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Environmental Law--Standing to Sue

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COMMENTS

ENVIRONMENTAL LAW--STANDING TO SUE

In recent years the protection of the environment from destruction or abuse has become an impelling cause for groups of concerned citizens. However, in many cases these people have been denied adjudication of their attempts to save the environment by what might seem to be archaic procedural rules.[1] In most cases, those without a direct property interest have been denied access to a judicial determination of the merits of their complaint. Even in recent years, liberalization of the requirements of standing has occurred slowly and in scattered areas of the law. The scope of this comment will be to present the present situation as it has developed, and to examine the virtues and drawbacks of the status quo as compared to possible alternatives.

The question of standing in environmental cases has generally arisen in two different areas of law: administrative law and public nuisance law. Standing to appeal an administrative decision is a relatively recent problem, since the whole field of administrative law is in a formative stage. But in the field of public nuisance law, the law regarding standing has been well established.[2]

Disregarding some recent decisions, the common law dictated that a private individual could not bring an action for the abatement of a public nuisance,[3] unless it was also a private nuisance, or unless a different and greater injury was suffered by the complaining party than by the general public. The same rule has been applied to groups of concerned citizens with only limited exceptions.[4] It can be safely said that, subject to few exceptions, the state has been the only entity permitted to sue for abatement of an exclusively public nuisance.

1. *See* notes 5, 7 and 8, *infra.*
2. Although the law is settled in nuisance cases—that an individual cannot gain court recognition in an attempt to abate a public nuisance—there are signs of change. For instance in the RESTATEMENT OF TORTS, Tentative Draft 16, § 821c, there are signs of rebellion against the "harm of a different kind" rule. *See also,* 38 U.S. Law Week 2632 (1970).
3. 39 AM. JUR. *Nuisance* § 124 (1942).
4. Shreveport Anti-Vice Committee v. Simon, 151 La. 494, 91 So. 851 (1922). Most of the exceptions to the general rule are cases involving citizens' attempts to terminate the operation of brothels.

In one recent case, *Sarasota County Anglers Club v. Burns,*[5] a sportsmen's group was held to have no standing to enjoin the state approved dredging of certain bottomlands by a landowner. Since there was no statutory basis for standing, and apparently no special injury, the court said, "We must agree ... that the plaintiffs have failed to show in what manner they have been damaged as private citizens differing in kind from the general public and therefore have no right to sue."[6] The court then concluded that only the state could sue for such an injunction.

Suits for environmental protection by homeowners' organizations have presented problems similar to those presented by conservation-group suits. The courts have previously given a similar answer to a similar problem: no standing. In one recent case, an attempt by such a homeowners' group to enjoin the pollution of a lake upon which many of the members lived failed when the court denied standing. "No one can constitute himself a guardian of the public and maintain an action for public nuisance which does not sensibly injure him or his property."[7] This court, like many others, was reluctant to grant standing to an association which did not own property, even though most of its members did. The court also reasoned that to allow suits by private individuals would be to deprive the state of its rightful hand in determination of public policy.

The prohibition against individual or group suits has often been carried to illogical extremes. In one such case,[8] two District Attorneys joined with the members of a local conservation association in an attempt to enjoin, as a public nuisance, the pollution of a river. As a practical matter, most of the work was carried on by the Allegheny County Sportsmen's League, and, in fact, the League's attorneys were appointed as deputies by the District Attorneys. When the case came to trial the court refused to rule on the merits,

5. Sarasota County Anglers Club v. Burns, 193 So. 2d 691 (Fla. 1967), *aff'd.*, 200 So. 2d 178 (Fla. 1967).
6. Sarasota County Anglers Club v. Burns, 193 So. 2d 691, 693 (Fla. 1967).
7. Garland Grain Co. v. D-C Home Owners Investment Assoc., 393 S.W. 2d 635, 640 (Tex. 1965).
8. Commonwealth *ex rel.* Shumaker v. New York & Pennsylvania Co., 378 Pa. 359, 106 A. 2d 239 (1954).

claiming that the District Attorneys had unlawfully abdicated their vested authority. The lone dissenting judge asked the majority what the harm would be in having experts prepare and prosecute a case for the state. In conclusion he indignantly proclaimed, "The law is a sphinx and in the meanwhile 20 millions of polluted water daily are pouring into the arteries of the Commonwealth."[9]

