ADDRESSING JUDICIAL RESISTANCE TO RECIPROCAL RELIANCE STANDING IN ADMINISTRATIVE CHALLENGES TO ENVIRONMENTAL REGULATIONS

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INTRODUCTION

The successful elimination of pollution relies far less on outright prohibitions than on the market-driven replacement of those substances or equipment that are detrimental to the environment. While there has been some recent acceptance of free-market environmental concepts, such as emission credit allocation and trading,[1] a productive relationship between environmentalism and capitalism has existed for most of the era of federal environmental regulation. The cost of environmental protection has long been a headache in both designing new rules[2]

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[1] Title IV of the Clean Air Act, 42 U.S.C. § 7651(a)–(o), incorporates a cap-and-trade program allowing regulated sources to buy and sell emissions credits to reduce sulfur dioxide, a key component of acid rain. *See* Byron Swift, Envtl. Law Inst., *How Environmental Laws Work: An Analysis of the Utility Sector's Response to Regulation of Nitrogen Oxides and Sulfur Dioxide Under the Clean Air Act*, 14 TUL. ENVTL. L.J. 309, 315 (2001) ("The program's record of over-achieving this goal [of reducing utility emissions ten million tons from 1980 levels] at very low compliance cost has prompted many to regard it as one of the most successful environmental regulatory programs.").

[2] *See, e.g.*, Exec. Order No. 12,291, 46 Fed. Reg. 13,193, 13,194–95 (Feb. 17, 1981) (requiring a Regulatory Impact Analysis for major rules having a significant impact on the economy, and review by the Office of Management and Budget); Regulatory Flexibility Act, *amended by* Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. §§ 603–604, 609 (2000) (requiring agencies to consider the financial burden of regulations on small businesses, smaller governments, and non-profit organizations). EPA is also subject to the Unfunded Mandates Reform Act of 1995, requiring a detailed cost-benefit analysis for regulations estimated to cost state, local, or tribal governments a combined $100 million or more in one year. 2 U.S.C. § 1532 (2000).

and complying with current obligations,[3] but money, like energy, is never truly lost; the costs of compliance land in the bank accounts of companies this paper will refer to as Environmental Capitalists.

These Environmental Capitalists could be roughly characterized as two types: Service Providers and Environmental Entrepreneurs. Service Providers are the companies supplying necessary services and equipment so that regulated industries can meet pollution standards. Without remedial contractors, no Superfund site would ever progress towards completion, no wet scrubbers would strip sulfur dioxide from power plants, and no oil spills would be contained and cleaned up. Environmental Entrepreneurs are the companies meeting the call of technology-forcing regulations. Whether creating alternative compounds that will replace environmentally threatening chemicals, or helping to design more efficient combustion engines, Environmental Entrepreneurs are the proactive corporations allowing the Environmental Protection Agency ("EPA") to impose more stringent requirements on regulated industries.

In the environmental context, Environmental Capitalists rely, at least in part, upon the demand for their products sparked by EPA's tangle of clean air, clean water, and waste disposal regulations. New rules that require stricter standards depend on private corporations to expend substantial capital in developing and manufacturing the technology required to meet those standards.[4] EPA creates a demand; Environmental Capitalists meet it. Without these corporations, federal command-and-control regulations would require a myriad of government-run suppliers or would simply collapse. Conversely, if EPA were to abandon or weaken pollution control standards, environmental capitalism would collapse. Yet, despite this symbiotic reliance between the

[3] *See infra* Part III (discussing cost considerations for individual pollution control stringency determinations).

[4] Many of these companies benefit from federal research funding. *See, e.g.*, Office of Fossil Energy, U.S. Dep't of Energy, Mercury Emission Control R&D, http://www.fossil.energy.gov/programs/powersystems/pollutioncontrols/overview_mercurycontrols.html (last visited Jan. 18, 2006) (discussing the accomplishments of the Department of Energy's Mercury Emission Control Research and Development Program). Even if federal dollars cover the entire cost of research and development, the resulting pollution controls do not manufacture themselves, nor is the federal government in the business of manufacturing them.

federal command-and-control system and private industry, the law does not recognize the right of Environmental Capitalists to challenge agency actions that weaken environmental standards and thus undercut their investments in pollution control.

Courts have consistently denied Environmental Capitalists prudential standing when these companies challenge alleged laxity in regulation.[5] Their profit motives appear to put off the judiciary, which finds them to be inappropriate petitioners for enforcing environmental standards and thus outside of the loose zone of interests test which governs the doctrine of prudential standing. That test appears to recognize only two types of challengers: beneficiaries of federal regulation and those burdened by it. Environmental capitalists are neither, so their claims are often dismissed for lack of standing.

Judges, however, should not presume that capitalism leads to the corruption of environmental regulation when business ventures aid the regulatory system. Courts largely endorse a narrow version of the zone of interests test and have perpetuated a judicial supposition that profit motives and environmental protection are incompatible.[6] However, Congress has explicitly rejected this view[7] and it is time for the courts to rightfully align the zone of interests test with the role Congress has staked out for private industry in enforcement of environmental legislation. This is not a request for radical change. A recognition that Congress relies on the private sector to further public goals has been loosely articulated by both the Supreme Court[8] and the D.C. Circuit.[9]

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[5] *See infra* Part II.

[6] *See infra* Part II.

[7] *See infra* Part III.

[8] Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 490–91 (2001) (Breyer, J., concurring) (Under the CAA, "the public interest requires [protection of] the health of persons, even if that means that *industries will be asked to do what seems to be impossible at the present time*." (internal quotation marks omitted)); Union Elec. Co. v. EPA, 427 U.S. 246, 257 (1976) (The CAA requires private actors to "develop pollution control devices that might at the time appear to be economically or technologically infeasible.").

[9] Nat'l Petrochemical Refiners Ass'n v. EPA, 287 F.3d 1130, 1146–48 (D.C. Cir. 2002) (holding that Congress arguably included anticompetitive protections in the CAA for engine manufacturers that produced engines cleaner than those required by regulations); Ethyl Corp. v. EPA, 541 F.2d 1, 11 n.14 (D.C. Cir. 1976) (In a challenge to regulations requiring lead in gasoline, the D.C. Circuit noted that EPA "is only mandating an end product . . . . The method for achieving the required result is entirely in the hands of the manufacturers.").

When considering environmental regulation, however, the courts still refuse to recognize the reciprocal relationship between Congress and industry due to an aversion to mixing profit and environmental protection.

This article introduces the notion of "reciprocal reliance standing," whereby Environmental Capitalists are granted prudential standing to challenge regulations that ease environmental standards not because they are either beneficiaries of or directly burdened by those rules, but because the regulatory regime and Environmental Capitalists rely on each other. Essentially, congressional use of technology-forcing standards depends on environmental capitalism to invent the equipment needed to improve environmental quality; Environmental Capitalists build their businesses around the environmental burdens Congress imposes on others. Should EPA promulgate arbitrary and capricious rules that undercut statutory schemes, the Environmental Capitalists, as participants in a governmentally created market for pollution control technology, have a profit motive to restore the environmental standards demanded by Congress—the same motive that Congress relied on to create a race towards better environmental controls. Reciprocal reliance standing will further the congressional intent of improving pollution control technology while protecting the necessary business investments in this technology. All of these goals fit easily within the zone of interests test as it already exists.

This article attempts to ease the judicial fear of corporations suing to uphold stricter environmental rules by outlining the indispensable role that Environmental Capitalists play in all of the major federal environmental laws. Section I reviews the doctrine of prudential standing and the zone of interests test and discusses the confusion courts have in articulating the standard and the purpose it was intended to serve. Section II examines past attempts by Environmental Capitalists to secure standing to challenge agency regulations and why the majority of these attempts have failed. Section III lays the basis for the policy rationale behind a reciprocal reliance test for standing—that is, congressional endorsement of technology-forcing environmental regulations. Finally, Section IV proposes the reciprocal reliance test for standing, which could easily be incorporated into the zone of interests test without disruption of either statutory schemes or precedent.

I. COURTS' CURRENT THINKING ON PRUDENTIAL STANDING: THE TWILIGHT ZONE OF INTERESTS

Prudential standing is an additional, judicially-imposed requirement of standing that, aside from complying with Article III, requires a challenging party to be "suitable" for the task of challenging a regulation.[10]

> In addition to the immutable requirements of Article III, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing. Like their constitutional counterparts, these judicially self-imposed limits on the exercise of federal jurisdiction are founded in concern about the proper—and properly limited—role of the courts in a democratic society.[11]

When non-individuals, such as corporations, trade associations, or public interest groups, challenge agency actions under the Administrative Procedure Act ("APA"), standing is rarely an obstacle. Judicial review is available for any person "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action."[12] Corporations are viewed as burdened by agency action in that they must comply with regulatory standards, while public interest groups are the beneficiaries,[13] giving each of them a direct injury to support standing. In most cases, demonstrating Article III standing to challenge an agency action, such as a rulemaking, is the easy part.[14] Even where a showing of standing for corporations seems

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[10] Hazardous Waste Treatment Council v. Thomas (*HWTC IV*), 885 F.2d 918, 924 (1989) ("HWTC may still have representational standing if any of its members, while not a direct or express object of Congressional beneficence, is a 'suitable challenger' to EPA's decision implementing RCRA.").

[11] Bennett v. Spear, 520 U.S. 154, 162 (1997) (internal citations and quotation marks omitted).

[12] 5 U.S.C. § 702 (2000). Judicial review under the APA is barred where "(1) [other] statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." *Id.* § 701(a).

[13] *See Bennett*, 520 U.S. at 162 (describing prudential standing as a requirement "that a plaintiff's grievance must arguably fall within the zone of interests *protected or regulated* by the statutory provision or constitutional guarantee invoked in the suit") (emphasis added).

[14] Under the familiar standards articulated in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), "the irreducible constitutional minimum of standing contains three elements": (1) an "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;" (2) traceability—"a causal connection between the injury and the conduct complained of;" and (3)

tenuous, such as injury through a loss of future business, rulemakings that expose them to competition, or injury through regulation of a customer, courts have drawn paths around these obstacles.[15] In some instances, however, the true challenge is negotiating the amorphous zone of interests test—the gateway to prudential standing.

