

NEPA's Zone of Interests

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The National Environmental Policy Act (“NEPA”) is a central federal environmental conservation statute.¹ It requires federal agencies to consider the environmental impacts of their actions and to incorporate environmental values into their decisionmaking.² Private parties injured by agency noncompliance with NEPA may be able to sue in federal court for an injunction mandating NEPA compliance.³ Common harms in the reported NEPA cases include damage to property,⁴ recreational opportunities,⁵ and aesthetic values.⁶

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1. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–47 (2000). NEPA has been called “the magna carta” of environmental legislation. DANIEL R. MANDELKER, *NEPA LAW AND LITIGATION*, § 1.1 (2d ed. 2006).

2. See *infra* Part I.A for a discussion of NEPA’s mandatory procedures. NEPA’s most significant provision, the environmental impact statement (“EIS”) requirement, applies only to federal actions with significant environmental impacts. 42 U.S.C. § 4332 (2000). However, the threshold issue of whether the EIS requirement applies requires agencies to consider and weigh the environmental impacts of their actions. See *infra* Part I.A (discussing the NEPA process). NEPA’s purpose is arguably served even when an agency chooses to avoid it by pursuing an alternative with a low environmental impact.

3. See *infra* Part I.B for a discussion of NEPA suits and remedies.

4. See, e.g., *Knaust v. City of Kingston*, 978 F. Supp. 86, 90 (N.D.N.Y. 1997) (discussing the effect of polluted runoff on property) *vacated by* 157 F.3d 86 (2d Cir. 1998). *Knaust* is discussed *infra* at note 44.

5. See, e.g., *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 678, 686–88 (1973) (discussing the inability to use wildlife areas for “camping, hiking, fishing, sightseeing, and other recreational [and] aesthetic purposes”).

6. *Id.*; see also *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (“[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process”).

Before a private party can sue to enforce NEPA, the party must establish its standing.⁷ The standing of private parties to bring actions under NEPA is the focus of this Note.⁸ Specifically, this Note focuses on the zone of interests test for prudential standing.⁹ This judicially created requirement bars plaintiffs asserting injuries outside the zone of interests of the statutory provision on which they rely.¹⁰

A circuit split has formed regarding the application of the zone of interests test to NEPA.¹¹ The Ninth Circuit Court of Appeals recently held that purely economic interests are not within the zone of

7. See *infra* Part I.C for a general discussion of standing in NEPA cases. It may be worth noting here that modern standing doctrine has been attacked by scholars calling for its reform or demise. See generally Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 670–83 (2004) (describing normative critiques of standing jurisprudence advanced by various scholars); see also *infra* note 48 (presenting critiques of modern standing jurisprudence based on precedent). Some scholars argue that the current standing requirements misinterpret the Constitution. E.g., Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 166–67 (1992) (calling the injury in fact requirement "a misinterpretation of the Administrative Procedure Act and Article III"). Others criticize a perceived flexibility in the doctrine which allows judges to insert personal ideology into the process. E.g., Richard J. Pierce, *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1744 (1999) (arguing that modern standing law is characterized by a "high degree of doctrinal malleability and result-oriented doctrinal manipulation" by judges). This debate is beyond the scope of this Note.

8. This Note addresses standing to bring suit only. Standing of private parties to intervene in NEPA suits is closely related, but the issues are not identical. See generally Juliet Johnson Karastelev, Note, *On the Outside Seeking In: Must Intervenors Demonstrate Standing to Join a Lawsuit?*, 52 DUKE L.J. 455 (2002) (describing law of intervenor standing and arguing that standing should apply to intervenors only when they assert or defend a legal claim). One point of difference is that Rule 24 of the Federal Rules of Civil Procedure may be a bar to intervenors, but not to plaintiffs. FED. R. CIV. P. 24. While the analysis and conclusions of this Note may in some respects apply to standing to intervene, this Note does not attempt to identify the extent to which such is the case. See Erik Figlio, Note, *Stacking the Deck Against "Purely Economic Interests": Inequity and Intervention in Environmental Litigation*, 35 GA. L. REV. 1219 (2001), for one perspective on intervenor standing in NEPA cases.

9. See *infra* notes 49–52 and accompanying text for a discussion of prudential standing. Note that standing is subject to constitutional limitations as well as prudential ones. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Constitutional standing is the set of features essential to a "case or controversy" within the meaning of Article III. See *id.* at 559–62; U.S. CONST. art. III, § 2. The various constitutional requirements present their own obstacles to would-be plaintiffs. See generally *Lujan*, 504 U.S. at 559–62; ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 2.5 (2d ed. 1997). These requirements are beyond the scope of this Note.

10. See *infra* notes 51–62 and accompanying text for discussion of the zone of interests test.

11. See *infra* Part II for coverage of the circuit split.

interests of any provision of NEPA.¹² That decision criticized a line of Eighth Circuit cases,¹³ which held that at least one of NEPA's provisions may protect purely economic interests.¹⁴ In effect, the Ninth Circuit rule prevents individuals suffering economic harms due to agency noncompliance with NEPA from challenging the detrimental agency actions in court.¹⁵ The Eighth Circuit rule, on the other hand, appears to permit challenges based on economic injuries in some circumstances.¹⁶

This Note analyzes the split and attempts to identify an appropriate resolution. Part I outlines NEPA and current standing jurisprudence. Part II presents the division of authority on NEPA's zone of interests and sets out the arguments of each side. Part III evaluates the competing approaches, looking at whether each is consistent with legislative intent, judicial precedent, and public policy.

12. *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 944–45 (9th Cir. 2005) (“Thus, to the extent [EIS] regulations clarify section 102(2)(c)’s zone of interests, they demonstrate that purely economic interests are not in that zone.”). See *infra* Part II.B for a discussion of *Ashley Creek*.

13. *Ashley Creek*, 420 F.3d at 942 (noting “disagreement with the Eighth Circuit’s reasoning” and criticizing the Eighth Circuit’s “open-ended and expansive” view of NEPA).

14. See *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1038 (8th Cir. 2002) (“Even purely economic interests may confer standing under NEPA if the particular NEPA provision giving rise to plaintiff’s suit evinces a concern for economic considerations.”). See *infra* Part II.A for discussion of the Eighth Circuit rule on NEPA’s zone of interests.

15. *Ashley Creek*’s discussion of prudential standing is merely an alternative basis for decision; the primary basis for the decision is constitutional standing. *Ashley Creek*, 420 F.3d at 939; see also *id.* at 945 (Beezer, Circuit Judge, dissenting in part) (“Because [plaintiff] has failed to establish constitutional standing, I would leave [the prudential standing issue] for another day.”).

16. Specifically, the Eighth Circuit allows NEPA challenges on economic grounds when the agency has prepared an environmental impact statement. See *Rosebud*, 286 F.3d at 1038; *infra* Part II.A (discussing the Eighth Circuit position).

I. BACKGROUND: NEPA, NEPA ACTIONS, AND STANDING TO SUE UNDER NEPA

A. NEPA's Environmental Impact Statement Requirement¹⁷

NEPA is primarily a procedural statute.¹⁸ The legislative purpose stated in NEPA is to promote environmental values.¹⁹ NEPA promotes environmental interests most actively with its environmental impact statement (“EIS”) requirement.²⁰ An EIS is a statement of the various impacts of a given action.²¹ The Council on Environmental Quality (“CEQ”) has the power to issue regulations

17. The sketch of NEPA in this section serves the narrow purposes of this Note. For a thorough treatment of NEPA, see MANDELKER, *supra* note 1.

18. *See, e.g.*, Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 558 (1978) (“[NEPA’s] mandate to the agencies is essentially procedural.”). The view that NEPA is procedural rather than substantive, although uniformly accepted by the courts, has been condemned by some scholars. *See, e.g.*, Philip Weinberg, *It’s Time To Put NEPA Back on Course*, 3 N.Y.U. ENVTL. L.J. 99 (1994).

19. National Environmental Policy Act of 1969 § 101, 42 U.S.C. § 4331 (2000). NEPA states its purpose:

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

Id.

20. *Id.* § 102(c), 42 U.S.C. § 4332(c) (2005). NEPA requires federal agencies to:

... include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id.

