must be likely, instead of speculative, that the injury will be redressed by a favorable decision by the court.\(^14\) At their most basic, then, the elements of standing are injury, causation, and redressability, but courts have demanded much more of each element.

**Injury**

The injury element is the most problematic for environmental plaintiffs. The irony of environmental standing is that potential or actual injury to the environment only matters to the extent that a person is harmed by the damage. Going back to the constitutional “controversy” language, the requirement that the plaintiff have a “personal stake” in the outcome ensures the adverseness necessary for resolution in court.\(^15\) It is

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8. *Id.* §§1361-1423h.
10. Throughout this chapter, the term “animals” means nonhuman animals.
11. Palila v. Hawaii Dep’t of Land & Natural Res., 852 F.2d 1106, 1107 (9th Cir. 1988) ("As an endangered species under the Endangered Species Act ("Act") . . . the bird (L. bailleui), a member of the Hawaiian honeycreeper family, also has legal status and wings its way into federal court as a plaintiff in its own right."); Marbled Murrelet (Brachyramphus marmoratus) v. Pacific Lumber Co., 880 F. Supp. 1343, 1346 (N.D. Cal. 1995); Loggerhead Turtle v. County Council of Volusia County, 896 F. Supp. 1170 (M.D. Fla. 1995). See also Sunstein, *supra* note 6, at 1359.
13. *Id.* at 559-60.
14. *Id.* at 560-61.
not sufficient that the plaintiff is just interested in environmental protection; some concrete interest of the plaintiff must be at stake.\textsuperscript{16} It is this requirement that the injury be “concrete and particularized” that is a particularly high bar for plaintiffs in environmental cases. Although the environmental damage may be widespread and may affect many people, the plaintiff must show that the damage caused him or her some specific injury.\textsuperscript{17} The recognition in \textit{Sierra Club v. Morton} that environmental degradation could constitute injury\textsuperscript{18} was crucial for the future of environmental standing. "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process."\textsuperscript{19} The Sierra Club sued under the Administrative Procedure Act for an injunction to prevent the development by Walt Disney Enterprises of a ski resort in the Mineral King Valley in the Sequoia National Forest. The remoteness of the area would require construction of a road and a power line into the resort. It was this remoteness and the resulting wilderness-like quality of the area that Sierra Club sought to protect. The Court recognized that the development and the road would injure the aesthetic and recreational values of those who used the area, but nevertheless found that Sierra Club did not have standing because it failed to show that any of its members used the area or would be significantly impacted by the development.\textsuperscript{20} 

The Court noted that its holding requiring individual concrete injury does not preclude judicial review of injuries to the public interest. It insisted, however, that those who have the most at stake in protecting those injuries because of their own direct injury are the ones who should seek review.\textsuperscript{21} The Court revisited this idea from a slightly different perspective in \textit{Massachusetts v. EPA}, noting that the fact that the injury is "widely shared" does not minimize the injury to the individual.\textsuperscript{22} In that case, the widely shared injury is the effect of climate change. Massachusetts was able to establish the injury requisite for standing because although the environmental effects of climate change are global, Massachusetts also suffered local injury, i.e., rising sea levels are swallowing the state’s coastlines.\textsuperscript{23} As a coastal landowner, the commonwealth suffered a particularized injury.\textsuperscript{24} Massachusetts, then, had standing to seek judicial review with potential global impact.

A further irony of environmental standing is that it is often based on aesthetic injury, which will always be subjective, seemingly the antithesis of the required concreteness. In \textit{Animal Legal Defense Fund v. Glickman}, the plaintiff sought standing on the basis that he had an aesthetic interest in observing animals, in this case several primates, living under humane conditions.\textsuperscript{25} The plaintiff had been an employee and volunteer of animal welfare and rescue organizations, was trained in wildlife rehabilitation, and had experience investigating complaints regarding treatment of wildlife.\textsuperscript{26} Over the period of a year, he visited a local animal park several times and attested that his visits only stopped because his health prevented them.\textsuperscript{27} During this time, he complained about the living conditions of several primates.\textsuperscript{28} Based on these details, the court granted standing. "The key requirement, one that Mr. Jurnove clearly satisfies, is that the plaintiff must have suffered his injury in a personal and individual way—for instance, by seeing with his own eyes the particular animals whose condition caused him aesthetic injury."\textsuperscript{29} On one level, the plaintiff’s injury is purely aesthetic—his visits to the animal park were to view the animals, to watch them. Although not expressly, the court’s holding encompasses a more expansive definition of aesthetics, one that has a moral component. Mr. Jurnove’s background reveals that his interest in protecting animals is deeper than viewing them living under humane conditions; it is more likely that his concerns regarding the living conditions of the primates come more from a moral conviction rather than an aesthetic one.

The \textit{WildEarth Guardians}\textsuperscript{30} court also stretched the concept of aesthetic injury. In that case, the district court quite easily seemed to reach the conclusion that the plaintiff’s statement that his

\begin{itemize}
  \item \textsuperscript{16} \textit{Id.} at 734-35.
  \item \textsuperscript{17} \textit{Id.}
  \item \textsuperscript{18} \textit{Id.} at 734.
  \item \textsuperscript{19} \textit{Id.}
  \item \textsuperscript{20} \textit{Id.} at 735.
  \item \textsuperscript{21} \textit{Id.}
  \item \textsuperscript{22} \textit{Id.} at 740.
  \item \textsuperscript{23} \textit{Id.} at 522-23.
  \item \textsuperscript{24} \textit{Id.}
  \item \textsuperscript{25} \textit{Animal Legal Def. Fund}, 154 F.3d 426, 429 (D.C. App. 1998).
  \item \textsuperscript{26} \textit{Id.}
  \item \textsuperscript{27} \textit{Id.}
  \item \textsuperscript{28} \textit{Id.} at 430.
  \item \textsuperscript{29} \textit{Id.}
  \item \textsuperscript{30} \textit{Id.} at 433.
  \item \textsuperscript{31} \textit{WildEarth Guardians v. Salazar}, 834 F. Supp. 2d 1220 (D. Colo. 2011).
\end{itemize}
enjoyment of eastern and central Wyoming was injured by the impending disappearance of the diving beetle because of failure to list them as a threatened or endangered species. The court found that the plaintiff demonstrated a concrete and particularized injury despite his never having seen a diving beetle in the area, as follows:

That Mr. Tuchton’s alleged injury is concrete and particularized is beyond contention. Contrary to the Secretary’s argument, Mr. Tuchton need not allege that he has actually seen a Diving Beetle or that the Diving Beetle is in some way essential to his personal or professional well-being. He need only establish that his enjoyment of the area is in some way dependent upon the continued existence of the Diving Beetle.

