Standing in a Federal Agency's Shoes: Should Third-Party Action Affect Redressability under the National Environmental Policy Act?

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Through the doctrine of constitutional standing, federal courts have consistently attempted to limit their jurisdiction to claims in which they can redress the plaintiff's injury. This determination becomes more complicated when a third party asserts that it would "replace" the defendant's role and cause the same injury to the plaintiff that the defendant would have caused. Courts have generally responded by assessing if this replacement will actually occur. However, courts have neither clearly articulated nor consistently applied the standards that govern this replaceability inquiry. The replaceability approach also elides more fundamental questions of whether defendants should be able to escape judicial review simply because other parties might also commit the same harm.

This Note addresses the third-party-replacement issue in the context of the National Environmental Policy Act, which requires federal agencies to conduct an environmental analysis prior to acting. Courts have adopted a special approach to standing for procedural statutes like the National Environmental Policy Act, which does not impose substantive restrictions once agencies have complied with its environmental review procedures. This Note reviews how courts have dealt with the interaction of replaceability and standing under the National Environmental Policy Act, focusing on cases where federal agencies provide funding and other services for wildlife management and energy projects. It concludes that the current replaceability approach is too uncertain for courts to rely on, and is systematically weighted against plaintiffs. The result is that federal programs involving third parties can evade judicial review for reasons that are unrelated to the Act's purposes.

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In WildEarth Guardians v. U.S. Department of Agriculture*, the Ninth Circuit offered an alternative justification for finding redressability in third-party cases: the ability of plaintiffs to obtain relief against one of multiple, independent causes of injury. This Note argues that the court's independent-cause framework should completely displace the replaceability approach to third-party action in National Environmental Policy Act cases. To justify this new approach, this Note looks at the features of the Act that make it especially important to consider the federal agency independently of non-federal parties.*

INTRODUCTION

Redressability, a basic question of standing, is a threshold issue that a court must resolve before reaching the merits of a claim.[1] A recurring problem in this inquiry is when a third party contends that if the court enjoins the defendant from acting, the third party will simply step into the defendant's shoes and cause the same harm. Resolving this third-party issue requires careful consideration of the nature of the plaintiff's injury, and of exactly what constitutes legally sufficient relief. Statutes like the National Environmental Policy Act (NEPA)[2] complicate this determination because they create enforceable procedural rights. This raises questions as to how certain and

1. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 97 n.2 (1998).
2. 42 U.S.C. §§ 4321–4347 (2012).

tangible relief must be for a plaintiff to obtain standing, as well as how much courts can adapt constitutional standing to give effect to congressional statutes. The courts' basic approach—considering whether the third party will in fact replace the defendant—has engendered significant confusion when applied in the NEPA context. This is not just an academic concern—when courts cannot cleanly resolve these jurisdictional issues, it can substantially delay, or altogether prevent, the consideration of valid claims.

WildEarth Guardians v. U.S. Department of Agriculture shows how this third-party issue can derail a case in the initial procedural stage. On April 30, 2012, the environmental group WildEarth Guardians (Guardians) filed a complaint in the District Court for the District of Nevada against the U.S. Department of Agriculture's Wildlife Services over its predator damage management program, which used lethal control on over five million animals in 2010.[3] Although Guardians did not have a legal claim to halt the program entirely, it sought to force Wildlife Services to update its Environmental Impact Statement (EIS) for its predator-damage-management activities, in accordance with NEPA.[4] Wildlife Services had last conducted an EIS for its nationwide program in 1994.[5] Guardians asserted that the scope of the program had expanded considerably since then, and that evolving science had undermined many of the 1994 assessment's underlying assumptions.[6] Guardians also emphasized that these assumptions were based on studies dating back to the 1970s.[7] In addition, Guardians challenged a 2011 Environmental Assessment (EA)[8] of Wildlife Services' implementation of the Nevada portion of its predator-damage management, conducted jointly with the Nevada Department of Wildlife (NDOW), which had relied in part on the 1994 EIS.[9]

Guardians' strategy was not unique or surprising. NEPA's basic mandate, that "public officials make decisions that are based on understanding of environmental consequences," has proven surprisingly powerful in effecting substantive change since the statute's enactment in 1969.[10] By one account, NEPA's "look before [you] leap" approach has "successfully prevented at least hundreds, and likely thousands, of actions from causing unnecessary damage to

3. Complaint for Declaratory and Injunctive Relief at 2, WildEarth Guardians v. U.S. Dep't of Agric., Animal and Plant Health Inspection Serv., 2013 WL 1088700 (D. Nev. Mar. 14, 2013) (No. 2:12-cv-00716-MMD-PAL).

4. *Id.* at 1–2.

5. *Id.* at 2–3.

6. *Id.* at 3.

7. *Id.*

8. An EA is a less comprehensive analysis than an EIS, and agencies are often able to use an EA for smaller elements of a broader program by incorporating analysis from a programmatic EIS. *See* 40 C.F.R. § 1508.28 (2016) (describing the "tiering" process).

9. Complaint for Declaratory and Injunctive Relief at 4, *WildEarth Guardians*, 2013 WL 1088700 (No. 2:12-cv-00716-MMD-PAL).

10. § 1500.1.

the nation's environment."[11] Its efficiency, on the other hand, has been called into question, with legitimate criticisms abounding of NEPA's penchant for excessive paperwork and lack of substantive constraints on agency action.[12] Yet even without substantive bite, NEPA has become a valuable tool for environmental groups to generate political pressure and gain access to information that may reveal violations of other substantive laws.[13] In this case, Guardians also sought to force the agency to consider Guardians' own published research on Wildlife Services' predator management, which it had previously lobbied the agency to incorporate into a new environmental analysis.[14]

But neither Guardians' claims nor its science made it through the courthouse doors. The district court dismissed the case for lack of standing, a judicial doctrine that articulates the limits of federal jurisdiction under Article III of the Constitution.[15] The court held that Guardians had not alleged an injury of sufficient specificity in any areas outside of Nevada, and thus could not challenge the national EIS.[16] The court also dismissed the Nevada-specific claims for a lack of redressability, holding that it could not provide any relief to Guardians because the Nevada agency had stated its intent to continue the program without Wildlife Services.[17] On August 3, 2015, over three years after Guardians had filed its complaint, the Ninth Circuit unanimously reversed the district court's ruling on both counts and remanded for further proceedings in *WildEarth Guardians v. U.S. Department of Agriculture*.[18] In the meantime, Wildlife Services' program had continued unchanged, and Guardians was no closer to the relief that it originally sought.

This Note focuses on the redressability issue raised by the Nevada-specific set of claims. Although the national claims might have greater immediate import to Guardians' campaign against Wildlife Services, the Nevada claims point to a significant issue for NEPA litigants challenging joint projects or

11. Richard Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains*, 100 GEO. L.J. 1507, 1510 (2012).

12. *See, e.g.*, Sam Kalen, *The Devolution of NEPA: How the APA Transformed the Nation's Environmental Policy*, 33 WM. & MARY ENVTL. L & POL'Y REV. 483 (2009) (criticizing judicial interpretation of NEPA as lacking a substantive component); Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 917–25 (2002) (critiquing NEPA's practical implementation by agencies). NEPA criticisms, defenses, and proposals for reform have been explored at great length elsewhere. This Note addresses the scope of standing under NEPA, while acknowledging that there is considerable room for improving NEPA's operation.

13. *See* Lazarus, *supra* note 11, at 1518–19, 1519 n.67 (explaining that NEPA forces the agency to provide "critical" information that environmental groups could not generate on their own).

14. Complaint for Declaratory and Injunctive Relief at 16, *WildEarth Guardians*, 2013 WL 1088700 (No. 2:12-cv-00716-MMD-PAL).

15. Lujan v. Defs. of Wildlife, 504 U.S. 555, 559–60 (1992); *see also* U.S. CONST. art. III, § 2.

16. WildEarth Guardians v. U.S. Dep't of Agric., Animal & Plant Health Inspection Serv., No. 2:12-cv-00716-MMD-PAL, 2013 WL 1088700, at *11–12 (D. Nev. Mar. 14, 2013).

17. *Id.* at *19.

18. WildEarth Guardians v. U.S. Dep't of Agric., 795 F.3d 1148, 1159 (9th Cir. 2015).

programs that involve a non-federal actor. Standing requires a party to show that its injury can be "redressed by a favorable decision."[19] While NEPA applies broadly to all federal agencies, it does not extend to state, local, or private actors.[20] Where programs involve both a federal agency and a third party beyond NEPA's reach, courts have generally denied standing when the third party convincingly asserts that it would "replace" the federal contribution. This specter of "third-party replacement" can therefore act as a systematic bar against NEPA review of those programs.

In practice, courts have struggled to consistently apply what I call the "replaceability approach," leading to inconsistent results. The legal standards for evaluating third-party action are not well developed, and the inquiry is inherently speculative. The replaceability approach is also particularly ill suited to NEPA, because the only relief that a court can grant in a NEPA case is to force the agency to perform more environmental analysis. Since the third party is not bound by NEPA's procedural requirements, it is misleading to say that it is replacing the federal agency.

However, *WildEarth Guardians* suggests another approach. The Ninth Circuit analyzed the federal agency and the third party as independent causes of Guardians' injury, and implied that Guardians could obtain relief against just the federal agency.[21] This framework suggests that the court may have considered third-party replacement irrelevant to redressability. Although the court went on to "bolster" its conclusion with a replaceability analysis, this Note argues that the independent-cause framework can stand on its own in NEPA cases.

This Note examines the third-party-replacement problem and concludes that the independent-cause framework is a better approach to third-party cases because it avoids the flaws of the replaceability approach. Although it presents a conceptual challenge to reconcile the independent-cause framework with current standing doctrine, this Note argues that the framework fits within the boundaries of how courts have adjusted standing to accommodate procedural rights. Part I discusses the two salient doctrinal issues—third-party redressability and NEPA standing—and evaluates their application in previous NEPA cases. Part II reviews *WildEarth Guardians*, concluding that while the Ninth Circuit reached the right result, it failed to clearly articulate its reasoning. Lastly, Part III draws on *WildEarth Guardians*'s discussion of independent causes and proposes applying the court's approach as a categorical rule in NEPA cases. This Note concludes that this approach is more faithful to NEPA's structure and Congress's intent to place a unique burden on federal agencies.

19. *Lujan*, 504 U.S. at 560 (citation omitted).
20. *See* 42 U.S.C. § 4332 (2012) ("all agencies of the Federal Government shall . . . .").
21. *WildEarth Guardians*, 795 F.3d at 1157.

I. THE REDRESSABILITY AND NEPA ISSUES

The redressability issue presented in *WildEarth Guardians* arose at the intersection of two standing questions that courts have failed to resolve. First, how should courts analyze the potential actions of third parties when determining standing? Second, how should courts define an injury that occurs when an agency fails to comply with a statute's procedures—in this case, under NEPA—and what effect should that definition have on the standing analysis?

This Part examines previous cases that, like *WildEarth Guardians*, involved both of these questions. First, it provides background on the third-party redressability issue, focusing on the particular difficulties created when a defendant argues that an injunction will not provide relief to a plaintiff because a third party will replace the defendant's contribution and cause the same injury. Second, it explains the role of procedural statutes like NEPA in the standing analysis, highlighting the divergent approaches developed by the Ninth and D.C. Circuits. Finally, it illustrates how the third-party redressability and NEPA standing issues interact to produce problematic judicial reasoning and outcomes.

A. Redressability: The Third-Party-Replacement Problem

Federal courts have used the doctrine of standing to define the limits of their Article III jurisdiction to hear "cases" and "controversies."[22] As the Supreme Court articulated in the landmark standing case, *Lujan v. Defenders of Wildlife*, "the irreducible constitutional minimum of standing contains three elements" that a plaintiff must show: (1) an injury in fact which is "concrete and particularized" and "actual or imminent"; (2) "a causal connection between the injury and the conduct complained of"; and (3) a "'likel[ihood],' as opposed to mere[] 'speculati[on],' that the injury will be 'redressed by a favorable decision.'"[23] Although some scholars have vigorously criticized this interpretation of Article III,[24] the Court has consistently maintained the three-part test of injury in fact, causation, and redressability.[25]

The causation and redressability prongs of the standing inquiry become more complicated when a third party has contributed to the alleged injury.