21. *See id.*; MANDELKER, *supra* note 1, § 2.6.

interpreting the EIS requirement.²² An EIS or substantial equivalent is required whenever the action will cause a significant environmental impact.²³ CEQ regulations impose numerous procedural and drafting requirements on the preparation of an EIS,²⁴ which can make the process complex and protracted.²⁵ Preparation of

22. 40 C.F.R. §§ 1500–18 (2005). NEPA gives the CEQ various information gathering and reporting duties, near § 9, 42 U.S.C. § 4344 (2000), but does not authorize it to promulgate regulations. Regulatory authority over NEPA was granted by executive order. Exec. Order No. 11,514, 3 C.F.R. § 902 (1969–1970), *reprinted as amended in* 42 U.S.C. § 4321 (1994). Another executive order made the CEQ regulations interpreting NEPA binding on government agencies. Exec. Order No. 11,991, 3 C.F.R. § 123 (1977), *reprinted in* 42 U.S.C. § 4321 (1994). Courts defer to the CEQ regulations interpreting NEPA. *See, e.g., Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979) (“CEQ’s interpretation of NEPA is entitled to substantial deference.”).

23. National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (2000).

24. *See generally* MANDELKER, *supra* note 1, §§ 7:11–:17; Valentine D. Sworts and Alan C. Schroeder, *Pegasus, Workhorse, or Trojan Horse? A Case Study of the Use of the NEPA Process in Grazing Use Decisions on Bureau of Land Management Lands in Wyoming*, 3 WYO. L. REV. 3, 21–23 (2003).

25. First, an agency must publish a notice of intent to prepare an EIS in the Federal Register. 40 C.F.R. § 1501.7 (2005). The notice must describe the proposed action, possible alternatives to the action, and the agency’s EIS scoping process. *Id.* § 1508.22.

Next, the preparing agency must perform a scoping process, creating a list of all environmental issues relevant to the project under consideration. *Id.* § 1501.7. The agency must include interested private parties and federal and state agencies with relevant expertise in the scoping process. *Id.* The scoping report must include division of responsibilities among participating agencies and a timetable for completion of the EIS. *Id.*

The agency must then conduct the necessary research on the issues identified in the scoping report. Methods vary widely depending on the project, circumstances, and agency. *See generally* MANDELKER, *supra* note 1, § 10:2.

Next, the agency must prepare and release a draft EIS. 40 C.F.R. § 1502.9 (2005). The draft must conform as nearly as possible to the requirements of a final EIS. *See id.* §§ 1502.10–.18 (format and content requirements); §§ 1502.21–.25 (analysis and use of evidence); §§ 1502.7, 1502.8, 1502.20 (stylistic norms). While regulations state that an EIS should normally be less than 150 pages and up to 300 in exceptional cases, *id.* § 1502.7, the average EIS released in the year 2000 was over 700 pages long. TASK FORCE ON IMPROVING NATIONAL ENVTL. POLICY ACT AND TASK FORCE ON UPDATING NATIONAL ENVTL. POLICY ACT, 109TH CONG., INITIAL FINDINGS AND DRAFT RECOMMENDATIONS 18 (2005) [hereinafter TASK FORCE FINDINGS], available at http://environment.transportation.org/pdf/hot_documents/nepareport_finaldraft.pdf.

A mandatory comment period follows the release of the draft, during which the preparing agency must submit the draft for Environmental Protection Agency review and accept comments from the public. 40 C.F.R. §§ 1503.1, 1506.10 (2005).

Finally, the agency must publish a record of decision (hereinafter “ROD”) regarding the EIS. *Id.* § 1505.2. The ROD must state the decision; identify all alternatives considered by the agency in reaching its decision; evaluate the various options, identifying all relevant factors and explaining how they affected the decision; identify, evaluate, and discuss all practicable means to mitigate environmental harm from the decision; adopt a monitoring and enforcement

an EIS can consume considerable agency resources and lead to costly project delays.²⁶ As a result, agencies seem to avoid the EIS process whenever possible.²⁷

If an EIS were required for every federal agency action, NEPA would severely hamper the functions of the federal government. However, NEPA only requires an EIS where significant environmental impact is expected to result.²⁸ For minor or routine actions, the agency will know the expected level of impact and whether an EIS is necessary without making any investigation.²⁹ If the level of environmental impact is unknown, however, the agency must carry out an environmental assessment (“EA”).³⁰ An EA addresses the sole question of whether any significant environmental impact from a given action is likely.³¹ Unlike an EIS, an EA is a brief report with few formal requirements.³²

If the EA shows that significant environmental impact may result from the action, the agency must complete an EIS.³³ If not, the agency may release a finding of no significant impact (a “FONSI”).³⁴ A FONSI is the substantial equivalent of an EIS, therefore releasing a FONSI fulfills the EIS requirement.³⁵ Like an EA but unlike an EIS,

program for mitigation efforts where appropriate; and reply in an appropriate way to each comment received. *Id.*

This overview of the EIS process is drawn in part from Sworts, *supra* note 24, at 21–23.

26. For a discussion of the costs of EIS preparation, see TASK FORCE FINDINGS, *supra* note 25, at 21.

27. See COUNCIL ON ENVTL. QUALITY, THE NATIONAL ENVTL. POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS 19–20 (1997), available at <http://ceq.eh.doe.gov/neap/nepa25fn.pdf> [hereinafter CEQ STUDY] (noting a decrease in the number of EIS’s prepared annually).

28. National Environmental Policy Act of 1969 § 102(2)(C), 42 U.S.C. § 4332(2)(C) (2000); 40 C.F.R. § 1501.4 (2005).

29. 40 C.F.R. § 1501.4(b) (2005).

30. *Id.*

31. *Id.* § 1501.3.

32. Regulations define an environmental assessment as “a concise public document” which serves to “[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.” *Id.* § 1508.9. An EA must “include brief discussions of the need for the proposal, of alternatives [to the proposed action] . . . , [and] of the environmental impacts of the proposed action and alternatives, [as well as] a listing of agencies and persons consulted.” *Id.*

33. *Id.* §§ 1501.4(c), 1508.18, 1508.27.

34. 40 C.F.R. § 1501.4(e) (2005).

35. *Id.* § 1501.4. Agencies may also avoid the EIS requirement by creating categorical exclusions through rulemaking. *Id.* § 1508.4. A categorical exclusion is “a category of actions

a FONSI has relatively few formal requirements.³⁶ The FONSI complies with NEPA, and is cheaper and easier to prepare than an EIS.³⁷ Not surprisingly, agencies frequently use FONSIs and other alternatives to the EIS process.³⁸

B. Private Actions to Enforce NEPA Compliance

NEPA does not create a private cause of action.³⁹ Unlike some environmental statutes, it has no citizen suit provision.⁴⁰ However, the Administrative Procedure Act (“APA”) allows individuals harmed by agency actions to seek judicial review of those actions.⁴¹ As applied, the APA permits private parties to challenge agency compliance with NEPA in court.⁴² Courts review agency NEPA compliance efforts for arbitrariness and abuse of discretion.⁴³ In these

which do not individually or cumulatively have a significant effect on the human environment . . . and for which, therefore, neither an environmental assessment nor an environmental impact statement is required.” *Id.*; see also *id.* § 1501.4. Categorical exclusions may generate controversy, see, e.g., Kevin H. Moriarty, *Circumventing the National Environmental Policy Act: Agency Abuse of the Categorical Exclusion*, 79 N.Y.U. L. REV. 2312 (2004), and become targets of litigation, see *High Sierra Hikers Ass’n v. Powell*, 150 F. Supp. 2d 1023, 1042–44 (N.D. Cal. 2001). Further examination of categorical exclusions and other EIS alternatives is beyond the scope of this Note.

36. Compare 40 C.F.R. § 1508.13 (2005) (FONSI requirements), with *supra* note 32 (discussing the EA requirements in 40 C.F.R. § 1501.3 (2005)) and *supra* note 25 (EIS requirements).

37. See CEQ STUDY, *supra* note 27, at 20 (“When the EIS process is viewed as merely a compliance requirement rather than a tool to improve decisionmaking, mitigated FONSI’s may be used simply to prevent the expense and time of the more in-depth analysis required by an EIS.”).