In the past the courts have been very strict in their allowance of standing to private individuals in cases involving public nuisances. But in the developing field of administrative law, the courts have seemed to be more liberal in granting standing. Still, the general rule is that to appeal an administrative decision, "the plaintiff must show that he is injured, that is, subjected to or threatened with a legal wrong."[10]

There is very little time-honored precedent involving the question of standing with reference to conservation groups. Case law seems to be divided on the question involving any type of public interest group. While the trend seems to be the expansion of the class of aggrieved parties, earlier courts were split; some courts granted standing to groups without a direct economic interest,[11] while some denied it.[12]

One of the earliest cases dealing with environmental protection in an administrative context involved the construction of hydro-electric facilities on the Namekagon River in Wisconsin.[13] The court found that the facilities would damage the interests of the public in recreation and aesthetic appreciation. The plant could not be justified upon balancing of the interests.[14] The court granted standing to the plaintiff, as a private citizen, saying:

9. *Id.* at 247.
10. AM. JUR. 2d *Administrative Law* § 575 (1962).
11. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951). This was a successful attempt by the Refugee Committee to have its name removed from a list of subversive groups.
12. Moffat Tunnel League v. U.S., 289 U.S. 113 (1933); Shaker Community, Inc. v. State Racing Commission, 346 Mass. 213, 190 N.E. 2d 897 (1963). The *Shaker* case was an attempt to appeal the granting of a race track license near the Shaker Community. The *Tunnel* case involved an unsuccessful attempt to appeal an ICC ruling allowing one railroad to purchase the stock of another.
13. Muench v. Public Service Commission, 261 Wis. 492, 53 N.W. 2d 514 (1952).
14. The actual factual decisions were made upon remand. The case was finally disposed of 2 years later: Namekagon Hydro. Co. v. Federal Power Commission, 216 F.2d 509 (7th Cir. 1954).

> Our holding in this respect is in keeping with the trend manifested in the development of the law of navigable waters in this state to extend the rights of the general public to the recreational use of the waters of this state, and to protect the public in the enjoyment of such rights.[15]

However, the trend referred to did not gain much impetus until recent years.

The first important case in the recent conservation trend was *Scenic Hudson Preservation Conference v. FPC.*[16] The issue involved was whether the Scenic Hudson Preservation Conference, a group of concerned local citizens, had standing to sue for an injunction against the granting of a license for the operation of power producing machinery on the Hudson River. The license was issued by the FPC as required by the Federal Power Act. The plaintiffs correctly contended that the Federal Power Act was effected to promote the most efficient use of water resources, including recreational use,[17] and that their interests would be destroyed by the construction of the plant. The court rejected the answer by the defendants that plaintiffs lacked standing. The wording of the Federal Power Act,[18] the court felt, expanded the class of those aggrieved to include those without a direct economic interest. The *Scenic Hudson* case was very important in that a voluntary group of citizens were allowed to appeal an administrative decision unfavorable to the environment.

Soon after the *Scenic Hudson* case, a similar decision was made in *Road Review League, Town of Bedford v. Boyd.*[19] In this decision, a local conservation group was granted standing to appeal an administrative decision by the Federal Highway Administrator, which called for Interstate Highway 87 to run through the Chestnut Ridge section of southern New York. The plaintiffs claimed this was an arbitrary and shortsighted decision, since Chestnut Ridge was rich aesthetically

15. Muench v. Public Service Commission, 261 Wis. 492, 53 N.W.2d 514, 523 (1952).
16. Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965).
17. 16 U.S.C. § 803(a) (1964).
18. 16 U.S.C. § 825 1(b) (1964): "Any person . . . aggrieved."
19. Road Review League, Town of Bedford v. Boyd, 270 F.Supp. 650 (S.D. N.Y. 1967).

as well as recreationally. The government alleged the cost factor made the decision necessary, and, more important, the plaintiff was not the proper party to appeal such a ruling. The District Court applied the *Scenic Hudson* ruling to the facts, and found that the Administrator had disregarded the essence of the Federal-Aid Highway Act, by failing to consider both local and environmental needs.[20] Applying the decision in *Scenic Hudson* that standing should be granted through the Federal Power Act, the *Road Review* court found that the identical language of the Administrative Procedure Act[21] could be used as a basis for standing.