The Supreme Court developed the zone of interests test in *Association of Data Processing Service Organizations, Inc. v. Camp*[16] as a way to limit the broad grant of standing under the APA. In this case, data processing businesses challenged a rule promulgated by the Comptroller of the Currency allowing banks to provide its customers with data processing services.[17] The Association argued that the financial injuries suffered by increased competition conferred standing to challenge the Comptroller's rulemaking as conflicting with statutes limiting banks to the core services of banking.[18] Since the conventional wisdom would be that banking restrictions are created to protect banking customers, the Court considered whether the Association's interests fell "within the meaning of a relevant statute"[19] as required by the APA.

In its discourse, the Court stated that under a "rule of self-restraint,"[20] it must consider whether the plaintiff's interests come "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[21] The Court stated further that it will not exercise this rule and dismiss a

redressibility—the likelihood that "the injury will be redressed by a favorable decision." *Id.* at 560–61 (internal quotation marks and citations omitted).

[15] *See, e.g.*, Bristol-Myers Squibb Co. v. Shalala, 91 F.3d 1493, 1499 (D.C. Cir. 1996) (discussing the competitor standing doctrine); Wabash Valley Power Ass'n, Inc. v. FERC, 268 F.3d 1105, 1113 (D.C. Cir. 2001) (allowing standing for exposure to competition "based only on injuries that might arise from [another power company's] exercise of market power in the future"); FAIC Sec., Inc. v. United States, 768 F.2d 352 (D.C. Cir. 1985) (finding prudential standing for companies that suffer economically when their regulated customers are subject to additional restrictions which constrict the plaintiff's sales opportunities).

[16] 397 U.S. 150 (1970).

[17] *Id.* at 151.

[18] *Id.* at 152. The statutes at issue were the Bank Service Corporation Act, 12 U.S.C. § 1864, and the National Bank Act, 12 U.S.C. § 24.

[19] *Data Processing*, 397 U.S. at 153 (quoting 5 U.S.C. § 702 (1964)).

[20] *Id.* at 154 (quoting Barrows v. Jackson, 346 U.S. 249, 255 (1953)).

[21] *Id.* at 153.

plaintiff's challenge unless preclusion of judicial review is specifically stated within the underlying statute challenged (in this case the banking statutes) or there is "clear and convincing evidence of an intent to withhold it."[22] Here, the Court found no evidence that the banking acts at issue precluded judicial review for any groups; simply put, nothing in the acts showed that allowing these parties to sue would frustrate the "accepted public policy which strictly limit[ed] banks to banking."[23]

Despite announcing a broad power to winnow the pool of litigants to less than those with constitutional standing, the zone of interests test came with little guidance and promptly floundered. Lower courts concurrently misapplied it,[24] openly criticized it,[25] and even called for abandonment of the rudderless test.[26] While the Court later mentioned the zone of interests in some cases, they added only a word or two of guidance in dicta. After an attempt to explain the test, Professor Kenneth Culp Davis declared the zone of interests test dead.[27]

In 1987's *Clarke v. Securities Industry Association*,[28] the Court attempted to comprehensively clarify the zone's structure,

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[22] *Id*. at 156 (quoting H.R. REP. NO. 1980, at 41 (1946)). In other words, "[t]here is no presumption against judicial review and in favor of administrative absolutism unless that purpose is fairly discernible in the statutory scheme." *Id.* at 157 (citation omitted).

[23] *Id.* at 155 (quoting S. REP. NO. 2105, at 7–12 (1962)).

[24] *See* Upper Pecos Ass'n v. Stans, 452 F.2d 1233, 1235 (10th Cir. 1971) (allowing an environmental group to challenge a federal road construction grant under the mistaken belief that the U.S. Supreme Court had declared environmental interests to always be protected by the zone of interests test).

[25] *See* Control Data Corp. v. Baldridge, 655 F.2d 283, 291 (D.C. Cir. 1981) (describing the test as "starkly stated . . . without accompanying expression of the methods to be utilized in its application. . . . generally conclusory in nature . . . . nor has [the Supreme Court] even undertaken to apply the zone test in a standing inquiry").

[26] *See* Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208, 1212 n.4 (8th Cir. 1972) ("We record our preference for simplifying the 'law on standing.' We think that all that is required for a plaintiff to have standing to sue for a constitutional or a statutory violation is a showing of 'injury in fact.'").

[27] KENNETH CULP DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 22.02-11 (Supp. 1976); *see also* Jonathan R. Siegel, *Zone of Interests*, 92 GEO. L.J. 317, 331 (2004) (opining that the D.C. Circuit's decision in *National Credit Union Administration v. First National Bank and Trust Co.*, 522 U.S. 479, 482–83 (1998) served "virtually to eliminate the test altogether"); Doe v. Blum, 729 F.2d 186, 189 n.3 (2d Cir. 1984) (voicing "doubts about the continued vitality of the zone of interest requirement").

[28] 479 U.S. 388 (1987).

by downplaying its rigor. The Court stated that the zone of interests review was simply "not meant to be especially demanding."[29] And further that while the test is "basically one of interpreting congressional intent" [30] it does not require the party to be a beneficiary of the law, or a member of the "class for whose *especial* benefit the statute was enacted."[31] Instead, the "essential inquiry is whether Congress 'intended for [a particular] class [of plaintiffs] to be relied upon to challenge agency disregard of the law.'"[32] Even the interpretation of congressional intent was loosely formulated; litigants would only be prudentially eliminated where "the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'"[33] Without this affirmative congressional intent, agency actions are "presumptively reviewable," and plaintiffs will only be excluded when their "interests are so marginally related to, or inconsistent with, the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit."[34]

Clarke shifted the burden towards the administrative agencies to show that parties meeting Article III standing requirements somehow fall outside the broad class of potential challengers to an agency action. To meet this burden, the agency must prove that "would-be plaintiffs [are] not even '*arguably* within the zone of interests to be protected or regulated by the statute.'"[35]

As described above, prudential standing does not spring from the language of the APA; it is but a judicial "gloss" on its language.[36] There is no statutory or constitutional mandate for prudential standing.[37] Faced with the situation where *anyone* can

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[29] *Id.* at 399.

[30] *Id.* at 394.

[31] *Id.* at 401 n.16 (quoting Cort v. Ash, 422 U.S. 66, 78 (1975)).

[32] *Id.* at 399 (quoting Barlow v. Collins, 397 U.S. 159, 167 (1970)). *Barlow* was a companion case to *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970).

[33] Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399 (1987) (quoting Block v. Cmty. Nutrition Inst., 467 U.S. 340 (1984)); *see also Data Processing*, 397 U.S. at 154 ("Congress can, of course, resolve the question one way or another, save as the requirements of Article III dictate otherwise.").

[34] *Clarke*, 497 U.S. at 399.

[35] *Id.* at 397 (emphasis added).

[36] *Id*. at 395.

[37] Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 1209 (5th Cir. 1991) ("At issue in this case is a question of prudential standing, which is of less than constitutional dimensions."); *Clarke*, 479 U.S. at 395–96 ("What was needed

challenge agency actions involving highly complex statutory and regulatory schemes, the courts maintain a notion that, when statutes draw no limits, *someone* must be excluded from the right of judicial review. In ejecting a Canadian petitioner that sold asbestos materials in the U.S. from a challenge to Toxic Substances Control Act ("TSCA") regulations banning the manufacture, importation, and distribution of asbestos for lack of prudential standing, the Fifth Circuit could only offer that "[i]f the rule were otherwise, the concept of standing would lose all meaning."[38] Or, as former Chief Judge Patricia Wald of the D.C. Circuit opined, "[t]he notion underlying the zone of interests test is that even broad standing . . . should be read to impose *some* limits, so that courts do not entertain suits that seek to 'vindicate' interests that Congress had no intention of protecting or regulating."[39]

The D.C. Circuit's interpretation of the zone of interests test splits all qualified challengers into two camps: those benefited by the underlying statute and those burdened by the regulations promulgated to implement that statute.[40] As the Hazardous Waste Treatment Council ("HWTC" or "Council") cases ("*HWTC* cases") discussed in Section II Part A will show, Environmental Capitalists are neither; thus, they have been designated as the *someone* to be excluded. The reasons for this exclusion, however, contradict the principles behind the zone of interest test, because "'at bottom the reviewability question turns on congressional intent.'"[41] This, in turn, requires an examination of "the statute's

was a gloss on the meaning of § 702. The Court supplied this gloss by adding . . . the additional requirement that 'the interest sought to be protected by the complainant [be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" (quoting *Data Processing*, 397 U.S. at 153)). There is no statutory or constitutional mandate for other prudential doctrines such as the political question doctrine, the abstention doctrine, ripeness, and mootness. Like these other prudential doctrines, prudential standing cannot be waived by a party and may be challenged *sua sponte*. Assoc. Gas Distribs. v. FERC, 899 F.2d 1250, 1258 n.5 (D.C. Cir. 1990) ("The FERC does not challenge the standing of petitioners, but the intervenors do, and in any case it is our duty to assure ourselves that petitioners do indeed have standing.").

[37] *Corrosion Proof Fittings*, 947 F.2d at 1210.

[38] *Id*.

[39] Hazardous Waste Treatment Council v. Thomas (*HWTC IV*), 885 F.2d 918, 927 (D.C. Cir. 1989) (Wald, C.J., dissenting).

[40] *See supra* note 37.

[41] *HWTC IV*, 885 F.2d at 927 (Wald, C.J., dissenting) (quoting *Clarke*, 479 U.S. at 400).

text, structure, [and] legislative history" to find "the requisite 'clear and convincing evidence' of a preclusive purpose."[42] Instead of this requisite examination, courts refuse to grant prudential standing to Environmental Capitalists largely based on an "undercurrent of unease"[43] as opposed to the congressional intent behind the enacting of a statute with the goal of environmental protection.

While it is disconcerting that this denial is based on an excess of prejudice and scant evidence, there is some encouragement in the fact that prudential standing is an amorphous, judge-made doctrine with barely defined boundaries. Calling the zone of interests test a "test" is actually quite inappropriate. Judges and commentators have filled reams of paper still guessing about the doctrine's boundaries, origin of authority, the role of congressional intent, and areas of application.[44] The only point of agreement appears to be that defining the zone of interests test is like trying to nail Jell-O to the wall; each new Supreme Court description provides little explanation and vague yet contradictory principles.[45] A definitive history of the test and its catalog of mysteries is outside the scope of this article;[46] however, the following section will track its effect on Environmental Capitalists who have challenged EPA regulations allegedly weakening environmental protections.