38. See *id.* at 19 (observing “a significant increase in EAs and a decrease in EISs”). Other alternatives to the EIS process exist and are used by agencies. See *id.* (mitigated FONSIs); 40 C.F.R. § 1501.4(e) (categorical exclusions).

39. E.g., *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1238 (9th Cir. 2005) (“NEPA do[es] not provide a private cause of action[.]”).

40. See, e.g., the Endangered Species Act, 16 U.S.C. § 1540(g) (2000). A House of Representatives task force has recommended that a citizen suit provision be added to NEPA. TASK FORCE FINDINGS, *supra* note 25, at 26–27.

41. 5 U.S.C. § 702 (2000). “A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” *Id.*

42. See, e.g., *Native Ecosystems*, 428 F.3d at 1238 (“Decisions allegedly violating . . . NEPA are reviewed under the Administrative Procedure Act.”).

43. 5 U.S.C. § 706(2)(A) (2000). The abuse of discretion standard and the arbitrary and capricious standard are very similar, if not equivalent. See Ronald M. Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report*, 38 ADMIN. L. REV. 239, 292 (1986).

cases, courts give agencies which have obeyed NEPA procedures substantial latitude to interpret the relevant data, weigh competing values, and select a course of action.⁴⁴ In contrast, agencies who fail to comply with NEPA, such as those who have failed to prepare a required EIS, have their decisions more rigorously reviewed.⁴⁵ These agencies may be enjoined from proceeding with the action until they satisfy NEPA.⁴⁶

C. Prudential Standing to File a NEPA Complaint

Plaintiff standing is frequently litigated in NEPA cases.⁴⁷ “In essence the question of standing is whether the litigant is entitled to

Further examination of these standards of review or detailed analysis of their application in NEPA cases is beyond the scope of this Note. For general treatment of these standards in administrative law, see CHARLES H. KOCH, JR., *ADMINISTRATIVE LAW AND PRACTICE*, §§ 10.4–6 (2d ed. 1997). For an overview of their application in NEPA cases, see MANDELKER, *supra* note 1, §§ 3.1–4.

44. See, e.g., *Knaust v. City of Kingston*, 978 F. Supp. 86 (N.D.N.Y. 1997), *vacated*, *Knaust v. City of Kingston*, 157 F.3d 86 (2d Cir. 1998). In that case, neighbors of the site of a proposed business park complained that polluted runoff from the project would damage their property. *Id.* at 90. The court stated that its role was “simply to ensure that the relevant agency’s decisions are not arbitrary and capricious.” *Id.* at 91. The court considered the agency decisionmaking record and the affidavits submitted by plaintiffs’ experts. *Id.* at 91–93. The experts’ testimony contradicted the agency on several key points. *Id.* The court did not attempt to decide which account was correct, but simply found that the agency “adequately considered and disclosed the environmental effects of the business park.” *Id.* at 93. It held that the agency’s actions were not arbitrary or capricious, and granted the agency’s motion for summary judgment on the NEPA claims. *Id.*

45. For example, in *Ocean Advocates v. United States Army Corps of Engineers*, 402 F.3d 846 (9th Cir. 2005), the Army Corps of Engineers (hereinafter “Corps”) granted permits for construction of a second pier at an oil refinery on the Alaskan coast. *Id.* at 856–57. The Corps issued a FONSI for the project, accepting the oil company’s statements that the new pier would not increase the likelihood of an oil spill at the site. *Id.* at 856. The plaintiffs challenged the decision under NEPA. *Id.* at 855. On the NEPA issue, the Ninth Circuit held that the agency had overlooked the obvious fact that the second pier would increase the refinery’s ability to handle tanker traffic. *Id.* at 865–67. This point had been raised by various concerned groups throughout the permit process. *Id.* at 855–57. Failure to account for the potential impact of additional traffic was fatal to the FONSI. *Id.* at 867. The Ninth Circuit remanded the case for evidentiary hearings and consideration of remedies. *Id.* at 875.

46. For detailed coverage of injunctive remedies in NEPA cases, see MANDELKER, *supra* note 1, §§ 4:53–62.

47. One source indicates, plausibly, that plaintiff standing is “the most frequently litigated issue in the reported NEPA cases.” John A. Glenn, et al., eds., Annotation, *General Principles Governing Standing to Maintain Action Challenging Omission or Adequacy of Environmental Impact Statement Required by § 102(2)(c) of National Environmental Policy Act of 1969* (42 U.S.C.A. § 4332(2)(c)), 61 A.L.R. FED. 87 § 2 (1983).

have the court decide the merits of the dispute or the particular issues.”⁴⁸ Prudential standing is a set of principles of judicial self-restraint regarding the types of interests that courts will allow a party to assert.⁴⁹ Congress has the power to alter or eliminate the judicially-created prudential standing rules.⁵⁰

The zone of interests test is the current formulation of a doctrine that has long existed in standing jurisprudence.⁵¹ The test was first stated in *Association Data Processing Service Organization v. Camp*.⁵² In that case, the Supreme Court considered whether financial data processors had standing under the APA and relevant banking statutes to challenge a regulation allowing banks to participate in the data processing field.⁵³ The plaintiffs' naked purpose in opposing the regulation was to protect their business from competition.⁵⁴ The Court stated the rule that a complainant has standing only if “the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”⁵⁵ Applying this rule, the Court

48. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). *See also* *Allen v. Wright*, 468 U.S. 737, 750–52 (1984) (summarizing standing doctrine); BLACK'S LAW DICTIONARY 1442 (8th ed. 1999) (defining standing as “a party's right to make a legal claim or seek judicial enforcement of a duty or right”). While use of the term “standing” to describe a discrete area of law is a relatively recent addition to constitutional jurisprudence, *see KOCH, supra* note 43, § 14.13, its originators claimed a foundation in earlier jurisprudence, *see Ass'n of Data Processing Orgs. v. Camp*, 397 U.S. 150, 151–57 (1970) (discussing precedent). Whether standing has an acceptable historical foundation continues to be a subject of debate among scholars. *Compare* Ann Woodhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691–92 (2004) (arguing that standing had ample precedent at the time of its emergence), *with* Sunstein, *supra* note 7, 166.

49. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Barrows v. Jackson*, 346 U.S. 249, 255 (1953) (setting out the rule of self-restraint). In addition to limiting the zone of interests, prudential standing bars plaintiffs from asserting either the rights of third parties or “generalized grievance[s]” shared in substantially equal measure by all or a large class of citizens.” *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

50. *Warth*, 422 U.S. at 501; *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 208–10 (1972) (stating that Congress may grant standing as broadly as Article III permits). Congress cannot alter standing requirements drawn from the Constitution. *Warth*, 422 U.S. at 501; *see also supra* note 9 (distinguishing constitutional standing from prudential standing).

51. *See* Jonathan R. Siegel, *Zone of Interests*, 92 GEO. L.J. 317, 319–41 (2004).

52. *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970).

53. *Id.* at 151.

54. *Id.* If the banks were permitted to provide data processing services, the companies already in that business stood to lose customers and revenue. *Id.*

55. *Id.* at 153.

held that the banking statute's express limitation on certain bank activities "arguably brings a competitor within the zone of interests protected by it."⁵⁶ It concluded that the data processors had standing to seek judicial review.⁵⁷

The *Data Processing* zone of interests test remains a feature of prudential standing.⁵⁸ It has been described as a permissive requirement.⁵⁹ Competitor suits and suits by others asserting economic interests have been permitted under the APA in a variety of contexts.⁶⁰ However, it is clear that the Court intends the requirement to bar at least some suits.⁶¹ Courts applying the zone of interests test have dismissed numerous suits.⁶²

The Supreme Court has not considered NEPA's zone of interests test,⁶³ but its decision in *Bennett v. Spear* presents a similar

56. *Id.* at 156.

57. *Id.* at 158.

58. *Bennett v. Spear*, 520 U.S. 154, 162–63 (1997).

59. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399–400 (1987) (noting that zone of interests test is permissive); *id.* at 400 n.15 (admonishing overly restrictive lower court interpretations). "The [zone of interests] test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff." *Id.* at 400 (footnote omitted).