The court cited Lujan v. Defenders of Wildlife for the proposition that the desire to view wildlife is a cognizable interest for purposes of determining standing. This is probably a stretch of Supreme Court jurisprudence. The court reasoned that it was not surprising the plaintiff had never actually seen a diving beetle since his contention was that they were threatened or endangered. However, that reasoning is circular since it is based on the merits of the case when standing was not yet established. It is unlikely this case represents a real development in environmental standing jurisprudence, though it does demonstrate a lack of clarity regarding what constitutes an injury for standing purposes. Indeed, the court blamed the Supreme Court for vacillating “between expansive and limiting applications of standing, often without discernible reason or justification” and failing “to provide meaningful guidance to lower courts.”

The WildEarth Guardians court actually had more trouble with the requirement that the injury be actual or imminent. “Much of the confusion over the Supreme Court’s standing jurisprudence arises from the determination of whether a party’s alleged injury is ‘actual or imminent.’” The court pointed to the decisions in Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc. and Summers v. Earth Island Institute as being inconsistent, but nevertheless then crafted a rule to reconcile them.

The WildEarth Guardians court was correct that the requirement of imminence is problematic, though probably more so for plaintiffs than courts. In Lujan, plaintiffs failed to meet the actual or imminent component of the injury test because although they had visited the affected area in the past and hoped to do so again in the future, they had no specific plans to go back. In that case, the plaintiffs challenged the application of the ESA to only federally funded projects in the United States and on the high seas. Specifically, they maintained that rehabilitation of the Aswan High Dam on the Nile in Egypt would endanger the Nile crocodile, and that an Agency for International Development project in Sri Lanka would endanger species including the Asian elephant and leopard. Both plaintiffs stated in their affidavits that they had visited the affected areas in the past but only that they intended to visit the areas again in the future and hoped to see the animals. However, they had no current concrete plans to do so and, in fact, civil war in Sri Lanka vented one plaintiff from making such plans. The Court held:

They plainly contain no facts, however, showing how damage to the species will produce “imminent” injury to Mses. Kelly and Skilbred. That the women “had visited” the areas of the projects before the projects commenced proves nothing. As we have said in a related context, “Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.”

Imminence is not necessarily a temporal requirement. Indeed, in the Lujan Court’s statement of the standing rule, it sets “actual or imminent” against “not conjectural or hypothetical,” which does not suggest temporality. The failure of the plaintiffs in Lujan was not that they did not have plans to visit the affected areas soon—it was that they did not have concrete plans at all, just the idea that they would like to return to these sites.

31. Id. at 1222.
32. Id.
33. Id. (emphasis added).
34. Id. n.6.
35. Id. at 1224.
36. Id. at 1225.
41. Id. at 563.
42. Id.
43. Id. at 563-64.
44. Id. at 564 (internal references omitted).
45. Id. at 560-61.
The plaintiff’s future plans were even more tentative in *Summers v. Earth Island Institute*.

In that case the original dispute was resolved when the case was settled. The plaintiffs, however, sought to continue the case to challenge the timber-salvage regulations in question with regard to future projects and received an injunction in the district court invalidating five of the regulations. After the Ninth Circuit upheld the injunction, the Supreme Court granted certiorari to determine whether Earth Island Institute could still challenge the regulations. The Court held that the plaintiff did not have standing in part because the affidavits submitted based the claim of injury on the fact that the plaintiff visited many national forests and planned to visit many more. The Court stated:

> There may be a chance, but is hardly a likelihood, that Bensman’s wanderings will bring him to a parcel about to be affected by a project unlawfully subject to the regulations. Indeed, without further specification it is impossible to tell which projects are (in respondents’ view) unlawfully subject to the regulations.

The result was different in *Laidlaw*, where the plaintiffs easily established past use of the affected area, but failed to show concrete plans of future use. However, the *Laidlaw* Court concluded that the plaintiffs demonstrated injury-in-fact. In that case, the plaintiffs lived near the affected area, had used the area in the past for specific activities, and testified that the only reason they no longer used the area and had no plans to return to the area was fear of the harmful effect of the pollution. The Court specifically distinguished this holding from *Lujan v. Defenders of Wildlife*:

> Nor can the affiants’ conditional statements—that they would use the nearby North Tyger River for recreation if Laidlaw were not discharging pollutants into it—be equated with the speculative “some day’ intentions” to visit endangered species halfway around the world that we held insufficient to show injury in fact in *Defenders of Wildlife*.

From *Summers* and *Laidlaw* particularly, the court in *WildEarth Guardians* fashioned the following rule:

> Where a party demonstrates repeated past usage of the affected area, either by his proximity to the affected area or repeated, habitual, even if infrequent, visits, the likelihood that he will return is readily established by reference to his plans to continue past usage. . . . A party need not demonstrate “concrete plans” to return. In contrast, where a party does not live in the immediate vicinity of the affected area and has only demonstrated a sporadic history of past visits, he must establish his intention to return with more specificity. In essence, if not in name, these standards allow courts a means of objectifying what is otherwise an inherently subjective determination—the credibility of the affiant.

This may, however, be a misreading of *Laidlaw*. The key factor in *Laidlaw* was likely not the plaintiffs’ proximity to the affected areas, but their explanations of why they no longer visited the area. It was not their proximity that suggested they would one day return to the area so much as their statements of how they would like to continue to use the area if not for the pollution. Nevertheless, the rule does correctly suggest that the court should consider (and the plaintiff should therefore plead), the totality of the circumstances.

**Causation**

The second prong of the standing test requires that the plaintiff’s injury be “fairly traceable” to the defendant with no intervening third-party cause. This element is far less problematic than determination of injury but still raises some challenges for plaintiffs in environmental cases. In both *Animal Legal Defense Fund, Inc. v. Glickman* and *Massachusetts v. EPA*, causation was at issue and in both cases the courts found the plaintiffs adequately showed causation, though the dissents strongly objected.

In *Animal Legal Defense Fund, Inc. v. Glickman*, one issue was whether the plaintiff’s injury could be reasonably traced to the Secretary of Agriculture’s Animal Welfare Act rules when it was a third party, the animal park, who was actually responsible for the living conditions of endangered species.

*Id. at 181-83.*

51. *Id. at 184.*


the primates that caused the plaintiff’s aesthetic injury. The plaintiff claimed that it was the U.S. Department of Agriculture’s failure to adopt regulations that met the minimum standards of the Animal Welfare Act that allowed the animal park to continue to house animals under such conditions. The court held that the plaintiff met the causation element, noting that “Supreme Court precedent establishes that the causation requirement for constitutional standing is met when a plaintiff demonstrates that the challenged agency action authorizes the conduct that allegedly caused the plaintiff’s injuries, if that conduct would allegedly be illegal otherwise.” In this case, the agency’s actions in failing to promulgate adequate regulations allowed the animal park to keep animals under conditions that were illegal under the Animal Welfare Act, thus causing the plaintiff’s aesthetic injury. The dissent found it “frightening at a constitutional level the majority’s assumption that the government causes everything that it does not prevent.”

