ARTICLES

ARE STANDING REQUIREMENTS BECOMING A GREAT BARRIER REEF AGAINST ENVIRONMENTAL ACTIONS?

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> Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.[1]

INTRODUCTION

These words of Justice Brandeis, penned over seven decades ago with regard to the depredations of unregulated investment bankers, are as apt today when applied to unrestrained land development. Environmental quality review statutes, like the National Environmental Policy Act (NEPA)[2] and New York's State Environmental Quality Review Act (SEQRA),[3] are aimed at the same public disclosure. But recent federal and state court rules slash away at the standing of citizens and groups seeking to ensure that agencies implement those laws.

These environmental statutes, crucial to the protection of our finite land and natural resources, require effective judicial review. Without court examination of agency decisions to assure their compliance with these statutes, the sunlight will be obscured and land use decision-making will regress to the era of the

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[1] LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 62 (1933) (compiling articles written in 1913).

[2] 42 U.S.C. §§ 4321-4370 (1994).

[3] N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to -0117 (McKinney 1997).

smoke-filled room, a venue as harmful to the environment outside it as within it.

This Article will first look at the path of Supreme Court decisions on standing in environmental cases. It will then turn to the recent Court of Appeals and other New York rulings that circumscribe standing under SEQRA, as well as some comparable cases from other states. Finally, the Article will recommend a more generous view of standing that is more faithful to the legislative intent of these statutes.

I
The Narrowing of Federal Standing

The traditional view of standing required some pecuniary or physical damage, either sustained or impending.[4] Since this proved to be a serious obstacle to suits in both the civil liberties and environmental areas, courts generally, and the Supreme Court in particular, expanded standing in a series of decisions through the 1960s and 1970s. These decisions culminated in the landmark ruling in *Sierra Club v. Morton*,[5] holding that, while economic injury was not necessary for standing, there must be "injury in fact" to the plaintiff. Since "[t]he Sierra Club failed to allege that it or its members would be affected in any of their activities" by the project, it was not "aggrieved" within the meaning of the Administrative Procedure Act[6] and therefore lacked standing to challenge the project.[7] While *Sierra Club* did not open the door to standing as broadly as the plaintiff environmental advocacy group wished, it nonetheless made clear that plaintiffs have standing to seek review of agency decisions as long as they can show genuine injury.

Earlier cases in the federal courts had paved the way to *Sierra Club*'s reasonable standard. For instance, in *Scenic Hudson Preservation Conference v. Federal Power Commission*,[8] the Second Circuit found that a variety of conservation groups had standing to challenge the issuance of a permit to a controversial hydroelectric power plant athwart Storm King Mountain in New York's Hudson Highlands. The court noted that the Federal

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[4] *See* Sierra Club v. Morton, 405 U.S. 727, 738 (1972).
[5] 405 U.S. 727 (1972).
[6] 5 U.S.C. § 702 (1994).
[7] *Sierra Club*, 405 U.S. at 735.
[8] 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

Power Act,[9] under which the contested permit had been granted, required the Commission to weigh conservation values alongside economic interests.[10]

The Supreme Court opened the door to standing most widely in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*,[11] decided the year after *Sierra Club*. The plaintiffs in *SCRAP*, a group of students, were held to have standing to seek review of freight rates approved by the Interstate Commerce Commission that made it cheaper to ship newly minted metal than scrap metal.[12] The students argued that the rates were a disincentive to recycling. Their standing was based on assertions that "their members used the forests, streams, mountains and other resources in the Washington metropolitan area for camping, hiking"[13] and the like, and that the disparate freight rates would "result[ ] in more refuse that might be discarded in national parks in the Washington area."[14] Dissenting, Justice White, joined by Chief Justice Burger and Justice Rehnquist, found these injuries "so remote, speculative, and insubstantial" as to justify "permitting citizens at large to litigate any decisions of the Government . . . with which they disagree."[15]

At just about this time, in fact, the citizen-suit ogre feared by Justice White became a reality manifest in most of the environmental regulatory statutes enacted by Congress. The Clean Air Act,[16] Clean Water Act,[17] Endangered Species Act,[18] and other federal environmental statutes contain explicit provisions authorizing "any person" or "any citizen" to sue to enjoin violations.[19] However, as we shall see, even these expansive grants of standing have been severely hobbled by a series of recent Supreme Court decisions.[20]

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9 16 U.S.C. §§ 791a-828c (1994).
10 *See Scenic Hudson*, 354 F.2d at 614.
11 412 U.S. 669 (1973).
12 *See id.* at 685.
13 *Id.*
14 *Id*. at 688.
15 *Id*. at 723 (White, J., dissenting).
16 42 U.S.C. §§ 7401-7671q (1994).
17 33 U.S.C. §§ 1251-1387 (1994).
18 16 U.S.C. §§ 1531-1544 (1994).
19 *See* 42 U.S.C. § 7604(a)(1) (Clean Air Act); 33 U.S.C. § 1365(a)(1) (Clean Water Act); 16 U.S.C. § 1540(g)(1)(A) (Endangered Species Act).
20 *See* Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003 (1998); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990).

The retreat from *Sierra Club* and *SCRAP* began in 1990 with *Lujan v. National Wildlife Federation*[21] and has continued to gather speed. In *National Wildlife Federation*, the Supreme Court denied standing to a nationwide conservation organization similar to the Sierra Club, even though the organization made the very assertions of specific injury to its members that *Sierra Club v. Morton* seemingly required. The issue in *National Wildlife Federation* was the reclassification of lands administered by the Bureau of Land Management in the Department of the Interior so as to allow mining and oil and gas leasing.[22] The plaintiff submitted affidavits from members who claimed a personal interest in the reclassified lands for "recreational use and esthetic enjoyment," and who alleged that this interest was "adversely affected in fact by the unlawful actions of the Bureau and the Department."[23] These assertions fit the requirements of *Sierra Club* precisely. Despite this fact, Justice Scalia, writing for a divided Court, ruled the affidavits insufficient, since they referred to considerably larger tracts of federal land than the parcels that were reclassified.[24] The Court held that the requirements of standing are

> assuredly not satisfied by averments which state only that one of respondent's members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action. It will not do to "presume" the missing facts because without them the affidavits would not establish the injury . . . .[25]

As for *SCRAP*, the Court blandly dismissed its "expansive expression" of standing as having "never since been emulated by this Court,"[26] and oddly distinguished the earlier case as based on a motion to dismiss, unlike the motion for summary judgment at bar. A motion to dismiss, the Court explained, "presumes that general allegations embrace those specific facts that are necessary to support the claim."[27]

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21 497 U.S. 871 (1990).

22 *See id.* at 879.