60. *Id.* at 394–400 (identifying cases illustrating the broad sweep of the zone of interests test).

61.

[T]he failure of an agency to comply with a statutory provision requiring 'on the record' hearings would assuredly have an adverse effect upon the company that has the contract to record and transcribe the agency's proceedings; but since the provision was obviously enacted to protect the interests of the parties to the proceedings and not those of the reporters, that company would not be adversely affected within the meaning of the statute.

Lujan v. Nat'l Wildlife Fed'n, 504 U.S. 871, 883 (1990).

62. In one such case, the Supreme Court held that postal employees who opposed a regulation permitting private couriers to engage in international remailing did not meet the zone of interests test. *Air Courier Conference of America v. American Postal Workers Union*, 498 U.S. 517 (1991). The congressional purpose in enacting the statutes at issue "was not . . . opportunities for postal workers but . . . the receipt of necessary revenues for the Postal Service." *Id.* at 525–26.

63. Lower courts have applied the Court's statements about NEPA in *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983), to the zone of interests test even though standing was not an issue in that case. See *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1126 (8th Cir. 1999) (citing *Metro. Edison* in discussion of NEPA's zone of interests); *Animal Lovers Volunteer Ass'n v. Weinberger*, 765 F.2d 937, 938 (9th Cir. 1985) (same); *Morris v. Myers*, 845 F. Supp. 750, 756–57 (D. Or. 1993) (same); *Gerosa, Inc. v. Dole*, 576 F. Supp. 344, 348 (S.D.N.Y. 1983) (same). *Metro. Edison* arose in the

question.⁶⁴ In *Bennett*, ranchers and farmers challenged a minimum water level set under the Endangered Species Act (hereinafter “ESA”),⁶⁵ the purpose of which was to protect an endangered fish species living in a certain reservoir.⁶⁶ The private plaintiffs alleged, among other claims, that the order violated section 7 of the ESA, which requires agencies to “use the best scientific and commercial data available” in making decisions under the ESA.⁶⁷ The plaintiffs submitted data showing that the continued normal operation of the reservoir would not impact the fish species in question, and therefore the minimum water level was not necessary to protect the fish.⁶⁸

Standing was a central issue in the case.⁶⁹ The plaintiffs’ interest in the matter was economic, namely their desire to use the reservoir water for agriculture.⁷⁰ The Court stated that the zone of interests of a statute “is to be determined not by reference to the overall purpose of the Act in question . . . , but by reference to the particular provision

wake of the Three Mile Island nuclear power plant accident when a citizens’ group sued to force the Nuclear Regulatory Commission to consider the psychological effects on members of the community, specifically fear of a future disaster, in its decision to reopen the plant. *Metro. Edison*, 460 U.S. at 768–70. The EIS for the project considered the environmental effects of normal plant operation and the risks of environmental effects from future accidents. *Id.* at 775. In its discussion of the merits of the NEPA claim, the Court described the congressional purpose behind NEPA’s EIS requirement:

To determine whether [§ 102(2)(C)] requires consideration of a particular effect, we must look at the relationship between that effect and the change in the physical environment caused by the major federal action at issue. . . . Our understanding of the congressional concerns that led to the enactment of NEPA suggests that the terms “environmental effect” and “environmental impact” in [§ 102(2)(C)] be read to include a requirement of a reasonably close causal relationship between a change in the physical environment and the effect at issue.

Id. at 773–74. The Court held that fear of a future environmental event was insufficiently connected to the physical world to require consideration in an EIS. *Id.* at 779 (“NEPA does not require agencies to evaluate the effects of risk, *qua* risk.”).

64. 520 U.S. 154 (1997).

65. Endangered Species Act, 16 U.S.C. §§ 1531–44 (2000).

66. *Bennett*, 520 U.S. at 158–60.

67. 16 U.S.C. § 1536 (a)(2). The plaintiffs also sued under the ESA citizen suit provisions. *Bennett*, 520 U.S. at 160.

68. *Id.*

69. *Id.* at 174–78. The Ninth Circuit held that the plaintiffs failed the zone of interests test because their economic interest (using the water in the reservoir for agriculture) did not match the stated conservation purpose of the ESA. *Bennett v. Plenert*, 63 F.3d 915, 919–22 (9th Cir. 1995), *rev’d*, *Bennett*, 520 U.S. at 179.

70. *Bennett*, 520 U.S. at 160.

of law upon which the plaintiff relies.”⁷¹ The Court found that while the overall purpose of the ESA was species preservation, one purpose of section 7 was to prevent unnecessary impacts on the economy.⁷² It concluded that the plaintiffs were “plainly within the zone of interest that the provision protects.”⁷³

II. THE CIRCUIT SPLIT OVER ‘ECONOMIC INTERESTS’ AND NEPA⁷⁴

A. *The Eighth Circuit: Sometimes, NEPA Protects Purely Economic Interests*

The leading Eighth Circuit case on NEPA’s zone of interests is *Rosebud Sioux Tribe v. McDivitt*.⁷⁵ The appellant in *Rosebud* was a company that attempted to lease tribal land for hog production.⁷⁶ Initially, the Bureau of Indian Affairs (“BIA”) approved the lease

71. *Id.* at 175–76.

72. The Court stated,

The obvious purpose of the requirement that each agency “use the best scientific and commercial data available” is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise. While this no doubt serves to advance the ESA’s overall goal of species preservation, we think it readily apparent that another objective (if not indeed the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives.

Id. at 176–77.

73. *Id.* at 177.

74. The circuit split has been most clearly expressed in the decisions of the Courts of Appeals of the Eighth and Ninth Circuit, so this Note focuses on those decisions. The District of Columbia Circuit has also considered the application of *Bennett* to the standing of economic interest plaintiffs under NEPA. *Town of Stratford v. Fed. Aviation Admin.*, 285 F.3d 84, 88–89 (D.C. Cir. 2002). The D.C. Circuit view seems closer to that of the Ninth Circuit. *Compare id.* with *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1038 (8th Cir. 2002) (discussed *infra* at part II.A) and *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934 (9th Cir. 2005) (discussed *infra* at part II.B).

75. *Rosebud Sioux*, 286 F.3d 1031. *Rosebud Sioux* is the most recent Eighth Circuit case to address the issue and it summarizes, and synthesizes, the earlier precedent. *See id.* at 1038–39 (discussing *Cent. S.D. Coop. Grazing Dist. v. Sec’y of the U.S. Dep’t of Agric.*, 266 F.3d 889, 892–96 (8th Cir. 2001); *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1125–26 (8th Cir. 1999); *Robinson v. Knebel*, 550 F.2d 422, 425 (8th Cir. 1977)).

76. *Id.* at 1034–35. The initial action to challenge the revocation was brought by the lessor tribe. *Id.* at 1035. The lessee hog company intervened on the tribe’s side. *Id.* The tribe later withdrew after a change in leadership, and the hog company made the appeal. *Id.*

after preparing an EA and issuing a FONSI.⁷⁷ The BIA later revoked its approval when an advocacy group challenged the lease in court, alleging noncompliance with NEPA.⁷⁸ The hog company then challenged the revocation under NEPA.⁷⁹ It did not rely on a specific NEPA provision to support its standing, but cited NEPA as a whole.⁸⁰

The Eighth Circuit recognizes that “the purpose of NEPA is to establish ‘a broad national commitment to protecting and promoting environmental quality.’”⁸¹ However, following *Bennett*,⁸² the court’s standing inquiry focuses on the particular provisions raised by the plaintiffs rather than the overarching purpose of the act in question.⁸³ The hog company’s failure to cite any specific provision led the court to summarize its previous analyses of standing under NEPA’s various provisions.⁸⁴

As read by the Eighth Circuit, use of the term “human environment” in NEPA’s EIS provision, section 102(2)(C),⁸⁵ “requires consideration of economic interests” in every EIS.⁸⁶ In

77. *Id.*

78. *Concerned Rosebud Area Citizens v. Babbitt*, 34 F. Supp. 2d 775 (D.D.C. 1999); *Rosebud Sioux*, 286 F.3d at 1035.

79. *Rosebud Sioux*, 286 F.3d at 1035–36.