In *Massachusetts v. EPA*, EPA did not dispute that there is a causal connection between greenhouse gas emissions and global warming. The Agency claimed, however, that for the purposes of standing analysis, its decision not to regulate greenhouse gases from new automobiles was an insignificant cause of the plaintiff Massachusetts’ injuries, especially given the predicted rise in emissions from countries like China and India. The Court disagreed, saying that it was “erroneous” to assume “that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum.” The relatively small contribution to the causation (from new U.S. automobile emissions) in contrast to the expansive scope of the problem (global warming) sets an important benchmark in environmental standing jurisprudence. This determination was too tenuous for the dissent, however, which reasoned that Massachusetts could not show that its injury—risk of loss of its coastline due to the effects of global warming—was actually caused by the very small impact from EPA’s failure to regulate domestic automobile emissions, given that such regulations would only address a “fraction of 4% of global emissions.”

### Redressability

The final standing element, redressability, requires that “it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’” In *Lujan*, the Court held that in addition to failing to meet the injury element, the respondents also failed to establish redressability because it was not likely the Court’s decision against the agency would require the third-party funding agencies to participate in the consultation sought by the respondents. Respondents’ case against the Secretary of the Interior sought to compel the secretary to interpret existing ESA regulations requiring consultation regarding threatened and endangered species as applying to overseas as well as domestic projects. The hurdle that the respondents could not overcome, according to the Court, was the fact that the funding agencies were not parties to the case themselves and were likely not bound by the regulation. The respondents’ requested remedy might redress the injury if the third-party agencies chose to comply with the regulation, but it was speculative that they would do so.

The respondents in *Lujan* also faced a secondary problem. The Court noted that the funding agencies provided only a small fraction of the funding for the projects at issue. Respondents failed to show that if the requested consultation happened and the funding agencies did not fund the projects as a result, the projects would be suspended and cause no more harm.

Contrast this scenario with the language from *Massachusetts v. EPA* quoted above, which held that small, incremental steps were sufficient to establish redressability. In that case, the fact that the U.S. auto emissions were only a small contributor to global climate change was still sufficient, whereas in *Lujan* the fact that U.S. agency funding was only a small part of the total funding of the international projects was not. From a legal standpoint, the distinguishing factor is the causa-
tion versus redressability analysis. However, the real key to the different treatment may be in the pleadings. The respondents in *Lujan* failed to recognize that they needed to plead facts sufficient to overcome the fractional impact of the defendant's actions while the petitioners in *Massachusetts* succeeded in doing so.

**Prudential Standing and Citizen Suits**

Article III standing ensures that plaintiffs meet the constitutional minimum elements to establish standing. Courts have added an additional layer to the analysis that applies when there is no statute granting the plaintiffs the right to seek review of government action, though the Court in *Cetacean Community v. Bush* also suggests that the prudential standing test is applied when it is unclear whether plaintiffs meet the test for injury under Article III.73 According to *Sierra Club*, absent such a statute, the plaintiff may still be required to show that his interests fall within the "zone of interest" protected by the statute.74 It is an undemanding test—the plaintiff must show only that his interests fall arguably within the zone of interest protected by the statute.75 For example, in *Animal Legal Defense Fund v. Glickman*, the court held that the individual plaintiff's interest in viewing animals living in humane conditions met the zone of interest test for prudential standing.76 "The very purpose of animal exhibitions is, necessarily, to entertain and educate people; exhibitions make no sense unless one takes the interests of their human visitors into account."77 One reading of the holding is that the court was suggesting that the purpose of the Animal Welfare Act is to protect people. However, an alternate reading confirms the expansive reach of the zone of interest test; even if the main purpose of the Animal Welfare Act is to protect, among other animals, those living in zoos and exhibitions, people who want to view those animals also fall within that zone of interest.

While Article III constitutional standing is a mandatory requirement, prudential standing is a judicially created requirement that is discretionary.78 There is, however, a major exception to the prudential standing requirement that is especially important in environmental cases: where Congress has provided a statutory "citizen suit" provision, a plaintiff is relieved of the prudential standing requirement.79 Major federal environmental statutes have citizen suit provisions allowing citizens to petition the courts for review of actions under those statutes. For example, the Clean Water Act authorizes any citizen to "commence a civil action on his own behalf" against anyone or government agency for violation of Clean Water Act standards or against EPA for failure to perform its administrative duties.80 Citizen suit provisions do not automatically confer standing, however, and a plaintiff still has to demonstrate a personal injury that is more than a generalized grievance and that the government failed to do something required by the statute.81 Because citizen suits are less common with animal protection statutes—only the ESA has a citizen suit provision82—plaintiffs in animal welfare standing cases typically will have to meet the "zone of interest" test in addition to the Article III elements.

**Informational and Procedural Standing**

In addition to substantive injuries, plaintiffs may try to establish standing based on informational or procedural injuries. To some degree, these concepts broaden the injury requirement for Article III standing,83 allowing in plaintiffs who would otherwise be barred, but these are not easy injuries to establish. Informational injuries are rooted in statutes requiring agencies to provide information; their failure to do so may cause injury to an organization whose purpose is to disseminate that information.84 For purposes of informational standing, a plaintiff "is injured-in-fact . . .

73. *Cetacean Cnty.*, 386 F.3d 1169, 1175 (9th Cir. 2004).
74. *Sierra Club v. Morton*, 405 U.S. 727, 731-34 (1972); see also *Animal Legal Def. Fund*, 154 F.3d 426, 431 (D.C. App. 1998). In *Sierra Club*, the plaintiff was suing under §10 of the Administrative Procedure Act, which grants the right to seek judicial review to anyone who suffers an injury under a statute due to federal agency action. 5 U.S.C. §702 (quoted in *Sierra Club*, 405 U.S. at 732.) So, for example, in *Animal Legal Def. Fund*, the plaintiff sued under §10 because the Animal Welfare Act has no citizen suit provision. In discussing the "zone of interest" test, the court refers to it as a "gloss" on §10. 154 F.3d at 444.
75. *Animal Legal Def. Fund*, 154 F.3d at 444.
76. Id. at 444-45.
77. Id.
80. 35 U.S.C. §1365(a).
82. 16 U.S.C. §1540(g).
84. Id. at 349.
because he did not get what the statute entitled him to receive.”