Expanding on the allowance of standing to local ad hoc groups by *Scenic Hudson* and *Road Review,* the court deciding *Citizens Comittee for the Hudson Valley v. Volpe* granted standing to the Sierra Club, a national conservation group, along with a local citizens' committee and the Village of Tarrytown.[22] These groups brought an action in court to enjoin the partial filling of the Hudson River to support an expressway. A permit to fill was illegally issued by the Army Corps of Engineers. Due to a technicality in wording, approval of Congress and the Secretary of Transportation was necessary, in addition to that already granted.[23] The court felt the haphazard approach taken by the government would "frustrate one of the main purposes of the Department of Transportation Act, i.e., the conservation of the country's natural resources."[24] The court then interpreted the Administrative Procedure Act[25] as follows:

> [I]f the statutes involved in the controversy are concerned with the protection of natural, historic and scenic resources, then a Congressional intent exists to give standing to groups interested in these factors,

20. 23 U.S.C. § 138 (Supp. III) (1968).
21. 5 U.S.C. § 702 (Supp. III) (1968). This section entitles any person who is "aggrieved by agency action within the meaning of the relevant statute" to judicial relief.
22. Citizens Committee for the Hudson Valley v. Volpe, 302 F.Supp. 1083 (S.D. N.Y. 1969), *aff'd.*, 425 F.2d 97 (2d Cir. 1970).
23. Congressional approval was necessary for the construction of a "dike" on a navigable river, through 33 U.S.C. § 401 (1964), while the approval of the Secretary of Transportation was necessary to construct a causeway, 49 U.S.C. § 1655(g) (Supp. III) (1968).
24. Citizens Committee for the Hudson Valley v. Volpe, 302 F.Supp. 1083, 1092 (S.D. N.Y. 1969).
25. 5 U.S.C. § 702 (Supp. III) (1968).

> and who allege that these factors are not being properly considered by the agency.[26]

The Court of Appeals affirmed, and acknowledged the legally protected interest of the Sierra Club, and its right to appeal an agency decision "in contravention of that public interest."[27] The Court of Appeals added that "allowance of standing to private attorneys general in 'public actions' challenging administrative activity is by no means a new or unusual concept."[28]

These three cases, *Scenic Hudson, Road Review and Citizens Committee,* exemplify the trend in administrative law. Subsequent to these cases, there have been more cases granting standing to conservation groups. These decisions were reached by applying the standards set forth in the earlier cases, or by setting out new more liberal rules. Standing was granted to four national groups, the Izaak Walton League, the Sierra Club, the National Audubon Society and the Environmental Defense Fund, along with one local organization, to appeal the Secretary of Agriculture's inaction in restricting DDT. The only requirement for standing was that the plaintiffs should "have the necessary stake in the outcome of a challenge to the Secretary's inaction to contest the issues with the adverseness required by Article III of the Constitution."[29] The same requirements were set out in another recent case in which the Izaak Walton League was permitted to enjoin mineral exploration, permitted by the Secretary of Agriculture, in a northern Minnesota Wilderness Area.[30] Local conservation groups have also been granted standing to appeal administrative decisions in more recent cases.[31]

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26. Citizens Committee for the Hudson Valley v. Volpe, 302 F.Supp. 1083, 1092 (S.D. N.Y. 1969).
27. Citizens Committee for the Hudson Valley v. Volpe, 425 F.2d 97, 105 (2d Cir. 1970).
28. *Id.* at 102.
29. Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093, 1097 (D.C. Cir. 1970).
30. Izaak Walton League v. St. Clair, 313 F.Supp. 1312 (D. Minn. 1970).
31. Citizens to Preserve Overton Park, Inc. v. Volpe, 309 F.Supp. 1189 (W.D. Tenn. 1970) this case was recently affirmed in the Supreme Court—91 S.Ct. 814 (1971); Parker v. U.S., 309 F.Supp. 593 (D. Colo. 1970). The *Overton* case involved the efforts of a local ad hoc group to protect a park from highway construction. The Colorado case was the appeal of an administrative decision to allow timber cutting near Vail, because of the resultant damage to the natural beauty of the area.