23 *Id*. at 886 (quoting plaintiff's affidavit).

24 *See id.* at 889.

25 *Id*.

26 *Id*.

27 *Id*.

But the affidavits here surely met the burden under Rule 56(e) of the Federal Rules of Civil Procedure to "set forth specific facts showing that there is a genuine issue for trial."[28] As the four dissenters noted, the affidavits stated that the affiant members used the exact federal lands of which portions were to be opened to mining.[29] Further, the affidavits referred to those lands in the same geographical terms used by the agency.[30]

The majority revealed its true motive when it objected to the suit as a "challenge [to] the entirety of petitioners' so-called 'land withdrawal review program.' That is not 'agency action' within the meaning of § 702"—the Administrative Procedure Act provision for judicial review of agency decisions.[31] What the Court clearly balked at was what it uncharitably characterized as "seek[ing] *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made."[32] This characterization utterly overlooked the fact that the plaintiff asserted the Bureau's actions to be unlawful.[33] There is no rule of standing nor any notion stemming from separation of powers doctrine that subjects only trivial or site-specific government acts to court review. *SCRAP* belies this limiting construction, as do numerous other decisions reviewing major, far-reaching activities of federal agencies.[34]

The twig that *National Wildlife Federation* bent twisted the entire branch in *Lujan v. Defenders of Wildlife*.[35] Here, Justice Scalia's majority opinion again found that a respected nationwide conservation group lacked standing to challenge a Department of the Interior rule, despite factual affidavits asserting actual injury to its members.[36] The suit concerned a provision of the Endan-

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[28] FED. R. CIV. P. 56(e).

[29] *See National Wildlife Fed'n*, 497 U.S. at 902-03 (Blackmun, J., dissenting).

[30] *See id.* at 903.

[31] *Id.* at 890 (citing 5 U.S.C. § 702 (1994)).

[32] *Id*. at 891.

[33] *See id.* at 875.

[34] *See, e.g*., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (reviewing a nationwide air pollution rule promulgated by the Environmental Protection Agency); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978) (reviewing a nationwide power plant licensing rule promulgated by the Nuclear Regulatory Commission).

[35] 504 U.S. 555 (1992).

[36] *See id.* at 563.

gered Species Act[37] requiring federal agencies to consult with the Secretary of the Interior to ensure that their actions do not destroy the critical habitat of an endangered species.[38] The plaintiffs contended that this statute applied to federal agency actions outside the United States (as a 1978 regulation had provided) and that a revised rule to the contrary violated the Act.[39] The Supreme Court reversed the judgments of the lower courts and held that the plaintiffs were without standing under Article III of the Constitution, which requires that there be a case or controversy in order for a federal court to have jurisdiction.[40] It should be noted that *Defenders of Wildlife*, in contrast to *Sierra Club* and *National Wildlife Federation*, was decided not under the Administrative Procedure Act's statutory requirement that a plaintiff be aggrieved,[41] but under the "case" or "controversy" requirement of Article III of the Constitution.[42]

Two members of the plaintiff organization in *Defenders of Wildlife* stated in affidavits that they had visited sites in Egypt and Sri Lanka that were habitats of endangered species threatened by U.S.-funded projects and that they intended to revisit those sites.[43] These averments surely met the "injury in fact" test of *Sierra Club*. In fact, the Court agreed that "the desire to . . . observe an animal species . . . is undeniably a cognizable interest for purpose[s] of standing."[44] But the Court found that these plaintiffs lacked standing since the members failed to assert "imminent" injury.[45] Noting that the past visits did not show any ongoing or future illegality, the Court concluded that "the affiants' profession of an 'inten[t]' to return . . . is simply not enough. Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of . . . 'actual or imminent' injury."[46] Presumably, their affidavits would have sufficed had they furnished an actual date on which they planned to return. In fact, the Sri Lanka affiant aptly explained: "There is a

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37 16 U.S.C. § 1536(a)(2) (1994).
38 *See Defenders of Wildlife*, 504 U.S. at 557-58.
39 *See id.* at 559.
40 *See id.* at 562.
41 *See* 5 U.S.C. § 702 (1994).
42 *Defenders of Wildlife*, 504 U.S. at 578.
43 *See id.* at 563-64.
44 *Id.* at 562-63.
45 *See id.* at 574-78.
46 *Id.* at 564.

civil war going on right now."[47] It is hard to understand how greater specificity would have been possible.

The grudging view of standing taken in *Defenders of Wildlife* is all the more incomprehensible since the plaintiffs sued under the Endangered Species Act's citizen-suit provision. This provision expressly states that "any person may commence a civil suit . . . to enjoin any person, including [a] governmental . . . agency, [asserted] to be in violation of any provision of this chapter."[48] The clear intent of this section was to finesse the traditional difficulties in showing standing. Subject only to the outer limits of the case or controversy requirement of Article III, citizen-suit provisions were enacted precisely to obviate disputes over standing and to enable any persons with the constitutionally-mandated degree of interest to enjoin violations of environmental laws.[49] This "irreducible minimum" interest, as the Court has often held and as Justice Blackmun's dissent noted, is only that the plaintiff assert an injury "fairly traceable" to the defendant and "likely to be redressed by the requested relief."[50]

Justice Scalia's opinion shows its true colors in objecting to the plaintiffs' failure to show "redressability": "Instead of attacking the separate decisions to fund particular projects," they chose to challenge the rule itself.[51] The statute, however, explicitly authorizes suits against an agency "in violation of any provision" of the Act.[52] Congress did not only allow suits against individual projects.

The Supreme Court held in *Bennett v. Spear*,[53] a 1997 decision deserving of two cheers, that the citizen-suit provision in the Endangered Species Act could be invoked by plaintiffs advancing economic interests. However, the ruling in *Bennett* hardly al-

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[47] *Id.* (quoting plaintiff's affidavit).

[48] 16 U.S.C. § 1540(g) (1994).

[49] *See* Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692 (D.C. Cir. 1975). In describing the function of the citizen-suit provision within the Clean Water Act, 33 U.S.C. § 1365(a)(1) (1994), the court remarked: "Anyone even remotely familiar with the case law of the period will discern that this provision took broad steps to facilitate the citizen's role in the enforcement of the Act . . . in removing the barrier, or hindrance, to citizen suits that might be threatened by challenges to plaintiff's standing." *Natural Resources Defense Council*, 510 F.2d at 700.

[50] *Defenders of Wildlife*, 504 U.S. at 590 (Blackmun, J., dissenting) (citing Allen v. Wright, 468 U.S. 737, 751 (1984)).

[51] *Id.* at 568.

[52] 16 U.S.C. § 1540(g) (1994).