In Animal Legal Defense Fund v. Yuetter, where the Animal Welfare Act required reporting regarding compliance with AWA regulations concerning treatment of laboratory animals, the plaintiff claimed an informational injury because the regulations failed to include rats, mice, and birds in the definition of “animal,” making it impossible for the plaintiff to obtain and disseminate information regarding those species. The court elaborated on the requirements of informational standing: (1) that there is a link between the agency’s actions and the organization’s activities; (2) that the information is essential to the organization’s activities (though not necessarily all of the organization’s activities); and (3) that the organization’s interests must be within the zone of interests protected by the statute.

The parties contested the second requirement: the plaintiffs claimed that the lack of data regarding mice, rats, and birds rendered their reporting to their members infeasible while defendants claimed that the organization’s mission was advocating for better conditions for all animals and that was not sufficiently hindered by the regulations.

Plaintiffs initially won the argument with the court saying that it is sufficient that “an activity that is germane to the organization’s purpose be significantly hindered.” However, the organization lost on appeal where the court held that although the informational injury was sufficient to establish Article III standing, the organization nevertheless failed to meet the zone of interest test. The court held:

The principle established by our decisions, then, is that to come within the zone of interests of the statute under which suit is brought, an organization must show more than a general corporate purpose to promote the interests to which the statute is addressed. Rather it must show a congressional intent to benefit the organization or some indication that the organization is “a peculiarly suitable challenger of administrative neglect.”

Absent specific citizen suit provisions, this is a tough showing.

In American Society for the Prevention of Cruelty to Animals v. Feld Entertainment, the court considered informational standing for an organizational plaintiff, but here too the plaintiff could not meet the burden. This case was brought under the ESA, which contains a citizen suit provision. However, the plaintiffs brought the case under §9 of the Endangered Species Act, the takings provision. The court held that there is no reporting requirement in §9 and therefore the organizational plaintiff could not claim a right to information based on that provision under which it brought suit.

The organization’s informational standing would only be triggered if the defendant’s activities constituted a “take,” the defendant failed to apply for a permit as required in §10, and either the defendant failed to disclose the information on the permit application or the U.S. Fish and Wildlife Service (FWS) refused to make the information public.

Procedural standing is grounded in an agency’s failure to comply with statutory procedural mandates. In Lujan v. Defenders of Wildlife, the federal appeals court originally upheld procedural standing based on the citizen suit provision in the ESA, which provides that “any person may commence a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter.” The Supreme Court found far too broad the interpretation that the statute confers standing on all persons who just want to ensure the law is upheld. This is the type of generalized grievance that the Court has consistently rejected.

The Court did suggest the types of procedural injury that would support standing: (1) cases where the disregard of the procedural requirement would injure a substantive interest; (2) cases in which many persons have suffered the same concrete injury; and (3) cases in which a statute grants the plaintiff a “reward” for bringing a case against another private party that would benefit the government.

87. Id. at 926-27.
88. Id. at 927.
89. Id.
90. Animal Legal Def. Fund, 23 F.3d at 503.
92. Id. at 17, 19.
93. Id. at 17.
94. Id.
95. Id. at 23-24.
96. Abate & Myers, supra note 83, at 353.
97. 16 U.S.C. §1540(g) (quoted in Lujan, 504 U.S. at 571-72).
99. Id. at 572-73.

away” from the Court’s reasoning is clearly “that in suits against the Government, at least, the concrete injury requirement must remain.”

To ensure plaintiffs have more than a generalized interest, some courts have applied a “nexus test” for procedural standing, requiring a sufficient geographical nexus to establish a concrete injury. The nexus test originated in City of Davis v. Coleman, a NEPA case, where the court stated:

The procedural injury implicit in agency failure to prepare an EIS—the creation of a risk that serious environmental impacts will be overlooked—is itself a sufficient “injury in fact” to support standing, provided this injury is alleged by a plaintiff having a sufficient geographical nexus to the site of the challenged project that he may be expected to suffer whatever environmental consequences the project may have. This is a broad test, but because the nature and scope of environmental consequences are often highly uncertain before study, we think it an appropriate test.

The court held that the city established, because of its proximity to the contested project, a highway interchange, that the city could “be expected to suffer a wide variety of environmental consequences,” including damage to the water supply.

Subsequently, the Ninth Circuit found standing for the plaintiffs in Oregon Environmental Council v. Kunzman, who were challenging an inadequate environmental impact statement that allowed for spraying of pesticides to eradicate the gypsy moth. The court reasoned:

The Secretary argues that to allow anyone to bring an action to enforce compliance with NEPA would allow even individuals in states without gypsy moths to bring this action. This case does not present such a situation... In this case, OEC’s members reside in a state with an actual gypsy moth problem and thus may challenge a nationwide EIS that is applicable to them.

The nexus test may be broad, but Lujan demonstrates that it can still be an obstacle. The plaintiffs’ purpose in Lujan was to challenge an interpretation that allowed FWS to apply consultation regulations in the ESA only to domestic projects. Given the purpose of the case, it is unlikely that any plaintiff could have established a geographical nexus. The plaintiffs offered three alternative nexus tests: “ecosystem nexus,” “animal nexus,” and “vocational nexus.”

The ecosystem nexus test sought to extend geographical nexus to anybody who uses any part of the contiguous ecosystem, but the Court noted that precedent holding that use couldn’t even be “in the vicinity” precluded that interpretation. The Court rejected all three proposed tests. Despite the challenges presented by Lujan, though, Abate and Myers show that procedural and informational injuries are a cognizable basis for standing in environmental and animal cases, particularly where informational and procedural injuries are brought together.

Organizational Standing

Most of the above discussion suggests that the plaintiffs were individuals, when in reality, virtually all of the plaintiffs in these cases were organizations, which raises additional standing requirements. An organization may have standing based on injury to its members; however, with one exception, organizations only have standing if they can show (1) individual members have standing; (2) the issue of the lawsuit is within the mission of the organization; and (3) neither the lawsuit nor the remedy require the participation of individual members. This means the organization has to meet all of the requirements discussed above, with two additional elements. In WildEarth Guardians, the court noted the special problem that these additional elements can cause in environmental lawsuits, which are often based on federal regulations, stating:

In some contexts, most notably environmental law, the party with the most significant stake in the controversy, the organization that has actually participated in the rulemaking pro-