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[42] De Jesus Ramirez v. Reich, 156 F.3d 1273, 1276 (D.C. Cir. 1998).

[43] *HWTC IV*, 885 F.2d at 936 (Wald, C.J., dissenting).

[44] *See, e.g.*, David M. Dreisen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808 (2004); William M. Buzbee, *Expanding the Zone, Tilting the Field: Zone of Interests and Article III Standing Analysis After* Bennett v. Spear, 49 ADMIN. L. REV. 763 (1997); Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974); Kenneth E. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973).

[45] Later attempts to guide the lower courts in *Air Courier Conference of America v. American Postal Workers Union*, 498 U.S. 517 (1991), *Bennett v. Spear*, 520 U.S. 154 (1997), and *National Credit Union Administration v. First National Bank & Trust Co.*, 522 U.S. 479 (1998) continued to leave lower courts and commentators wanting for an understanding.

[46] For a more extensive review of the concept of zone of interest, see generally Siegel, *supra* note 27.

II. ENVIRONMENTAL CAPITALISTS' ATTEMPTS TO SECURE STANDING

A. *The* HWTC *Cases*

Perhaps the best example of the failure of Environmental Capitalists to secure standing under the APA can be seen through an examination of the *HWTC* cases. HWTC, an ambitious collection of "over 65 commercial firms that use advanced and established treatment technologies for the management of hazardous waste and supporting equipment manufacturers,"[47] launched an initiative to challenge the Resource Conservation and Recovery Act ("RCRA")[48] rulemakings that allegedly loosened waste disposal obligations on regulated parties. In *Hazardous Waste Treatment Council v. EPA* ("*HWTC II*"), the Council petitioned for review of EPA rules that allowed the burning of hazardous waste as fuel,[49] arguing that the regulations were "not comprehensive and strict enough to comply fully with the controlling statute, RCRA."[50]

The D.C. Circuit's suspicions were aroused by "the apparent anomaly of regulated entities demanding stricter regulation . . . ."[51] HWTC explained itself as an association of companies seeking to "promote the protection of the environment through the adoption of environmentally sound procedures and methods of destroying and treating hazardous wastes."[52] Its members challenged the rule because "the asserted laxity of the regulations [would] diminish the market for their high-tech control services," which would allow their potential clients to burn untreated, contaminated oil.[53] In this way, HWTC explained that it was "unique in that it represents

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[47] *HWTC IV*, 885 F.2d at 920 (D.C. Cir. 1989).

[48] Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–6992 (2000).

[49] 861 F.2d 277, 279 (D.C. Cir. 1988).

[50] *Id*. at 280.

[51] *Id.*

[52] *Id.* at 281.

[53] *Id.* The HWTC members brought two other claims as well. One company stated that, as a purchaser of used oil, the regulations would require it to test each tank load for contamination at an enormous expense (the "consumer claims"). *Id.* The second asserted that the regulations would "cause [the petitioners'] supply of contaminated used fuels to be diverted elsewhere" (the "supply diminution claims"). *Id.* at 281. The consumer claims were found conducive to prudential standing, *id*. at 282, while the supply diminution claims were subsumed into the competitor and consumer claims, *id.* at 281.

firms whose economic interests and future viability depend on the presence, not the absence, of appropriate regulations for the protection of the environment" and that "under RCRA, increased protection of human health and the environment, and increased use of the waste treatment services provided by the HWTC member companies is a direct" link.[54]

The D.C. Circuit denied the Council prudential standing, unconvinced that profit motives and environmental regulation could ever sincerely coincide. The opinion dismissed the overlap of interests as an "incidental benefit," falling outside the zone of interests.[55] RCRA, the court declared, was not intended "to benefit recycling and disposal firms" although it would be "inevitable that firms capable of advancing that goal may benefit."[56] Without "some explicit evidence of an intent to benefit such firms, or some reason to believe that such firms would be unusually suitable champions of Congress's ultimate goals," the court considered judicial consideration inappropriate.[57] Despite *Clarke*'s explanation that the zone of interests test was "not meant to be especially demanding,"[58] the court reversed the burden, requiring proof that HWTC was an intended beneficiary under RCRA.[59] Yet, leaving aside the court's explicit contradiction of *Clarke*, the reasons for abstention without finding a congressional indication to exclude parties like HWTC were far less reasons than speculation. The court speculated that "[a] regulatory extension sought by the competitor interests in the Council might benefit recyclers' profits . . . but harm the environment"[60] and "may defeat statutory goals."[61] This fear that Environmental Capitalists might somehow sucker the court into dismantling environmental obligations imposed on others became a recurring theme in the *HWTC* cases and beyond—but a theme bereft of any statutory or constitutional justification.[62]

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[54] *Id.* at 282 n.1.

[55] *Id.* at 282–85.

[56] *Id.* at 283.

[57] *Id.*

[58] Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399 (1987).

[59] Earlier that year, the D.C. Circuit rejected any requirement that litigants be expressly or directly granted prudential standing by Congress. Humane Soc. of the U.S. v. Hodel, 840 F.2d 45, 60–61 (D.C. Cir. 1988).

[60] *HWTC II*, 861 F.2d at 284.

[61] *Id.* at 283.

[62] *See* Hazardous Waste Treatment Council v. Thomas (*HWTC IV*), 885 F.2d

Undeterred, the Council returned the following year in *HWTC IV* to challenge EPA's California List rule, alleging that it allowed land disposal of untreated hazardous wastes.[63] Here, the Council attempted to shift the question from standing under the APA to standing under RCRA by claiming that the "broad judicial review provision" of RCRA "simply does not admit of any prudential limitation."[64] Relying largely on *HWTC II*, the D.C. Circuit again rejected the notion that non-environmentalists could challenge a purported loosening of environmental obligations on others and denied the group prudential standing again.

In *HWTC IV*, the court explained that "the theory underlying prudential standing doctrine is elegant in its simplicity."[65] According to the D.C. Circuit, the zone of interests is limited to those parties that "Congress intended either to regulate or to protect,"[66] in order to filter out "those plaintiffs whose suits are more likely to frustrate than to further statutory objectives."[67] Under this analysis, the Council was neither a regulated entity,[68] an intended beneficiary of RCRA,[69] nor a recipient of a coincidental

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918, 931–32 (D.C. Cir. 1989) (Wald, C.J., dissenting). Wald wrote,

> [The majority's] fanciful inquiry into how the challenger might seduce a naïve court into taking actions totally outside the ambit of the case before it leaves me with a haunting sense that this 'suitable challenger' inquiry—the insistence that parties who are not express recipients of congressional solicitude show that their interests 'systematically coincide' with the interests of those who are express beneficiaries—will degenerate in the vast majority of cases into only a phantom category, a pleasing verbal formulation destined to ring hollow in providing any real supplement to the 'express' requirement.

Id.

[63] *Id.* at 920.

[64] *Id.* at 921.

[65] *Id*.

[66] *Id.* at 922 (citing Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970)).

[67] *Id.* (quoting Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 397 n.12 (1987)).

[68] The Council's "members . . . are not 'regulated' in the relevant sense. 'A party is 'regulated' for purposes of the 'zone' test only if it is regulated by the particular regulatory action being challenged.'" *Id.* (quoting Hazardous Waste Treatment Council v. EPA (*HWTC II*), 861 F.2d 277, 284 (D.C. Cir. 1988)).

[69] While allowing that RCRA's legislative history indicates that "the primary means [Congress] chose to [protect human health and the environment] was the increased use of advanced treatment technologies such as those provided by HWTC's members," the court skated past the significance of this admission and simply denied that RCRA was enacted "to improve the business opportunities of treatment firms." *Id.* at 923.

benefit.[70] The court did not mince words in denying the Council prudential standing, not because it was without injury, but because the court viewed business and the environment as inherently repulsive to one another: "we have no doubt that injured environmental groups or landowners would have standing to pursue the very claims raised here. Significantly, however, they have not done so."[71] Yet, in offering how, exactly, HWTC's challenge would frustrate the purpose of RCRA, it could only speculate that a successful challenge "might lead to the substitution of manufacturing methods that generate other, more dangerous but less strictly regulated wastes."[72] Why a challenge by environmental groups would lead to a potentially different result was left unexplained.

With admirable persistence, the HWTC would return yet again to challenge an alleged relaxation of RCRA waste treatment regulations in *Louisiana Environmental Action Network v. EPA*.[73] Despite the fact that HWTC changed its name to the Environmental Technology Council ("ETC"),[74] the D.C. Circuit was not fooled and denied prudential standing yet again with almost no discussion.[75] That the ETC was now joined by an environmental group in challenging a regulation that purportedly allowed the disposal of less treated hazardous wastes made no difference.[76]

The ETC returned to court in 2001, challenging regulations

[70] "Also included within that zone, however, are parties whose interests, while not in any specific or obvious sense among those Congress intended to protect, coincide with the protected interests." *Id.* at 922. "[T]here is not the slightest reason to think that treatment firms' interest in getting more revenue by increasing the demand for their particular treatment services will serve RCRA's purpose of protecting health and the environment." *Id.* at 924.

[71] *Id.* at 926.

[72] *Id.* at 925.

[73] 172 F.3d 65 (D.C. Cir. 1999).

[74] *Id.* at 67 (referring to ETC as "a waste treatment company trade association formerly known as the Hazardous Waste Treatment Council").

[75] *Id.* (citing Hazardous Waste Treatment Council v. EPA (*HWTC II*), 861 F.2d 277, 283 (D.C. Cir. 1988); *HWTC IV*, 885 F.2d at 925).