80. *Id.* at 1038 (“[Plaintiff] fails to cite in its complaint or other filings any particular provision of NEPA upon which it relies to protect its economic interests. Instead, it refers broadly to NEPA . . .”).

81. *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1125 (8th Cir. 1999) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989)).

82. *Bennett v. Spear*, 520 U.S. 154 (1997) (discussed *supra* at text accompanying notes 64–74).

83. *See Rosebud Sioux*, 286 F.3d at 1038 (citing *Bennett*, 520 U.S. at 175–76); *Cent. S.D. Coop. Grazing Dist. v. Sec’y of the USDA*, 266 F.3d 889, 895 (8th Cir. 2001) (same); *Dombeck*, 164 F.3d at 1125 (same)).

84. *Rosebud Sioux*, 286 F.3d at 1038.

85. 42 U.S.C. § 4332(2)(C) (2000) (requiring an EIS “in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.”).

86. *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1038–39 (8th Cir. 2002) (citing *Grazing*, 266 F.3d at 896; *Dombeck*, 164 F.3d at 1125–27; *Robinson v. Knebel*, 550 F.2d 422, 425 (8th Cir. 1977)). “[E]ven purely economic interests may confer standing under NEPA if the particular NEPA provision giving rise to the plaintiff’s suit evinces a concern for economic considerations. . . . [section 102(2)(C)] requires consideration of economic interests, [but] only applies when an EIS is prepared.” *Id.* at 1038–39.

Friends of the Boundary Waters Wilderness v. Dombeck, 164 F.3d 1115 (8th Cir. 1999), was the first case from the Eighth Circuit to apparently allow economic interests to support standing in a NEPA suit. In *Dombeck*, a group of outfitters and guides who derived their livelihood from the use of a certain wilderness area challenged a Forest Service regulation

support of this interpretation, the Eighth Circuit cites the regulatory definition of “human environment,”⁸⁷ and points out several other places where NEPA and its implementing regulations appear to display concern for economic interests.⁸⁸ However, this aspect of section 102(2)(C) “only applies when an EIS is prepared,” and thus did not apply to the BIA’s action in *Rosebud*.⁸⁹

restricting use of the area. *Id.* at 1119–21. The Eighth Circuit stated that section 102(2)(C) “indicate[s] that the social and economic effects of proposed agency action must . . . be considered once it is determined that the proposed agency action significantly affects the physical environment.” *Id.* at 1125.

However, the court also recognized that the outfitters’ own recreational interest in the wilderness area was a non-economic interest closely tied to the physical environment. *Id.* at 1126. The court held,

[T]he Outfitters have asserted particular provisions of NEPA which encompass the claims they set forth in their complaint. We need not consider whether the Outfitters are in fact more concerned with economics than with the welfare of the physical environment. Regardless of their true intent, they have standing to ensure that the agency adequately considers all of the statutorily referenced concerns when balancing the relevant factors in the Final EIS.

Id. at 1127.

Although the grounds for the holding are not spelled out in so many words, the outfitters’ recreational interests were presumably sufficient to support their standing. *See supra* notes 5–6. It is unclear whether the discussion of economic interests was dicta or an alternate ground for the holding.

87. *Dombeck*, 164 F.3d at 1125.

Human environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. . . . This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

40 C.F.R. § 1508.14 (2006). The Eighth Circuit’s apparent reliance on implementing regulations in this context has been the subject of criticism from other circuits. *See infra* note 105.

88. *Dombeck*, 164 F.3d at 1126 (citing 42 U.S.C. §§ 4331(b)(2) (purpose of NEPA to “assure for all Americans . . . productive . . . surroundings”), 4331(b)(5) (purpose of NEPA to “achieve a balance . . . which will permit high standards of living”), 4331(a) (purpose of NEPA “to create and maintain conditions under which man and nature can . . . fulfill the social, economic, and other requirements of present and future generations of Americans.”), and 40 C.F.R. §§ 1508.27(a), 1508.8, and 1502.16(a),(b)).

89. *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1039 (8th Cir. 2002). The court relied on *Central S.D. Cooperative Grazing Dist. v. Sec’y of the United States Dep’t of Agric.*, 266 F.3d 889, 895 (8th Cir. 2001), in reaching this conclusion. *Rosebud Sioux*, 286 F.3d at 1038 (“[T]his case is controlled by our very recent holding in *Grazing* . . .”).

In *Grazing*, an association of ranchers who grazed cattle on federal land challenged a land

Outside the EIS context, the Eighth Circuit has not held that any NEPA provision requires consideration of economic effects. The statement of concern for the “economic . . . requirements of present and future generations of Americans”⁹⁰ in section 101(a) is “merely a broad policy statement” which does not provide a basis for standing.⁹¹ Section 102(2)(E) does not reference the human environment or economic interests, and thus cannot support the standing of a plaintiff with purely economic interests.⁹²

In sum, the Eighth Circuit rule distinguishes between challenges to non-preparation of an EIS (threshold applicability cases) and challenges to the adequacy of an existing EIS.⁹³ Standing to challenge the non-preparation of an EIS requires an environmental injury.⁹⁴ Standing to challenge the adequacy of an EIS, on the other hand, may be supported by an economic injury.⁹⁵

management plan reducing the number of grazing animals permitted. *Id.* at 892–94. The agencies responsible had prepared an EA and a FONSI for the plan. *Id.* Addressing the association’s standing, the Court stated the rule that an organizational plaintiff can only assert interests germane to its purpose. *Id.* at 896–97 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)). Because the grazing district did not show that its interests were in any way environmental, it could not assert environmental interests even if they were present. *Id.*

The Eighth Circuit considered and rejected three NEPA provisions proffered by the plaintiffs as a basis for standing. *Id.* at 895. It held that section 101(a) was merely a broad policy statement that did not support standing. *Id.* at 896. Section 102(2)(C), the EIS requirement, did not apply because no EIS had been prepared. *Id.* at 895. Section 102(2)(E) did apply, but did not require consideration of economic interests, the only interests the association was able to assert. *Id.* at 896. The court concluded, “[I]f its interests are only economic, the Grazing District is not within the zone of interests of the provision under which it has asserted its claim and thereby lacks prudential standing.” *Id.* at 896–97.

90. National Environmental Policy Act of 1969 § 101(a), 42 U.S.C. § 4331(a) (2000).

91. *Rosebud Sioux*, 286 F.3d at 1039 (citing *Central S.D. Coop. Grazing Dist. v. Sec’y of the U.S. Dep’t of Agric.*, 266 F.3d 889, 896 (8th Cir. 2001)).

92. *Id.* (relying on *Grazing*, 266 F.3d at 896). The court has stated that section 102(2)(E) “does not specifically consider the human environment. . . . Based on the statutory structure and language, the manifest purpose of section [102(2)(E)] is to require federal agencies to consider environmentally sound alternatives to proposed actions without reference to the human environment and, thus, to economic interests.” *Grazing*, 266 F.3d at 896.

93. *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1127 (8th Cir. 1999) (“in the present case, the threshold applicability of NEPA is not contested”); *Cent. Grazing*, 266 F.3d at 896 (“In this matter . . . no EIS was prepared, which is of central import to [§ 102(2)(C)] and to *Dombeck*.”).

94. *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1039 (8th Cir. 2002). See *supra* notes 91–94 and accompanying text for discussion of this rule.

95. *Rosebud Sioux*, 286 F.3d at 1038–39. See *supra* notes 86–88 and accompanying text

*B. The Ninth Circuit: A Purely Economic Injury is not Within
NEPA's Zone of Interests*

The Ninth Circuit rejected the Eighth Circuit rule in *Ashley Creek Phosphate Co. v. Norton*.⁹⁶ In that case, a producer of phosphate challenged a Bureau of Land Management decision allowing another company to open a phosphate mine on government land.⁹⁷ The producer alleged that the EIS for the project did not consider that it could produce the phosphate, a lower-impact alternative to its competitor's mining.⁹⁸ The court found that the plaintiff lacked constitutional standing, but proceeded to consider prudential standing as an alternative basis for its decision.⁹⁹

The Ninth Circuit directly criticized the Eighth Circuit's "bifurcated reading"¹⁰⁰ of section 102(2)(C), on which the producer relied.¹⁰¹ First, the court argued that section 102(2)(C) "does not set out a *purely* economic factor, unconnected to environmental concerns."¹⁰² Second, it pointed out Supreme Court precedent identifying NEPA as a statute that protects the environment.¹⁰³ Third, the Ninth Circuit challenged the Eighth Circuit's reliance on the regulatory definition of "human environment" to support its interpretation of section 102(2)(C).¹⁰⁴ The court questioned whether

for discussion of this rule.