22. *Lujan*, 504 U.S. at 559–60; *see also* U.S. CONST. art. III, § 2.

23. *Lujan*, 504 U.S. at 560–61 (citations omitted).

24. Such critiques have often focused on the lack of a constitutional basis for the injury-in-fact requirement. *See, e.g.*, William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 229–30 (1988) (arguing that Article III does not require injury in fact); Richard Murphy, *Abandoning Standing: Trading a Rule of Access for a Rule of Deference*, 60 ADMIN. L. REV. 943, 968–69 (2008) (arguing that current views of standing are not justified by the Constitution or functional concerns); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 170–92 (1992) (tracing the injury-in-fact test to a 1958 treatise on the Administrative Procedure Act and concluding that the Court "basically" "ma[de] up" the test).

25. *See, e.g.*, Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009); Massachusetts v. EPA, 549 U.S. 497, 517–18 (2007).

Courts have imposed a higher bar for standing when one of the three elements "depends on the unfettered choices made by independent actors not before the court and whose exercise of broad and legitimate discretion the courts cannot presume either to control or predict."[26] In such cases, the plaintiff must "adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability."[27] This problem is particularly likely to arise in claims against the federal government where the plaintiff is not the "object of the [challenged] government action or inaction" because the relief the plaintiff seeks often depends on how a regulated entity responds to the government action.[28]

Courts have particular difficulty in assessing third-party action in cases involving either federal funding or joint federal/non-federal programs. When the government's relationship to the third party is based on its regulatory or permitting authority, courts have generally looked at whether, under the relevant statutory scheme, the agency's decision either legally or practically compels a third-party response that the court can comfortably predict.[29]

But in cases like *WildEarth Guardians*, the government provides funding or services rather than exercising regulatory authority.[30] The question often then becomes whether the third party can, and will, replace the agency's contribution to the challenged action.[31] If so, then it follows that the third party will be able to carry out the same action in the same way. In that case, no relief that the court could grant will alter the plaintiff's injuries.[32] However, while an agency may be the exclusive source of regulatory or permitting authority, funding or other services are generally available from a broader range of sources. Where statutory and regulatory constraints are not present and funding

26. *Lujan*, 504 U.S. at 562.

27. *Id.* (citation omitted).

28. *Id.*

29. For example, in *National Parks Conservation Association v. Manson*, the Department of Interior, acting under the Clean Air Act, withdrew its finding that a proposed power plant would cause adverse air quality impacts in National Park and wilderness areas. 414 F.3d 1, 3–4 (D.C. Cir. 2005). Although the ultimate decision to permit the power plant rested with a Montana agency, the D.C. Circuit found causation and redressability because "Interior's withdrawal of its impact letter was virtually dispositive of the state permitting decision," citing the statutory hurdles that Montana would have to overcome if the letter was not withdrawn. *Id.* at 6–7. Based on this "formal legal relationship," the court distinguished the case from one involving a "truly independent actor." *Id.* at 6. *See also* Bennett v. Spear, 520 U.S. 154, 168–70 (1997) (finding redressability where, under the Endangered Species Act, the Fish and Wildlife Service's Biological Opinion was "virtually determinative" of the Bureau of Reclamation's course of action).

30. *See* WildEarth Guardians v. U.S. Dep't of Agric., 795 F.3d 1148, 1152 (9th Cir. 2015) (describing Wildlife Services contributions).

31. *See, e.g.*, *id.* at 1158–59 (finding redressability satisfied where "the notion that [the third party] would replace everything [the federal agency] does is . . . speculative at best").

32. Replacement may also defeat causation, as some courts have reasoned that agencies cannot be fairly considered a cause of harm if the loss of their contribution will not avert any concrete injury. *See* Appalachian Voices v. Bodman, 587 F. Supp. 2d 79, 89 (D.D.C. 2008).

is the only issue, courts have struggled to consistently determine whether an agency's assistance is replaceable.

B. NEPA: Defining a Procedural Injury

The third-party-replacement problem takes on an additional layer of complexity when combined with the issue of procedural standing. Since a plaintiff cannot ordinarily show that an agency's failure to follow a required procedure will cause a decision that leads to injury—or that the agency's adherence to the correct procedure would redress it—courts have relaxed parts of the standing analysis for procedural claims.[33] But the underlying tension in defining a procedural injury has led courts to implement this relaxed standard in very different ways. Of particular relevance to this Note, the relaxed redressability standard could lower the plaintiff's burden in third-party-replacement cases.

NEPA is especially likely to bring these procedural and third-party issues together for two reasons. First, all NEPA injuries are essentially procedural. Second, the statute's broad application and federally oriented structure often creates third parties that are beyond the reach of a NEPA lawsuit.[34]

NEPA requires federal agencies to prepare an EIS describing the environmental effects for "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."[35] If an agency is unsure whether an action will have significant effects, it prepares a shorter EA to assess the possible significance of the action.[36] The agency must prepare a full EIS if the EA reveals significant impacts.[37] Otherwise, the agency issues a Finding of No Significant Impacts, and has fulfilled its NEPA obligations.[38] Courts have interpreted NEPA as a purely procedural statute, declaring that it "merely prohibits uninformed—rather than unwise—agency action."[39] An agency can thus proceed with an

33. To do otherwise would vitiate a vast array of procedural statutes that Congress has enacted, particularly in the environmental field. Brian J. Gatchel, *Informational and Procedural Standing After* Lujan v. Defenders of Wildlife, 11 J. LAND USE & ENVTL. L 75, 76 (1995) (emphasizing that many environmental statutes are principally informational and procedural).

34. *But see* Sierra Club v. U.S. Dep't of Agric., 777 F. Supp. 2d 44, 60 (D.D.C. 2011) (explaining that courts have sometimes extended NEPA injunctions to a non-federal entity where "the level of federal involvement in the nonfederal project amounts to the creation of a joint venture or partnership between the federal agency and a non-federal entity").

35. 42 U.S.C. § 4332(C) (2012).

36. 40 C.F.R. § 1501.4 (2016). Agencies may also develop categorical exclusions for categories of the actions that the agency has already found "do not individually or cumulatively have a significant effect on the human environment." § 1508.4. These activities do not require an EA or an EIS. *Id.*

37. § 1501.4(c).

38. § 1501.4(e).

39. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989). For a critical examination of NEPA's origins and subsequent development into a purely procedural statute, see Kalen, *supra* note 12, at 483 (tracing NEPA's caselaw development) and Sam Kalen, *Ecology Comes of Age: NEPA's Lost Mandate*, 21 DUKE ENVTL. L. & POL'Y F. 113 (examining NEPA's legislative history).

environmentally damaging project, no matter how damaging, so long as it has adequately studied and documented the likely impacts.[40]

Despite its lack of substantive standards, NEPA serves two purposes.[41] Internally, "[i]t ensures that the agency . . . will have available, and will carefully consider, detailed information concerning significant environmental impacts."[42] Externally, it provides that same information to the public at large, so that the public "can provide input as necessary to the agency."[43] But NEPA does not create its own cause of action for plaintiffs.[44] Typically, plaintiffs bring NEPA claims under the Administrative Procedure Act.[45]

The third-party-replacement problem arises under NEPA with particular frequency because NEPA applies to federal agency actions that involve state agencies, local agencies, or private parties.[46] A broad range of agency activities can constitute "major Federal action," "including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies."[47] When these joint arrangements between federal and non-federal actors are subject to NEPA challenges, they can create third parties because plaintiffs have a legal claim against the federal actor, but not the state, local, or private party.[48]

NEPA injects additional confusion into third-party-replacement analysis because courts disagree about the relative importance of the concrete and procedural elements of an injury asserted under NEPA. In *Lujan*, Justice Scalia's majority opinion held that Congress's inclusion of a citizen-suit provision in the Endangered Species Act[49] did not give plaintiffs a freestanding procedural right to challenge an agency's failure to follow a procedure without

40. *See Robertson*, 490 U.S. at 350–51.

41. Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 768 (2004).

42. *Id.* (alteration in original) (quoting *Robertson*, 490 U.S. at 349).

43. *Dep't of Transp.*, 541 U.S. at 768.

44. Fla. Audubon Soc'y v. Bentsen, 94 F.3d 658, 665 (D.C. Cir. 1996).

45. Nat'l Coal. to Save Our Mall v. Norton, 161 F. Supp. 2d 14, 19 (D.D.C. 2001).

46. *See* Scientist's Inst. for Pub. Info. v. Atomic Energy Comm'n, 481 F.2d 1079, 1088–89 (D.C. Cir. 1973) ("[T]here is 'Federal action' within the meaning of [NEPA] . . . whenever an agency makes a decision which permits action by other parties which will affect the quality of the environment.").

47. 40 C.F.R. § 1508.18 (2016).

48. Although some states have enacted similar state environmental procedure acts (SEPAs), the remaining states lack a similar environmental procedural statute that would give a court jurisdiction over a state or local actor. David Sive & Mark A. Chertok, *"Little Nepas" and Their Environmental Impact Assessment Procedures,* SS042 A.L.I.-A.B.A. 921, 923 (2013); *see also* Goat Ranchers of Or. v. Williams (*Goat Ranchers I*), Civil No. 08-97-ST, 2009 WL 883581, at *14 (D. Or. Mar. 30, 2009) (denying NEPA standing for a claim against a federal agency and expressing "dismay[] at leaving concerned citizens without any legal remedy" against the Oregon agency's plan because the state lacked a NEPA-equivalent). Additionally, not all SEPAs apply to local agencies. Sive & Chertok, *supra*, at 926–27.

49. The Endangered Species Act provides that "any person may commence a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter." 16 U.S.C. § 1540(g) (2012).

a "discrete injury flowing from that failure."[50] However, Justice Scalia distinguished cases where disregarding procedure "could impair a separate concrete interest" of the plaintiff.[51] In an influential footnote,[52] he explained that "[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 of redressability and immediacy."[53]

Justice Scalia gave the example of a plaintiff living adjacent to a proposed federal dam project. He reasoned that the plaintiff would have standing to challenge "the licensing agency's failure to prepare [an EIS], even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered."[54] In this case, the procedural standing approach to immediacy would free the plaintiff from having to show that the failure to prepare an EIS would lead to "imminent" harm from the dam; similarly, relaxed redressability would make it unnecessary to demonstrate that it would be "likely," rather than "speculative," that the agency would stop or alter the dam after conducting an EIS.[55] Otherwise, since the agency is free to proceed with the dam project regardless of the environmental impacts disclosed in the EIS,[56] no plaintiff would ever have standing to challenge an agency's NEPA compliance.

Under the standard that Justice Scalia articulated, a plaintiff must assert a link between a procedural injury and a concrete harm to achieve procedural standing. This creates a hybrid injury that includes both procedural and concrete attributes. Courts agree that the "concrete interest . . . is the ultimate basis of [a procedural plaintiff's] standing."[57] However, different courts, particularly the Ninth and D.C. Circuits, have taken conflicting approaches to analyzing standing for NEPA and other procedural injuries.[58] At the heart of

50. Lujan v. Defs. of Wildlife, 504 U.S. 555, 571–72 (1992).

51. *Id.*

52. Some courts and scholars have simply referred to this type of procedural standing as "footnote seven standing." *See, e.g.*, Pac. Nw. Generating Co-op. v. Brown, 38 F.3d 1058, 1065 (9th Cir. 1994); Bradford Mank, *Standing in* Monsanto Co. v. Geertson Seed Farms*: Using Economic Injury as a Basis for Standing When Environmental Harm is Difficult to Prove*, 115 PENN. ST. L. REV. 307, 312 (2010).

