# Standing - Jurisdiction and Injury

# Learning Objectives for this Module

## Learn the difference between jurisdiction and standing

## Learn the theories of standing and how they are used in adlaw cases

## Learn the difficulties of assessing probabilistic injuries

## Learn the special nature of procedural injuries

# Reading Assignment

## Chapter 6 to II. Exceptions to Judicial Review Under the APA (241).

# Issues to be addressed

# Causation for Standing

## Procedural Violations and Causation

### NEPA requires an Environmental Impact Statement (EIS) before the Corps issues a permit for a dam.

#### An EIS requires fully analyzing the risks of the project and its CBA

#### Once it is done, you can built the project irrespective of the risks and CBA that was determined.

#### It is meant to create public discussion which can allow other political forces affect the decisionmaking.

#### Why would it be hard to shows that requiring an agency do to EIS would affect the outcome of agency decisiomaking?

### The Corps issues the permit without the EIS

### How does failing to do the EIS make the final agency action – building the dam – illegal?

### Do you have to show that that had the Corps done the EIS, the permit for the dam would not have been issued?

### Is this partially driven by the nature of the EIS, i.e., that it is only informational and does not prevent issuing the permit?

## Confusion with Harmless Error

### 5 U.S.C. § 706 (Civil procedure)

#### “In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.”

### Some courts have required plaintiff to show it is substantially probable that the procedural breach will cause the injury

#### Is this a proper standard for a procedural violation, such as failing to do an EIS?

### Must the plaintiff show that it is more than theoretically possible for the violation to affect the outcome?

#### How could the agency show that the EIS could not have altered the decisionmaking?

#### Congress directed the Corps to rebuild the New Orleans levees after Katrina.

#### Would an EIS affect the Corps decision to build the levees?

## Third party actions and causation – does what you are asking for help your client?

### Group challenged the tax exemption for a hospital, saying it did not deliver enough charity care to justify the exemption

### Why is the plaintiff asking for this remedy?

### Would denying the exemption increase charity care?

### What if plaintiffs could show that the exemption is so valuable that hospitals always cave in before losing it?

#### Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26 (1976)

## What type of Causation?

### Must the government’s violation directly affect plaintiff?

### Does the EPA’s failure to regulate greenhouse gasses directly affect MA’s coastline?

### What directly affects the coast?

### Does the EPA’s regulatory failure contribute to the climate change that affects the ocean?

# Redressability

## You have to be able to show that the remedy you seek from the court would address your problem

### The agency must have the power to grant your remedy

### The remedy must address your client's problem

### If you have stated a concrete claim for injury to your client caused by the agency’s action, you probably have also met this standard

## Procedural Violations and Redressability

### Assume you have stated a real procedural injury

#### Is there still a redressability problem because the plaintiff cannot show that fixing the violation would result in a favorable result?

### In Lujan v. Defenders of Wildlife, the Court said, “[t]he person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."

#### Do you still have to show a theoretical effect if the procedure is fixed?

#### What if Congress has directed the agency do the project (without waiving environmental regs) and the agency claims it will do it no matter what the EIS says?

## Does it have to fix the problem?

### Is it likely that having the EPA regulate GHGs from cars in the US while have a measurable effect on climate change?

### How do you argue that these regs nevertheless meet the redressability stand?

## Representational Standing

### When can associations bring actions on behalf of their members?

#### At least one member must have standing

#### It must fit the organizational mission

### The remedy must not require the participation of individual plaintiffs, beyond the standing analysis

#### Limited to injunctive relief or declaratory judgments

#### Individual damages would require that every plaintiff claiming damages to have standing because there would have to be an individualized determination of damages, or it would have to satisfy class action requirements.

### Why is representational standing important for environmental and poverty action groups

#### Why might businesses with money still prefer to be part of a trade association action, rather than bringing an action on their own?

# (Juris)Prudential Standing

## Article III standing (Lujan) applies in all cases and cannot be waived by statute.

## If you can meet Article III standing, the court will next inquire as to whether your claims fall under the law giving you jurisdiction. This is often call the Zone of Interests test – is your action one that Congress intended the law to address? (Or, if a constitutionally based claim, one that the court intends the right to address?)

## 5 USC 702

### “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.”

### The courts have used 702 to narrow claims to what the court determines is the purpose of the statute. This is similar to the test in torts for negligence per se – is the person who was injured in the class of persons intended to be protected by the statute, and is the injury the sort of injury that the statute was intended to prevent?

## Air Courier Conference of America v. American Postal Workers Union, 498 U.S. 517 (1991)

### Do postal workers have a right to challenge changes in the rules giving a monopoly on 1st class mail because they see it as undermining their job security?