96. 420 F.3d 934 (9th Cir. 2005).

97. *Id.* at 936–37.

98. *Id.* at 937–38 (referring to the requirement in NEPA section 102(2)(C)(iii), 42 U.S.C. § 4332(2)(C)(iii) (2000) that every EIS consider alternatives to the proposed action).

99. *Id.* at 937–39.

100. *Id.* at 941.

101. *Id.* at 940–42.

102. *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 940–42 (9th Cir. 2005). The court observed that "the human environment is the overarching principle driving [section 102(2)(C)]." *Id.* at 943. It considered the statutory requirements for an EIS and found them "infused with environmental considerations, leaving no room for economic interests divorced from the environment." *Id.* Finally, it argued that the word 'productivity' in subsection (iv) "does not require a discussion of the impacts on productivity that are not intertwined with the environment." *Id.*

103. *Id.* at 943 (citing *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 143 (1981); *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979); and *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983)). *Metropolitan Edison* is discussed *supra* at note 63.

104. *Ashley Creek*, 420 F.3d at 943–44 (referring to *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1125–26 (8th Cir. 1999); see also *supra* note 87 and

such reliance was appropriate,¹⁰⁵ adopting the position that “courts should not use regulations to expand the zone of interests beyond what Congress intended.”¹⁰⁶ The Ninth Circuit then examined the regulation and concluded that “to the extent regulations clarify section 102(2)(C)’s zone of interests, they demonstrate that purely economic considerations are not within that zone.”¹⁰⁷

Finally, the court provided an alternative application of *Bennett v. Spear* to NEPA. It distinguished between NEPA and ESA, arguing that the ESA provision at issue in *Bennett* “establishes specific normative requirements, [while] each section of NEPA is a purely procedural one that furthers the general purpose of the statute.”¹⁰⁸ It concluded, on this basis, that the purpose of NEPA and the purpose of section 102(2)(C) are “one and the same: protection of the environment.”¹⁰⁹

accompanying text.

105. *Ashley Creek*, 420 F.3d at 943 n.4. The Ninth Circuit cited and drew from *Town of Stratford v. Federal Aviation Administration*, 285 F.3d 84, 89 (D.C. Cir. 2002), in its treatment of this point. *Ashley Creek*, 420 F.3d at 943 n.4 (2005). *Stratford* directly criticized *Dombeck*, stating, “we do not see how any agency regulation implementing a statute could extend prudential standing beyond the class of persons Congress intends, but, in any event, we do not read the CEQ regulations as purporting to extend prudential standing.” *Stratford*, 285 F.3d at 89.

106. *Ashley Creek*, 420 F.3d at 943 n.4 (2005).

107. *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 944 (9th Cir. 2005). “Although [the regulatory definition of ‘human environment’] indicates that economic considerations may be relevant, those economic effects matter only when they are ‘interrelated’ with ‘natural or physical environmental effects.’” *Id.* (quoting 40 C.F.R. § 1508.14) (emphasis omitted).

108. *Id.* at 944.

109. *Id.* at 945 (quoting *Arizona Cattle Growers’ Ass’n v. Cartwright*, 29 F. Supp. 2d 1100, 1109 (D. Ariz. 1998)).

The overall purpose of NEPA is to declare a national commitment to protecting and promoting environmental quality. Each of NEPA’s various procedural provisions is designed to further that goal of environmental protection. . . . Because the individual procedural provisions, including section 102(2)(C), are intended to further the overarching goal of NEPA, to safeguard the environment, the provisions cannot be divorced from that broader purpose.

Id. (internal citations omitted).

The Ninth Circuit rests this conclusion on the Supreme Court’s decision in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348, 350–51 (1989). *Ashley Creek*, 420 F.3d at 944–45. The Ninth Circuit initially cites *Methow Valley* for its contrast of NEPA’s procedural requirements with the Endangered Species Act’s substantive requirements. *Id.* at 944 (citing *Methow Valley*, 490 U.S. at 350–51). It then cites *Methow Valley* for its statement that NEPA’s EIS requirement is an “action-forcing procedure” meant “to ensure that the commitment to environmental protection is infused into the federal government’s actions.” *Id.* at 945 (citing

III. WHAT IS NEPA'S ZONE OF INTEREST?

A. *Bennett v. Spear and NEPA*

The Ninth Circuit's reading of NEPA in *Ashley Creek* is unpersuasive:

In contrast to the [Endangered Species Act], under which the substantive goals of an individual provision may have a more specific objective than the overarching goal of the statute and may be analyzed independently, section 102 of NEPA cannot be separated from the statute's overarching purpose of environmental protection because it is designed to further that purpose[.]¹¹⁰.

Bennett v. Spear's holding, that even though section 7 of the ESA is designed to further the statute's overarching purpose of species preservation, it *also* aims to prevent needless economic dislocation,¹¹¹

Methow Valley, 490 U.S. at 348). Finally, the Ninth Circuit quotes a statement from *Methow Valley* that the action-forcing procedures of NEPA enable its sweeping policy goals to be realized. *Id.* (citing *Methow Valley*, 490 U.S. at 350). While these references accurately present the holdings of *Methow Valley*, they seem not to be entirely on point. *Infra* note 111 gives one possible explanation for this puzzling aspect of an otherwise sound opinion.

110. *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 944–45 (9th Cir. 2005).

111. *Bennett v. Spear*, 520 U.S. 154, 176–77 (1997) (implying that a statutory provision may have more than one purpose and, thus, more than one zone of interests). See *supra* notes 64–73 and accompanying text for a discussion of *Bennett*.

The Ninth Circuit's curious reliance on *Methow Valley* in *Ashley Creek*, see *supra* note 109, may be due to a misreading of *Bennett* on this point. While the Ninth Circuit correctly identifies the holding of *Bennett* “that one objective of [ESA] section 7 was to avoid ‘needless economic dislocation’”, *Ashley Creek* at 941 (quoting *Bennett*, 520 U.S. at 176–77), it does not anywhere state or indicate awareness that a statutory provision may have more than one purpose. In discussing *Bennett*, the Ninth Circuit states that “the specific purpose of section 7 of the ESA” is “preventing economic dislocation” and that this purpose is “different from” the general purpose of ESA in preserving endangered species. *Id.* at 944 (citing *Bennett*, 520 U.S. at 176–77). However, *Bennett* does not identify the prevention of needless economic dislocation as the purpose of section 7. See *Bennett*, 520 U.S. at 176–77. Rather, it states that “while [section 7] no doubt serves to advance the ESA's overall goal of species preservation, we think it readily apparent that *another objective (if not indeed the primary one)* is to avoid needless economic dislocation.” *Id.* (emphasis added). The Ninth Circuit's emphasis on “the specific purpose” of the statutory provision contrasts with the Supreme Court's language indicating multiple purposes.

If the Ninth Circuit failed to appreciate the full holding of *Bennett*, that a statutory provision may have more than one purpose and, thus, more than one zone of interests, this could help explain its practically exclusive reliance on *Methow*. See *infra* note 110 and

counters the Ninth Circuit's position. It is thus apparent that section 102(2)(C) may further any number of purposes, both economic and environmental. The question of which purposes it promotes depends on congressional intent.¹¹²

B. Congressional Intent: The Purpose(s) of NEPA

The overarching purpose of NEPA is clearly articulated in section 101.¹¹³ Section 101 exhibits concern for economic goals and values, but this concern is presented through the lens of the environment.¹¹⁴ Stated another way, the purpose of the act is to protect the environment so that economic goals and other goals can be fulfilled.¹¹⁵ While section 101 reflects appreciation of economic factors, environmental concerns are the clear focus of the statute.