100. Id. at 578.
102. 521 F.2d 661 (9th Cir. 1975).
103. Id. at 671 (cited in Abate & Myers, supra note 83, at 354).
104. Id.
105. 817 F.2d 484 (9th Cir. 1987).
106. Id. at 489 (cited in Abate & Myers, supra note 83, at 355).
107. Id. at 491.
109. Id. at 566.
110. Id.
111. Abate & Myers, supra note 83, at 368-80.
112. Id. at 388.
113. Abate, supra note 101, at 127.
cess, lacks independent standing to seek judicial relief. Instead of ensuring that parties have “a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy,” the modern conception of standing forces many environmental plaintiffs to rely upon the “discrete injury” suffered by one of its members, a party with at best a derivative stake in the controversy, to establish their standing.115

The requirement that members have standing negates the possibility of an organization pursuing a lawsuit based solely on the interests stated in its mission. The Court in Sierra Club v. Morton made it clear that a “mere ‘interest in a problem,’ no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization ‘adversely affected’ or ‘aggrieved’ within the meaning of the APA.”116 In other words, a generalized interest in the environment is not enough, but the recreational or aesthetic injuries of members will suffice.117 However, once an organization establishes standing, it can argue public interest as well.118 Sierra Club failed to show that its members suffered the requisite injury, even aesthetic injury, because it did not state facts showing that they used the area at issue.119 Similarly, Earth Island Institute failed to establish standing in its case challenging timber sale regulations in part because the member’s alleged injury, on which the organization relied to assert its standing, did not specify a particularized injury.120

An organization can establish standing without having to rely on injury to its members by showing that “the defendant’s actions cause a ‘concrete and demonstrable injury to the organization’s activities’ that is ‘more than simply a setback to the organization’s abstract social interests.’”121 Known as Havens standing, the organization must show under this test that it suffered an injury to its interest in promoting its mission and that it expended resources to counteract that injury.122 This standard seems a bit counterintuitive given the Court’s statement in Sierra Club v. Morton that an organization’s “mere interest” in an issue by itself is an insufficient basis on which to claim an injury.123 In American Society for the Prevention of Cruelty to Animals v. Feld Entertainment, the court clarified that to establish Havens standing, the injury has to be “more than simply a setback to the organization’s abstract social interests”;124 it must impact the organization’s mission.125 In other words, it must be not just the organization’s interests that are at stake, but what it does in support of those interests.

In American Society for the Prevention of Cruelty to Animals v. Feld Entertainment, the organization seeking standing claimed that the circus’s use of bullhooks to control its elephants undermined the organization’s advocacy and education efforts aimed at eliminating the use of bullhooks.126 Unfortunately, the court determined it did not need to answer the question of whether injury to an organization’s advocacy efforts was sufficient injury for Havens standing because the rest of the standing inquiry would fail at the causation element.127

States as Plaintiffs

After Massachusetts v. EPA, states present a special case in standing determinations. In that case, the Court recognized that Massachusetts had a special position for purposes of determining standing.128 As a quasi-sovereign, Massachusettts has sovereign interests, but not the ability to defend those interests. “Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, it cannot negotiate an emissions treaty with China or India, and in some circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted.”129 Basing its decision on the 1907 case, Georgia v. Tennessee Copper Co.,130 the Court held that Massachusetts, as a property holder, was entitled to special solicitude in the standing analysis and established the requisite injury for standing.131 The Court noted that this special solicitude does not relieve the state of the

115. Id. at 1224.
117. Id. at 734-37.
118. Id. at 737.
119. Id. at 735.
122. Id. (citing Equal Rights Ctr. v. Post Props., Inc., 633 F.3d 1136, 1138 (D.C. Cir. 2011)).
125. Id. (quoting National Treasury Employees Union v. United States, 101 F.3d 1423, 1430 (D.C. Cir. 1996)).
126. Id. at 26.
127. Id.
129. Id. at 519.
130. 206 U.S. 230 (1907).
131. Massachusetts, 549 U.S. at 520.
need to establish that it meets the injury, causation, and redressability elements of standing.\textsuperscript{132}

\textbf{Lessons for Animal Law}

As with injuries to environmental resources, injuries to animals are redressable only if humans are injured as well.\textsuperscript{133} Statutes purport to provide for welfare and protection of animals, but only humans can seek enforcement of those statutes. Moreover, only humans who themselves have a stake in the outcome of the case can even pursue a case. With that in mind, the line of environmental standing cases, and the smattering of animal standing cases among them, offer insight into how plaintiffs can strengthen their standing cases.

\textbf{Pleadings Matter: It’s in the Details}

The plaintiff bears the burden of establishing standing.\textsuperscript{134} Furthermore, the plaintiff retains the burden of sustaining standing throughout the various stages of the case. For example:

Since they are not mere pleading requirements but rather an indispensable part of the plaintiff’s case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, \textit{i.e.}, with the manner and degree of evidence required at the successive stages of the litigation.\textsuperscript{135}

Although general allegations are sufficient initially, on summary judgment, specific facts must be stated in the affidavits. If the case goes to trial, standing must be established through evidence.\textsuperscript{136}

In both \textit{Lujan v. Defenders of Wildlife} and \textit{Summers v. Earth Island Institute}, the Court noted the plaintiffs’ failure to plead sufficient details to establish standing from the beginning. In \textit{Lujan}, the plaintiffs’ affidavits “plainly contain[ed] no facts . . . showing how damage to the species will produce ‘imminent’ injury to Mses. Kelly and Skilbred.”\textsuperscript{137} The situation was slightly different in \textit{Summers}. In that case, although an initial affidavit did contain facts showing that the individual plaintiff had specific plans to visit the site of the timber sale, that issue was settled.

Another individual plaintiff filed an affidavit that he had suffered injury in the past, but “[t] hat does not suffice for several reasons: because it was not tied to application of the challenged regulations, because it does not identify any particular site, and because it relates to past injury rather than imminent future injury that is sought to be enjoined.”\textsuperscript{138} The plaintiff did allege that he planned future trips to national forests, but the Court determined that “[i]t is a failure to allege that any particular timber sale or other project claimed to be unlawfully subject to the regulations will impede a specific and concrete plan of Bensman’s to enjoy the National Forests.”\textsuperscript{139} There was an additional problem in that case for the organizational plaintiff. The Sierra Club did not file individual affidavits of its members and therefore did not show with evidence sufficient for the purposes of standing that it had members who used and enjoyed the Sequoia National Forest.\textsuperscript{140} The Court wanted not just an affidavit from the organization describing its members’ activities, but also affidavits from individual members.