[76] *Louisiana Environmental Action Network* shows that the participation of environmental groups, which are more conventional challengers, neither cancels nor protects the prudential standing of a for-profit corporation. *Id.* at 67–68. *See also HWTC IV*, 885 F.2d at 936 (Wald, C.J., dissenting) ("[T]he mere existence of these more conventional challengers, even if they might seem more comfortable, does not in any way operate to *cancel* the otherwise valid standing of parties . . . like HWTC who seek to sue on their behalf.").

that allowed sources to petition for alternative (and potentially weaker) emission standards for cement kilns.[77] Predictably, the Council was denied prudential standing. This time, however, the group's argument spoke directly to the relationship between profit interests and technology-forcing regulation: "members will suffer 'economic and competitive injury, most significantly diminished value of capital investment, if competing facilities are excused from the [Maximum Achievable Control Technology] standards and thereby avoid the substantial compliance costs.'"[78] These capital investments were in "various pollution control technologies [that] constitute the 'best performing sources' to which the [Clean Air Act] refers in § 7412(d)."[79]

Cement Kiln is notable because the Council was much more explicit in pressing its argument that congressional reliance on technology-forcing makes companies that provide the required technology able champions against erosions of environmental standards. The Council stated that "by adopting a technology-based approach to emissions standards [in the Clean Air Act], Congress aligned the interests of competitors and environmentalists in such a way as to bring the former into the zone of interests."[80] The D.C. Circuit rejected this argument with little consideration, stating that: "[t]he case before us is identical to *HWTC II* and *IV*, except that the relevant statute is the [Clean Air Act] . . . . As in the *HWTC* cases, the Council's interest lies only in increasing the regulatory burden on others. . . . The Council therefore lacks prudential standing."[81]

B. *Other Challenges by Environmental Capitalists*

Environmental capitalists have scored rare victories; however, these cases are distinguishable from the *HWTC* line of cases. In *National Petrochemical Refiners Association v. EPA*,[82] Mack Trucks survived the prudential standing gauntlet to challenge

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[77] Cement Kiln Recycling Coal. v. EPA, 255 F.3d 855 (D.C. Cir. 2001).

[78] *Id.* at 870 (citation omitted).

[79] *Id.*

[80] *Id.* at 871.

[81] *Id.* The Council can take some solace, however, in that the D.C. Circuit devoted two sentences to ruling against the merits of their argument. *Id.* It finally received some type of substantive attention from the courts, if only as dicta.

[82] 287 F.3d 1130 (D.C. Cir. 2002).

regulations amending the Averaging, Banking and Trading Program that allowed clean engine manufacturers to bank emission credits to offset the maker's higher emitting engines.[83] Although the rule could have provided advantages to Mack Trucks' competitors, EPA contested prudential standing.[84] Mack Trucks successfully contended that the Clean Air Act's ("CAA") imposition of nonconformance penalties upon noncompliant engines and the ability to bank, trade, or offset emissions credits were created to "remove any competitive disadvantage to manufacturers whose engines or vehicles achieve the required degree of emission reduction."[85] The court thus extended prudential standing in compliance with express congressional intent to ameliorate competitive disadvantage.[86] This however, does not show a newfound understanding of reciprocal reliance standing. The demand for explicit congressional authorization shows that where Environmental Capitalists are concerned, courts still have too narrow a view of prudential standing. As articulated by the Supreme Court, prudential standing does not require petitioners, either legally[87] or logically, to evidence a congressional intent to protect those who further pollution reductions through enterprise.

More recently, Honeywell International Inc. scored a victory to protect its investment in a foam-blowing agent with zero-ozone depletion potential ("ODP").[88] In this case, Honeywell challenged an EPA rule which allowed for use of ozone-depleting products despite the fact that Honeywell's product, a zero-ODP product, was an available alternative. EPA, acting under Section 612 of the CAA[89] and the Significant New Alternatives Program ("SNAP"),[90]

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[83] *Id.* at 1146–48.

[84] *Id.* at 1147.

[85] *Id.* at 1148 (quoting 42 U.S.C. § 7525(g)(3)(E) (2000)).

[86] *Id.* at 1148–49. Mack Trucks' procedural challenge to the rule failed. *See id.* at 1148–1149.

[87] *See* Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 157 (1970) (requiring "clear and convincing evidence of an intent to withhold" standing, not extend it) (internal citation omitted).

[88] Honeywell Int'l Inc. v. EPA, 374 F.3d 1363 (D.C. Cir. 2004), *withdrawn in part on reconsideration of other grounds*, 393 F.3d 1315 (D.C. Cir. 2004).

[89] Clean Air Act § 612(c), 42 U.S.C. § 7671k(c) (2000). Title VI includes a table listing the ODP for class I substances, which have the highest ODP, as well as class II substances which are somewhat less dangerous but still contribute significantly to the destruction of the ozone layer. 42 U.S.C. § 7671a(a)–(b), (e) (2000). This provision of Title VI requires the EPA Administrator to

had accelerated the ban on three class II ozone-depleting chemicals: HCFC-141b would be banned beginning in 2003, HCFC-22 and HCFC-142b would be phased out by 2020.[91] Anticipating the 2003 ban on HCF-141b, Honeywell sought and received approval for HFC-245fa, a substitute for HCFC-141b with zero-ODP.[92] At this point, the SNAP program was fulfilling its purpose of forcing the development of more environmentally benign products.

One of Honeywell's competitors, Atofina Chemical, Inc. ("Atofina"), filed a petition seeking permission to sell HCFC-22, HCFC-124 and HCFC-142b, all class II substances, as acceptable substitutes for HCFC-141b.[93] EPA issued a proposed rule rejecting the petition because Atofina's products had significant ODP and there were "technically feasible zero-ODP . . . substitutes available."[94] In effect, with this rule, Honeywell's HFC-245fa would have been the only product available for the market previously filled with competitors. Deluged with complaints by small businesses and members of Congress that HFC-245fa was too expensive and presented technical difficulties, EPA struck a compromise.[95] HCFC-22 and HCFC-142b could be substituted for HCFC-141b in some areas, but not others.[96] EPA's rule rested

"promulgate rules . . . providing that it shall be unlawful to replace any class I or class II substance with any substitute substance which the Administrator determines may present adverse effects to human health or the environment, where the Administrator has identified an alternative to such replacement" that has a lower ODP." *Id.*

[90] 40 C.F.R. §§ 82.170–.184 (2005). The SNAP program "establishes criteria and procedures for listing chemicals as approved substitutes for chemicals phased out pursuant to the CAA." *Honeywell*, 374 F.3d at 1365–66.

[91] Protection of Stratospheric Ozone, 58 Fed. Reg. 65,018, 65,025 (Dec. 10, 1993) (codified at 42 C.F.R. pt. 82); *Honeywell*, 374 F.3d at 1366. These compounds are called foam-blowing agents and are used with other chemicals as foam insulation. This insulation is used in refrigerators, freezers, roofing, and residential walls. *Id.* at 1371–72.

[92] *Honeywell*, 374 F.3d at 1371–72.

[93] Listing of Substitutes for Ozone-Depleting Substances, 65 Fed. Reg. at 42,656 (July 11, 2000) (codified at 40 C.F.R. pt. 82); *Honeywell*, 374 F.3d at 1366.

[94] Listing of Substitutes for Ozone-Depleting Substances, 65 Fed. Reg. at 42,657.

[95] *See Honeywell*, 374 F.3d at 1367; Listing of Substitutes in the Foam Sector, 67 Fed. Reg. 47,703, 47,704 (July 22, 2002) (codified at 40 C.F.R. pt. 82).

[96] Specifically, use in commercial refrigeration, sandwich panel applications and polyurethane slabstock were acceptable; polyurethane boardstock, spray

largely on findings that forcing industry to use Honeywell's zero-ODP substitute "would be difficult and prohibitively costly" for small businesses.[97] Honeywell, which saw EPA cede portions of the market for HFC-245fa back to its competitors, challenged the new rule on the grounds that the CAA forbids EPA from considering the costs of phasing out ODP substances, and requires EPA to ban all but the most environmentally friendly compounds available.[98] As occurred in the *HWTC* cases, a corporation sued to enforce a more stringent application of environmental regulations, and again, prudential standing appeared to be a problem. EPA's attack played to the inherent judicial suspicion of Environmental Capitalists. EPA characterized the suit as "nothing more than a futile effort to bolster the demands for [Honeywell's] product . . . ."[99] EPA paraded out all of the fears that "judicial intervention" on behalf of commercial interests "would distort the regulatory process."[100] Honeywell did not dispute that its Article III standing relied on its "substantial economic injury—lost sales,"[101] but countered that it was an essential cog in the technology-forcing system. To argue its case for prudential standing, Honeywell pointed to "its role in the market for substitutes to ozone-depleting substance[s] that Congress created in Section 612 of the CAA."[102]

Although the court recognized that Honeywell, like petitioners in the *HWTC* cases, was seeking "stronger regulations" in hopes of "increased demand for [its] products,"[103] it granted prudential standing. It did not, however, endorse the rationale that Honeywell was an indispensable part the technology-forcing nature of the CAA. Instead, the court recited its assumptive fears of seeing profit-making companies enforce the rules of an

foam, and appliances were not. *Honeywell*, 374 F.3d at 1367 (citing Listing of Substitutes in the Foam Sector, 67 Fed. Reg. at 47,703).

[97] Listing of Substitutes in the Foam Sector, 67 Fed. Reg. at 47,709.

[98] *Honeywell*, 374 F.3d. at 1371; *see* 42 U.S.C. § 7671k(a); 40 C.F.R. § 82.170.

[99] *Honeywell*, 374 F.3d at 1368 (quoting Final Brief for Respondent at 3, *Honeywell*, 374 F.3d 1363 (No. 02-1294).

[100] *Honeywell*, 374 F.3d at 1370 (quoting Hazardous Waste Treatment Council v. EPA (*HWTC II*), 861 F.2d 277, 285 (D.C. Cir. 1988)).

[101] Brief for Petitioner Honeywell International Inc. at 13, *Honeywell*, 374 F.3d 1363 (No. 02-1294).

[102] *Id.* at 14.

[103] *Honeywell*, 374 F.3d. at 1370.

environmental scheme.

> Irrespective of whether the statutory scheme contemplates that competitive interests will advance statutory goals, the court has held that the *Hazardous Waste Treatment Council* line of cases is inapposite when a competitor sues to enforce a 'statutory demarcation,' such as an entry restriction, because "the potentially limitless incentives of competitors [are] channeled by the terms of the statute into suits of a limited nature brought to enforce the statutory demarcation."[104]

Honeywell attained prudential standing, not because of a newfound recognition of the essential role Environmental Capitalists play in developing technologies that further environmental goals, but because the circumstances of the SNAP left little room for Honeywell to sabotage the regulatory scheme. The court re-affirmed the *HWTC* line of cases, however, that made suspicion of corporations seeking to strengthen environmental regulations a de facto policy.