53. *Lujan*, 504 U.S. at 572 n.7.

54. *Id.*

55. *Id.* at 560.

56. *See supra* notes 39–40 and accompanying text.

57. WildEarth Guardians v. U.S. Dep't of Agric., 795 F.3d 1148, 1154 (9th Cir. 2015) (quoting W. Watersheds Project v. Kraayenbrink, 632 F.3d 472, 485 (9th Cir. 2010)); *cf.* Fla. Audubon Soc'y v. Bentsen, 94 F.3d 658, 668 (D.C. Cir. 1996) (en banc) (rejecting the concept that "the injury at issue in an EIS suit [is] . . . only the procedural violation").

58. The Ninth Circuit's procedural standing approach, which is more liberal than the D.C. Circuit's, is particularly important because "[seventy percent] of all federal public lands are located in [the Ninth] [C]ircuit," resulting in many NEPA and other procedural challenges to agency land management decisions. Bradford C. Mank, Summers v. Earth Island Institute: *Its Implications for Future Standing Decisions*, 40 ENVTL. L. REP. NEWS AND ANALYSIS 10958, 10959 (2010). Other Circuits, not discussed here, are also split on questions of procedural standing. *See, e.g.*, *Fla. Audubon*

these disagreements are questions as to whether courts should focus their analysis of causation and redressability on the concrete or procedural elements of the alleged injury. The answers depend in part on courts' views of how much to relax the traditional standing analysis to accommodate congressionally created procedural rights.

The Ninth Circuit has characterized a NEPA injury as the risk that "environmental consequences might be overlooked" as the result of a procedural violation where a plaintiff has a concrete interest in a given project.[59] Plaintiffs may establish a concrete interest by demonstrating a "geographic nexus" to the area where the project will take place.[60] The D.C. Circuit has adopted a more stringent approach to NEPA injuries. Emphasizing that standing requires a "particularized" injury, the D.C. Circuit requires that plaintiffs identify a "*specific* risk of environmental harm to [their] interests."[61] The Ninth Circuit has rejected the need for plaintiffs to identify such a specific risk, reasoning that it "would in essence . . . requir[e] that the plaintiff conduct the same environmental investigation that [the plaintiff] seeks . . . to compel the agency to undertake."[62]

As with injury in fact, the D.C. Circuit takes the more stringent approach to causation, requiring a stronger procedural-concrete connection than the Ninth Circuit. Although *Lujan* referred only to the relaxation of immediacy and redressability requirements in the context of procedural standing, the Ninth Circuit has held that causation is also relaxed for procedural injuries.[63] Under this relaxed standard, a plaintiff must show "a reasonable probability" that, as a result of the agency's procedural failure, potentially overlooked consequences would impair plaintiffs' concrete interest in the area.[64] For instance, the agency might not realize that its action would destroy important habitat for species that plaintiffs enjoy observing. Once plaintiffs establish this connection, they can satisfy causation.

Although the D.C. Circuit had previously applied an approach similar to that of the Ninth Circuit, the court—sitting en banc—repudiated this approach

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Soc'y, 94 F.3d at 675 n.5 (Rogers, J., dissenting) (noting that the Seventh and Ninth Circuits allow procedural challenges to forest management plans prior to site-specific project proposals, but that the Eighth and Eleventh Circuits do not); Comm. to Save the Rio Hondo v. Lucero, 102 F.3d 445, 451–52 (10th Cir. 1996) (rejecting *Florida Audubon Society*'s test for causation in NEPA cases).

59. Citizens for Better Forestry v. U.S. Dep't of Agric., 341 F.3d 961, 971 (9th Cir. 2003) (internal quotations and citation omitted).

60. *Id.* (finding the "geographic nexus" requirement satisfied where plaintiffs used the national forests at issue for recreation and wildlife observation).

61. *Fla. Audubon Soc'y*, 94 F.3d at 667 (emphasis added).

62. *Citizens for Better Forestry*, 341 F.3d at 972.

63. *See, e.g.*, WildEarth Guardians v. U.S. Dep't of Agric., 795 F.3d at 1154 (citing W. Watersheds Project v. Kraayenbrink, 632 F.3d 472, 485 (9th Cir. 2010)). The Ninth Circuit has explained that causation "is only implicated where the concern is that an injury caused by a third party is too tenuously connected to the acts of the defendant." *Citizens for Better Forestry*, 341 F.3d at 975.

64. *Id.* at 972.

in *Florida Audubon Society v. Bentsen*.[65] The court instead articulated a two-part causation test. First, the plaintiff must show that the failure to comply with NEPA might cause the agency to overlook a specific risk to a plaintiff's concrete environmental interest.[66] The second step requires "a substantial probability that the government act allegedly implicating the EIS requirement will cause [the increased risk of injury]."[67] The court noted that past cases had mistakenly focused solely on the first step, implicitly critiquing the Ninth Circuit's approach.[68] The additional second step shifts the analysis to the agency's substantive action rather than its procedural failure, and also imposes a more stringent "substantial probability" requirement.

Redressability in the Ninth Circuit simply requires plaintiffs to show that the "procedural right . . . if exercised, *could* protect their concrete interests."[69] The Ninth Circuit has not been clear about whether this relaxed standard also applies to cases that involve third-party replacement. For the D.C. Circuit, though, the relevant harm flows from the actual effects of the third party's potential actions on the plaintiff's concrete interest, rather than from the federal agency's failure to adequately protect that interest by complying with NEPA's procedures.[70] Accordingly, in third-party-replacement cases, the D.C. Circuit has held that the relaxed redressability standard only applies to whether "the *agency* would reach a different decision," not whether the third party might do so.[71]

These distinctions are driven by different conceptions of how much constitutional standing concerns limit courts' abilities to shape the standing analysis in response to Congress's goals in imposing a procedural requirement. Yet in some ways it is disingenuous to talk about NEPA as a product of congressional intent. By many accounts, NEPA's drafters did not intend for the EIS to take on primary importance or for judicial review to be the primary enforcement mechanism.[72] Conversely, there are also many critiques of NEPA

65. 94 F.3d at 667.

66. *Id.* at 672.

67. *Id.*

68. *Id.* at 668.

69. WildEarth Guardians v. U.S. Dep't of Agric., 795 F.3d 1148, 1154 (9th Cir. 2015) (internal citation omitted).

70. *See* Sierra Club v. U.S. Dep't of Energy, 825 F. Supp. 2d 142, 149 (D.D.C. 2011) ("[T]he Sierra Club challenges DOE's decision, but the harm to its members results from the actions of Mississippi Power.").

71. St. John's United Church of Christ v. Fed. Aviation Ass'n, 520 F.3d 460, 463 (D.C. Cir. 2008); *see also* Chesapeake Climate Action Network v. Exp.-Imp. Bank of the U.S., 78 F. Supp. 3d. 208, 224 (D.D.C. 2015) ("[P]laintiffs must satisfy normal redressability standards as to the third party whose actions are directly causing the plaintiff's injuries.").

72. *See, e.g.*, Oliver A. Houck, *Is That All? A Review of the National Environmental Policy Act, an Agenda for the Future, by Lynton Keith Caldwell*, 11 DUKE ENVTL. L. & POL'Y F. 173, 176 (2000) (summarizing one NEPA author's critique of the contemporary "undue focus on impact statement preparation"); Lazarus, *supra* note 11, at 1515 ("NEPA's drafters . . . apparently believed that the primary enforcement mechanism of NEPA's EIS requirement would not be lawsuits."); Matthew J. Lindstrom, *Procedures Without Purpose: The Withering Away of the National Environmental Policy*

that argue that the statute was not intended to be "purely procedural."[73] The courts, for better or for worse, settled on a compromise where NEPA's only commands were procedures, but those procedures were subject to judicial review under the Administrative Procedure Act.[74] Both the role for judicial review of NEPA and the statute's purely procedural nature have been accepted for decades.[75] This Note adopts NEPA's existing structure, as developed by Congress, the courts, and the Council for Environmental Quality regulations, as a starting point for its reasoning.[76]

Under this structure, although NEPA's procedures are "almost certain to affect the agency's substantive decision," they do not provide the degree of certainty that would satisfy traditional standing requirements.[77] The Ninth Circuit is more willing to adapt its analysis to focus on whether "the defendant's actions will injure the plaintiff *in the sense contemplated by Congress*."[78] While this approach does not eliminate the need for a concrete interest, it treats it as a threshold requirement. Once a plaintiff demonstrates a concrete interest, the court's focus turns to the procedural right that Congress granted, and the more relaxed procedural standards.

The D.C. Circuit, in contrast, emphasizes the concrete elements of the injury. In imposing the second step of the causation analysis, the *Florida Audubon* majority declared that the first step viewed a NEPA injury as "at bottom, only a procedural violation."[79] It found this approach inconsistent with *Lujan*'s requirement that a concrete interest support the procedural injury.[80]

Act's Substantive Law, 20 J. LAND RES. & ENVTL. L. 245, 264 (2000) (concluding from NEPA's legislative history that Congress "anticipated that the policy goals and the CEQ would play a more prominent role in NEPA's implementation," but also "did not foresee the extensive role that the federal courts would play in interpreting and enforcing NEPA").

73. *See, e.g.*, Philip Michael Ferester, *Revitalizing the National Environmental Policy Act: Substantive Law Adaptations from NEPA's Progeny*, 16 HARV. ENVTL. L. REV. 207, 208 (1992) ("Concurrently, the substantive policies which form NEPA's foundation were neglected, leading to their eclipse by the Act's procedural aspects."); Kalen, *supra* note 39, at 117 ("The assumption that NEPA only mandates procedures is not beyond rebuke. The Supreme Court's NEPA opinions never confront basic questions about the Act and how it should be interpreted . . . . Each of the Court's NEPA precedents are vulnerable"); Lindstrom, *supra* note 72, at 264.

74. Lindstrom, *supra* note 72, at 264 ("[I]t is the courts that have elevated the EIS requirement to its predominant status in environmental planning. However, the courts have concomitantly lessened the impact of the law's (and the EIS's) fundamental and substantive provisions.").

75. *See, e.g.*, Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989).

76. This lack of Congressional clarity might, however, be a concern for someone like Justice Kennedy in interpreting standing under NEPA. In Justice Kennedy's *Lujan* concurrence, he acknowledged Congress's ability to "define injuries and articulate chains of causation . . . where none existed before," but required that it do so explicitly. Lujan v. Defs. of Wildlife, 504 U.S. 555, 580 (Kennedy, J., concurring). However, this Note does not to purport to argue that its proposed framework would necessarily survive Supreme Court review; rather, it offers a doctrinal justification for a better approach to a current problem at the intersection of standing doctrine and NEPA.

77. *Robertson*, 490 U.S. at 350.

78. Citizens for Better Forestry v. U.S. Dep't of Agric., 341 F.3d 961, 973 (9th Cir. 2003).

79. Fla. Audubon Soc'y v. Bentsen, 94 F.3d 658, 668 (D.C. Cir. 1996) (en banc).

80. *Id.*

Similarly, the necessity of an asserted specific, rather than general, risk of environmental harm serves to ensure that the concrete interest is sufficiently particularized to satisfy the traditional injury-in-fact inquiry.[81]

These contrasting philosophies have led to Circuit splits over whether there is standing for certain types of NEPA claims.[82] Although the D.C. Circuit has not categorically denied standing in third-party-replacement cases under NEPA, the cumulative differences in its NEPA standing analysis make it extremely difficult for plaintiffs to show that replacement will not occur. This is problematic because, as the cases below demonstrate, some federal programs are structured so that third-party replacement will always be a possibility. When courts consistently deny standing on that basis, the effect can be to systematically shield these government actions from NEPA review.