Of course, *Bennett* shows that the overarching purpose of a statute may be distinct from the purposes of its individual provisions.¹¹⁶ The initial clause of section 102(2)(C) requires an EIS whenever there is a significant impact on the "human environment."¹¹⁷ The statute does not define "human environment." Therefore, construction of the term falls to common usage.¹¹⁸ Most simply, "human environment" means

accompanying text. Adopting the flawed interpretation of *Bennett* suggested above, if *Methow Valley* says that section 102(2)(C) serves an environmental purpose, then the Eighth Circuit must be wrong to say that it serves any other purpose. If a particular statutory provision can have at most one purpose, the Supreme Court in *Methow Valley* trumps the Eighth Circuit's reading. In the context of this flawed interpretation of *Bennett*, the Ninth Circuit's reliance on *Methow Valley* makes sense.

112. *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 156 (1970) (looking to statutory text to identify zone of interests).

113. 42 U.S.C. § 4331 (2000).

114. *Id.*, see *supra* note 95.

115. In other words, the economic and other interests alluded to in section 101 are NEPA's ultimate ends, with its environmental requirements the means to those ends. See *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772–73 (1983) ("Although NEPA states its goals in sweeping terms of human health and welfare, these goals are ends that Congress has chosen to pursue by means of protecting the physical environment.").

116. *Bennett v. Spear*, 520 U.S. 154, 176–77 (1997) (discussed *supra* at text accompanying notes 64–74).

117. 42 U.S.C. § 4332(2)(C) (2000).

118. Although the CEQ regulations define "human environment", 40 C.F.R. § 1508.14 (2005), use of the regulations to discern congressional intent has been questioned. See *supra* note 107 and accompanying text. Because *Bennett* focuses on congressional intent, 520 U.S. at 176–77, and especially because the CEQ regulations interpreting NEPA were never authorized or endorsed by Congress, see *infra* note 124, this section focuses on the statute in isolation from

“the environment of humans” or “the surroundings we live in.”¹¹⁹ Congress defined the set of situations in which an EIS is required, and it makes sense that they would impose this burden only when environmental interests are at stake.¹²⁰ On this point, the intent of the Congress seems clear: a plaintiff must assert an environmental interest in order to have standing to challenge non-preparation of an EIS.

Section 102(2)(C)(iv) requires every EIS to cover “the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity.”¹²¹ The mention of “productivity” suggests an economic consideration, since productivity is a measure of economic output per unit of input. On the other hand, the placement of “productivity” within the clause links it to “man’s environment,” suggesting that productivity here refers to an environmental value.¹²² Recalling the means-ends relation of environmental and economic goals of section 101,¹²³ it appears that section 102(2)(C)(iv) refers to the tradeoffs involved in making decisions about the allocations of resources.¹²⁴ Other features of section 102(2)(C) support this observation: subsection (iii) requires inclusion of alternatives to the proposed action; subsection (iv) refers

its implementing regulations.

119. Compare National Environmental Policy Act § 102(2)(C)(iv), 42 U.S.C. § 4332(2)(C)(iv) (2000) (“man’s environment”) with *id.* § 102(c), 42 U.S.C. § 4332(C) (“human environment”).

120. Considering the required content of an EIS, it does not appear that one would be of much use unless some environmental value were at stake. *Id.* § 102(2)(C)(i), 42 U.S.C. § 4332(2)(C)(i), (“environmental impact”); § 102(2)(C)(ii), 42 U.S.C. § 4332(2)(C)(ii) (unavoidable “adverse economic effects”); § 102(2)(C)(iv), 42 U.S.C. § 4332(2)(C)(iv) (tradeoffs between short-term and long-term uses of “man’s environment”); § 102(2)(C)(v), 42 U.S.C. § 4332(2)(C)(v) (irreversible commitments of resources).

121. Section § 102(2)(C)(iv), 42 U.S.C. 4332(2)(C)(iv).

122. *Id.*

123. See *supra* note 115 and accompanying text.

124. Indeed, it is apparent throughout the statute that Congress does not recognize a bright line distinction between economic and environmental values. NEPA seems to have been motivated by the idea that in order for economic prosperity to be sustainable over the long term, environmental values must be honored. National Environmental Policy Act of 1969 § 102(2)(C)(iv), 42 U.S.C. § 4332(2)(C)(iv); see also Chairman Barton, *Aiming at the Target: Achieving the Objects of Sustainable Development in Agency Decision-Making*, 13 GEO. INT’L ENVTL. L. REV. 837, 881–82 (2001) (“If one studies the goals and principles encapsulated within Section 101 of NEPA, the notions of intergenerational equity and sustainable development are clearly apparent.”).

to “uses,” implying consideration of multiple purposes; and subsection (v) requires a discussion of permanent resource commitments.¹²⁵ These textual features indicate that Congress intended economic values related to local, short-term consumption of resources to be considered alongside environmental values related to sustainable long-term uses.

This is not to say, however, that the Eighth Circuit interpretation is the correct interpretation, that all economic interests are sufficient to confer standing to challenge the sufficiency of an EIS which has already been prepared.¹²⁶ Agency actions may affect economic interests that are not related to weighing local short-term economic benefits against the benefits of a more sustainable policy. Economic interests unrelated to the environment are outside the zone of interests of NEPA and do not support standing.¹²⁷

For example, the plaintiff mining company in *Ashley Creek* was interested in neither the immediate short-term use of the resource in question, the government land, nor the preservation of that resource.¹²⁸ The company's purpose was to procure business for itself by obstructing a competing business.¹²⁹ The harm caused by the alleged NEPA violation, loss of a business opportunity, was not tied to aesthetic values or use of natural resources. The decision in *Ashley Creek* was therefore correct.

In contrast, a professional guide's interest in the use of a certain wilderness area, although economic, is directly related to the environment.¹³⁰ The guide derives his livelihood from the use of environmental resources. NEPA's concern for competing uses and commitments of resources requires consideration of these interests in the EIS. A professional guide or outfitter with these interests should be permitted to enforce the EIS requirement.¹³¹

125. 42 U.S.C. § 4332(2)(C).

126. See *supra* text accompanying notes 85–89 for discussion of this Eighth Circuit rule.

127. *Cf. Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 773–74; text accompanying *supra* note 63.

128. *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 936 (9th Cir. 2005).

129. *Id.* at 939 (“Ashley Creek's interest in the EIS analysis is purely financial.”).

130. *Cf. Dombeck*, 164 F.3d 1115, 1125 (8th Cir. 1999).

131. This example ignores the likelihood that a plaintiff in this situation would assert loss of aesthetic enjoyment and recreational opportunities instead of, or in addition to, economic injuries. See *Dombeck*, 164 F.3d at 1126. These injuries would be sufficient to confer standing

This approach, which appears to be the correct application of the zone of interests test to section 102(2)(C), based on the text of that statute, is captured by one statement of the Ninth Circuit:

... [Section 102(2)(C)(iv)] requires a statement, not of all economic interests, but rather of the *relationship* between uses of the environment and *productivity*. It does not require a discussion of the impacts on productivity that are not intertwined with the environment. In short, nothing in the text of [the EIS requirement] suggests that an EIS must address an economic concern that is not tethered to the environment.¹³²

In sum, economic interests “tethered to” or “intertwined with” the environment, such as those connected with aesthetic values or the use of natural resources are within the zone of interests implicated by section 102(2)(C). Therefore, those economic interests should support standing to challenge an EIS.¹³³

C. Public Policy: Who Should Have Standing?

Even if the rule set out in the previous section is the correct application of the current standing doctrine to the current NEPA statute, it is susceptible to policy arguments.¹³⁴ Congress has the power to modify the rules of prudential standing, and it has the power to modify NEPA.¹³⁵ If a different rule would better serve the interests of the public, then Congress should move to adopt it.¹³⁶

under NEPA. *Id.*

132. *Ashley Creek*, 420 F.3d at 943.

133. *C.f.* *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 773–74 (1983). Note that while this conclusion adopts language from *Ashley Creek*, the reasoning behind it differs in several respects from that of the Ninth Circuit.

