	**Background paper for the "Seminar on Strengthening the Enforcement and Administration of Environmental law in North America." PANEL 2.- Procedural and Evidentiary Challenges for Effective Environmental Law Enforcement. (A) Standing to sue. Author: Andrea L. Berlowe, Senior Counsel, U.S. Department of Justice, Environment and Natural Resources Division.**

I. INTRODUCTION

The United States Constitution limits the jurisdiction of federal courts. In addition, federal laws and the courts themselves have developed prudential limitations on the exercise of that jurisdiction. This article discusses standing from both the constitutional and prudential perspective.

Article III of the Unites States Constitution limits the power of the federal courts to the resolution of "cases" or "controversies."[1/] A core component of a justiciable controversy, as envisioned by Article III, has always been the requirement that a litigant have standing to challenge the action sought to be adjudicated.[1/] Article III standing is a "threshold jurisdictional question" that a court must decide before it may consider the merits of a case.[1/]

In addition to the constitutionally-derived prerequisite of standing to sue, a litigant must also show that the law relied upon as the basis for the claim is intended to protect the interests that the litigant asserts. This requirement provides a prudential limitation on the exercise of jurisdiction by federal courts.

II. CONSTITUTIONAL STANDING

The United States Supreme Court has long held that the party seeking federal court jurisdiction bears the burden of establishing standing.[1/] In order to demonstrate standing under Article III, a party must demonstrate, "at an irreducible minimum," that it has suffered an injury in fact, which "fairly can be traced to the challenged action and is likely to be redressed by a favorable decision."[1/]

The United States Supreme Court has made clear that "injury in fact" must be "concrete and particularized," and "actual or imminent," rather than "'conjectural' or 'hypothetical.'"[1/] The Court explained its use of the word "particularized" to mean "that the injury must affect the plaintiff in a personal and individual way."[1/] Thus, to establish standing, parties must be "'directly' affected apart from their 'special interest' in the subject."[1/]

The requirement to establish a cognizable injury varies somewhat for individuals and organizations. If an organization is claiming injury to itself, rather than on behalf of its members, the injury requirements are the same as those for an individual. If an organization, such as an environmental group, claims injury on behalf of its members, however, it is not

sufficient for the organization to assert generalized grievances. Rather, "[a]n association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[1/] Thus a fundamental distinction between individual and organization standing is the requirement that the injuries to the organization's members are "germane to the organization's purpose."[1/] When an organization seeks to represent its members' interests, therefore, the members must be injured in such a way that affects their concerns as members of the organization.[1/] An organization cannot satisfy the germaneness requirement by merely stating a broad organizational purpose during litigation.

The second element of the tripartite test for standing requires an injured party to demonstrate "a causal connection between the injury and the conduct complained of."[1/] Plaintiffs must proffer facts establishing that all links in the causal chain are satisfied.[1/] Further, the mere possibility that causation is present is not enough, and the presence of an independent variable between an alleged harm and a defendant's conduct makes causation sufficiently tenuous that standing should be denied.[1/]

To establish the "redressability" component, a litigant must show a "substantial likelihood" that the alleged injury will be redressed by the relief it seeks.[1/] Thus, judicial action must be likely to remedy the alleged harm, and cannot be merely speculative.[1/]

In addition to these jurisdictional prerequisites, a federal court will look to prudential considerations to determine whether it should exercise its limited jurisdiction in light of the relevant law and the facts of the particular case.

III. PRUDENTIAL STANDING

In addition to constitutional limitations on a federal court's jurisdiction, there are prudential limitations on the exercise of that jurisdiction. The courts themselves create these limitations as a means of self-governance and, unlike the constitutional prerequisites, Congress can change them through legislation.[1/] Prudential limitations on the exercise of federal court jurisdiction apply both where a litigant is challenging a federal action or decision and where a litigant is acting as a "private attorney general" and suing another private entity to enforce compliance with an environmental law. The latter situation is generally known as a citizen suit.