The court's apprehension, while not irrational, diminishes the effectiveness of technology-forcing regulations. Specifically, the D.C. Circuit's suspicion towards Environmental Capitalists ignores the intentions of Congress to harness "the potentially limitless incentives of competitors"[105] towards public ends and disregards the extent to which Environmental Capitalists have relied on the technology-forcing structure in making investments. Not only should the structure of technology-forcing regulations be viewed as congressional intent to provide prudential standing (or at least the absence of congressional prohibition on standing), it also allays judicial worrying that a corporation will deviously enlist the courts to bite the very regulatory scheme that feeds it. What follows is a consideration of the nature of technology-forcing regulations and the intended role of Environmental Capitalists.

III. CONGRESSIONAL INTENT: THE ENDORSEMENT OF TECHNOLOGY-FORCING REGULATIONS

Technology-forcing regulations consist of either technology-based standards, where regulated sources must retrofit their

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[104] *Id.* (quoting Scheduled Airlines Traffic Offices v. Dep't of Def., 87 F.3d 1356, 1360–61 (D.C. Cir. 1996)) (alteration in original).

[105] *Scheduled Airlines Traffic Offices*, 87 F.3d at 1360–61 (quoting First Nat'l Bank and Trust Co. v. Nat'l Credit Union Admin., 988 F.2d 1272, 1278 (D.C. Cir. 1993)).

facilities with pollution control devices in order to operate, or the more radical avenue of bans or phaseouts of particular substances.[106] There is no question that technology-forcing regulations push towards an increase in environmental quality. They have been so well received that they are now incorporated into the Clean Water Act, Clean Air Act, and the Resource Conservation and Recovery Act.[107] In essence, these regulations consist of three parts: a pollutant standard, a deadline, and a hammer. First, Congress sets specific, rigorous standards for regulated sources to be met within several years. Then, if the deadline passes and the sources have not complied, the regulated entities get the "hammer," which can include severe penalties, denial of a permit to build, or even an order to shutdown. The subjects of the regulation are left to their own devices to meet the deadline.[108] The most important aspect of these provisions is that they require the use of equipment that either did not currently exist at the time of drafting or ground emissions standards upon whichever technology performed the best at any given time.[109]

One example of Congress's use of technology-forcing is the provisions for mobile sources in the CAA. The CAA Amendments of 1970 concentrated on cutting the most damaging emissions from automobiles. After prolonged frustration with industry progress throughout the 1960s, Congress resorted to a "pervasive reliance on technology-forcing to achieve the CAA's

[106] *See* Thomas O. McGarity, *Radical Technology-Forcing in Environmental Regulation*, 27 LOY. L.A. L. REV. 943, 943–44 (1994).

[107] *See, e.g.*, Clean Water Act §§ 304(b), 306, 33 U.S.C. §§ 1314(b), 1316 (2000); Clean Air Act §§ 111, 173, 42 U.S.C. §§ 7411, 7503 (2000); Resource Conservation Recovery Act §§ 3004(m), (o), 42 U.S.C. §§ 6924(m), (o). *See generally* McGarity, *supra* note 106 (discussing EPA's first successes with technology forcing in banning pesticides DDT, mirex, aldrin, and dieldrin in order to jolt the industry into producing safer alternatives). This article focuses on the technology-forcing aspects of the CAA; however, technology forcing of some fashion is found in nearly every environmental law.

[108] *See* Arnold W. Reitze, Jr. & Randy Lowell, *Control of Hazardous Air Pollution*, 28 B.C. ENVTL. AFF. L. REV. 229, 258 (2001).

[109] *See* McGarity, *supra* note 106, at 946–47 (discussing EPA's ban on pesticide Mirex on the premise that a substitute would be invented before the phase-out period); Storage, Treatment, Transportation, and Disposal of Mixed Waste, 66 Fed. Reg. 27,218, 27,221 (May 16, 2001) (codified at 40 C.F.R. pt 266) (acknowledging that treatment technology required to meet RCRA's mixed waste regulations did not adequately materialize). *See generally* Reitze & Lowell, *supra* note 108.

most important health and environmental protection objectives."[110] Using technology-forcing provisions to accomplish this goal was less of a creative option than a last resort. A 1969 suit brought by the Department of Justice alleged that the four largest automobile manufacturers had "conspired to delay the development of emission control devices,"[111] and thus it was clear that the industry would have to be forced, rather than asked, to develop this technology.

The response to a recalcitrant industry was to set standards far beyond the reach of existing technology, demanding a ninety percent reduction in permissible carbon monoxide and hydrocarbon levels[112] and aggressive reductions in nitrogen oxides emissions by the 1975 model year.[113] "Congress was aware that these 1975 standards were drastic medicine, designed to force the state of the art. There was, naturally, concern whether the manufacturers would be able to achieve this goal."[114] The hammer? Failure to comply with the standards by 1975 would result, theoretically, in a shutdown of the automotive industry.[115]

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[110] Henry A. Waxman, *An Overview of the Clean Air Act Amendments of 1990*, 21 ENVTL. L. 1721, 1742 (1991). As noted in *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973), "[t]he development of emission control technology proceeded haltingly. The Secretary of [Health, Education, and Welfare] testified in 1967 that 'the state of the art has tended to meander along until some sort of regulation took it by the hand and gave it a good pull.'" *Id.* at 622–23 (quoting Hearings on Air Pollution—1967, Hearings before the Subcomm. On Air and Water Pollution, Sen. Comm. On Public Works, 90th Cong., 1155–56 (1967)). Of course, industry was not the only culprit trying Congress's patience. "EPA's track record" in regulating hazardous air pollutants was "exceptionally poor, having regulated seven pollutants in twenty years." Waxman, *supra*.

[111] *Int'l Harvester*, 478 F.2d at 623. The opinion in that case declared the standards promulgated by the CAA of 1965 and the Air Quality Act of 1967 which "authorized . . . emission limitations commensurate with existing technological feasibility" to be failures. *Int'l Harvester*, 478 F.2d at 622.

[112] Clean Air Act Amendments of 1970, Pub. L. No. 91-604 § 202(b), 84 Stat. 1676, 1690 (1970). The 1970 Amendments also allowed the EPA Administrator to promulgate regulations banishing tetraethyl lead from gasoline, requiring refiners to find new, less-polluting additives that were compatible with the catalytic converter. *Id. See* Control of Lead Additives in Gasoline, 38 Fed. Reg. 33,734, 33,734 (Dec. 6, 1973); *see generally* Amoco Oil Co. v. EPA, 501 F.2d 722 (D.C. Cir. 1974) (upholding Administrator's findings under and applications of the regulation).

[113] 42 U.S.C. § 1857f-1(b)(1)(A) (amended and transferred to 42 U.S.C. § 7521 in 1974).

[114] *Int'l Harvester*, 478 F.2d at 623.

[115] *Int'l Harvester*, 478 F.2d at 636. There was a "realistic escape hatch"

The harshness of technology-forcing regulations, imperiling thousands of jobs[116] and causing other economic disruptions, illustrates their necessity. Compliance necessitated the development of new and innovative technology; the legislative history of the CAA Amendments makes clear that Congress intentionally aimed to "force the industry to broaden the scope of its research."[117] Without an aggressive mandate to invent that which did not exist, Congress would likely still be waiting for reductions in automobile emissions. Congress obtained a real taste for the technology-forcing approach when these 1970 Amendments "succeeded in spurring development of the catalytic converter for control of automotive tailpipe emissions."[118]

Another example of Congress's endorsement of technology-forcing is in regulation of stationary sources. "The cornerstone of the CAA Amendments of 1970 is the requirement that the Environmental Protection Agency . . . set geographically uniform national ambient air quality standards ("NAAQS")."[119] To meet NAAQS, each state must formulate State Implementation Plans ("SIPs") to reduce emissions of criteria pollutants and have them

allowing for a one-year suspension of the standards if the EPA Administrator could be convinced that the technology was unavailable. *See id.* at 636. As *International Harvester* demonstrated, Administrator Ruckelshaus doggedly remained convinced that the requisite technology was available despite the consistent failure of industry and a concession by the National Academy of Science that the required science could not emerge in time. *Id.* at 624–28.

[116] At the time, one out of every seven jobs in the U.S. was dependent upon the automotive industry. *Id.* at 636.

[117] *Id.* at 635 (citing 116 CONG. REC. 32,906 (1970) (statement of Sen. Muskie); H.R. REP. NO. 91-1146, at 6 (1970)). For example, Congress explicitly acknowledged that the regulations were "designed to force the state of the art." 116 CONG. REC. 33,120 (1970).

[118] Waxman, *supra* note 110, at 1749; *see also* EDWARD L. GLOVER ET AL., U.S. EPA, EVALUATION OF METHODS TO DETERMINE CATALYST EFFICIENCY IN THE INSPECTION/MAINTENANCE PROCESS 1 (1995), *available at* http://www.epa.gov/otaq/regs/im/960092.pdf ("The catalytic converter is a critical component of the emission control system on most vehicles. It is typically responsible for oxidizing more than 70 percent of the engine-out hydrocarbons and more than 50 percent of the engine-out carbon monoxide….[Catalytic converters] also reduce engine-out oxides of nitrogen (NOx)."); *see also* Karim Nice, *How Catalytic Converters Work*, HOWSTUFFWORKS, Jan. 22, 2006, http://auto.howstuffworks.com/catalytic-converter.htm.

[119] Clean Air Act § 109, 42 U.S.C. § 7409 (2000); *see also D.C. Circuit Upholds NAAQS for Lead and Ozone, Defers to EPA's Rulemaking Discretion Under Air Act*, 11 ENVT'L L. REP. 10,197, 10,197 (1981).

approved by EPA.[120] Each SIP demonstrates the State's design for "implementation, maintenance, and enforcement" of criteria pollutant standards.[121] Under the SIP programs, each State faces a difficult tradeoff: emissions versus the economy. To prevent stationary sources from torpedoing a State's efforts, the CAA requires operating and preconstruction permits compelling the use of technology-based standards for pollution control.[122]

The CAA Amendments of 1990 show a Congressional abandonment of risk-based standards in favor of technology-based standards "based on the maximum reduction in emissions which can be achieved by application of [the] best available control technology ["BACT"]."[123] BACT serves as an example of how technology-forcing standards rely on a progressive evolution of control technology to continuously reduce pollution over time. BACT is "an emission limitation based on the maximum degree of reduction of each [criteria pollutant] . . . which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility . . . ."[124] Theoretically, BACT should strive for meeting the lowest achievable emission rate ("LAER")[125] "so long as the costs of doing so will not cause a shutdown" of the facility.[126]

When put in practice, EPA sets a target emissions rate to be incorporated into permits based on the pollution control technology available per each standard. As an example, EPA issued a policy memorandum discussing LAER and BACT for NO_x and Volatile Organic Compounds for gasoline sulfur refinery

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[120] Clean Air Act § 110 (a)(1)–(2), 42 U.S.C. § 7410 (a)(1)–(2) (2000). See also Arnold W. Reitze, Jr., *State and Federal Command-and-Control Regulation of Emissions From Fossil-Fuel Electric Power Generating Plants*, 32 ENVTL. L. 369, 376 (2002) for a detailed examination of how NAAQS and SIPs work in the context of a specific type of source.