Contrast the details provided in the affidavits filed in \textit{Animal Legal Defense Fund v. Glickman}. The plaintiff established that he was trained in wildlife rehabilitation and had spent many years in animal rescue.\textsuperscript{141} Furthermore, he established that between specific dates he visited the animal park a specific number of times and gave a reason for not continuing those visits.\textsuperscript{142} He even established how long each visit lasted and what he witnessed during those visits.\textsuperscript{143} Finally, he stated that he planned to reinstate his visits within a few weeks and to continue them into the future.\textsuperscript{144} The plaintiff gave sufficient detail that the court was able to find standing.\textsuperscript{145}

\textit{American Society for the Prevention of Cruelty to Animals v. Feld Entertainment} highlights how important the details are at all stages of the litigation. At the earliest stages of the litigation, the individual plaintiff pled facts that established “emotional attachment, coupled with his desire to visit the elephants and his ability to recognize the effects of mistreatment” that was sufficient to establish the necessary injury-in-fact.\textsuperscript{146} However, after a trial that lasted six weeks, the trial court

\begin{footnotes}
\item[132] \textit{Id.} at 521-26.
\item[133] \textit{Serjeanna B. Wymya, Standing for Endangered Species: Justiciability Beyond Humanity, 15 U. Balt. J. EnvTL. L. 45 (2007).}
\item[134] \textit{Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992).}
\item[135] \textit{Id.}
\item[136] \textit{Id.}
\item[137] \textit{Id.} at 564.
\item[138] \textit{Summers v. Earth Island Institute, 555 U.S. 488, 495 (2009).}
\item[139] \textit{Id.}
\item[140] \textit{Id.} at 499.
\item[141] 154 F.3d 426, 429 (D.C. App. 1998).
\item[142] \textit{Id.}
\item[143] \textit{Id.}
\item[144] \textit{Id.}
\item[145] \textit{Id.} at 435.
\item[146] 659 F.3d 13, 18 (D.D.C. 2011).
\end{footnotes}
found that the plaintiff was not credible and that the evidence presented failed to establish that he was injured. Among the facts the court noted against him: he was a paid plaintiff, he disparaged the elephants and failed to take advantage of opportunities to visit them, he could not identify the elephants to which he claimed an attachment, and he used bullhooks in working with the elephants, casting doubt on his claim that he did not want to witness any more mistreatment. Reviewing this evidence, the district court, in very detailed and sometimes strongly worded Findings of Fact, found that the plaintiff failed to establish the emotional attachment on which he based his claim of injury. The appeals court upheld the determination, concluding:

Although at the pleading stage general factual allegations may suffice to establish standing, “[i]n response to a summary judgment motion . . . the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts.” Where, as here, standing remains an issue at trial, the plaintiff’s burden is higher still: the facts establishing standing must be “supported adequately by the evidence adduced at trial.”

Much was at stake in this case. Since plaintiffs also failed to establish organizational standing, everything was riding on the individual plaintiff. Had plaintiffs won, Ringling Bros. and Barnum & Bailey Circus would have been forced to change its treatment of elephants. As it was, after plaintiffs failed to establish standing, Feld Entertainment won a settlement of $16 million to cover its litigation costs.

Extending the Holdings

The environmental standing cases are complicated and nuanced. Because standing is a constitutional threshold, courts provide detailed and carefully considered opinions. Equally careful reading of these opinions, especially in conjunction with each other, reveals where courts may be willing to go a little farther. Even dissents provide clues into where courts may be willing to go given the right set of facts. The discussion that follows addresses some examples that broaden some of the language in existing cases in ways that could enhance standing in animal cases.

Aesthetic Injury

The Court’s recognition of aesthetic injury in *Lujan* was crucial for environmental standing, and for many animal law cases it works as well—being able to view animals in their natural environment is an aesthetic interest. Courts seem poised to extend the aesthetic injury doctrine. Arguably, *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC)*, Inc. already goes beyond a strict interpretation of aesthetic injury. In that case, the Court found that the plaintiffs established injury-in-fact based on their perception that the river was polluted. Also, in *Animal Legal Defense Fund v. Glickman*, the court’s determination that aesthetic injury includes viewing captive animals living in humane conditions seems to stretch the concept of aesthetic injury. Humaneness is more of a moral idea than an aesthetic one. Indeed, the dissent had trouble with extending aesthetic injury. “Humaneness, like beauty, is in the eye of the beholder: one’s individual judgment about what is or is not humane depends entirely on one’s personal notions of compassion and sympathy. I find it difficult to imagine a more subjective concept than this.”

Further, in *American Society for the Prevention of Cruelty to Animals v. Feld Entertainment*, the district court was willing to recognize the individual plaintiff’s emotional attachment to the elephants as an aesthetic injury.

Courts appear to be prepared to recognize moral injuries. Cass Sunstein makes the point that statutes like the Animal Welfare Act, enacted along with at least 50 other statutes that demonstrate commitment to some form of animal rights, added a cause of action for the protection of animals where none existed before. Enacting these statutes in the first place reflects

147. *Id.* at 20.
148. *Id.* at 20.
156. *See Sunstein*, supra note 6, at 1353.
157. *Id.* at 1354.
raises the potential that states could, which was based on courts reiterate the idea that “such expansion is more recent cases have added, “water, wetlands, public trust cases focused on submersible lands, expanded the traditional common law public trust doctrine even farther in two directions. First, doctrine even farther in two directions. First, going back to the 1892 case Illinois Central R.R. v. Illinois, the public trust doctrine holds that the state’s sovereign ownership of natural resources must be exercised for the public good. The Court based this public trust on states obtaining sovereign ownership of navigable waters upon statehood. Over time, the public trust expanded to include waters that are not navigable and uses beyond the the traditional “trid” of public trust uses, which included fishing, navigation, and commerce. As society has changed, more recent cases have expanded the traditional common law public trust doctrine even farther in two directions. First, courts have expanded the trust res. While early public trust cases focused on submersible lands, more recent cases have added, “water, wetlands, dry sand beaches, nonnavigable waterways.” Second, courts have also expanded the traditional uses to include environmental, aesthetic, and recreational interests. Both scholars and courts reiterate the idea that “[s]uch expansion is well within the function of common law to adapt to emerging societal needs.”

With this in mind, scholars have argued for a public trust in wildlife. Forty-eight states already claim state ownership of wildlife, which is analogous to state ownership of navigable waters. Nevertheless, only a few states have gone one step further to also expressly include wildlife in the public trust, though most states have at least employed some form of trust in judicial opinions on the issue, making it seem that states have all but adopted a public trust doctrine for wildlife. A California appeals court, for example, found a public trust in wildlife in that state in a case regarding protection of raptors and other bird species from wind turbines. However, in doing so, the court distinguished between traditional common law public trust and a statutory public trust, which is what it applied to wildlife. This leaves open the question of whether there is a common law public trust in wildlife in California. But returning to the holdings that the public trust doctrine is expandable as public interests change, it seems likely that eventually wildlife will be covered by a more explicit public trust. At that point, states could employ the Court’s “special solicitude” reasoning from Massachusetts v. EPA, which was based on the idea that “the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.”