If a party is challenging federal agency action, the nature of the prudential limitations

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often depends on the scope of a waiver of sovereign immunity because the U.S. government cannot be sued in federal courts except to the extent the Congress has expressly consented by law. Several environmental statutes have independent waivers of sovereign immunity. If a litigant fulfills the specific prerequisites contained in an express statutory waiver, then the litigant may proceed with its claims provided it satisfies other jurisdictional prerequisites that stem from the "case or controversy" requirement in Article III, such as ripeness. Ripeness is, essentially, the requirement that a litigant's asserted injury be "actual or imminent," as described previously.

If a statute does not contain an express waiver of sovereign immunity, however, a litigant can often challenge a decision or action of the federal government under the general waiver of sovereign immunity contained in the Administrative Procedure Act (APA). The APA provides that, "[a] person suffering legal wrong because of [federal] agency action, or adversely affected or aggrieved by [federal] agency action within the meaning of the relevant statute, is entitled to judicial review thereof."[1/] The APA generally limits judicial review to federal "[a]gency action made reviewable by statute and final [federal] agency action for which there is no other adequate remedy in a court."[1/] The phrase "within the meaning of the relevant statute" means that claims brought pursuant to the APA must fall within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[1/] Thus federal courts look to the substantive law that is the basis for a litigant's claims to define the scope of interests necessary to demonstrate prudential standing in a case brought pursuant to the APA.

Similarly, an environmental group seeking to use a citizen suit provision of an environmental statute to sue a polluting company must also demonstrate that the alleged injury to itself or its members falls within the range of interests to be protected by the statute that contains the citizen suit provision. Thus a federal court will look to the statute and, under certain circumstances, its legislative history, to determine whether Congress intended to restrict prudential standing in any way. In addition, the U.S. Supreme Court has held that the third prong of the test that an organization must satisfy to demonstrate sufficient injury, (*i.e.*, "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit") is prudential rather than constitutional in nature.[1/]

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i. U.S. Const. art. III, § 2, cl. 1; *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982).

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i. *Valley Forge Christian College*, 454 U.S. at 471. *See also Poe v. Ullman*, 367 U.S. 497 (1961); *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975).

i. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93-102 (1998); *Warth*, 422 U.S. at 498.

i. *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

i. *Valley Forge*, 454 U.S. at 472 (internal quotations omitted); *Defenders of Wildlife*, 504 U.S. at 560-61.

i. *Defenders of Wildlife*, 504 U.S. at 560 (citations omitted).

i. *Defenders of Wildlife*, 504 U.S. at 560 n.1.

i. *Defenders of Wildlife*, 504 U.S. at 563 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735, 739 (1972)).

i. *Friends of the Earth, Inc. v. Laidlaw Envt'l Services (TOC), Inc.*, 528 U.S. 167, 181 (2000) (citing *Hunt*, 432 U.S. at 343).

i. *United Food & Commercial Workers Union Local 751 v. Brown Group*, 517 US 544, 553 (1996).

i. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

i. *Defenders of Wildlife*, 504 U.S. at 560.

i. *Garelick v. Sullivan*, 987 F.2d 913, 919 (2d Cir.), *cert. denied*, 510 U.S. 821 (1993).

i. *Coker v. Bowen*, 715 F.Supp 383, 388 (D.D.C. 1989), *aff'd*, 902 F.2d 84 (D.C. Cir. 1990).

i. *See Duke Power Co. v. Carolina Envt'l Study Group, Inc.*, 438 U.S. 59, 75 n.20 (1978).

i. *Lujan*, 504 U.S. at 561.

i. *Bennett v. Spear*, 520 U.S. 154, 162-63 (1997)

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i. 5 U.S.C. § 702.

i. 5 U.S.C. § 704.

i. *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970).

i. *United Food and Commercial Workers Union v. Brown Group Inc.*, 517 U.S. 544, 555 (1996).