[53] 117 S. Ct. 1154 (1997).

tered the Court's course set to diminish judicial review of environmental agencies. The plaintiffs, two irrigation districts and two ranchers relying on water flow from a reservoir, sought to challenge the Department of Interior's determination that flow should be restricted in order to keep water levels high enough to protect the habitat of endangered fishes.[54] The Court simply adhered to basic principles that economic harm confers standing,[55] which likely would have sufficed even without a citizen-suit provision.

Most recently, Justice Scalia, writing for the Court in *Steel Co. v. Citizens for a Better Environment*,[56] further curtailed private standing to question government decision-making, again despite a citizen-suit statute and again based on Article III. This time the Court was essentially unanimous.[57] Justice Blackmun, who led the dissenters in *National Wildlife Federation* and *Defenders of Wildlife*, had retired.

The plaintiff in *Steel Co.* sought civil penalties, which are payable to the Government, from a steel manufacturer that had failed for eight years to inform the Environmental Protection Agency of its hazardous chemical storage and discharges in violation of the Emergency Planning and Community Right-To-Know Act (EPCRA).[58] The suit was brought under the statute's citizen-suit provision.[59] Since the violations were wholly in the past, the plaintiff did not seek injunctive relief under the statute.[60] The real question—whether citizen-suit statutes authorize actions involving past violations—was identical to that decided by the Supreme Court in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*[61] a few years earlier, regarding the Clean

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[54] *See id.* at 1159-60.

[55] *See id.* at 1163.

[56] 118 S. Ct. 1003 (1998).

[57] All the justices agreed that the plaintiff lacked standing. Justices O'Connor and Kennedy joined the Court's majority opinion but wrote a short concurrence. *See id.* at 1020 (O'Connor, J., concurring). Justice Breyer's concurrence disagreed only with the majority's insistence that questions of standing invariably ought to be decided first. *See id.* at 1020-21 (Breyer, J., concurring). Justices Stevens, Souter, and Ginsburg concurred as well, agreeing the plaintiff lacked standing under the statute and thus contending that "the Court should leave the constitutional question for another day." *Id*. at 1021 (Stevens, J., concurring).

[58] 42 U.S.C. §§ 11001-11050 (1994).

[59] *See id.* §§ 11022-11023.

[60] *See Steel Co.*, 118 S. Ct. at 1018.

[61] 484 U.S. 49 (1987).

Water Act's citizen-suit provision. The *Gwaltney* Court reached the merits and went on to rule that under that statute an injunction action did not lie for past acts without a showing that they were likely to recur.[62] However, the Court in *Steel Co.* distinguished the ability of the *Gwaltney* Court to reach the merits on the flimsy basis that the Clean Water Act statute contained the phrase "without regard to the amount in controversy or the citizenship of the parties"—words absent from the EPCRA citizen-suit provision.[63] It concluded that the "phrase strongly suggested (perhaps misleadingly) that the provision was addressing genuine subject-matter jurisdiction."[64]

In the end the Court bottomed its holding, as in *Defenders of Wildlife*, on a separation of powers theory that frowns upon citizen challenges of executive agencies.[65] But that is what judicial review is all about: the ability of the courts to restrain unlawful or unconstitutional acts or other abuses of power by governmental agencies. As Chief Justice Marshall eloquently questioned long ago: "To what purpose are powers limited, and to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to be restrained?"[66]

Despite this plain need for judicial oversight, the Court in *Steel Co.* found, as in *Defenders of Wildlife*, no "redressability." The plaintiff sought a judgment declaring the defendant to have violated EPCRA, a civil penalty, and the authorization to inspect the defendant's plant, records, and copies of its compliance reports.[67] Yet the Court ruled that none of these "would serve to reimburse [the plaintiff] for losses caused by the late reporting, or to eliminate any effects of that late reporting upon [the plaintiff]."[68] Ironically, the Court held that a declaratory judgment would be "worthless" since the defendant had already conceded violating the statute.[69] Additionally, the penalties were "not remediation of [plaintiff's] injury" since they were payable to the

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[62] *See id.* at 66.

[63] *Steel Co.*, 118 S. Ct. at 1010 (quoting 33 U.S.C. § 1365(a) (1994)).

[64] *Id.*

[65] *See id.* at 1012.

[66] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

[67] *Steel Co.*, 118 S. Ct. at 1018.

[68] *Id.*

[69] *See id.*

Government[70]—as if a judgment requiring the defendant to pay them did not benefit the plaintiff in any way. The access to inspect the defendant's plant and papers was likewise held unavailing since it was "injunctive in nature" and the plaintiff had failed to assert a continuing violation.[71] One would have thought that this issue was what the suit was about.

In 1998, the Supreme Court narrowed even further the ability of citizens asserting environmental harm to seek judicial review with an eye to imposing a measure of restraint on unbridled executive power. In *Sierra Club v. Thomas*,[72] the Sixth Circuit had upheld the plaintiffs' standing to challenge a land resource management plan adopted by the United States Forest Service as violative of the National Forest Management Act.[73] The appellate court had rejected the Forest Service's claim that "disputes over forest planning are not ripe for review until a site-specific action occurs."[74] The plan at issue was a ten-year management plan for Wayne National Forest in Ohio that authorized the cutting of 7.5 million board feet of timber each year from a 126,000-acre portion of the forest.[75] The plan specifically allowed clearcutting in most of that area.[76]

The plaintiffs had asserted that this plan violated the Act, which limits clearcutting to situations in which it is the optimum means of harvesting.[77] Under the Act, the management plan itself may be adopted only after citizen participation.[78] The Sixth Circuit noted that there would be little point in delaying legal challenge until a specific area is about to be clear-cut. In the court's words, "[i]f the Sierra Club was allowed to challenge the Forest Service plan only at the site-specific stage, then the meaningful citizen participation contemplated by the . . . Act 'would forever escape review.'"[79]

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[70] *Id*.

[71] *See id.* at 1019.

[72] 105 F.3d 248 (6th Cir. 1997), *vacated sub nom.* Ohio Forestry Ass'n Inc. v. Sierra Club, 118 S. Ct. 1665 (1998).

[73] 16 U.S.C. §§ 1600-1614 (1994).

[74] *Thomas*, 105 F.3d at 250.

[75] *See id*. at 249.

[76] *See id.*

[77] *See* 16 U.S.C. § 1604(g)(3)(F)(i).

[78] *See id.*

[79] *Thomas*, 105 F.3d at 250 (citing Idaho Conservation League v. Mumma, 956 F.2d 1508, 1516 (9th Cir. 1992)).