C. Problems in Third-Party-Replacement Case Law

The third-party-replacement case law suffers from two major deficiencies. First, courts have struggled to develop a coherent doctrine. The analysis is inconsistent from case-to-case, incorporating different standards for evaluating third-party action, with a varying emphasis on the role of procedural standing. Moreover, analyzing future actions is generally fact-specific and uncertain, and courts have not yet given clear signals about what evidence is sufficient to rebut a third party's statement that it will replace a federal contribution. This is especially problematic because the replacement approach incentivizes third parties to make these statements. Overall, this inconsistent inquiry makes it more difficult for plaintiffs and agencies to predict future outcomes, and gives insufficient guidance to the courts that ultimately shape those outcomes.

Second, this inquiry into third-party action leads to overly restrictive decisions on standing. The cases can turn on fine distinctions in a court's third-party-replacement approach, such as the importance of a certain percentage of funding,[83] or the willingness to speculate that the third party might modify its project.[84] These elements can block plaintiffs from bringing otherwise viable NEPA claims to protect their legitimate concrete interests. This allows third-party replacement to restrict NEPA's scope in a way that this Note suggests is not mandated under either the statute itself or current standing doctrine.[85]

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81. *Id.* at 667.

82. For instance, the Ninth Circuit grants standing for a plaintiff to challenge an agency's NEPA analysis for a programmatic rule, while the D.C. Circuit does not. For an in-depth discussion of the circuit split, see Zachary D. Sakas, *Footnotes, Forests, and Fallacy: An Examination of the Circuit Split Regarding Standing in Procedural Injury-Based Programmatic Challenges*, 13 U. BALT. J. ENVTL. L. 175, 192–202 (2006).

83. *See* Appalachian Voices v. Bodman, 587 F. Supp. 2d 79, 89 (D.D.C. 2008).

84. *See* Friends of Animals v. Clay, No. 13-CV-7293 (JG), 2014 WL 4966122, at *4 (E.D.N.Y. Oct. 3, 2014).

85. *See infra* Part III.

This subpart primarily focuses on the problematic inconsistencies in courts' analyses of replaceability. But this Note posits that NEPA's purposes are best served by not conducting the replaceability inquiry at all. Thus, these issues also serve to highlight the advantages of a categorical approach to these cases.

1. Whether Relaxed Redressability Applies

Courts have diverged at the threshold question of the extent of the plaintiff's burden to show that replacement will not occur. This is likely due in part to the different emphases that some courts—such as the Ninth and D.C. Circuits—put on the procedural right and the concrete injury. Under relaxed redressability, a NEPA plaintiff need only show that the procedure "*could* influence" the agency's decision.[86] Applying this relaxed "could" standard to the third party would seem to relieve the plaintiff of the burden to show that replacement will not occur. But the D.C. Circuit's focus on the concrete injury makes it less willing to extend the relaxed redressability standard to third-party action. Thus, "it becomes the burden of the plaintiff to adduce facts showing that those choices either have been or will be made in such manner as to produce causation and permit redressability."[87] In essence, the plaintiff carries a heavy burden to show what the third party's action will be.

The D.C. Circuit approach to third-party replacement reflects its greater emphasis on concrete interest rather than procedural injury. In *Sierra Club v. Department of Energy*, faced with a claim that the power company Missouri Power could replace Department of Energy (DOE) financing for a clean-coal plant, the District Court for the District of Columbia explained that the harm "spr[ang] from [Missouri Power's] construction and operation of the plant," not the DOE's allegedly inadequate NEPA analysis.[88] The DOE had approved financial assistance for approximately 14 percent of the project, and was also considering making a loan guarantee for up to 80 percent of the projected $2 billion cost.[89] The court acknowledged that enjoining the financial assistance would "disrupt the current financing of the . . . project and ultimately make [it] more expensive," but pointed to a Missouri Power official's sworn affidavit that the project would go forward without federal funding.[90] The Sierra Club argued that this statement lacked evidentiary support, but the court responded that "Sierra Club . . . gets the burden backwards; it is the Sierra Club, not the defendants, that must make [that] showing at the preliminary injunction stage."[91]

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86. WildEarth Guardians v. U.S. Dep't of Agric., 795 F.3d 1148, 1156 (9th Cir. 2015).

87. Lujan v. Defs. of Wildlife, 504 U.S. 555, 562 (1992) (emphasis added).

88. Sierra Club v. U.S. Dep't of Energy, 825 F. Supp. 2d 142, 149 (D.D.C. 2011).

89. *Id.* at 146–47. The court ultimately dismissed the claims involving the loan guarantee as unripe since the DOE had not made a final decision to grant it. *Id.* at 156–57.

90. *Id.* at 151.

91. *Id.*

In *Appalachian Voices v. Bodman*, a similar case involving a challenge to DOE funding for a clean-coal project, the D.C. District Court again emphasized that the procedural claim did not affect its third-party analysis. The court applied the D.C. Circuit's "substantial probability" causation test[92]—developed to put greater emphasis on concrete injury[93]—to the question of replacement.[94] The court required Appalachian Voices to show that the DOE's tax credit—7 percent of the project cost—was "at least a substantial factor motivating Duke Energy's [decision to build the plant]."[95] The parties contested whether Supreme Court precedent involving third-party conduct, but not procedural claims, was applicable.[96] The court explained that the "relevant inquiry is not which statute the claims were brought under, but instead, whether the chain of causation rests on acts of independent third parties."[97] As in *Sierra Club v. Department of Energy*, the plaintiffs were unable to rebut the third party's claim of replacement under this high standard.[98]

2. Inconsistent Application of Relaxed Redressability

In the Ninth Circuit, by contrast, courts have often—but not always—cited the relaxed redressability standard.[99] Yet these courts' articulated standard for redressability does not correspond to the stringency of their replacement analysis. For instance, similar cases from other circuits apply a more liberal replacement analysis without referencing relaxed redressability. The disconnect between the standard and the analysis is best understood by examining what courts do in third-party replacement cases with little or conflicting evidence.

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92. Although courts generally look at replacement as a redressability issue, the *Appalachian Voices* court considered it under causation. Appalachian Voices v. Bodman, 587 F. Supp. 2d 79, 88 (D.D.C. 2008).

93. *See supra* notes 65–68 and accompanying text.

94. *Appalachian Voices*, 587 F. Supp. 2d at 87.

95. *Id.*

96. *Id.* at 87–88.

97. *Id.* at 89.

98. *Id.* at 89. Other D.C. Circuit and District Court for the District of Columbia cases have also declined to find redressability in similar third-party replacement cases involving federal funding. *See* St. John's United Church of Christ v. Fed. Aviation Ass'n, 520 F.3d 460, 463 (D.C. Cir. 2008) (finding that plaintiffs failed to meet the normal standard of redressability where they could not affirmatively show that the loss of federal funding would affect the project's completion); Indian River Cnty. v. Rogoff, 110 F. Supp. 3d 59, 70–72 (D.D.C. 2015) (finding no redressability where the loss of a tax exemption would increase project cost by 9.5 to 13.5 percent, but third party had submitted declaration that it would proceed anyway); Chesapeake Climate Action Network v. Exp.-Imp. Bank of the U.S., 78. F. Supp. 3d. 208, 226–28 (D.D.C. 2015) (denying standing where plaintiffs failed to show that enjoining federal funding would cause the recipient to reduce its coal exports).

99. For cases citing relaxed redressability, see Goat Ranchers of Or. v. Williams (*Goat Ranchers I*), Civil No. 08-97-ST, 2009 WL 883581, at *12 (D. Or. Mar. 30, 2009); Americanus v. Wildlife Servs., No. CV-03-1606-HU, 2004 WL 2127182, at *9–10 (D. Or. Sept. 23, 2004); Sierra Club v. U.S. Fish & Wildlife Serv., 235 F. Supp. 2d 1109, 1123 (D. Or. 2002); *but see* Goat Ranchers of Or. v. Williams (*Goat Ranchers II*), 379 Fed. Appx. 662, 663 (9th Cir. 2010) (mem.) (finding that plaintiffs failed to show that redressability was "likely, as opposed to merely speculative").

These problems are well illustrated by cases that have arisen in the context of two different wildlife management programs: the Wildlife Restoration Act (WRA)[100]—administered by the U.S. Fish & Wildlife Service (FWS)—and the Department of Agriculture's Wildlife Services program.[101] Wildlife management agencies may seek to kill—or "take"[102]—individual animals for a number of reasons, including increasing populations of their prey[103] and preventing damage to private property or livestock.[104] The plaintiffs in these cases have all asserted aesthetic and recreational injuries from decreased opportunities to view those species, and have sought relief through reduced or no take of those species.

The WRA[105] allows the FWS to allocate funds to state agencies for "wildlife-restoration projects," which can include lethal take.[106] Wildlife Services—the defendant in *WildEarth Guardians*—provides predator control in order to prevent damage to agricultural resources throughout the United States, collaborating with federal, state, and local agencies, as well as private parties.[107] Since its predator management involves a significant amount of lethal take, Wildlife Services has been a long-running source of discontent for wildlife protection groups.[108]

In cases without evidence of the third party's likely actions, courts should default to a result that reflects the standard of redressability. If normal redressability applies, then the plaintiff must show that replacement will not occur—a lack of evidence does not satisfy redressability. However, if relaxed

100. 16 U.S.C. §§ 669–669i (2012).

101. The Animal and Plant Health Inspection Service (APHIS), an agency within the Department of Agriculture, runs the Wildlife Services program. *About APHIS*, U.S. DEP'T OF AGRIC. (Aug 3, 2015), https://www.aphis.usda.gov/aphis/banner/aboutaphis/.

102. This Note uses "take" in the traditional sense of killing or capturing an animal, rather than the broader meaning used in Section 9 of the Endangered Species Act. *Compare* Babbit v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 717 (1995) (Scalia, J., dissenting) ("To 'take,' when applied to wild animals, means to reduce those animals, by killing or capturing, to human control."), *with id.* at 691, 708 (majority opinion) (approving a regulation interpreting Section 9 "take" to include, among other things, "significant habitat modification" that impairs "essential behavioral patterns").

103. *See, e.g.*, Sierra Club v. U.S. Fish & Wildlife Serv., 235 F. Supp. 2d 1109, 1118–19 (D. Or. 2002) (involving a study of bear and cougar take to increase deer and elk populations).

104. *See, e.g., Depredation Investigations*, OR. DEP'T OF FISH & WILDLIFE (last visited Apr. 16, 2016), http://www.dfw.state.or.us/Wolves/depredation_investigations.asp.

105. §§ 669–669i.

106. § 669; *see* § 669a(1) ("[C]onservation . . . include[es] . . . the taking of individuals within wildlife stock or population if permitted by applicable State and Federal law.").

107. WildEarth Guardians v. U.S. Dep't of Agric., 795 F.3d 1148, 1151–52 (9th Cir. 2015); *see also* 7 C.F.R. § 371.6(b)(3) (2016).

108. *See, e.g.*, Darryl Fears, *Petition Targets "Rogue" Killings by Wildlife Services*, WASH. POST (Dec. 15, 2013), https://www.washingtonpost.com/national/health-science/petition-targets-rogue-killings-by-wildlife-services/2013/12/15/c749b3b2-5e8b-11e3-bc56-c6ca94801fac_story.html; Darryl Fears, *USDA's Wildlife Services Killed 4 Million Animals in 2013; Seen as an Overstep by Some*, WASH. POST (June 7, 2014), https://www.washingtonpost.com/national/health-science/governments-kill-of-4-million-animals-seen-as-anoverstep/2014/06/06/1de0c550-ecc4-11e3-b98c-72cef4a00499_story.html.

redressability applies to the third party, then it should only require that replacement might not occur, which is presumably true if there is no evidence. Yet courts' applications do not necessarily align with the articulated standard.