Risk

The Court in Massachusetts v. EPA provided an additional opportunity for those seeking standing


Id. (citing In re Hood River, 227 P. 1065, 1086-87 (Or. 1924)); see also National Audubon Soc’y v. Superior Court of Alpine County, 658 P.2d 709, 719 (Cal. 1983) (quoting Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971)).

Blumm & Paulsen, supra note 158, at 1440. With this in mind, scholars have argued for a public trust in wildlife. Forty-eight states already claim state ownership of wildlife, which is analogous to state ownership of navigable waters. Nevertheless, only a few states have gone one step further to also expressly include wildlife in the public trust, though most states have at least employed some form of trust in judicial opinions on the issue, making it seem that states have all but adopted a public trust doctrine for wildlife. A California appeals court, for example, found a public trust in wildlife in that state in a case regarding protection of raptors and other bird species from wind turbines. However, in doing so, the court distinguished between traditional common law public trust and a statutory public trust, which is what it applied to wildlife. This leaves open the question of whether there is a common law public trust in wildlife in California. But returning to the holdings that the public trust doctrine is expandable as public interests change, it seems likely that eventually wildlife will be covered by a more explicit public trust. At that point, states could employ the Court’s “special solicitude” reasoning from Massachusetts v. EPA, which was based on the idea that “the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.”

The special solicitude doctrine from Massachusetts v. EPA raises the potential that states could more easily gain standing to protect at least some animals if they were also willing to recognize a duty under the public trust doctrine to protect wildlife for the benefit of the citizens of the state. Going back to the 1892 case Illinois Central R.R. v. Illinois, the public trust doctrine holds that the state’s sovereign ownership of natural resources must be exercised for the public good. The Court based this public trust on states obtaining sovereign ownership of navigable waters upon statehood. Over time, the public trust expanded to include waters that are not navigable and uses beyond the the traditional “trid” of public trust uses, which included fishing, navigation, and commerce. As society has changed, more recent cases have expanded the traditional common law public trust doctrine even farther in two directions. First, courts have expanded the trust res. While early public trust cases focused on submersible lands, more recent cases have added, “water, wetlands, dry sand beaches, nonnavigable waterways.” Second, courts have also expanded the traditional uses to include environmental, aesthetic, and recreational interests. Both scholars and courts reiterate the idea that “[s]uch expansion is well within the function of common law to adapt to emerging societal needs.”

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in animal welfare cases: in its discussion of special solicitude the Court recognized that risk of injury meets the Article III injury-in-fact requirement. This was not the first time that courts recognized risk of harm as injury and in fact it is discussed less in this case than in previous cases. In *Northwest Environmental Defense Center v. Owens Corning Corp.*, the court concluded that “a plaintiff need not wait until after he has been harmed before seeking relief, particularly when the injuries are of a kind not readily redressed by damages.” Previous to that, in *Delta Water Agency v. United States*, the Ninth Circuit recognized not only that a “credible threat of harm is sufficient to constitute actual injury for standing purposes,” but even applied that principle to animals in noting, “The extinction of a species, the destruction of a wilderness habitat, or the fouling of air and water are harms that are frequently difficult or impossible to remedy.” In *Massachusetts v. EPA*, the Court stated without any discussion that risk of injury was sufficient as though the idea was well-established. This basis for establishing injury is crucial when the continued existence of a species is at stake: extinct is forever and courts cannot change that outcome regardless of the remedy.  

The geographical nexus test for procedural standing still requires a localized harm. In *Massachusetts v. EPA*, Massachusetts was able to show that global climate change caused a risk of loss of the Massachusetts coastline. A state would have to be able to show that an agency’s actions would cause harm to a species existing locally, even if the harm itself was not localized. For example, a state with a population of a threatened bird species might be harmed by EPA permitting use of a specific pesticide that will kill the bugs that the birds eat, or by global climate change that kills off those same bugs.

Citizen Suits

Congress could grant standing to animals. For example:

We see no reason why Article III prevents Congress from authorizing a suit in the name of an animal, any more than it prevents suits brought in the name of artificial persons such as corporations, partnerships or trusts, and even ships, or of juridically incompetent persons such as infants, juveniles, and mental incompetents.

Cass Sunstein notes that both people and animals could have standing to the extent Congress grants it, but Congress has chosen not to grant standing to animals. In fact, in most animal protection statutes, Congress failed to even include any citizen suit provisions at all.

The one animal protection statute with a citizen suit provision, the ESA, contains a broad grant that allows “any person” to bring a suit under the statute, as follows:

The term “person” means an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.

However, the court in *Cetacean Community* held that this definition does not authorize animals to bring suit.

One scholar suggests there are two problems with *Cetacean Community*. First, the court should not have determined so readily that its own seeming grant of standing to the Hawai’ian palila was dicta, and second, that the court misinterpreted the ESA citizen suit provision when it held that it precludes animals from having standing. Wymyslo’s discussion highlights the confusion created by the inconsistent jurisprudence of ESA standing.

It will likely take a series of cases to untangle the confused judicial precedent. But Congress could quite easily solve the issue by amending the ESA to include animals in the citizen suit provision. Moreover, Congress should amend the ESA to effectuate its original intent, which contemplated the “use of all methods and procedures...

170. *Id.* at 521.
171. See *Abate*, *supra* note 101, at 130-37.
173. 306 F.3d 398, 950 (9th Cir. 2002) (emphasis added) (cited in *Abate*, *supra* note 101, at 132).
175. *See Abate*, *supra* note 101, at 155.
177. *Id.* at 1176.
178. *Sunstein*, *supra* note 6, at 1335.
179. 16 U.S.C. §1540(g).
180. *Id.* §1532(13).
183. *Id.* at 59.
which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. The current doctrine of standing under the ESA focuses on injuries to people, not to animals. But "[i]t is ‘beyond doubt that Congress intended endangered species to be afforded the highest of priorities.’ This cannot occur until the legislature grants species standing."  

Wymyslo makes a solid argument for standing under the ESA, which already has a citizen suit provision. Sunstein believes that Congress will soon grant standing to animals, but it may be more plausible that Congress will first add citizen suit provisions to allow people to more easily establish standing under the statutes. What is clear is that congressional action is key to relaxing standing requirements for injuries to animals. To the extent some form of activism is required to effect the change, it may be Congress, not the courts, that should be the focus of the activity.