However, the Supreme Court unanimously reversed, holding that the suit was not ripe.[80] The Court ruled that the plan "does not give anyone a legal right to cut trees" since "before the Forest Service can permit logging, it must focus upon a particular site."[81] Thus, in the context of a ripeness issue, the Court missed a chance to mitigate some of the damage done by *National Wildlife Federation*, *Defenders of Wildlife*, and *Steel Co.* and to uphold standing and justiciability in a genuine controversy brought by a plaintiff with a genuine stake in the outcome. Instead, the Court continued on its seeming crusade to deprive conservation groups of their ability to review governmental action in the courts.

Why did Congress enact citizen-suit statutes if their use is to be obstructed by the Supreme Court at every turn? The history of these cases is reminiscent of the long and notorious use of the Commerce Clause and substantive due process by an earlier Supreme Court majority to strike down laws aimed at curbing untrammeled corporate power.[82] In a similar vein, the Court in recent years has read the citizen-suit provisions of the federal statutes far too narrowly, while forging the hitherto-neutral Article III case or controversy requirement into a weapon to thwart Congressional intent. Let us look at each of these concerns in turn.

Congress has enacted citizen-suit statutes in virtually all the regulatory legislation controlling environmentally harmful acts, such as pollution of air and water, discharge of hazardous waste, and threats to endangered species.[83] These provisions "reflected a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that the Act[s] would be implemented and enforced."[84] As the Senate Committee Report on the 1970 Clean Air Act noted: "Government initiative in seeking enforcement under the Clean Air Act has been restrained. Authorizing citizens to bring suits for violations of

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[80] *See* Ohio Forestry Ass'n, Inc. v. Sierra Club, 118 S. Ct. 1665 (1998).

[81] *Id.* at 1670.

[82] *See, e.g.*, Morehead v. New York *ex rel*. Tipaldo, 298 U.S. 587 (1936) (holding that states may not set a minimum wage); Hammer v. Dagenhart, 247 U.S. 251 (1918) (holding that Congress may not regulate the shipment of goods made by child labor); Lochner v. New York, 198 U.S. 45 (1905) (holding that states may not set a limit on labor hours).

[83] *See supra* note 19.

[84] Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692, 700 (D.C. Cir. 1975).

standards should motivate governmental agencies charged with the responsibility to bring enforcement and abatement proceedings."[85]

Recognizing the limits on government resources and zeal, as well as the fundamental importance of this legislation safeguarding our irreplaceable air, water, wildlife, and land, Congress could hardly have expressed more plainly its intent to bolster government enforcement of environmental regulatory statutes with citizen actions for injunctive relief. Here, the plain meaning of the statutes and their legislative histories are in total harmony.

In addition, the Court in *Defenders of Wildlife* and *Steel Co.* inflated Article III's case or controversy mandate beyond any conceivable intent on the part of the founders. Environmental litigation, in contrast to some suits involving constitutional issues,[86] nearly always involves specific issues relating to the protection of specific resources. *Defenders of Wildlife* related to safeguarding the habitat of the Nile crocodile and several other similarly endangered species. *Steel Co.* concerned the failure of one steel mill to report its storing and discharge of certain toxic chemicals. These cases simply are not about "generalized grievances" or abstract injury, as in other decisions in which Article III standing has been denied. Environmental protection is of a different nature. The distortion of both the "aggrieved" requirement and Article III in environmental litigation will, if unchecked, greatly hamstring enforcement of laws aimed at safeguarding public health, not to say human survival.

II
Standing in the New York Courts

A. *The Requirement of Environmental Injury*

New York courts have traditionally lagged behind the federal judiciary in providing standing. The archaic rule that a plaintiff must assert pecuniary or physical injury persisted until 1974, when the Court of Appeals belatedly granted standing to a citi-

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[85] S. Rep. No. 91-1196, at 35-36 (1970), *cited with approval in* Friends of the Earth v. Carey, 535 F.2d 165, 172 (2d Cir. 1976).

[86] *See, e.g.*, Flast v. Cohen, 392 U.S. 83 (1968) (addressing whether a federal program providing aid to sectarian schools violated the First Amendment); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (addressing whether members of Congress may constitutionally hold Armed Forces Reserve commissions).

zen group to challenge a zoning change.[87] However, New York has failed for two decades to enact a citizen-suit statute despite its introduction in the legislature (and repeated passage in the Assembly).[88] Although the state now allows standing to environmental groups asserting environmental harm, the Court of Appeals has in recent years restricted that standing greatly.

This situation is most severe and odd with regard to standing under SEQRA, the State Environmental Quality Review Act. Although the federal courts have found that plaintiffs claiming either economic or environmental injury have standing to challenge agency decisions under NEPA,[89] New York courts adhere to the peculiar requirement that plaintiffs challenging an agency's violation of SEQRA must assert environmental injury alone.

Worse yet, this rule has been enforced so harshly by some courts in recent years that numerous violations of the Act have become virtually immune from judicial review. These courts have veered far from the legislature's intent in enacting SEQRA, to ensure that state and municipal agencies "conduct their affairs with an awareness that they are stewards of the air, water, land, and living resources, and . . . have an obligation to protect the environment for the use and enjoyment of this and all future generations."[90]

Although the "environmental injury only" hurdle to judicial review of SEQRA compliance had initially been confined to lower court decisions,[91] the Court of Appeals adopted this rule in two increasingly narrowing decisions at the start of this decade. In *Mobil Oil Corp. v. Syracuse Industrial Development Agency*,[92] the owner of an oil distribution terminal and others sought to challenge a city-financed private development plan for the area, which was to include a large shopping mall. The plaintiffs' challenge to the city's environmental impact statement (EIS), prepared pursuant to SEQRA, was prompted out of concern that

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87 *See* Douglaston Civic Ass'n v. Galvin, 324 N.E.2d 317 (N.Y. 1974).

88 *See, e.g.*, A. 191, 218th Leg., Ann. Sess. (N.Y. 1995); S. 2323, 218th Leg., Ann. Sess. (N.Y. 1995).

89 *See, e.g.*, Committee for Auto Responsibility v. Solomon, 603 F.2d 992 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 915 (1980) (environmental injury); Shiffler v. Schlesinger, 548 F.2d 96 (3d Cir. 1977) (economic injury).

90 N.Y. ENVTL. CONSERV. LAW § 8-0103(8) (McKinney 1997).

91 *See, e.g.*, Seawall Assocs. v. City of New York, 510 N.Y.S.2d 435 (Sup. Ct. 1986); New York State Builders Ass'n, Inc. v. State, 414 N.Y.S.2d 956 (Sup. Ct. 1979).