In *Sierra Club v. U.S. Fish & Wildlife Service*, the U.S. District Court for the District of Oregon, presented with a record lacking any evidence for or against replacement, found that redressability was satisfied.[109] Plaintiffs challenged the FWS's NEPA compliance for WRA funding of Oregon's elk-management study, which included the lethal take of cougars.[110] Oregon had initiated the study before applying for WRA funds, and the state agency was to administer the study.[111] However, the court explained that "there is no evidence in the record . . . that the [Oregon agency] is authorized to continue, and will continue, the study absent the provision of seventy-five percent of the costs funded by the FWS under the WRA."[112]

Yet two years later, the same court[113] took the opposite approach in *Ursus Americanus v. Wildlife Services*.[114] Wildlife groups had challenged Wildlife Services' NEPA analysis of its black-bear-management program in Oregon.[115] The program provided direct services to private landowners, "including hunting and killing depredating bears[116] at [their] request," with 83.8 percent of the funding provided by the landowners.[117] However, Oregon law also allowed landowners to kill depredating bears without either a state permit or Wildlife Services' assistance.[118] Still, plaintiffs claimed that private landowners would not kill as many bears without Wildlife Services' program, thereby redressing plaintiff's aesthetic interest in viewing wild bears.[119] The court cited evidence that landowners would continue to kill bears, as well as the plaintiffs' own admission that there was no way to project the landowners' independent take.[120] Without such projections, the court reasoned that redressability was "speculative, at best," and denied standing.[121]

109. Sierra Club v. U.S. Fish & Wildlife Serv., 235 F. Supp. 2d 1109 (D. Or. 2002).

110. *Id.* at 1116, 1118–19.

111. *Id.* at 1123.

112. *Id.*

113. The two cases were not only decided by the same court, but by the same Magistrate Judge. *Compare id.* at 1117, *with* Americanus v. Wildlife Servs., No. CV-03-1606-HU, 2004 WL 2127182, at *1 (D. Or. Sept. 23, 2004).

114. 2004 WL 2127182, at *15–16.

115. *Id.* at *1. Plaintiffs challenged both Wildlife Services' decision not to prepare an EIS and the adequacy of its EA. *Id.*

116. Depredation refers to wild animals that cause property damage, often through the killing of livestock. *See, e.g., Depredation Investigations*, OREGON DEP'T OF FISH & WILDLIFE (last visited Apr. 16, 2016), http://www.dfw.state.or.us/Wolves/depredation_investigations.asp.

117. *Americanus*, 2004 WL 2127182, at *2.

118. *Id.* at *5.

119. *Id.*

120. *Id.*

121. *Id.* at *6.

It is difficult to reconcile these two results. In both cases, the court cited the relaxed redressability standard.[122] Yet in *Sierra Club v. FWS*, the court did not require the plaintiffs to show that the state would halt the program, an implicit application of relaxed redressability.[123] In contrast, in *Ursus Americanus*, the court cited an inability to project the third party landowners' level of take as evidence that redressability was not satisfied.[124] Moreover, the court did not address the potential effect of losing the 16.2 percent of the funding that Wildlife Services contributed.[125] Despite nominally applying the same standard, *Ursus Americanus* clearly set the bar much higher for the plaintiffs.

The problems with third-party replacement analysis only become more complex when there is conflicting evidence about the likelihood of replacement. The primary issue is how to evaluate the third party's statement that it will replace the federal contribution. In making this assessment, third parties are hardly neutral. Even if the federal contribution is truly replaceable, finding a replacement still imposes transaction costs on the third party. The third party therefore has a strong incentive to help the agency defeat redressability. This incentive could lead it to accidentally or deliberately overestimate its own likelihood of replacement.[126] And even if courts are suspicious of these third-party statements, it can still be difficult for plaintiffs to provide affirmative evidence about a third party's capability to replace the government's role.[127]

Plaintiffs have primarily attempted to combat third parties' statements by emphasizing the size of the federal role and attacking the third party's practical capabilities. Ultimately, however, this method asks the court to make an inference based on the percentage of the federal contribution[128]—but this inference is an uncertain determination that invites subjectivity and

122. *See id.* at *9–10; Sierra Club v. U.S. Fish & Wildlife Serv., 235 F. Supp. 2d 1109, 1123 (D. Or. 2002).

123. *See* 235 F. Supp. 2d. at 1124.

124. *See* 2004 WL 2127182, at *14–15.

125. *Id.* at *4.

126. Essentially, the third party benefits from a Catch-22, where the more strongly and convincingly it asserts that it does not need federal assistance, the more likely it is to get it, as the court will more likely find redressability lacking. In addition, the third party is less likely to have to follow through on its promise.

127. In *Goat Ranchers of Oregon v. Williams* (*Goat Ranchers I*), a magistrate judge explicitly addressed this issue, noting that the third-party letter, which claimed that the state wildlife agency could replace Wildlife Services' contribution, was written after plaintiffs filed their complaint. Civil No. 08-97-ST, 2009 WL 883581, at *12 (D. Or. Mar. 30, 2009). Despite the convenient timing, the court decided that its suspicions were "a slim and insufficient reed on which to support redressability" without affirmative evidence in plaintiffs' favor. *Id.* Under this approach, there is no downside for the third party. Even when its statement strains the bounds of credibility, it does not provide plaintiffs with an affirmative tool to show redressability.

128. *See* Klein v. U.S. Dep't of Energy, 753 F.3d 576, 579–80 (6th Cir. 2014) (finding that replacement might not occur by explicitly making an "inference" based on the percentage of the federal contribution).

arbitrariness.[129] Both parties may try to submit external economic evidence about the availability of other funding sources, but the information about a third party's economic situation is likely to be asymmetrical: plaintiffs have less access. In addition, the court may be more inclined to trust a business's or an agency's projection based on their perceived expertise. This asymmetry is problematic because the third party and the plaintiffs are essentially opposing parties. Attempts by plaintiffs to rely on public statements or assessments by agencies or Congress have met with mixed success.[130]

The third-party-replacement inquiry is difficult for courts. In general, courts lack a clear doctrinal footing, leading to inconsistent approaches when the evidence in the record is unclear. The uncertainty inherent in evaluating third-party action exacerbates this inconsistency. In addition, the structural incentives for the third party to support a replacement defense and asymmetrical information access mean that this inconsistency falls more heavily on plaintiffs in these cases.

3. Other Approaches to Replacement

The standard approach to replacement is a binary question of whether or not the third party will replace the federal agency's contribution. Some courts have been more flexible, recognizing other outcomes that could provide the plaintiffs sufficient relief to satisfy redressability.

In Wildlife Services cases, courts have considered whether replacement will fully occur—that is, whether the third party might kill fewer animals, even if it still implements a similar program. Although these courts have generally focused on the number of animals killed,[131] one judge has suggested that even a slower rate of killing could satisfy redressability. In *Goat Ranchers of Oregon v. Williams*, the Ninth Circuit found sufficient evidence of replacement to prevent redressability, but the dissent noted that when Wildlife Services had participated in the management program, the program had killed twice as many cougars for the same cost.[132] Since the plaintiffs' injury was the reduced

129. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 562 (1992) (cautioning against basing standing on future acts by third parties "whose exercise of broad and legitimate discretion the courts cannot presume either to control or predict").

130. *See, e.g.*, Appalachian Voices v. Bodman, 587 F. Supp. 2d 79, 89 (D.D.C. 2008) (explaining that a third party's public statement that federal tax credits were "important" to a project did not establish their legal importance for standing). The *Appalachian Voices* court also explained that pursuant to D.C. Circuit precedent, it would "not defer to the views of Congress or administrative agencies as to the effect of a law or policy." *Id.* The court thus did not give much weight to the federal agency's predictions that the tax credits would "accelerate the widespread use" of the type of project at issue. *Id.* In contrast, the *WildEarth Guardians* court cited the federal agency's NEPA document, which suggested that the third party was unlikely to fully replace the federal role. WildEarth Guardians v. U.S. Dep't of Agric. 795 F.3d 1148, 1158–59 (9th Cir. 2015).

131. *See, e.g.*, Goat Ranchers of Or. v. Williams, 379 Fed. Appx. 662 (9th Cir. 2010) (mem.); Americanus v. Wildlife Servs., No. CV-03-1606-HU, 2004 WL 2127182, at *15 (D. Or. Sept. 23, 2004) (denying redressability where plaintiffs could not show that the third party would kill fewer bears).

132. *Goat Ranchers II*, 379 Fed. Appx. at 664–65 (Bea, J., dissenting).

opportunity to view cougars, the dissent reasoned that a slower rate of killing would provide more chances to view cougars—and thus redress plaintiffs' injury—even if the state eventually killed the same number of cougars.[133]

The District Court for the Eastern District of New York took an even more flexible approach in *Friends of Animals v. Clay*, where plaintiffs had challenged the adequacy of a supplemental EIS for Wildlife Services' role in bird removal at John F. Kennedy Airport.[134] Despite the fact that the third party paid all of Wildlife Services' costs, the court emphasized Wildlife Services' historical role in developing and implementing the program.[135] The court reasoned that if it enjoined Wildlife Services, then "at a minimum, the Port Authority would need to rethink its allocation of resources" and might consider other alternatives, or be unable to find a contractor at the same price.[136] The idea that redressability is satisfied because the third party might reconsider its actions is all the more notable because the court did not reference any relaxed standard of redressability.[137]

Finally, in *Klein v. Department of Energy*, the Sixth Circuit questioned the replaceability inquiry itself.[138] The majority resolved the inquiry in the plaintiffs' favor, but also noted that the parties disagreed over whether "that view of redressability [was] correct." Since the majority had already decided that the plaintiffs had standing under the replacement approach advocated by the defendant agency, it declined to decide the issue.[139] While the concurrence did not abandon replaceability altogether, it advocated a very lenient standard, only requiring "some possibility" of incremental relief, including "even slight" modifications to the project.[140] The concurrence also emphasized that, given the plaintiffs' concrete and particularized injury, granting standing would not violate "the principles that underlie the doctrine of standing," such as ensuring that cases are litigated by opposing parties that are truly adverse.[141]

These flexible approaches to replaceability provide a clear contrast to the more restrictive views of some other courts.[142] Within this broad spectrum lies a high degree of unpredictability for litigants, as courts struggle to articulate coherent doctrinal justifications, and engage in an uncertain, fact-specific inquiry into potential third-party action. But in *WildEarth Guardians*, the Ninth Circuit's approach hinted at a way out of this quagmire: framing the federal

133. *Id.* at 665.
134. Friends of Animals v. Clay, No. 13-CV-7293 (JG), 2014 WL 4966122, at *1 (E.D.N.Y. Oct. 3, 2014).
135. *Id.* at *4.
136. *Id.*
137. *See id.* at *3 (requiring the plaintiff to show a "substantial likelihood" for redressability).
138. Klein v. U.S. Dep't of Energy, 753 F.3d 576, 579–80 (6th Cir. 2014).
139. *Id.*
140. *Id.* at 586 (Stranch, J., concurring).
141. *Id.* at 587.
142. *See supra* Parts I.C.1 & I.C.2.

agency and the third party as multiple, independent causes of the harm to plaintiffs.

II. THE *WILDEARTH GUARDIANS* DECISION

In *WildEarth Guardians*, the Ninth Circuit faced a similar claim of third-party replacement, yet its discussion of the issue introduced a different view of the federal agency and the third party. This Part explores the court's reasoning and the possible implications of its decision. It first outlines the underlying dispute, and the district court's disposition and reasoning. It then analyzes the Ninth Circuit's opinion, looking closely at its language. Finally, this Part examines how *WildEarth Guardians* might shape future courts' approaches to third-party replacement cases.

A. Background

As discussed above, Wildlife Services provided predator control throughout the United States, collaborating with federal, state, and local agencies, as well as private parties.[143] Wildlife Services and NDOW jointly conducted Nevada's predator management program, with Wildlife Services providing "significant funding, staffing, and supervision."[144] Wildlife Services had evaluated the environmental impacts of the Nevada program in two applicable NEPA documents: (1) a programmatic Environmental Impact Statement (PEIS) for its nationwide activities, issued in 1994 and revised in 1997; and (2) a Nevada-specific EA, issued in 2011, which found no significant impacts from the program.[145] Guardians challenged the adequacy of both NEPA analyses, citing more recent research that questioned the methods prescribed in the 1994/1997 PEIS.[146] Guardians claimed that Wildlife Services had violated NEPA by failing to update the 1994/1997 PEIS and by incorporating its stale analysis into the 2011 EA.[147]

143. WildEarth Guardians v. U.S. Dep't of Agric., 795 F.3d 1148, 1152 (9th Cir. 2015).

144. *Id.*

145. *Id.* at 1152–53.