134. This section does not attempt to address all normative critiques of standing doctrine. *See supra* notes 9, 47 (citing critiques outside the scope of this Note). It only addresses concerns of public policy within the scope of this Note: those related to the ability of economic interest plaintiffs to challenge an EIS, and the bar to economic interest plaintiffs challenging non-preparation of an EIS.

135. *See supra* note 50.

136. A congressional task force has recommended changes to NEPA, and to NEPA standing in particular. TASK FORCE REPORT, *supra* note 25, at 26–27:

Recommendation 4.1: *Ammend NEPA to create a citizen suit provision.* . . . This provision would clarify the standards and procedures for judicial review of NEPA

One policy concern raised by the current rule is the ability of affected parties to participate in the NEPA process and to challenge results unfavorable to them.¹³⁷ Under current NEPA standing doctrine, non-environmental economic interest parties cannot challenge non-preparation of an EIS.¹³⁸ This might be considered a fault of the current doctrine, and a justification for expanding the scope of NEPA. However, NEPA is not concerned with the interests of such parties.¹³⁹ There are statutes other than NEPA that require agencies to consider certain economic effects of their actions.¹⁴⁰ If Congress wanted to expand the ability of economic interest parties to challenge agency actions, it would be more sensible to enact an appropriate economic policy act than to amend NEPA and distort its purpose.¹⁴¹

The other countervailing policy concern is the avoidance of undue interference with agency action. Agencies are constrained to comply with NEPA before taking any action with significant environmental effects.¹⁴² When this mandatory compliance takes the form of an EIS, costly delays and lost opportunities may result.¹⁴³ To some extent,

actions. If implemented, the citizen suit provision would . . . [e]stablish clear guidelines on who has standing to challenge an agency decision. These guidelines should take into account factors such as the challenger's relationship to the proposed federal action, the extent to which the challenger is directly impacted by the action, and whether the challenger was engaged in the NEPA process prior to filing the challenge[.]

Id.

137. One justification for the APA suit provision, 5 U.S.C. § 702 (2000), is that agencies may choose to ignore injured parties that cannot enforce their rights in court.

138. Put another way, current NEPA standing doctrine bars economic interest plaintiffs from challenging an agency's choice of the FONSI route to NEPA compliance.

139. *See supra* notes 123–27 and accompanying text.

140. *See, e.g.*, Regulatory Flexibility Act, 5 U.S.C. §§ 601–12 (2000) (mandating procedures similar to those of NEPA considering impacts of regulations on small businesses).

141. This is not meant to recommend adoption of any such economic policy act, but merely to advocate against amending NEPA to serve economic purposes. Before adopting such a law, the Congress would do well to carefully weigh the countervailing interests to such an act, of which the efficiency of agency decisionmaking is only the most relevant to the focus of this Note. *See infra* notes 148–49 and accompanying text.

142. *See supra* Part I.A.

143. An agency may delay approving a license for a private business enterprise, for example, so that it will have time to prepare an EIS. This delay might cause investors to withdraw support or lead to a host of other potential problems. Alternately, a delay in a public construction project might drastically increase the cost of the project to taxpayers.

this is an unavoidable consequence of NEPA generally and is not tied to rules about standing. However, if more liberal standing rules were adopted, the number of lawsuits filed would presumably rise, as would the costs of litigation to agencies.¹⁴⁴ In response, agencies would be likely to approach the EIS process with more caution, either including reams of unnecessary documents and analyses in a misguided effort to survive review,¹⁴⁵ or avoiding it through overuse of FONSI's. Neither approach would efficiently and effectively advance the goals of NEPA. Thus, an ideal rule would provide appropriate opportunities for private parties to assert their interests while, at the same time, minimally hampering the ability of agencies to make timely decisions.

One approach would deny standing to all parties with an economic, rather than purely environmental, interest. While it is certainly important not to apply NEPA so that it unreasonably interferes with agency processes, it is not clear that such a rule would substantially accomplish this goal. Economic interest plaintiffs appear to bring only a small number of NEPA cases, and so it does not seem that their presence greatly increases either incidence, expense, or agency fear of NEPA litigation.¹⁴⁶ Furthermore, standing is no guarantee of a hearing on the merits, as some portion of economic interest cases are already dispatched relatively inexpensively on motions to dismiss. It is thus unclear whether agency operations would be made substantially more efficient by denying all economic interest plaintiffs standing.

More importantly, there are better ways to limit NEPA's negative effects on agency efficiency. One proposal is firm time limits on the

144. Because fewer cases would be dismissed for lack of standing, more cases would presumably go to trial, and litigation costs would increase significantly.

145. See CEQ STUDY, *supra* note 27, at 19–20.

146. The circuit split on standing of economic interest plaintiffs did not clearly emerge until *Ashley Creek* in 420 F.3d 934 (9th Cir. 2005), nearly 35 years after the enactment of NEPA. In the meantime, NEPA standing has been litigated in dozens of reported cases. Annotation, *General Principles Governing Standing to Maintain Action Challenging Omission or Adequacy of Environmental Impact Statement Required by § 102(2)(c) of National Environmental Policy Act of 1969* (42 U.S.C.A. § 4332(2)(c)), 61 A.L.R. FED. 87 (2005). This suggests a fairly low percentage of economic interest plaintiffs.

Recall that parties with standing under the current rule are those whose economic interests are fairly “intertwined” with the environment rather than those with an unrelated economic interest in a particular matter. See *supra* Part III.B.

NEPA process and page limits on NEPA compliance documents.¹⁴⁷ If aversion to legal liability causes some agencies to irrationally over-allocate resources to NEPA compliance efforts, this tendency could be corrected by externally-imposed limitations. To the extent that NEPA compliance efforts are a cause of agency inefficiency, this proposal seems a better solution than excluding plaintiffs who arguably serve the purpose of NEPA.¹⁴⁸

Another proposal would limit standing to parties who have asserted their interests throughout the NEPA process.¹⁴⁹ Opportunities for public comment and participation occur at several key junctures in the process.¹⁵⁰ If interested parties make use of these forums to voice their interests, agencies have the opportunity to address these concerns preemptively.¹⁵¹ However, agencies never have the opportunity to do this if interested parties opt not to participate. Penalizing nonparticipating parties through loss of standing to sue would substantially narrow the class of potential plaintiffs without arbitrarily eliminating parties based on an abstract judgment about the nature of their interests.¹⁵²

These two proposals, reining in the excesses of the EIS process and making active participation in the NEPA process a prerequisite for standing, promote efficient agency decisionmaking, as well as the goals of NEPA. These proposals and others that do not arbitrarily exclude interested parties should be explored before a more restrictive standing rule is considered.

147. TASK FORCE REPORT, *supra* note 25, at 25 (recommending an amendment of NEPA to limit EIS process to eighteen months and EA process to nine months); *id.* at 26 (recommending a 300 page limit for EIS's).

148. Drafting the type of rule described in this paragraph might prove difficult, because an exception to the page limit might occasionally be warranted for complex projects. However, allowing any exception would be dangerous, because the current exception for "extraordinary circumstances" has swallowed the rule. *See id.*

149. *Id.* at 26–27, *see also supra* Part I.A.

150. *See* MANDELKER, *supra* note 21 (describing the EIS process).

151. In *Ocean Advocates v. United States Army Corps of Engineers*, 402 F.3d 846 (9th Cir. 2005), discussed *supra* at note 45, the court noted the participation of advocacy groups throughout the process.

152. Of course, adequate notice to the interested parties of their opportunity to participate in the process would be essential to the fairness of such a system.

IV. CONCLUSION

NEPA's EIS provision is a considerable safeguard against short-sighted agency actions that ignore significant environmental consequences. NEPA enforcement suits by private parties make agency decisionmaking less efficient, but have the valuable upside of promoting NEPA compliance. Prudential standing is one way the federal courts safeguard against frivolous lawsuits, and the zone of interests test in particular gives effect to congressional purpose. A close reading of NEPA reveals that its zone of interests encompasses economic considerations that bear a substantial relationship to the environment, and excludes all other economic interests. This rule makes sense in the context of current standing doctrines, and it does not appear that its modification would substantially further NEPA purposes. This is particularly true in light of more promising and less arbitrary proposals for improving NEPA standing requirements.