92 559 N.E.2d 641 (N.Y. 1990).

the mall "was merely the first step in . . . an extensive plan for redevelopment of the entire area" and that the city had improperly segmented its SEQRA review by neglecting other existing plans to develop the district.[93]

The court began with the unexceptionable general standing rule that one must show "special damage, different in kind and degree from the community generally."[94] Citing earlier lower court cases, the court went on to hold that "[t]o qualify for standing to raise a SEQRA challenge, a party must demonstrate that it will suffer an injury that is environmental and not solely economic in nature."[95] But Mobil in fact argued that the development planned for its back yard would impose on the city substantial costs of acquiring the land and relocating oil tanks, impact adversely on Syracuse's downtown business center, and add to the cost of fuel throughout the region.[96] Nonetheless, the court insisted these were mere economic concerns outside the purview of SEQRA review, despite explicit statutory language mandating that "the environment, human and community resources shall be given appropriate weight" by agencies together "with social and economic considerations."[97] Further, "[s]ocial, economic, and environmental factors" are to be "considered together in reaching decisions on proposed activities."[98]

This view is supported by SEQRA's legislative history. Assembly Member Herbert A. Posner, Chair of the Environmental Conservation Committee and legislative sponsor of the bill that became SEQRA, described the statute's purpose in a supporting memorandum as enabling agencies "to intelligently assess and weigh environmental factors *along with social, economic and other relevant considerations* in determining whether or not a project or activity should be approved."[99] In the landmark *Jack-*

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[93] *Id.* at 643.

[94] *Id.* at 644 (quoting Sun-Brite Car Wash v. Board of Zoning & Appeals, 508 N.E.2d 130, 133 (N.Y. 1987) (addressing standing in the context of a zoning case not involving SEQRA)).

[95] *Id.* (citing cases).

[96] *See id.*

[97] N.Y. ENVTL. CONSERV. LAW § 8-0103(7) (McKinney 1997).

[98] *Id.*

[99] A. 4533-A, 198th Leg., Civ. Y. Sess. (N.Y. 1975) (emphasis added), *reprinted in* 1975 N.Y. LEGIS. ANN. at 438, *cited with approval in* Tuxedo Conservation & Taxpayers Ass'n v. Town Bd. of Tuxedo, 408 N.Y.S.2d 668, 671 (Sup. Ct. 1978), *aff'd*, 418 N.Y.S.2d 638 (App. Div. 1979).

son v. New York State Urban Development Corp.,[100] the Court of Appeals likewise saw SEQRA as an "attempt to strike a balance between social and economic goals and concerns about the environment."[101]

Now that the United States Supreme Court in *Bennett v. Spear* has recognized economic harm as a valid support for standing under an environmental statute[102]—as the federal courts have consistently held under NEPA[103]—perhaps New York's courts will reconsider their insistence that standing to review SEQRA compliance be limited to environmental injuries.

The *Mobil Oil* decision was, however, no more than a curtain-raiser to *Society of the Plastics Industry, Inc. v. County of Suffolk*,[104] a four-three decision that has dangerously restricted the ability of citizens to seek review of agencies' violations of SEQRA. *Society of Plastics* involved a local county law that banned certain plastic food containers.[105] The law was motivated by concern over limited landfill capacity on Long Island and the threat to groundwater from plastic deposited in those landfills.[106] Unlike paper, food, and yard waste, plastic does not biodegrade and thus can leach into waterways and aquifers.

Although county laws are covered by SEQRA,[107] Suffolk County had issued a negative declaration, that is, a finding that the proposed law had no significant environmental impact.[108] The plaintiffs—plastics industry trade associations and manufacturers, including one based in the county—brought suit, asserting that the county should have prepared an EIS. They also contended that the local law deprived them of property without due process of law, that it denied them equal protection under the laws, and that it was preempted by federal laws regulating solid waste.[109]

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100 494 N.E.2d 429 (N.Y. 1986).

101 *Id.* at 434.

102 *See supra* text accompanying note 55.

103 *See supra* text accompanying note 89.

104 573 N.E.2d 1034 (N.Y. 1991).

105 *See id.* at 1035-36.

106 *See id.* at 1034.

107 *See* Brew v. Hess, 508 N.Y.S.2d 712 (App. Div. 1986). The Department of Environmental Conservation regulations similarly interpret SEQRA's definition of "action" to encompass "local laws." *See* N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(b)(2)-(3) (1998).

108 *See* N.Y. COMP. CODES R. & REGS. tit. 6, § 617.5 (1998).

109 *See Society of Plastics*, 573 N.E.2d at 1037.

To justify its standing, the Society (the lead plaintiff) submitted its president's affidavit as to the perceived environmental impacts of the law.[110] The Society alleged that increased use of paper instead of plastic would lead to greater truck traffic, thereby damaging roads, impairing air quality, and increasing noise.[111] In addition, the Society anticipated groundwater contamination from increased bulk in landfills and greater air and water pollution and energy use from producing paperboard and the like to replace plastic containers.[112] The affidavit of the local manufacturer buttressed these claims that replacement of plastic with paper would lead to increased solid waste and greater truck traffic, groundwater pollution, and energy use.[113]

Whether these claims would be borne out is, of course, not the issue. They plainly raise legitimate environmental concerns, as the lower courts found.[114] But the Court of Appeals' narrow majority concluded they were insufficient to support standing. The court began by restating the familiar rule that a plaintiff must assert direct injury "different from that of the public at large."[115] In applying this test, however, the court found the Society's professed injuries to be insufficiently related to the organization's purpose since it was a trade association instead of an environmental group.[116] Tellingly, the court emphasized that the Society's members were "entities whose economic interests are not served by bans on plastics products,"[117] as if that somehow automatically precluded standing. Instead, the environmental claims raised by the Society were off limits because they could not "be said to be germane to the purposes of this nationwide trade organization."[118]

As for the local manufacturer, it also failed the test for standing since its assertions of harm were, in some unexplained way, "tenuous" and "ephemeral."[119] Why increased truck traffic, burdens on already overwhelmed landfills, and groundwater contamination deserved such short shrift the court did not explain.

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110 *See id.*
111 *See id.*
112 *See id.*
113 *See id.*
114 *See id.*
115 *Id.* at 1041.
116 *See id.* at 1043.
117 *Id.*
118 *Id.*
119 *Id*.

Instead, it merely emphasized the economic nature of the harm raised by the company.[120] Though the court acknowledged that raising economic issues did "not foreclose [the local company's] standing also to raise environmental injury,"[121] it seemed to feel the economic harms to be the only ones genuinely asserted, treating the environmental issues as make-weights. For example, the court made much of the support for the plastics curb by a phalanx of environmental groups.[122] This contrasting emphasis suggests that the court rejected the plaintiffs' environmental assertions due to a lack of proof or simply because the court presumed them to be insincere. Either rationale is misguided. As the U.S. Supreme Court has repeatedly held, it is improper to "requir[e] the [plaintiffs] to prove their case on the merits in order to defeat a motion to dismiss."[123]

Ironically, the majority in *Society of Plastics* agreed that the plaintiffs had standing to raise the due process, equal protection, and preemption claims that the lower courts had dismissed on the merits.[124] Yet the court did not explain why those claims did not require the same level of standing as the SEQRA assertions. The court's holding rested on its insistence that, since SEQRA is an environmental statute, only environmental injury suffices to furnish standing—and that environmental injury must be specific to the plaintiff indeed.