[121] Clean Air Act § 110(a)(1), 42 U.S.C. § 7410(a)(1).

[122] *See* Clean Air Act § 165, 42 U.S.C. § 7465.

[123] Cement Kiln Recycling Coal. v. EPA, 255 F.3d 855, 857 (D.C. Cir. 2001) (quoting S. REP. NO. 101-228, at 133 (1989), *reprinted in* 1989 U.S.C.C.A.N. 3385, 3518).

[124] Clean Air Act § 169, 42 U.S.C. § 7479 (2000).

[125] *See* 40 C.F.R. § 51.165(a)(1)(xiii) (2004).

[126] *See* Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333, 1335 (1985) (discussing the existing system of pollution regulation which is primarily based on Best Available Technology (BAT) strategies).

projects. In what is known as the "Seitz Memo," the EPA specifically considered the technology that could be used to reach its emissions standard for these sources.[127] However, as this memo shows, BACT is somewhat of a forgiving standard in that it considers technical feasibility.[128] This feasibility is inextricably linked to cost, causing EPA to yield somewhat on what it considers BACT.[129]

As another example of technology-based standards, the 1990 CAA Amendments introduced standards for hazardous air pollutants ("HAPs").[130] Congress made HAPs subject to the Maximum Achievable Control Technology ("MACT").[131] For new sources, this means simply the best emissions control technology "achieved in practice by the best controlled similar source."[132] Existing sources must install pollution controls based on the best performing twelve percent of existing sources.[133] MACT is probably the weakest of technology-forcing regulations in the CAA in that it requires only a semblance of parity among the best performing sources. Encouraging innovation and improved controls, however, allows MACT to continually impose even greater standards on all sources and avoid pollution reductions from stalling.

Outside of technology-forcing provisions, EPA actively encourages air pollution control technology innovations.[134] Regulated sources may propose the incorporation of innovative

[127] Memorandum from John S. Seitz, Dir., Office of Air Quality Planning and Standards, to Air Div. Dirs., Regions I–X (Jan. 19, 2001), *available at* http://www.epa.gov/ttn/oarpg/t1/memoranda/bactguid.pdf.

[128] *Id*. at 2–3.

[129] *Id.* at 3. For these smaller heaters, BACT is dropped down to a combination of low-NO_x burners and internal flue gas recirculation, allowing for a much higher 29 ppmv of NO_x. *Id.*

[130] Hazardous air pollutants are those pollutants specifically listed by Congress in section 112 of the CAA. *See* 42 U.S.C. § 7412(a)(6). Pollutants that should be listed are those that present a threat of "adverse human health effects." *Id.* § 7412(b)(2).

[131] Clean Air Act § 112(d)(2), 42 U.S.C. § 7412(d)(2) (2000) (described as "the maximum degree of reduction in emissions . . . including a prohibition on such emissions, where achievable . . . taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements . . . .").

[132] *Id.* § 7412(d)(3).

[133] *Id.* § 7412(d)(3)(A). *See also* Cement Kiln Recycling Coalition v. EPA, 255 F.3d 855, 858–59 (D.C. Cir. 2001).

[134] 40 C.F.R § 51.166(b)(19) (2005).

control technology into their operating or construction permits, with the concurrence of the State permitting agency, provided that the new system provides continuous emissions reductions equal to or better than established technology.[135] The prevention of significant deterioration ("PSD") program also makes concessions for innovative pollution control technology retrofits.[136] Other PSD regulations allow for Clean Coal Technology projects, or "any technology . . . at a new or existing facility which will achieve significant reductions in air emissions of sulfur dioxide or [NO_x] associated with the utilization of coal in the generation of electricity, or process steam which was not in widespread use as of November 15, 1990."[137] Even enforcement policy reflects the need to spur new and improved forms of control technology. Consent decrees reached with violators of the CAA routinely require the facility to incorporate innovative control technology.[138]

Nor is technology-forcing a priority for just the CAA. The Clean Water Act imposes point source effluent limitations based on the best available technology, as reviewed and determined by EPA every five years.[139] RCRA also contains technology-forcing

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[135] *See id*. § 51.166(s).

[136] *See id.* § 52.21(b)(2)(iii)(h) (requiring addition or replacement of pollution control projects to provide "more effective emission control than that of the replaced control technology"); *id.* § 52.21(b)(2)(iii)(j) (allowing "installation or operation of a permanent clean coal technology demonstration project . . . provided that the project does not result in an increase in the potential to emit of any regulated pollutant"). Pollution control projects are defined as the installation of any existing control system listed in 40 C.F.R § 52.21(b)(32)(i)–(vi) which are "presumed to be environmentally beneficial," but other experimental technologies may be accepted on a case by case basis. *Id*. § 51.166(b)(31).

[137] *Id.* § 51.166(b)(33).

[138] *See, e.g.*, Notice of Lodging of Consent Decree Under the Clean Air Act, 70 Fed. Reg. 7120, 7120 (Feb. 10, 2005) ("Under the settlement, COPC will implement innovative pollution control technologies to reduce emissions of nitrogen oxides, sulfur dioxide, and particulate matter from refinery process units."); Notice of Lodging of Consent Decree Under the Clean Air Act, 69 Fed. Reg. 62,916, 62,916 (Oct. 28, 2004) ("The proposed Consent Decree requires CITGO to implement innovative pollution control technologies to greatly reduce emissions of nitrogen oxides and . . . sulfur dioxide . . . from refinery process units to reduce the number and impact of flaring events.").

[139] Clean Water Act §§ 301(b), (d), 304(b), 306(b), 307(a), 33 U.S.C. §§ 1311(b), (d), 1314(b), 1316(b), 1317(a); *see also* NRDC v. EPA, 822 F.2d 104, 110 (D.C. Cir. 1987) (summarizing the best available technology, best available demonstrated control technology, and best conventional pollutant control technology standards under the Clean Water Act).

elements pertaining to both hazardous waste treatment standards and pollution controls at landfills with periodic revisions to consider evolving control technologies.[140] Thus, implicit throughout environmental law is the idea that progressive reductions in pollution cannot occur when control technology stagnates. Without the push of technology-forcing regulations, industry is complacent.[141] Regulated industries will only retrofit facilities with the minimum pollution control technologies required; it will not take steps to improve beyond that. Without this improvement, technology-based standards are only of limited value. Most standards based upon the best available technology are not frozen in time, allowing for technological progression, but their utility is only as good as what is available and tempered by whatever technological or economic limitations that make the best controls infeasible.[142] If Environmental Capitalists invested in making current pollution control devices smaller, cheaper or less intrusive into the emitting unit's process, otherwise infeasible controls could be installed, allowing for greater pollution reductions. Congress and the EPA rely on Environmental Capitalists to advance pollution control technology to make the infeasible feasible.

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[140] Resource Conservation and Recovery Act §§ 3004(m), (o), 42 U.S.C. §§ 6924(m), (o); Edison Electric Institute v. EPA, 996 F.2d 326, 335 (D.C. Cir. 1993) (describing RCRA as "a highly prescriptive, technology-forcing statute.").

[141] This technology-forcing push must be a constant. As Professor McGarity noted,

> [i]n the clean water context, [technology forcing] initially meant forcing the industrial laggards to install better-than-average technologies in five years and top-of-the-line technologies in ten years. Although this technology-based technology-forcing brought about tremendous decreases in industrial discharges of conventional water pollutants, it did not inspire industries to significantly change their policies.

McGarity, *supra* note 106, at 944. Once a technological plateau has been reached and the regulators claim to be satisfied, as Professor McGarity described, no firm has an incentive to invest in upgrading. *Id.* *Cf.* Int'l Harvester Co. v. Ruckelshaus, 478 F.2d 615, 638 (D.C. Cir. 1973) (explaining that without constant pressure to meet more stringent technology-based standards, it "is likely to be detrimental to the leader who has tooled up to meet a higher standard than will be ultimately required").

[142] *See* Swift, *supra* note 1, at 332–34 (discussing design improvements in scrubbers making them more "available" in the sense that operating costs were reduced).

IV. THE FAILURE OF THE ZONE OF INTERESTS TEST: HOW THE *HWTC* COURTS GOT IT WRONG

The boundary that courts have created for Environmental Capitalists can be easily unmade without violating the Constitution or re-interpreting the APA. The D.C. Circuit in the *HWTC* cases erred in denying standing for two reasons. First, the D.C. Circuit erroneously relied on the Supreme Court's holding in *Block v. Community Nutrition Institute*.[143] Second, the Circuit's decision is inconsistent with the congressional intent to endorse technology-forcing provisions. The D.C. Circuit could faithfully interpret prudential standing to recognize more than just the beneficiaries and the burdened when considering which interests arguably fall within the zone of interests.

A. *The* HWTC *Cases—Tripped By a Stumbling* Block

In *HWTC II*, the D.C. Circuit relied on the Supreme Court's holding in *Block v. Community Nutrition Institute* to support the proposition that a presumption of standing can be overcome by a finding that a suit would "severely disrupt a complex and delicate administrative scheme."[144] Thus, the court held that judicial intervention on behalf of Environmental Capitalists to prevent the erosion of environmental standards "may defeat statutory goals" because their "interests . . . coincide only accidentally with those goals."[145] This appears to be the epicenter of the *HWTC* cases—that courts are free to withhold prudential standing if they fear that a suspicious group's challenge may foul the "complex and delicate administrative scheme." This stance jettisons the presumption in favor of prudential standing which continues to exist with most other challengers.[146] In its place stands a contrary standard,

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[143] 467 U.S. 340 (1984).