**Personhood**

Regardless of how much those litigating for animal welfare can learn from environmental protection lawsuits, perhaps the best hope for broadening standing in animal welfare cases is to give standing to the animals themselves. This is not an entirely implausible idea. Courts have already allowed animals as named plaintiffs, and the Ninth Circuit at least for a while left open the possibility that it had allowed standing to an animal. In *Palila*, the court simply stated that the Hawai’ian palila, a bird species, “has legal status and wings its way into federal court as a plaintiff in its own right.” Although subsequent cases used *Palila* as the basis for standing for other animals, that is actually a misreading of the case. Since only one plaintiff has to have standing, there can be additional plaintiffs that do not have standing. As the court finally explained in *Cetacean Community v. Bush*, after requesting briefing, that language was dicta—

the litigation had been extensive and this was the court’s fourth opinion in the case; other parties had standing, and standing had never been an issue. The court stated that their statements were “little more than rhetorical flourishes.” However, the fact that the court later requested briefing on its own language suggests it was at least willing to consider the legal merit of that language.

At the same time, the court did not immediately dismiss the idea of standing for animals. The only issue before the court in *Cetacean Community v. Bush* was whether cetaceans had standing to sue in their own names under various federal statutes, including the ESA and MMPA. The court began its analysis with this statement: “Article III does not compel the conclusion that a statutorily authorized suit in the name of an animal is not a ‘case or controversy.’ As commentators have observed, nothing in the text of Article III explicitly limits the ability to bring a claim in federal court to humans.” The question the court analyzed then was whether Congress had passed a statute granting standing. After analyzing specific language in each of the statutes, the court determined that none granted standing to animals. Nevertheless, the statement that Article III itself does not preclude standing for animals remains. After having to explain its earlier “rhetorical flourishes,” the court could not have made that statement lightly.

But under *Cetacean Community*, animals do not have standing until Congress grants it to them. The Nonhuman Rights Project is working in the courts to change the common law doctrine that animals are not legal persons.

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186. Sunstein, supra note 6, at 1359-60.  
187. Id. at 1359-61.  
188. See Palila v. Hawaii Dep’t of Land & Natural Res., 852 F.2d 1106 (9th CIR. 1988).  
189. Id. at 1107.  
have explored this idea for many years and pos-
ited that at least some animals should be classified as legal persons and thereby have legal rights of their own.198 The Nonhuman Rights Project has filed the first cases seeking judicial recognition of legal personhood status for at least some animals. All four cases (in three courts) were habeas corpus actions filed in New York State trial courts on behalf of individual chimpanzees.199 All three courts dismissed the cases200 on different grounds, but none closed the door. Instead, they included language suggesting they were sympathetic to the petitions.201 The intermediate appeals courts upheld the trial courts’ decisions, though one did so on alternate grounds and did not hold that animals are not legal persons.202 The Nonhuman Rights Project is appealing these cases further.203 In a momentarily exciting twist, it appeared that a New York Supreme Court judge recognized two of the chimpanzees, Hercules and Leo, as legal persons when she granted their writ of habeas corpus and issued an order to show cause.204


201. Id.


207. Sunstein, supra note 6, at 1365.

208. In December 2014, worldwide news sources reported that a court in Argentina declared that an orangutan named Sandra was, as a non-human person, being held illegally. E.g., Court in Argentina Grants Basic Rights to Orangutan, BBC, Dec. 21, 2014, http://www.bbc.com/news/world-latin-america-30571577. However, once the decision was translated, it appeared that although the court said “[i]t has based on a dynamic rather than static interpretation of the law, it is necessary to recognize the animal as a subject of rights, because nonhuman beings (animals) are entitled to rights, and therefore their protection is required by the corresponding jurisprudence,” it did not grant the habeas corpus petition, so Sandra’s status is unclear. Copy & Translation of Argentine Court Ruling, NONHUMAN RIGHTS PROJECT, Dec. 23, 2014, http://www.nonhumanrightsproject.org/2014/12/23/copy-of-argentine-court-ruling/.

Just hours later, however, the judge amended her order, striking the writ of habeas corpus and issuing only the order to show cause.205 While these cases continue to make their way through the New York appeals courts, the Nonhuman Rights project also plans to file additional cases.206 The legal implications of personhood status for animals is far-reaching. Although standing would not be automatic, legal personhood would entirely change the analysis for some animals. For those animals, the conclusion in Cetacean Community v. Bush, based on animals not being persons as required by the citizen suit provisions, would be reversed. Even absent citizen suit provisions, animals would no longer have to rely on what is essentially a third-person’s injury. Scholars have contemplated the practical ramifications of personhood status and found standing not to be problematic given that we already use guardians for humans who cannot press their own cases such as children and the disabled.207 Standing for at least some nonhumans would not be the procedural disaster that opponents fear. But courts are not there yet.208 In the United States, only New York courts have had the...
opportunity to even consider legal personhood for animals, and only for chimpanzees. This is probably not the easiest way to gain standing for animals, but it would be the most concrete way to ensure somebody has standing in those cases in which, right now, standing is elusive.

Conclusion

Animals and the natural environment are in much the same position with respect to seeking redress for injury. Their own injury is not sufficient and they have to rely on a corresponding human injury. Only if there is a human injury will anybody have standing to bring the lawsuit. Even then, establishing standing is not easy, nor are the requirements especially clear. Beyond the basic elements of injury, causation, and redressability, there seems to be much in the environmental standing doctrine (which includes animal standing cases) that is malleable or at least changeable. This leaves room for people seeking standing in animal cases to not only learn from the previous cases, but to argue to extend them. However, the best hope may not be in judicial decisions regarding standing but in congressional grant of standing to establish standing, but they are mostly still nonexistent for animal plaintiffs. A further hope lies in an idea that is not open to environmental elements: the idea of personhood for at least some animals. As sentient beings, animals may one day have direct access to the courts when they are injured.

Perhaps they will not win. Perhaps the bulldozers of “progress” will plow under all the aesthetic wonders of this beautiful land. That is not the present question. The sole question is, who has standing to be heard? Those who hike the Appalachian Trail into Sunfish Pond, New Jersey, and camp or sleep there, or run the Allagash in Maine, or climb the Guadalupes in West Texas, or who canoe and portage the Quetico Superior in Minnesota, certainly should have standing to defend those natural wonders before courts or agencies, though they live 3,000 miles away. Those who merely are caught up in environmental news or propaganda and flock to defend these waters or areas may be treated differently. That is why these environmental issues should be tendered by the inanimate object itself. Then there will be assurances that all of the forms of life which it represents will stand before the court—the pileated woodpecker as well as the coyote and bear, the lemmings as well as the trout in the streams. Those inarticulate members of the ecological group cannot speak. But those people who have so frequented the place as to know its values and wonders will be able to speak for the entire ecological community.