Judge Hancock, joined in his dissent by Judges Simons and Titone, pointed out that, under the majority's view, any threatened or actual environmental injury suffered by *all* residents of a locality may not be raised by *any* of them—unless one can show harm different from that inflicted on his or her neighbors.[125] This interpretation, he aptly noted, "establishes criteria so restrictive as to present a virtual bar to SEQRA challenges . . . having such area-wide environmental effects."[126] The majority itself acknowledged the possibility that "where solely general harm would result from a proposed action, a plaintiff [may] have standing . . . based on potential injury to the community at

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120 *See id*.

121 *Id.* at 1043-44.

122 *See id.* at 1036.

123 Allen v. Wright, 468 U.S. 737, 775 (1984) (Brennan, J., dissenting); *see also* Havens Realty Corp. v. Coleman, 455 U.S. 363, 376 (1982).

124 *See Society of Plastics,* 573 N.E.2d at 1037.

125 *See id.* at 1046 (Hancock, J., dissenting).

126 *Id.*

large."[127] However, the majority held that this was not such a case. Others presumably could have raised the SEQRA claims that the plaintiffs—even the local resident—were forbidden to litigate. The majority, however, offered "no coherent reason" nor "satisfactory directions" as to when to suspend its rule requiring special harm for standing.[128] As the dissent warned, this deficiency "invites ad hoc and unguided implementation by the lower courts"[129]—a prophecy worthy of Cassandra.

The dissenters in *Society of Plastics* furnished an example of environmental harm that no one could challenge as violative of SEQRA under the court's newly-espoused rule: a local law allowing all residents to throw their garbage into the street.[130] Since the law affects all residents equally, none could challenge it.[131] But this grudging application of standing would have barred many earlier SEQRA-based suits that the courts nonetheless heard where area-wide harm was asserted. For example, as Judge Hancock's dissent pointed out, the harm claimed in *Industrial Liaison Committee v. Williams*[132] resulted from strict state water-quality regulations that, the plaintiffs argued, would have led to increased air pollution as industry burned hazardous waste previously discharged into waterways.[133] Thus, the majority's position in *Society of Plastics* was both unprecedented and unprincipled.

B. *New York Narrows Standing Beyond* Society of Plastics

The dissent's prediction of chaos and "unguided implementation" proved accurate. *Society of Plastics* was soon followed by *Otsego 2000, Inc. v. Planning Board*,[134] where the Appellate Division denied standing to a local conservation group that was challenging the town's failure to comply with SEQRA when approving a residential development on a scenic lake. The petitioner group's members included town residents who were

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127 *Id.* at 1044; *see also id.* at 1046.
128 *Id*. at 1046.
129 *Id*.
130 *See id.* at 1051.
131 *See id.*
132 521 N.Y.S.2d 321 (App. Div. 1987), *aff'd*, 527 N.E.2d 274 (N.Y. 1988).
133 *See Society of Plastics*, 573 N.E.2d at 1051 (Hancock, J., dissenting) (citing *Industrial Liaison Comm.*, 521 N.Y.S.2d at 325).
134 575 N.Y.S.2d 584 (App. Div. 1991), *appeal denied*, 589 N.E.2d 1263 (N.Y. 1992).

involved in environmental and land use issues. But, relying on *Society of Plastics*, the court ruled that the petitioner lacked standing because there was no claim that the group or its members either used the property to be developed or owned land in close proximity.[135] The court gave no weight to the petitioner's claims that the town-approved development would harm environmental and recreational values in this pristine area surrounding historic Cooperstown. Following *Society of Plastics* in lockstep, the court found these assertions of standing to be "at best . . . generalized claims of harm no different . . . from [that to] the public at large."[136]

Even the claim that one member of the organization owned land adjacent to the project was insufficient in *Otsego 2000*, for the court held that the owner's name was not on the petitioner's list of members and that there was no "affidavit from the property owner to establish that petitioner is acting as her representative."[137] The court affirmed dismissal of the suit without affording the petitioner leave to amend its petition—an opportunity that the Supreme Court had explicitly allowed the plaintiff in *Sierra Club v. Morton*.[138] Bewilderingly, the court concluded by observing that "this is not a case where a denial of standing to petitioner will insulate the governmental action from judicial review"[139]—though it is difficult to imagine how such review would occur if this petitioner could not seek it. In fact, no such judicial review has since taken place.

The expansion of the *Society of Plastics* rule in *Otsego 2000* was both unwarranted and ironic. The Court of Appeals in *Society of Plastics* had specified that citizen groups, in contrast to the industry plaintiffs before the court, would have standing if they asserted "in-fact injury within the zone of interest of environmental statutes" that would "directly harm association members in their use and enjoyment of the affected natural resources."[140] In addition, the *Society of Plastics* and *Mobil Oil* suits were

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135 *See id.* at 586-87.

136 *Id*. at 586.

137 *Id*.

138 *See* 405 U.S. 727, 735 n.8; *see also* Sierra Club v. Morton, 348 F. Supp. 219 (N.D. Cal. 1972) (upholding standing where the Sierra Club amended its complaint on remand to assert injury-in-fact).

139 *Otsego 2000*, 575 N.Y.S.2d at 586-87.

140 Society of the Plastics Indus., Inc. v. County of Suffolk, 573 N.E.2d 1034, 1042 (N.Y. 1991).

brought by industrial interests, and the plaintiff in *Society of Plastics* sought to use SEQRA to derail environmentally beneficial legislation. There is much irony and scant justification for the court's now using these decisions to block suits by those asserting genuine environmental concerns.

Again, in *Long Island Pine Barrens Society, Inc. v. Planning Board (Pine Barrens II)*,[141] the Appellate Division held that a regional environmental organization lacked standing to challenge a town's non-compliance with SEQRA in approving a large residential subdivision in a designated special groundwater protection area astride Long Island's pine barrens. The pine barrens themselves, vital to Long Island's water supply, are protected by a state law requiring a permit to build,[142] a law enacted following earlier litigation by the same petitioner asserting a violation of SEQRA.[143] Citing *Mobil Oil* and *Society of Plastics*, the court concluded that the individual petitioners were without standing no matter how great their interest, since they did not own land "in close proximity to the parcel to be developed" or otherwise show injury different in kind from that of the public at large.[144] Further, the Pine Barrens Society's standing was no better than that of its members. The court's ruling meant that no one but an adjacent landowner could seek to review a town's failure to prepare an EIS in allowing development in a concededly environmentally critical area. As in *Society of Plastics* and *Otsego 2000*, the court was effectively holding that injury to all is legally injury to none and thus unreviewable.