146. *Id.* at 1153.

147. *Id.* The district court dismissed Guardians' PEIS claims, holding that the declaration of a Guardians member failed to sufficiently connect his recreational and aesthetic injuries to the implementation of the PEIS, and thus did not establish injury in fact. WildEarth Guardians v. U.S. Dep't of Agric., Animal and Plant Health Inspection Serv., No. 2:12-cv-00716-MMD-PAL, 2013 WL 1088700, at *3–4 (D. Nev. Mar. 14, 2013). On appeal, the Ninth Circuit held that Guardians' injuries in Nevada were sufficient to challenge the PEIS. *WildEarth Guardians*, 795 F.3d at 1155. The court then explained that since Guardians asserted a procedural injury under NEPA, it satisfied the "relaxed redressability requirement" because "updating the PEIS *could* influence APHIS's predator damage management in Nevada." *Id.* at 1156.

B. The District Court Opinion

The District Court for the District of Nevada dismissed Guardians' Nevada-specific claims, holding that Guardians' aesthetic injuries—"viewing fewer predators in the wild"—were not redressable.[148] Wildlife Services had argued that third-party replacement would occur, relying on a letter from NDOW announcing its intention to "carry out management of wildlife with existing personnel or contract the work to other capable entities."[149] Guardians responded that NDOW was practically incapable of fully replacing Wildlife Services' role in the program, citing Nevada's budget shortfalls and NDOW's inability to continue using a particular avicide without federal involvement.[150]

The court rejected Guardians' position on two grounds. First, the court stated that the mere possibility of a lower level of take by NDOW was insufficient for redressability, applying a default presumption that NDOW would replace Wildlife Services' activities.[151] Second, the court explained that, given the record, projecting less take was "pure conjecture." The court discounted Guardians' evidence, and placed great weight on NDOW's letter.[152] Despite this defendant-friendly approach, the court asserted that it was applying a relaxed redressability standard.[153]

C. The Ninth Circuit Opinion

On appeal, Judge Michelle Friedland, writing for a unanimous Ninth Circuit panel, reversed the dismissal of Guardians' claims and remanded for further proceedings on the merits.[154] Although the opinion does not establish a clear rule, parts of it strongly suggest that the replaceability inquiry is not necessary to establish redressability in these third-party cases. However, the court still conducted a replaceability analysis, obscuring whether it thought that its multiple, independent-cause framework was sufficient on its own. The court was also unclear about the role of the procedural nature of Guardians' claims.

Unlike in other third-party-replacement cases, the court did not immediately analyze replaceability.[155] Instead, the court framed Wildlife Services and NDOW as multiple, independent causes of injury. In response to

148. *WildEarth Guardians*, 2013 WL 1088700 at *5–7.

149. *Id.* at *5.

150. *Id.* at *5–6. The avicide, DRC–1339, was a "special restricted-use pesticide" that the program used to manage raven populations, but required direct supervision by federal employees. *Id.* at *6.

151. *Id.* at *6.

152. *Id.*

153. *Id.* at *3. Notably, the court drew its standard from a D.C. District Court case and stated that causation was not relaxed, in conflict with Ninth Circuit precedent. *See, e.g.*, W. Watersheds Project v. Kraayenbrink, 632 F.3d 472, 485 (9th Cir. 2010) ("Once a plaintiff has established an injury in fact under NEPA the causation and redressability requirements are relaxed.") (citation omitted).

154. WildEarth Guardians v. U.S. Dep't of Agric., 795 F.3d 1148, 1158–59 (9th Cir. 2015).

155. *See supra* Part I.C.

Wildlife Services' argument that NDOW "would pick up where the federal government left off," the court stated:

> ***But the mere existence of multiple causes of an injury does not defeat redressability, particularly for a procedural injury. So long as a defendant is at least partially causing an alleged injury, a plaintiff may sue that defendant, even if the defendant is just one of multiple causes of injury.[156]

The court analogized to *Massachusetts v. EPA*, where the Supreme Court found that EPA regulation of new motor vehicles would redress Massachusetts' climate-change injuries, even if "predicted increases in greenhouse gas emissions from developing nations . . . [were] likely to offset any marginal domestic decrease" that might result from EPA regulation.[157] Emphasizing that "[t]he relevant inquiry is . . . whether a favorable ruling could redress the challenged cause of injury," the Ninth Circuit cited other cases that granted standing although the plaintiffs' requested relief would not have addressed other causes of injury.[158]

This mode of analysis suggests a different approach to third-party-replacement cases. The court's discussion of the defendant and the third party as independent sources of harm, and the cases it cited, seems to indicate that a plaintiff can satisfy redressability simply by getting relief from the defendant. By implication, whether the third party can replace that contribution is irrelevant to the plaintiff's standing to sue that defendant.[159]

I suggest two possible justifications for this framework. Under one theory, the plaintiff gets relief if and when the court enjoins a defendant—or provides some other judicial remedy—because at that moment, the court has relieved a discrete injury that the defendant would have caused the plaintiff. Thus, whatever a third party does after that relief is granted is irrelevant, or at least insufficient to undo redressability.

Alternatively, the independent-cause framework could represent a practical approach to the problems of replaceability analysis. Under this theory, the court acknowledges that if third-party replacement were not a threat, then it could grant relief to the plaintiff. Then, applying the relaxed redressability standard, the court applies the default presumption that redressability is satisfied as long as replacement *might* not occur.[160] This presumption is buttressed by an emphasis on the idea of incremental relief, so that if the third party fails to fully replace the defendant's action, redressability is satisfied.[161] Combining the relaxed procedural standard and incremental relief, redressability would only require the possibility that the third party would not replace the defendant in any way that would provide some increment of relief

156. *WildEarth Guardians*, 795 F.3d at 1157.
157. *Id.* (quoting Massachusetts v. EPA, 549 U.S. 497, 523–24 (2007)).
158. *WildEarth Guardians*, 795 F.3d at 1157.
159. *See id.* at 1157.
160. *See supra* Part I.C.2.
161. *See supra* Part I.C.3.

to the plaintiff.[162] This might be so practically unlikely, that combined with the evidentiary problems of assessing third-party action,[163] courts should just not conduct replaceability analysis.

Perhaps sensing that, under either theory, this application might represent a controversial approach, the court seemed to use a lack of replaceability as an alternative basis for its holding: "[t]he conclusion that [Guardian's] injury is redressable is *bolstered* by the fact that any independent predator damage management activities by [NDOW] are hypothetical rather than actual."[164] The court's language reads as though the multiple, independent-cause framing was sufficient to find redressability, and that the unlikelihood of replaceability provides reinforcement, rather than necessary support. Given the facts of *WildEarth Guardians*, this may have been a prudent strategy, as the court was able to determine that replaceability was unlikely by applying a default presumption in favor of the plaintiff and some skepticism towards the third-party statement.

On the issue of replaceability, the court reasoned that NDOW's letter expressed a general intent to take over the predator management program, but provided no evidence that an NDOW-only program would fully replace Wildlife Services' activities.[165] In the absence of a specific assertion of replacement, the court theorized that NDOW "might adopt practices that would be less harmful to [Guardians'] interests, or it might devote less funding to predator damage management than [Wildlife Services] currently provides."[166] Additionally, the court noted that the 2011 EA had predicted that if NDOW conducted a program without Wildlife Services, it would likely result in large reductions in aerial hunting and raven-killing, partially redressing Guardians' injuries.[167] Given the lack of evidence to support NDOW's letter, the court declared that projecting that the NDOW-only program's take would equal the existing program's take was "speculative at best."[168]

Even if it was not essential to the holding, the Ninth Circuit's discussion still outlines a replaceability analysis that is among the most plaintiff-friendly in the third-party-replacement case law. Most importantly, the court refused to grant broad deference to a general third-party statement.[169] Like other courts that have employed flexible approaches, the Ninth Circuit also showed a

162. This approach reflects elements of the reasoning in the cases outlined in Part I.C.3, particularly as formulated by Judge Stranch's concurrence in *Klein v. U.S. Dep't of Energy*, 753 F.3d 576, 586 (6th Cir. 2014) (finding redressability because there was "some possibility" that NEPA compliance would cause the agency to "include modifications to the project, even slight ones, that will 'to some extent' reduce [the plaintiff's injuries]").

163. *See supra* notes 126–130 and accompanying text.

164. *WildEarth Guardians*, 795 F.3d at 1158 (emphasis added).

165. *Id.*

166. *Id.*

167. *Id.* at 1158–59.

168. *Id.* at 1159.

169. *Id.* at 1158.

willingness to contemplate ways in which the third party might modify its actions, such as adopting different management practices, even though the plaintiffs did not provide evidence indicating that possibility.[170] The court also relied more on agency documents assessing the importance of the federal contribution than other courts had in similar cases.[171] However, the EA also considered the precise issue of replacement, and thus was highly relevant compared to the more general agency statements that plaintiffs have sought to rely on in other cases. Finally, the court made it clear that it was applying a default presumption that replacement would not occur—and, by extension, relaxed redressability.[172] In the absence of affirmative evidence in Wildlife Services' favor, the court stressed that the idea that replacement would occur was "speculative at best."[173]

This replaceability approach could have benefits for Ninth Circuit plaintiffs in the future. But the court's use of replaceability could also undermine the innovative independent-cause framework on which the court appeared to primarily rest its holding. Without clear instructions from the appellate level, district courts may continue to concentrate on the more familiar question of replaceability. Indeed, the only district court case to date that has squarely applied *WildEarth Guardians* focused its discussion of redressability on replaceability, not independent causes. In *Cascadia Wildlands v. Woodruff*, a subsequent and almost identical challenge to Wildlife Services' predator management of wolves in Washington, the U.S. District Court for the Western District of Washington engaged in a pure replaceability analysis.[174] Wildlife Services sought to distinguish the case from *WildEarth Guardians*, arguing that third-party replacement was more likely to occur.[175] The court identified two possible theories of relief. First, even if the number of wolf removals remained the same overall, the record revealed that there would be a temporary decrease.[176] Second, the court noted that the program's EA gave Wildlife Services considerable discretion, even though the agency claimed otherwise.[177] The court reasoned that, "if Plaintiffs prevail, Wildlife Services could either

170. *Id.*; *see also supra* notes 134–137 and accompanying text.

171. *Compare WildEarth Guardians*, 795 F.3d at 1158–59, *with* Sierra Club v. U.S. Dep't of Energy, 825 F. Supp. 2d 142, 150–51 (D.D.C. 2011) (finding irrelevant that the DOE's EIS considered the project "unlikely" to proceed without the agency contribution because the project had moved past the initial decision phase); Appalachian Voices v. Bodman, 587 F. Supp. 2d 79, 89 (D.D.C. 2008) (refusing to defer to the agency's prior assessment of the importance of the contested tax credits to the project).

172. In distinguishing another case, *Washington Environmental Council v. Bellon*, 732 F.3d 1131 (9th Cir. 2013), the court explicitly noted that "the redressability requirements [in *Bellon*] were not relaxed the way they are here." *WildEarth Guardians*, 795 F.3d at 1158.

173. *WildEarth Guardians*, 795 F.3d at 1159.

174. Cascadia Wildlands v. Woodruff, No. 3:15-cv-05132-RJB, 2015 WL 9217160, at *3–4 (W.D. Wash. 2015).

175. *Id.* at *3.