There are also some indications that the law of nuisance is becoming more responsive to the fight against pollution. The judge in one recent case declared:

> The fight against pollution of natural resources has in recent times become a cause celebre. Along with the increasing recognition of the importance of the effort, there has developed a feeling of futility when confronted with the overwhelming array of vested interests which are often adventitious polluters.[32]

The court then went on to declare what was obviously a public nuisance an actionable private nuisance. Though no court has openly rejected the old laws of nuisance, distinguishing cases as was done above might prove a valuable tool.

Problems of standing in these environmental cases might become things of the past. Standing granted by statute to those affected by environmental destruction is in effect in one state—Michigan, and has been presented to Congress for its approval as a national policy. The Michigan statute (and the nearly identical federal proposal) reads:

> The attorney general, any political subdivision of the state, any instrumentality or agency of the state or of any political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may maintain an action . . . for declaratory and equitable relief against . . . any . . . legal entity for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction.[33]

This statute went into effect on October 1, 1970, and has not yet been proven effective, or immune from loopholes. However, it does seem to provide a valuable weapon for conservationists.

The fact that standing, as a matter of right, is becoming a reality would seem to be an appealing thought. But there still remains the question of whether or not a judicial determination of such questions is the best method. It seems as

32. White Lake Improvement Assoc. v. City of Whitehall, 177 N.W.2d 473, 474 (Ct. App. Mich. 1970).

33. MICH. STAT. ANN. § 14.528(202) (1970).

though the advantages of such a system far outnumber the disadvantages.

The disadvantages of a judicial determination of such questions can be briefly summarized. First, few judges are experts on any field and there would be even fewer with special knowledge on the field of conservation. "Certainly judges are no wiser in such matters than those who hold administrative posts."[34] Second, courts are not endowed with investigative funds; they must rely on the presentation of the parties to get an accurate view of the facts. Administrative agencies often perform investigations to discover facts. Finally, crowded court dockets often make judicial relief a time-consuming process.

However, these disadvantages are balanced by several important advantages. First, the courts do not entertain personal or political ties with the parties involved, as is often the case with an administrative agency. "Judges do not ordinarily receive telephone calls from Senators . . ., and they do not have an agency's program or budget to balance against the merits of a particular case."[35] Related to this idea is the fact that judges, who spend very little of their time on environmental problems, develop no set attitude towards the problem. "It may seem a paradox that the greatest strength of an institution is its lack of expertise."[36] Administrative agencies quickly become burdened by familiarity. "Any official who deals routinely with particular interest groups inevitably feels the need to do some 'trading' in order to maintain a credible position in the eyes of those constituencies."[37]

Secondly, administrators are much more prone to give the benefit of the doubt to those with economic interests involved. Courts are less likely to take this position:

> [T]he bureaucratic perspective tends to intensify the problem of the so-called "nibbling phenomenon", the process on which large resource values are gradually eroded, case by case, as one development after another is allowed. The danger is that in each title dispute—

34. J. Sax, DEFENDING THE ENVIRONMENT, 108 (1971).
35. *Id.* at 108.
36. *Id.* at 110.
37. *Id.* at 110.

> when the pressure is on—the balance of judgment will move ever so slightly to resolve doubts in favor of those with a big economic stake in development and with powerful allies.[38]

This problem is one of the most important factors in preferring judicial rather than administrative determination.

Finally, the availability of the court is a tremendous advantage over administrative hearings. The court is an open forum. "The opportunity for anyone to obtain at least a hearing and honest consideration of matters that he feels important must not be underestimated."[39] A citizen with a legitimate grievance can rightfully feel that he has an opportunity to have it adjudicated. "Litigation is thus a means of access for the ordinary citizen to the process of governmental decision making."[40]

Protection of the environment is quickly becoming one of the greatest national priorities. In the past the ordinary citizen has been denied his opportunity to express his views in the courtroom or administrative hearings. Liberalization of the rules of standing, in nuisance actions, and in appeals of administrative actions, is providing every man a chance to be heard. Hopefully, the sphinx is losing its enigmatic quality.[41]

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38. *Id.* at 55.
39. *Id.* at 112.
40. *Id.* at 57.
41. *See* note 9.