Two other recent Appellate Division decisions illustrate the vast impediment to standing imposed by the heightening of the *Society of Plastics* barrier. *Heritage Coalition, Inc. v. City of Ithaca Planning & Development Board*[145] denied standing to teachers at Cornell University's College of Architecture, Art and Planning who used the characteristics of Sage Hall in their academic demonstrations. The teachers asserted that Cornell's plan

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141 623 N.Y.S.2d 613 (App. Div. 1995).

142 *See* N.Y. ENVTL. CONSERV. LAW § 57-0121(10) (McKinney 1997).

143 *See* Long Island Pine Barrens Soc'y, Inc. v. Planning Bd. (Pine Barrens I), 606 N.E.2d 1373 (N.Y. 1992) (holding that towns in the pine barrens need not prepare a cumulative EIS weighing the impact of numerous planned projects in the area because the projects were not embraced in a common plan).

144 *Pine Barrens II*, 623 N.Y.S.2d at 615.

145 644 N.Y.S.2d 374 (App. Div.), *aff'd*, 671 N.E.2d 1275 (N.Y. 1996).

to alter the historic landmark was in violation of SEQRA.[146] The court held that "the diminution of [the petitioners'] appreciation of Sage Hall and [their] use of it as a teaching tool, is not . . . within the zone of interest sought to be promoted or protected by" SEQRA.[147] Nor did the fact that one petitioner lived within a half-mile help.[148] Similarly, in *Buerger v. Town of Grafton*,[149] a petitioner living but 600 feet from a proposed development asserted potential flood damage to her property, forest habitat degradation, and water pollution in the lake abutting her land; nonetheless, the court held that she lacked standing to bring a SEQRA challenge.[150]

Consistent with Judge Hancock's prediction of a series of ad hoc rulings,[151] a few decisions since *Society of Plastics* have granted standing to challenge SEQRA determinations. For example, in *Motor Vehicle Manufacturers Ass'n v. Jorling*,[152] the Albany County Supreme Court found that a group and its members had standing to argue that the State Department of Environmental Conservation violated SEQRA in adopting stricter air quality standards for automobiles. The petitioners asserted that "[a]s owners of real property, [they] will be subjected to the effects of air pollution . . . [to their] buildings and structures" since the new requirements for cars would, they maintained, increase some forms of air pollution.[153] The court agreed that these claims sufficed to establish standing, ruling that they need not show individual harm since the rules and the claimed injury were statewide. The court relied on the dicta in *Society of Plastics* suggesting that general harm need not require individualized injury.[154]

More typical of decisions following *Society of Plastics*, however, is the recent ruling in another suit brought by the Pine Barrens Society. In *Long Island Pine Barrens Society, Inc. v. Central Pine Barrens Joint Planning & Policy Commission (Pine Barrens*

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146 *See id.* at 375.

147 *Id*. at 376.

148 *See id.* at 377.

149 652 N.Y.S.2d 880 (App. Div.), *aff'd*, 681 N.E.2d 1303 (N.Y. 1997).

150 *See id.* at 881-82.

151 *See supra* text accompanying note 129.

152 577 N.Y.S.2d 346 (Sup. Ct. 1991).

153 *Id*. at 350.

154 *See id.*; *see also* Society of the Plastics Indus., Inc. v. County of Suffolk, 573 N.E.2d 1034, 1044 (N.Y. 1991).

III),[155] the Suffolk County Supreme Court found that most of the group's members, as well as members of other environmental organizations, were without standing to seek review of a decision to build sports facilities on thirty acres of park land within the central pine barrens, an area the state legislature had protected. The petitioners, asserting a violation of SEQRA, claimed "to have significant memberships in the area in close proximity to [the parcel to be developed] and [to] draw their drinking water from" the hydrologic zone they claimed to be threatened.[156] They also asserted that they hiked, watched birds, and otherwise used the area, again including the particular tract.[157]

The court rebuffed this clear showing of standing. It concluded that residing within three-quarters of a mile of the parcel was not close enough proximity.[158] As for the petitioners' drinking the impacted water and using the park land, those claims did not establish standing different from that of the public in general.[159] As a matter of fact, these very claims suffice in the federal courts. In the leading federal cases on this issue, such as *Scenic Hudson*, use of the area to be developed was precisely what furnished standing.[160] These were also the exact assertions that the Supreme Court held would have provided standing in *Sierra Club v. Morton*.[161] Yet, these same averments were deemed insufficient here.[162]

At least the Suffolk County Supreme Court did grant standing to the executive director of the petitioner organization, and thus to the organization itself, based on his use of a well that was threatened by the development.[163] According to the court, the proposed development would "compromise his personal source of drinking water, which is different than [that of] more than 99 percent of the [area] population."[164]

Even while denying standing to most of the petitioners, the court acknowledged that "[c]ourts should be careful of a situation where denying standing would insulate decisions from judi-

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155 N.Y. L.J., Nov. 21, 1996, at 32 (Sup. Ct. Nov. 21, 1996).
156 *Id*.
157 *See id.*
158 *See id.*
159 *See id.*
160 *See supra* text accompanying notes 8-10.
161 *See* Sierra Club v. Morton, 405 U.S. 727, 735 (1972).
162 *See Pine Barrens III*, N.Y. L.J., Nov. 21, 1996, at 32.
163 *See id.*
164 *Id.*

cial review."[165] In support of that sensible view, which it largely ignored, the court cited *Har Enterprises v. Town of Brookhaven*,[166] a pre-*Society of Plastics* Court of Appeals decision finding that a property owner has standing to challenge non-compliance with SEQRA in regard to his or her own land, even though the owner asserted no environmental injury at all. In so holding, Judge Hancock (author of the *Society of Plastics* dissent), writing for a unanimous court, noted that to deny standing "would insulate decisions such as this from judicial review, a result clearly contrary to the public interest."[167]

Once again, in *Long Island Pine Barrens Society, Inc. v. Town of Islip (Pine Barrens IV)*,[168] the court found the Society to be without standing to challenge the town's sale of land in the groundwater protection district to a developer. Averments that three of the petitioners owned parcels "within close proximity of the subject parcel" and that its development would "have a significant negative impact on the economic and esthetic value of their property and [would] adversely affect their health and well-being" were held insufficient.[169] Another petitioner, the Society's executive director, asserted that "he would be uniquely harmed because he conducts field trips for scientists [and] students . . . on the subject property."[170] But the court ruled that "[n]one of the individual petitioners have set forth the proximity within which they live to the subject parcel" and that none showed the requisite injury "different from the general public."[171]

How much greater specificity may a court legitimately require of petitioners in establishing standing? Has the increasing need to show "proximity"—and virtually to prove it before being allowed into court—created a series of ritualistic shibboleths, losing sight of any of the true concerns that led to the standing requirement in the first place? Are New York's courts not, in fact,

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165 *Id*. at 32 n.2. (citing Har Enters. v. Town of Brookhaven, 548 N.E.2d 1289, 1293 (N.Y. 1989)).