176. *Id.*

177. *Id.* at *4.

narrow the contractual scope of its involvement with wolf management or prepare an EIS that sufficiently accounts for this discretion, rather than ignoring it."[178]

Although the *Wildlands* court did not adopt *WildEarth Guardians*'s independent-cause framework, it incorporated its more liberal approach to replaceability analysis. It acknowledged the possibility of relief from a reduction in the rate of wolf removal, even with no change in total wolves removed.[179] The court also relied on the relevant EA rather than simply deferring to a third-party statement, and was willing to hypothesize other possible avenues to incremental relief.[180]

However, *Wildlands* still turned on fine distinctions of fact, such as whether the state agency would remove wolves at a slower rate if it lost Wildlife Services' participation. While a more lenient replaceability analysis benefits plaintiffs, it remains subject to inconsistencies when courts delve into sparse or conflicting factual records.[181] Although *WildEarth Guardians* appeared to suggest an alternative framework that would avoid these pitfalls, the court's decision to "bolster" its conclusion with replaceability analysis may lead future district courts in the Ninth Circuit to continue to apply that approach.[182] As with *Massachusetts v. EPA*, where the Court offered multiple bases for its standing determination, but did not clearly distinguish which factors were critical, it is unclear how future courts will use *WildEarth Guardians*.[183]

WildEarth Guardians also left the role of the procedural nature of Guardians' claim ambiguous. In discussing the independent-cause framework, the court explained that "the mere existence of multiple causes of an injury does not defeat redressability, *particularly for a procedural injury*."[184] This suggests that the independent-cause framework does not rely on a procedural claim's relaxed redressability standard for justification. In turn, this supports the idea that, under the independent-cause framework, the possibility of relief against a defendant is doctrinally sufficient to establish standing, without relying on the lower bar for certainty in procedural claims. In contrast, the court's replaceability analysis appears to rely on the relaxed redressability standard.

178. *Id.*

179. *Id.*; *see also* Goat Ranchers of Or. v. Williams, 379 Fed. Appx. 662, 665 (9th Cir. 2010) (mem.) (Bea, J., dissenting) (suggesting a slower rate of cougar removal should satisfy redressability).

180. *Woodruff*, No. 3:15-cv-05132-RJB, 2015 WL 9217160, at *4 (W.D. Wash. 2015).

181. *See supra* Part I.C.

182. *See* WildEarth Guardians v. U.S. Dep't of Agric., 795 F.3d 1148, 1158 (9th Cir. 2015).

183. *See, e.g.*, William W. Buzbee, Panel Discussion, *Access to Courts After* Massachusetts v. EPA*: Who Has Been Left Standing?*, 37 ENVTL. L. REP. 10692, 10695 (2007) (analyzing whether the state standing or procedural rights part of the case's reasoning would have a great precedential impact).

184. *WildEarth Guardians*, 795 F.3d at 1157.

III. APPLYING THE INDEPENDENT-CAUSE FRAMEWORK IN NEPA CASES

WildEarth Guardians's impact on future third-party-replacement cases is uncertain. It is unclear if the independent-cause framework will displace replaceability as the key factor in redressability for these cases, or even whether the court intended for that switch to happen. However, as discussed above, courts have not successfully articulated a consistent doctrine for the replacement inquiry.[185] The current approach's lack of clear standards and structural disadvantages for plaintiffs threatens to preclude judicial review for whole categories of agency action, based on distinctions that are unrelated to statutory structure and purpose. In this regard, the independent-cause framework can simplify and improve courts' redressability analyses.

This Note focuses on NEPA as an area where the independent-cause framework is particularly appropriate and the concept of replaceability particularly inapt, and argues that courts should limit their analysis in NEPA third-party-replacement cases to the federal defendant's actions. This argument is guided by two principal contentions. First, predicting the outcome of a third party's actions does not dovetail with NEPA itself, which does not impose any restrictions on the outcome of the federal agency's decision-making process.[186] Second, environmental review statutes like NEPA and its state analogues subject federal, state, and private actors to different, although sometimes overlapping, duties towards the same natural resources. In this context, courts should analyze these actors independently, in terms of their compliance with their relative duties.

Under the independent-cause framework, a court should only have to address whether the plaintiff has adequately demonstrated NEPA standing in relation to the federal agency. In order to satisfy injury and causation, a plaintiff must still adequately demonstrate that a concrete interest is threatened by the agency's failure to comply with NEPA's procedural requirements. But unlike the current approach to redressability in third-party-replacement cases, the court would only consider if compliance with NEPA might prevent the agency's uninformed action—the conduct that NEPA prohibits.

This Part first addresses concerns that the independent-cause framework would allow plaintiffs to assert generalized grievances, by looking at the interaction of injury with replacement in *WildEarth Guardians*. Next, it examines how not analyzing replaceability fits within procedural standing, as courts have applied the doctrine to NEPA. It then argues that replaceability is not the proper inquiry under NEPA because NEPA imposes a trustee duty on federal agencies that differentiates federal from non-federal action. Finally, this Part considers some of this approach's likely practical implications.

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185. *See supra* Part I.C.

186. *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989) (NEPA "merely prohibits uninformed—rather than unwise—agency action.").

A. The Generalized Grievance Concern

Examining only the federal agency's action might raise the concern that plaintiffs will be able to assert "generalized grievances" based solely on "an undifferentiated public interest in executive officers' compliance with the law."[187] A careful look, using the facts of *WildEarth Guardians*, shows that this concern is misplaced. Beginning with the plaintiff's position at the time of the standing inquiry clarifies that the presence of an adequate injury does not depend on the third party.

The plaintiff must demonstrate an injury that is "actual or imminent" and "concrete and particularized" to establish injury in fact.[188] Under statutes like NEPA, plaintiffs with "a procedural right to protect [their] concrete interests can assert that right without meeting . . . the normal standard[] for . . . immediacy."[189] In *WildEarth Guardians*, Guardians submitted a declaration from one of its members asserting an injury from "his reduced recreational and aesthetic enjoyment of areas in Nevada impacted by [the] predator damage management programs."[190] This injury was concrete and particularized[191]—it was not based on a "generalized grievance" about Wildlife Services' predator management, but instead on how the program impacted an individual's concrete and particularized interest in seeing more predators.[192] In addition to this concrete aesthetic and recreational interest, Guardians asserted that Wildlife Services had violated NEPA, a procedural right which courts have consistently recognized as protecting those types of interests.[193] With both a concrete interest at stake and a related procedural right to assert, Guardians satisfied the normal requirements for a NEPA injury.[194]

The claim that NDOW would replace all of Wildlife Services' predator management activities did not remove Guardians' members' concrete and particularized interest in seeing more predators while visiting the affected areas.[195] It likewise had no impact on the procedural right at issue: whether Wildlife Services' NEPA analysis of its program was inadequate.[196] The

187. Lujan v. Defs. of Wildlife, 504 U.S. 555, 573–77 (1992).

188. Massachusetts v. EPA, 549 U.S. 497, 517 (2007).

189. *Lujan*, 504 U.S. at 571 n.7.

190. WildEarth Guardians v. U.S. Dep't of Agric., 795 F.3d 1148, 1155 (9th Cir. 2015).

191. Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167, 183 (2000) ("[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.'") (quoting Sierra Club v. Morton, 405 U.S. 727, 735 (1972)).

192. *WildEarth Guardians*, 795 F.3d at 1155.

193. *Id.* at 1154; *see also* Citizens for Better Forestry v. U.S. Dep't of Agric., 341 F.3d 361, 969–70 (9th Cir. 2003) (explaining that NEPA standing requires a geographic nexus between an individual and the proposed action, which was satisfied by plaintiffs' "use and enjoy[ment of] national forests); Comm. to Save the Rio Hondo v. Lucero, 102 F.3d 445, 449 (10th Cir. 1996).

194. The court also found "a sufficient causal link" between Wildlife Services' NEPA violations and those injuries. *WildEarth Guardians*, 795 F.3d at 1155–56.

195. *See id.* at 1155 (describing Guardians' asserted injuries).

196. *See id.* at 1151–53 (describing Wildlife Services' NEPA compliance).

asserted third-party replacement only affected the likelihood that enjoining Wildlife Services' predator management program would allow Guardians' members to actually observe more predators.[197] Since this future prospect did not strip Guardians of its injury in fact, it was not asserting "an undifferentiated public interest" or a "generalized grievance,"[198] but rather a procedural right to protect a concrete and particularized interest, consistent with the Court's standing doctrine.[199] If the Ninth Circuit had denied standing because of possible third-party replacement, the ultimate result would have been an injury that clearly gives rise to standing under NEPA: uninformed federal action by Wildlife Services and subsequent impairment of Guardians' concrete interests.[200] Injury, then, is not an obstacle to the independent-cause framework.

B. The Tension Between NEPA and Redressability

The Supreme Court has explained that, while "injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute," a procedural right can "loosen the strictures of the redressability prong."[201] Courts have loosened redressability in response to a variety of statutory claims.[202] In these instances, the guiding principle is a judicial attempt to effectuate a statute's purpose and structure by deferring to Congress's explicit and implicit determinations.[203]

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197. The injunctive relief that Guardians sought would have halted Wildlife Services' predator management completely until it updated its NEPA analysis; Guardians also presumably believed—or at least hoped—that an updated NEPA analysis would lead to a predator management program less reliant on lethal control. *See* Complaint for Declaratory and Injunctive Relief at 38–39, *WildEarth Guardians*, 2013 WL 1088700 (No. 2:12-cv-00716-MMD-PAL).

198. Lujan v. Defs. of Wildlife, 504 U.S. 555, 576–77 (1992).

199. *Id.* at 571 n.7.

200. Assuming, of course, that Wildlife Services had actually violated NEPA and that its ongoing predator management would actually impair Guardians' interests.

201. Summers v. Earth Island Inst., 555 U.S. 488, 497 (2009).

202. For instance, in *Friends of the Earth v. Laidlaw Environmental Services*, the Supreme Court held that forcing the defendant to pay Clean Water Act (CWA) penalties to the U.S. Treasury would provide relief to private plaintiffs, even though they received no direct benefits, because penalties "encourage defendants to discontinue current violations and deter them from committing future ones." 528 U.S. 167, 186 (2000). The Court stressed that "Congress has found that civil penalties in [CWA] cases . . . also deter future violations" and that "[t]his congressional determination warrants judicial attention and respect." *Id.* at 185. Similarly, in *Alaska Center for the Environment v. Browner*, the Ninth Circuit held that requiring the EPA to promulgate Total Maximum Daily Loads (TMDLs)—pollution budgets for waterways—under the CWA would relieve plaintiffs' injuries from the degraded waters of Alaska, even though TMDLs would only alter water quality if the State of Alaska chose to implement them. Alaska Center for the Env't v. Browner, 20 F.3d 981, 983 (9th Cir. 1994). While the only incentive for the State to implement the TMDLs was the risk of losing federal grant money, the court held that the TMDLs themselves satisfied redressability because "Congress ha[d] determined that [TMDLs were] the appropriate means of achieving desired water quality where other methods . . . ha[d] failed." *Id.* at 984. In both *Laidlaw* and *Browner*, the courts relied on relief that would not normally satisfy redressability, but were necessary to effectuate the statute through judicial review. Otherwise, no plaintiff would ever have standing to enforce penalties or force the implementation of TMDLs.

203. For a thorough discussion of the reasons for judicial deference to statutory structure and purpose, see Mark Seidenfeld & Allie Akre, *Standing in the Wake of Statutes*, 57 ARIZ. L. REV. 745

On its face, the independent-cause framework does not reconcile easily with redressability. If a court does not look at replaceability, it runs the risk of granting standing when third-party replacement is likely to occur. In that case, if the court forces a federal agency to comply with NEPA's procedures, the plaintiff's concrete environmental interests could suffer the same harm. This appears to only give the plaintiff the "psychic satisfaction" of seeing that "the Nation's laws are faithfully enforced," which the Court has repeatedly denied as a basis for standing.[204] However, as this subpart explains, the lack of a particular substantive outcome is not a bar to redressability.