[144] *See* Hazardous Waste Treatment Council v. EPA (*HWTC II*), 861 F.2d 277, 283 (1988) (quoting *Block*, 467 U.S. at 348); *see also* Cement Kiln Recycling Coalition v. EPA, 255 F.3d 855, 871 (D.C. Cir. 2001) (explaining how the rule of *Block* was used in *HWTC II* to reject the group's claim that "its interests were 'in sync' with those served by RCRA").

[145] *HWTC II*, 861 F.2d at 283.

[146] *See, e.g.*, Amgen, Inc. v. Smith, 357 F.3d 103, 111 (D.C. Cir. 2004) (For a drug company challenging Medicaid payments to hospitals under the Outpatient Prospective Payment System, "[t]here is a 'strong presumption that Congress intends judicial review of administrative action' . . . and it can only be overcome by a 'clear and convincing evidence that Congress intended to preclude the suit") (quoting Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 670

presuming that Environmental Capitalists are nefariously seeking to trick the court into dismantling a complicated environmental scheme and demanding to see some kind of affirmative blessing from Congress. A close reading of *Block*, however, shows that the Supreme Court intended no such result. The D.C. Circuit overstated any similarities between challenges by Environmental Capitalists and *Block*, where the Court found a congressional intent to preclude standing through a "complex administrative scheme" requiring a unique gamut of administrative review for agency actions.

Block answered the question of whether citizens, as consumers of dairy products, may challenge milk market orders regulating minimum prices paid by dairy handlers to dairy producers issued by the Secretary of Agriculture. Under the Agricultural Marketing Agreement Act of 1937,[147] these orders involved intricate compensatory payment schemes[148] and were issued through a detailed process and appealable only through a clear and independent scheme for appellate review.[149] After an evidentiary hearing, a market order required approval of the dairy handlers before it could become effective.[150] If the Secretary failed to gain this approval, the order could still be imposed on the dairy handlers if there was an administrative determination that the order was "the only practical means of advancing the interests of the producers."[151]

After citizen consumers of dairy products filed suit under the APA, the Court considered whether prudential standing existed by examining the statute's text, structural scheme and objectives; the congressional intent in passing the statute; and the nature of the agency actions involved. While the statute afforded clear and

(1986)); Heckler v. Chaney, 470 U.S. 821, 830 (1985) ("In this case, there is no indication that Congress sought to prohibit judicial review and there is most certainly no 'showing of "clear and convincing evidence" of a . . . legislative intent' to restrict access to judicial review.") (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 141 (1967)); Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 157 ("We find no evidence that Congress in either the Bank Service Corporation Act or the National Bank Act sought to preclude judicial review of administrative rulings by the Comptroller.").

147 7 U.S.C. §§ 601–674 (2000).

148 7 C.F.R. §§ 1012.44(a)(5)(i), 1012.60(e) (1984).

149 7 U.S.C. § 608(c).

150 Block v. Cmty. Nutrition Inst., 467 U.S. 340, 342 (1984).

151 7 U.S.C. § 608(c)(9)(B).

specific remedial provisions for dairy handlers,[152] the statute did not contain such provisions for the average consumer to challenge the milk market orders. It was this absence that led the Court to the conclusion that "Congress intended to foreclose consumer participation in the regulatory process."[153] The Court predicted that, should it have held otherwise, a disruption of the statutory scheme would have resulted. Such a holding "would provide handlers with a convenient device for evading the statutory requirement that they first exhaust their administrative remedies" by finding a consumer "who is willing to join in or initiate an action in the district court."[154] Through this back door, handlers could "seek injunctions against the operation of market orders" even when "such injunctions are expressly prohibited . . . ."[155]

Unlike the Agricultural Marketing Act, RCRA and the CAA (the statutory bases for the *HWTC* cases), provide no unique appellate scheme—they include no listed class of parties with special influence over decision making and establish no balance of power between the Administrator and the regulated industry. What grounds *Block* is the understanding that the milk market order scheme was simply not created with a consideration of consumer interests. As the *Block* Court stated, "the principal purposes [of the Act] are to raise the price of agricultural products and to establish an orderly system for marketing them."[156] Although the Agricultural Marketing Agreement Act of 1937 purported to protect safety, its true goal was to prop up an industry in decline—to *raise* prices for milk production, not lower them.[157] This makes consumers neither benefited nor burdened (under the regulations, at least); in fact, consumers are utterly uninvolved in

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[152] *See id.* § 608(15)(A).

[153] *Block*, 467 U.S. at 347. As the Court elaborated, "[h]ad Congress intended to allow consumers to attack provisions of marketing orders, it surely would have required them to pursue the administrative remedies provided in § 608(15)(A) as well." *Id.*

[154] *Id.* at 348.

[155] *Id.*

[156] *Id.* at 346; *see also id.* at 343 (The purpose of the milk market orders is "[t]o discourage destabilizing competition among producers . . . .").

[157] Nebbia v. New York, 291 U.S. 502, 549–51 (1934) (McReynolds, J., dissenting) (providing excerpts of the Legislative Committee report detailing the decline in the dairy industry and concluding that "[t]he purpose of this emergency measure is to bring partial relief from the disastrously low prices for milk which have prevailed in recent months. . . . This failure of demand had nothing to do with the quality of the milk—that was excellent.").

carrying out the Act's goals. Moreover, their interest in *lowering* prices actually conflicts with the general purposes of the act. Environmental Capitalists, unlike milk consumers in *Block*, are neither uninvolved in accomplishing the goals of environmental laws nor do they have interests that corrode any unique or complex construct required to administer Congressional goals. As discussed, *supra*, Environmental Capitalists are absolutely necessary to tightening environmental standards by inventing the technology necessary to impose better performing and cheaper pollution controls over time. In this sense, both Congress and Environmental Capitalists benefit from their reciprocal relationship; Congress gets results from the technology-forcing provisions in environmental laws and Environmental Capitalists get a return on their investment in developing improved pollution controls.

B. *Courts' Misinterpretation of Congressional Intent*

As explained in Section III, Congress has a history of relying on technology-forcing provisions to achieve environmental benefits. Specifically, in crafting pollution control legislation, Congress has relied on the existence and profit motivations of Environmental Capitalists. As Congressman Henry Waxman, a major sponsor of the CAA Amendments of 1990, explained, "[t]he rationale behind technology-forcing is that by setting emissions standards that are beyond the reach of conventional control methods, Congress creates a market incentive that can force the development and commercialization of new technologies."[158]

However, the *HWTC* courts failed to recognize this congressional intent. In *HWTC II*, for example, the D.C. Circuit's

[158] Waxman, *supra* note 110, at 1749. For further discussion about the nature of this market, see Kurt A. Strasser, *Cleaner Technology, Pollution Prevention and Environmental Regulation*, 9 FORDHAM ENVTL. L.J. 1, 6–7 (1997). Strasser explains that

> [t]he standards set in the regulatory system will effectively define at least the minimum market for environmental technology. If regulators do not set and enforce standards that require new technology to be adopted, business has little incentive to develop and deploy it. Conversely, when new technology is developed, if regulators do not approve it in their permitting and enforcement decisions, then the technology will not be profitable and ultimately will not survive in the market. A history of such disapproval will discourage firms from even developing new technology in the first place.

Id.

sense of the relationship between Environmental Capitalists and RCRA was inverted when it declared that RCRA was not intended "to benefit recycling and disposal firms."[159] The recycling and disposal firms were encouraged to exist for the benefit of RCRA, not vice versa.[160] The Fifth Circuit committed a similar error when, relying on *HWTC II*, it declared that "to 'proceed at the behest of interests that coincide only accidentally with [the statutory] goals' of TSCA may actually may work to defeat those goals."[161] As the history and practice of technology-forcing regulations shows, the coincidence of benefit is hardly an accident. This market for pollution control technology was created with the hopes that Environmental Capitalists would fill that need. Therefore, in order to sustain investment in pollution control, technology-forcing policy requires EPA to honor the rules of the subsequent market and for courts to entertain suits whenever EPA arguably eases environmental regulations that have established that market.

While some commentators have expressed concern about the effect of regulatory foot-dragging on Environmental Capitalists,[162] the issues involved in the *HWTC* cases and *Honeywell* had a far more destructive potential than mere delay in approving what constitutes best available control technology. By reducing the environmental burdens on the HWTC customers and improperly preserving the viability of Honeywell's competitors, EPA sought to change the rules of the market.[163] Allowing Environmental

[159] Hazardous Waste Treatment Council v. EPA (*HWTC II*), 861 F.2d 277, 283 (1988).

[160] *See* H.R. REP. NO. 98-616, at 32 (1983), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5591 (Congress wanted "to encourage the development of alternative treatment technology and capacity, by drastically reducing current dependence on land disposal.").

[161] Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 1209–10 (5th Cir. 1991) (quoting *HWTC II*, 861 F.2d at 283).

[162] *See, e.g.*, Strasser, *supra* note 158, at 6–7.

[163] The SNAP program, at issue in *Honeywell*, involves a far more radical technology-forcing scheme that actually bans the competition's products when an Environmental Capitalist invents a new substitute with less ozone-depleting potential. Clean Air Act § 612(c), 42 U.S.C. § 7671k(c) (2000). Acknowledging the environmental benefit of a new product and its general availability while continuing to allow Honeywell's competition to market products with higher ODP saps all incentive to invest in more environmentally-friendly products. To Honeywell, its $130 million investment in the non-ODP substitute HFC-245fa would only be made under the protections of the SNAP program. *See* Brief for Petitioner Honeywell International Inc., *supra* note 101, at 3, 15–16.

Capitalists to challenge agency actions that undermine these market rules aids in providing the stability and certainty required to effectuate the congressional goal of stimulating private investment in developing pollution control technology.

V. PROPOSAL: THE RECIPROCAL RELIANCE TEST FOR STANDING

A new rule is required to determine which interests arguably fall into the zone of interests test—one that accounts for a challenger that is neither an intended beneficiary nor burdened by the regulations. This goal would be precisely addressed by the adoption of a *reciprocal reliance* test to determine standing. This test would comprise a three-part inquiry:

1. What is the policy goal of the statute at issue?
2. What role does the litigant in question play with respect to the congressional intent of the statute: are they benefited, burdened, or neither?
3. If the litigant is neither benefited nor burdened, then does the party meet the threshold for standing under the reciprocal reliance standard, where Congress relies upon the product or service to implement the provisions of the statute, and the industry exists because of its reliance on congressional regulation?

If the answer to this third inquiry were "yes," then the reciprocal reliance rule would mandate that the party in question be given standing to challenge agency actions.