166 548 N.E.2d 1289 (N.Y. 1989).

167 *Id*. at 1293.

168 No. 97-08679 (Sup. Ct. Suffolk County filed Sept. 17, 1997).

169 *Id*., slip op. at 2

170 *Id*., slip op. at 3.

171 *Id*.

in Justice Brennan's words, "requiring [petitioners] to prove their case on the merits in order to defeat a motion to dismiss?"[172]

Another recent decision illustrates how niceties of standing may prevent those with a genuine interest in a project from seeking review of its legality under SEQRA. In *Fornino v. Town of New Hartford,*[173] the Oneida County Supreme Court held that residents near a proposed regional shopping center could not object to the town's asserted violations of SEQRA in approving the development, even though some plaintiffs lived within half a mile of the site. The court rebuffed their standing claims on the ground that "the roads they use do not lead directly into the proposed development" and that "[t]he traffic problems about which they complain involve intersections . . . not adjacent to or near their homes."[174] That these plaintiffs might use those roads daily seemed immaterial.

The court in *Fornino* went on to deny standing to the plaintiffs based on air quality "harms . . . [that] they can only have in common with other members of the general public."[175] Revealingly, the court denigrated these contentions as follows: "The law commits these concerns to the legislative branch of government. This court is not empowered to act as an all-purpose ombudsman nor to provide a court of last resort for every individual dissatisfied with legislative outcomes."[176]

In the end, the court assumed the plaintiffs' standing *arguendo*[177] and went on to decide against them on the merits.[178] But its narrow, restrictive view of standing echoes back to a time when judicial review, or even participation in decision-making by citizens, was all but impossible. This view runs counter to the legislative purpose of SEQRA and similar statutes designed to afford residents a role in decisions that affect the quality of their lives.[179] Just as war is too important for the generals alone, government determinations to fill in wetlands, endanger water sup-

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172 Allen v. Wright, 468 U.S. 737, 775 (1984) (Brennan, J., dissenting).

173 No. 97-2634 (Sup. Ct. Oneida County filed Jan. 6, 1998).

174 *Id*., slip op. at [5].

175 *Id*.

176 *Id*.

177 *See id*., slip op. at [6].

178 *See id*., slip op. at [10].

179 *See* Jackson v. New York State Urban Dev. Corp., 494 N.E.2d. 429, 434 (N.Y. 1986).

ply, and pave over farmland deserve and demand public participation and opportunity for review.

Where did New York's requirement that one's injury be different in kind from that suffered by others, imposed on plaintiffs in SEQRA litigation since *Society of Plastics*, come from? Its origin seems to stem from certain standing requirements in the law of nuisance, under which private plaintiffs seeking to bring a public nuisance action must make a similar showing. This doctrine does not apply to public nuisance suits by the state or governmental plaintiffs.[180] However, New York's courts insist on this proof and have dismissed actions challenging, for example, excessive noise on New York's subways on the ground that the plaintiffs' asserted injuries were not different in kind from those of the public generally.[181]

Whatever historical or other justifications buttress this rule in nuisance actions, it makes little sense to engraft it onto suits to review violations of SEQRA by governmental agencies. In this area, the legislative intent to foster public participation in decision-making and to ensure compliance with the act is crystal clear.

We have seen that the federal courts impose no such arcane requirements on plaintiffs asserting violations of NEPA. Either economic or environmental injury will suffice there, and there is no need to show the specialized injury that New York requires.[182] Likewise, other states with statutes similar to NEPA and SEQRA do not insist on this stringent level of particularized injury for standing. In *Murrieta Valley Unified School District v. County of Riverside,*[183] the California courts found that a school district had standing to review a county's land use plan under that state's Environmental Quality Act,[184] without demanding proof of particularized injury. Similarly, *Wisconsin's Environmental Decade, Inc. v. Public Service Commission*[185] held that a citizen group had standing to review an order restricting the sale

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[180] *See* State v. Ole Olsen, Ltd., 317 N.Y.S.2d 538 (Sup. Ct. 1971), *aff'd*, 331 N.Y.S.2d 761 (App. Div. 1972), *aff'd*, 320 N.E.2d 284 (N.Y. 1974) (holding that public nuisance actions by the state need not be brought by the tenant of land affected by the asserted nuisance).

[181] *See* Abrams v. New York City Transit Auth., 355 N.E.2d 289, 290 (N.Y. 1976).

[182] *See supra* text accompanying notes 89.

[183] 279 Cal. Rptr. 421 (Ct. App. 1991).

[184] CAL. PUB. RES. CODE §§ 21000-21177 (Deering 1996 & Supp. 1997).

[185] 230 N.W.2d 243 (Wis. 1975).

of natural gas to consumers as violative of a law similar to SEQRA. The Wisconsin Supreme Court found that the group members' interest in "continu[ing] to enjoy adequate and sufficient service through the conservation of natural gas" amply clothed them with standing.[186]

Conclusion

The federal courts have pointed out that "Congress made clear that citizen groups are not to be treated as nuisances . . . but rather as welcomed participants in the vindication of environmental interests."[187] While this particular statement was made in the context of a Clean Air Act citizen suit, its import applies as well to actions to review whether agencies have met their responsibilities under SEQRA. As New York's Court of Appeals has aptly ruled, SEQRA "formally recognized that environmental concerns should take their proper place alongside economic interests in . . . land use decision-making."[188] This can only occur if the courts authorize concerned residents to challenge government actions as a violation of that mandate. Archaic standing rules that hearken back to the era of special pleading should no longer stand as barriers to judicial review in this important area. Citizens concerned with sprawl and protecting water supply in their own communities are not nuisances, after all.

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[186] *Id*. at 252.

[187] Friends of the Earth v. Carey, 535 F.2d 165, 172 (2d Cir. 1976).

[188] King v. Saratoga County Bd. of Supervisors, 675 N.E.2d 1185, 1187 (N.Y. 1996).