### The monopoly on first class mail was intended to assure the financial stability of the post office. Modern technology and alternative delivery systems like UPS and FedEx changed the mail delivery world and the post office was adapting. The statute was passed long before there were any postal unions.

### Would postal workers be in the zone of interest?

## Bennett v. Spear, 520 U.S. 154 (1997)

### Ranchers want to contest rules under the Endangered Species Act limiting the release of water from dams.

### What is the Endangered Species Act (ESA) problem?

#### They want the water for their grass and do not care about the endangered species.

### The ESA requires that the agency rely on the best available data and is a procedural type of injury so that the injury requirements are relaxed.

### How would you argue that the ranchers are furthering the purpose of the act by demanding more data, even though this will likely delay the implementation of the plan to save the endangered species?

## Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970)

### Just to keep things confused, in this case the court allowed competitors of banks to contest rule changes that would have let banks do data processing

### The intent of the law was to protect banks from bad business decisions, not to protect competitors

### The court found that the plaintiffs challenge to the law would further its purpose - limit the conflicts for banks - even if they were not the intended beneficiaries.

### Not overruled, but maybe out of date.

## Hazardous Waste Treatment Council v. Thomas, 885 F.2d 918 (D.C. Cir. 1989)

### Trade group represents providers of advanced waste treatment services. EPA adopts rule requiring less complete treatment of waste.

### The plaintiff wants to contest the rule because it weaken their competitive advantage.

### Remembering the importance of cost benefit analysis, why might EPA not demand the highest level of treatment?

### Would this plaintiff be in the zone of interest?

## Honeywell International, Inc. v. EPA, 374 F.3d 1363 (D.C. Cir. 2004)

### Plaintiff contests the EPA allowing a product made by a competitor to be substituted for a CFC.

### In this case, there were very specific standards that had to be met before products could be certified to be sure that they would perform safely and protect the ozone.

### Why does the specificity of the standard help plaintiff's case, i.e., how is this like the rancher’s case?

### Can you distinguish this from Hazardous Waste because the rule which was being limited could be implemented in many different ways, some of which might have benefited plaintiffs but not the environment?

### Or is this just confusion in the courts?

## Example: Internet Book Stores

### IRS allows non-profit college book stores to operate on the Internet

### Other Internet books stores object

### What is the analysis?

### What is the purpose of the non-profit exception and the underlying law?

### Why might this further the purpose of the law?

## Zone of Interests Review

### Is the plaintiff's interest directly addressed by the statute or reg?

### Is the plaintiff's interest congruent with the statute, so that enforcing it furthers the purpose of the statute or reg?

### Courts have bought this, but it is shaky

### When can the party contest whether the statute or reg is correctly applied - ranchers/Honeywell?

### Still must show direct impact

# Evaluation Questions

## The Corps fails to hold a required hearing on a permit necessary to build a dam.

### When you are looking for a plaintiff to challenge this, what is the injury and what will you have to show for that plaintiff to Article III standing?

### What do you have to show to satisfy the redressability part of the standing test for this case?

### What is the harmless error doctrine and why doesn’t apply in these procedural rights cases?

### What if the evidence is that the Corps always grants permits to build dams?

## You client wants the local fishing club to allow poor children to fish on the new pier that it is building. Assume that part of the permit process is an evaluation of how the pier would serve the community. The client wants you to contest the permit for building the pier, arguing that there will be no access for the poor, thus the permit should not be granted. What are problems with this strategy and what is the relevant case?

## What is representational standing?

### What are the three requirements?

### Can you recover damages for individual plaintiffs – why or why not?

### What can you ask for as a legal remedy?

## What is the test for redressability?

### Do you have to show the remedy will fix the problem?

### How did the court resolve redressability in Mass. v. EPA?

## Jurisprudential Standing

### "Injury in fact" and "zone of interest" tests.

#### Distinguish the "injury in fact" and "zone of interest" tests.

#### Ranchers do not want their irrigation water used to help endangered species. They contest the EIS (environmental impact statement) supporting the release for the endangered species. (*Bennett v. Spear,* 520 U.S. 154 (1997). Standing or not and why?

#### Mail carriers want to sue to prevent the post office from allowing a private company to carry mail. - in the zone of interest and the mail carriers. (*Air Courier Conference of America v. American Postal Workers Union*) Standing or not and why?

#### How was the zone of interest different between a trade organization who wanted the EPA to have more rigorous standards for waste treatment (*Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918 (D.C. Cir. 1989)) and a company contesting whether a CFC replacement met the statutory requirements? (*Honeywell International, Inc. v. EPA*, 374 F.3d 1363 (D.C. Cir. 2004))

#### Using these examples of how the court has addressed the zone of interest problem, how would you apply them in analyzing new fact situations?