In answering the first and second prongs of the inquiry, courts should refer to the structure and scheme of the statute to consider the role of that challenger, if any, in furthering the goals of the underlying statute. The second prong is not an attempt to shoehorn Environmental Capitalists into the "beneficiary" category,[164] for it simply is not accurate to label Environmental Capitalists as "beneficiaries." The CAA or RCRA are not faux safety laws seeking to protect the pollution control industry, but environmental laws that benefit the general public. This does not mean, however,

[164] *Cf.* Hazardous Waste Treatment Council v. Thomas (*HWTC IV*), 885 F.2d 918, 928 (D.C. Cir. 1989) (Wald, Ch.J., dissenting) (The dissent argued that HWTC's members could be characterized as beneficiaries and "may claim that it has interests that Congress sought to protect through enactment of a regulatory scheme. . . . [S]uch claimants complain that administrative *under*-regulation leaves their interests unprotected in a manner that Congress 'arguably' sought to ameliorate.").

that Congress did not seek to protect their interests merely to encourage economic activity that furthers the goals of environmental laws. Under the third prong, instead of weighing true motives in an attempt to elicit the all-damning admission that profits are at stake, the court should simply determine what role the party plays in effectuating the general purposes of a statute. Where, as with Environmental Capitalists, Congress created a scheme to harness the profit motivations of private industry to provide products or services needed to carry out legislative goals, then these private parties will fall within the zone of interests. Since the legislative structure relies on action by unregulated private parties, and these unregulated private parties rely on the legislative structure as the basis for their business operations, this reciprocal reliance causes their interests in furthering the underlying legislative goals to overlap. The reciprocal reliance analysis of a party's role in the statutory scheme still fits neatly into the zone of interests test that presumes a party may challenge administrative action unless some positive indication from Congress shows the opposite intent.

This proposed rule is not new—simply neglected. The concept of determining the overall policy goals of a regulatory regime and its underlying statutes received a tepid endorsement in *Data Processing* where the Court analyzed the goals of the banking statutes at issue as a springboard to determining whose interests were implicated. It found that the general policy of the statutes was "apparent" and found easily identifiable parties whose interests were "directly affected by a broad or narrow interpretation of the acts."[165] While it stretches logic to believe that Congress intended a specific role for the data processing industry in protecting consumers under banking laws, it is plausible to believe that allowing potential competitors of any kind to challenge regulations expanding services deemed incidental to banking enforces "the accepted public policy which strictly limits banks to banking."[166] And incidentally, the Supreme Court voiced

[165] Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 157 (1970); *see also* Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399 (1987) (The zone of interest excludes only those "interests . . . so marginally related to, or inconsistent with, the *purposes implicit in the statute* that it cannot reasonably be assumed that Congress intended to permit the suit.") (emphasis added).

[166] *Data Processing*, 397 U.S. at 155 (quoting Arnold Tours, Inc. v. Camp, 408 F.2d 1147, 1153 (1st Cir. 1969)).

no concern as to whether the profit motives of data processors, which were not regulated by the two banking statutes at issue and admittedly sought only to avoid economic loss, would disrupt the statutory scheme intentionally or otherwise.

Delving into the true motivations of Congress and extrapolating the essential parties involved is easier and more objective (although never conflict-free) than subjective speculation about the hidden motives of various challengers. Nor is withholding prudential standing based on the statute's policy goals unheard of in the D.C. Circuit. In *Control Data Corporation v. Baldridge*,[167] several computer manufacturers challenged regulations promulgated under the Brooks Act that required uniform standards for government-procured computer systems.[168] The court did not speculate that the challenge was motivated by profits or whether these motives were incompatible with setting technical standards for governmental procurement of computers. It easily cobbled together the basic purposes of the Brooks Act[169] and rejected the appellants' claims that they were to play a role in setting those standards.[170]

Moreover, the reciprocal reliance inquiry is consistent with prior court holdings of a party's role in the statutory scheme. It works within the zone of interests test, which presumes that a party may challenge an administrative action unless some positive indication from Congress shows the opposite intent. In addition, it would still allow for some parties to be denied standing, as courts have interpreted the APA to intend.

Reverting to this more simplistic review of a statute's general policy goals and purpose to identify suitable challengers who are

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[167] 655 F.2d 283 (D.C. Cir. 1981).

[168] *Id.* at 284.

[169] *See id.* at 285 (The "avowed objective [is] 'the economic and efficient purchase, lease, maintenance, operation, and utilization of automatic data processing equipment by Federal departments and agencies.'") (quoting 111 CONG. REC. 22,823 (1965) (remarks of Rep. Brooks)). The court found that the Act satisfied "the overall need for standards . . . regarding the growing trend of noncompetitive ADP procurements by federal agencies" and "essential to the achievement of full competition and to the saving of large sums of money by the Government." *Id.* at 285–86.

[170] *See id.* at 289. The court rejected the claim "that competition has been recognized as an effective avenue to the accomplishment of the professed goals of the" scheme after a history of the act showed that competition is what prevented the establishment of uniform interface standards, making the Brooks Act necessary. *Id.* at 286.

neither benefited nor burdened by the regulations will protect the role that Congress encouraged Environmental Capitalists to adopt in the complex scheme of environmental protection. But, as courts have held, *someone* must be excluded from prudential standing. Would reversion to an even less defined "general policy goals and purpose" review exclude anyone? As an example of how this new rule would work in practice, the discussion returns to the familiar grounds of the banking industry.

In response to the complex and burdensome method of physically transporting paper checks to clearing centers, Congress enacted the Check Clearing for the 21st Century Act (the "Check 21 Act").[171] The stated purpose was to "facilitate check truncation . . . foster innovation in the check collection system . . . [and] to improve the overall efficiency of the Nation's payments system."[172] To further these goals, Congress authorized the use of a "substitute check," which is essentially a digital picture of an ordinary check that is processed electronically.[173] The Act could result in substantial economic losses for the conglomerate of couriers and check processing companies, and thus may be vulnerable to challenge by these companies. Under the zone of interests test, courts reviewing those challenges could presumably engage in a somewhat speculative quest to determine the underlying motives of these companies (i.e., economic), since there is no delicate administrative scheme to upset and no congressional articulation of what parties make "suitable" candidates to challenge the regulations to constitute clear and convincing evidence precluding challenges by the courier and processing companies. If the reciprocal reliance test were applied, would these parties be granted standing to challenge the Federal Reserve Board's implementing regulations?[174]

Applying the first prong of the reciprocal reliance inquiry, one could determine that Congress's goal in enacting the statute was to

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[171] Pub. L. No. 108-100, 117 Stat. 1177 (2003) (to be codified at 12 U.S.C. §§ 5001–5018).

[172] *Id.* at 1178 (to be codified at 12 U.S.C. § 5001(b)).

[173] *See* H.R. REP. NO. 108-291, at 20 (2003); Sarah Malmfeldt, *America Checks Into a New Banking Era With Check 21*, 17 LOY. CONSUMER L. REV. 209, 213 (2005).

[174] *See* Availability of Funds and Collection of Checks, 69 Fed. Reg. 47,290 (Aug. 4, 2004). Presumably, the challenge would include claims of both procedural deficiency and substantive claims related to consumer protection.

foster innovation and efficiency in the check collection system.[175] Under the second prong, couriers and check processing centers would be considered neither a beneficiary of the Check 21 Act nor burdened by the act like banks. Under the third prong, one could find that the couriers and processors do not play any role in implementing the electronic transmission of substitute checks by, for example, providing optical scanners, digital processors, or any other incidental equipment required to make the Check 21 Act work. Like the consumers in *Block*, their interests are antithetical to the purposes of the statute. Any challenge by the courier and processing companies would seek explicitly to return check processing to the slow and expensive methods of planes, trains, and automobiles.

Thus, applying the reciprocal reliance test could result in a determination of lack of standing. Lacking any role in the Check 21 Act or its implementing regulations as a recipient of congressional favor, obligor under the disputed statutory scheme, or congressional accomplice, the courier and processing companies should be found to lack prudential standing despite concrete economic injury. This exercise in determining the intended or implicit role for a party in the statutory scheme is a more objective method of separating those who mutually benefit from a regulatory regime and those who seek to either exploit or damage it. Thus the reciprocal reliance inquiry would still exclude some litigants from acquiring standing, but would avoid the complications of the amorphous zone of interests test. Applying this inquiry to Environmental Capitalists would allow them standing to challenge the alleged relaxation of environmental standards where technology-forcing regulations are involved in spite of the fact that they are not direct "beneficiaries" of environmental legislation.

CONCLUSION

This article does not advocate special treatment for Environmental Capitalists because they perform some saintly function in protecting the environment—quite the contrary. By recognizing congressional utilization of what some see as the corrupting drive of capitalism and channeling it towards fulfilling public policy goals, the reciprocal reliance by Congress on

[175] Check 21 Act, § 2(b).

industry and industry on the regulatory scheme at least arguably fits within the zone of interests, which is all that is demanded of this "not . . . especially demanding" test.[176] Recognizing the interests of challengers who are neither beneficiaries of nor burdened by regulation by resort to the general purposes of the underlying statute is hardly a call for radical change. It simply fills in the contours of the "zone" in accordance with the already loose proclamations of which interests pass muster.[177] Reliance standing simply asks the courts to protect the interests that Environmental Capitalists were asked to advance. Without this protection, Congress could find itself without a powerful alliance between environmentalism and capitalism.

[176] Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399 (1987). *Cf.* Control Data Corp. v. Baldridge, 655 F.2d 283, 289 (D.C. Cir. 1981) ("The test's amorphous nature, however, makes application difficult and careful evaluation impossible absent some refinement. To apply the zone of interests standard in a principled fashion, then, we must attempt to give it content and form, definition and scope.").

[177] Even the *HWTC* cases recognized that there was something more out there than simply the two-way street of benefits and burdens. *See* Hazardous Waste Treatment Council v. Thomas (*HWTC IV*), 885 F.2d 918, 922 (D.C. Cir. 1989) (admitting that the zone of interest test is satisfied for "parties whose interests, while not in any specific or obvious sense among those Congress intended to protect, coincide with the protected interests"); Hazardous Waste Treatment Council v. EPA (*HWTC II*), 861 F.2d 277, 283 (D.C. Cir. 1988) (requiring "some factor—some indicator that the plaintiff is a peculiarly suitable challenger of administrative neglect").