The concern of standing is "at bottom . . . whether petitioners have such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination."[205] In most cases, the three-part test of injury, causation, and redressability serves that purpose. But, as the Ninth and D.C. Circuits' disagreements over causation and redressability under NEPA show, there is an inherent tension between procedural statutes and standing's traditional focus on a particular plaintiff's concrete injury. [206] As Professor Cass Sunstein observed in *Lujan*'s aftermath:

> A procedural right is created, *not because it necessarily yields particular outcomes*, but because it structures incentives and creates pressures that Congress has deemed important to effective regulation. The same is true for the sorts of interests at stake in the [Endangered Species Act] and in many other environmental statutes. Congress is attempting not to dictate outcomes but to create procedural guarantees that will produce certain regulatory incentives. Redressability in the conventional sense is irrelevant.[207]

This dynamic creates problems for standing because, when statutes are not designed to produce specific results in particular cases, it may be impossible to show that it is "likely, as opposed to merely speculative, that an injury will be redressed by a favorable decision."[208] Justice Scalia's plurality opinion in *Lujan* recognized the need to relax the redressability test for these types of

(2015); *but see* Dru Stevenson & Sonny Eckhart, *Standing as Channeling in the Administrative Age*, 53 B.C. L. REV. 1357, 1366–88 (2012) (proposing that agencies are best positioned to define injury and causation, but that redressability "falls squarely within the judiciary's institutional competence, and thus should probably remain with the courts, as they have superior information about what remedies they can impose.").

204. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107 (1998).

205. Massachusetts v. EPA, 549 U.S. 497, 517 (2007) (citation and internal quotation marks omitted); *see also* Lujan v. Defs. of Wildlife, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring) ("[The concrete and particularized injury] requirement is not just an empty formality. It preserves the vitality of the adversarial process by assuring that the parties before the court have an actual, as opposed to professed, stake in the outcome.").

206. *See supra* Part I.B.

207. Sunstein, *supra* note 24, at 226 (emphasis added).

208. *Lujan*, 504 U.S. at 560 (internal quotations and citation omitted).

procedural claims.[209] Justice Kennedy's *Lujan* concurrence also noted the need to adapt standing to the growth of the administrative state: "As Government programs and policies become more complex and far reaching, [the Court] must be sensitive to the articulation of new rights of action."[210] To accommodate this uncomfortable fit between incentive-based procedural legislation—which produces results in the aggregate—and standing's concern with individual outcomes, courts have had to predicate standing on conceptual understandings that would not normally support it.[211]

NEPA is a purely procedural statute, since it does not contain any substantive standards that could dictate the agency's ultimate decision.[212] If an agency plans to build a dam and does not conduct NEPA analysis, an affected plaintiff can sue to enjoin the project and force the agency to complete an EIS.[213] But no matter what environmental impacts the EIS reveals, the agency can build the dam in precisely the same manner, causing precisely the same effect to the plaintiff.[214] Yet the plaintiff can still satisfy redressability, even though she cannot provide "any certainty" that an EIS will prevent harm to her concrete interests.[215]

In essence, the courts have treated NEPA as creating a legally relevant difference between informed federal agency action and uninformed federal agency action,[216] which can give rise to standing if it sufficiently threatens a plaintiff's concrete interest.[217] Thus, it is not simply the ultimate impact on a plaintiff's concrete interest that matters for NEPA standing, but also the character of the action itself. A plaintiff with a concrete interest at stake has standing to challenge a NEPA violation, even if a victory in court does not alter the status quo in the end.[218]

Courts should recognize a similar dynamic when *third-party* action could replace *uninformed federal* action. Like informed federal action, NEPA allows third-party (non-federal) action.[219] If the ultimate result of challenging uninformed federal action is that the dam is built anyway, the plaintiff's concrete interests suffer the same harm whether an informed federal agency or a third party builds the dam. But if the court does not grant standing to

209. *Id.* at 572 n.7; *see also* Sunstein, *supra* note 24, at 208 ("A contrary conclusion . . . would mean that Article III imposed a constitutional obstacle to most ordinary administrative law cases.").

210. *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring).

211. Some scholars have even suggested that lower courts have essentially eliminated the redressability requirement altogether in procedural cases. *See, e.g.*, Gatchel, *supra* note 33, at 108–09.

212. *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989).

213. *See Lujan*, 504 U.S. at 572 n.7.

214. *Id.*

215. *Id.*

216. *See Robertson*, 490 U.S. at 351 (NEPA "prohibits uninformed—rather than unwise—agency action.").

217. *See, e.g.*, WildEarth Guardians v. U.S. Dep't of Agric., 795 F.3d 1148, 1154 (9th Cir. 2015).

218. *Lujan*, 504 U.S. at 572 n.7.

219. *Cf.* 42 U.S.C. § 4332(C) (2012) (requiring an EIS for "major Federal action[s]"); 40 C.F.R. § 1508.18(a) (2016) (defining major Federal action).

challenge NEPA in the first instance, then the federal agency not only harms the plaintiff's concrete interests, but also violates the procedural right that Congress created by prohibiting uninformed agency action.[220] In order to avoid this result, courts have tolerated extreme uncertainty regarding the ultimate federal agency action. Uncertainty regarding the third party's action should be no different.

The most commonly articulated justification for redressability in NEPA cases is that NEPA compliance *could* lead to a different agency decision.[221] In third-party cases, it is equally possible that forcing NEPA compliance could lead to a different result, either because the third party is not, in fact, capable of replacing the federal contribution, or because the third party voluntarily modifies its action.[222] In most cases, there is already reason to doubt that replacement will occur, since the third party was initially willing to submit to NEPA's sometimes-burdensome requirements.[223] Under the current approach, courts engage in an inquiry to try to determine the likelihood of these scenarios, generally focusing on the third party's practical capabilities.[224] As detailed above, a lack of clear standards and inconsistent treatment of evidence make this inquiry problematic for courts.[225] Moreover, the inquiry creates structural incentives for the third party to purposefully or mistakenly overstate its replacement willingness or capacity.[226]

In contrast, courts do not inquire into the likelihood that the federal agency will change its decision.[227] In other words, courts do not question whether informed federal action is likely to "replace" uninformed federal action. In this sense, at least, not analyzing third-party replacement would not stretch redressability any further than the current doctrine already does. Giving effect to NEPA's aggregate structure requires courts to minimize the ultimate impact of the agency's decision on a plaintiff's concrete interests in an individual

220. *See supra* notes 216–218 and accompanying text.

221. *See WildEarth Guardians*, 795 F.3d at 1154 ("Plaintiffs . . . must show only that they have a procedural right that, if exercised, *could* protect their concrete interests."); *cf.* Massachusetts v. EPA, 549 U.S. 497, 517–18 (2007) ("[A procedural] litigant has standing if there is *some possibility* that the requested relief will prompt the injury-causing party to reconsider the decision") (emphasis added).

222. *See* Friends of Animals v. Clay, No. 13-CV-7293 (JG), 2014 WL 4966122, at *4 (E.D.N.Y. Oct. 3, 2014) (positing that the third party "might wish to consider other alternatives" to its current lethal bird management if the federal involvement ceased).

223. *See* Karkkainen, *supra* note 12, at 917–19 (summarizing the burdens of the EIS). The merits issue in third-party replacement has generally been the adequacy and the level of the agency's analysis, not whether the project is within NEPA's scope. *See, e.g.*, *WildEarth Guardians*, 795 F.3d at 1152–53; Sierra Club v. U.S. Dep't of Energy, 825 F. Supp. 2d 142, 146 (D.D.C. 2011); Sierra Club v. U.S. Fish & Wildlife Serv., 235 F. Supp. 2d 1109, 1117 (D. Or. 2002).

224. *See supra* Parts I.C & II.C.

225. *See id.*

226. *See supra* notes 126–127 and accompanying text.

227. *See supra* note 221.

case.[228] The addition of a third party should not shift the emphasis back to the concrete interest.[229]

C. NEPA's Imposition of a Solely Federal Burden

Examining NEPA's purpose and structure also highlights why the independent-cause framework, rather than replaceability, is the correct approach to third-party redressability cases. NEPA addresses only federal agencies and imposes a "trustee" obligation on them. Although scholars have expressed a range of views on the viability of a freestanding federal public trust doctrine,[230] some argue that NEPA directly codifies, or is influenced by, public trust principles.[231] The public trust doctrine places certain natural resources into a trust for the public's benefit, invests the government with an affirmative

228. As discussed in Part I.C, courts, particularly the Ninth and D.C. Circuits, disagree about how much a court can minimize the concrete interest. Nevertheless, the D.C. Circuit still accepts that relaxed redressability applies to defendants' actions in procedural claims, even if it does not apply to third parties' actions. *See supra* Part I.C.

229. *See* Gatchel, *supra* note 33, at 108–09 ("Once courts have established that procedural rights really 'are special' in such a way that the Constitution can tolerate much more uncertainty in the potential effect of a court's remedy on the plaintiff's concrete injury than in all other types of cases, distinguishing among the causes of that uncertainty makes little sense . . . . Great uncertainty is great uncertainty, no matter the cause.").

230. *See, e.g.*, Eric Pearson, *The Public Trust Doctrine in Federal Law*, 24 J. LAND, RESOURCES & ENVTL. L. 173, 174–75 (2012) (analyzing the "relatively few decisions from the federal courts" on the federal public trust doctrine and concluding that although they "seem to welcome the doctrine," they have not used it as an independent basis to "restrict the power of the federal government"); Richard M. Frank, *The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future*, 45 U.C. DAVIS L. REV. 665, 680–81 (characterizing the federal public trust jurisprudence as "currently-unsettled," but noting a recent judicial trend against imposing public trust-based "independently-enforceable mandates upon federal agencies and officials"). Other scholars have questioned more generally whether the public trust doctrine is productive when applied independently of environmental laws. *See, e.g.*, Richard J. Lazarus, *Judicial Missteps, Legislative Dysfunction, and the Public Trust Doctrine: Can Two Wrongs Make It Right?*, 45 ENVTL. L. 1139, 1157–61 (2015) (expressing concerns about the public trust doctrine as a "standalone *litigation* strategy" and that undue emphasis on public trust might undermine necessary advances in environmental regulation).

231. There seem to be a variety of views on the role of public trust principles in NEPA. *See, e.g.*, Susan D. Baer, *The Public Trust Doctrine—A Tool to Make Federal Administrative Agencies Increase Protection of Public Land and Its Resources*, 15 B.C. ENVTL. AFF. L. REV. 385, 398–99 (1988) (characterizing NEPA as "a direct and complete codification of the public trust doctrine"); Michael C. Blumm & Lynn S. Schaffer, *The Federal Public Trust Doctrine: Misinterpreting Justice Kennedy and Illinois Central Railroad*, 45 ENVTL. L. 399, 429–30 (2015) ("Courts should interpret . . . codifications of trust language and impositions of intergenerational responsibilities [as in section 101 of NEPA] as congressional recognition of the public trust doctrine which . . . imposes procedural rigor on the government trustee."); Alyson C. Flournoy et al., *Harnessing the Power of Information to Protect Our Public Natural Resource Legacy*, 86 TEX. L. REV. 1575, 1579–80 (2008) (noting the "congruence of NEPA's stated goals and the goal of preserving a public natural resource legacy," but concluding that its lack of substantive standards make it an insufficient mechanism for protecting public trust obligations); Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 720 (2006) (positing that NEPA and other federal statutes are "based on public trust principles in the sense that they set out a policy of protecting and preserving the environment for its own sake and for future generations").

duty to protect those resources, and obligates the courts to ensure that this duty is fulfilled.[232]

This Note suggests that NEPA's public trust element has two implications for the application of the independent-cause framework. First, since federal, state, and private actors can be subject to different public trust duties with regard to the same natural resources,[233] they should not be analyzed as interchangeable actors. Second, forcing the federal agency to comply with its trust obligations changes its relationship to a plaintiff's concrete interests in a manner that should be sufficient for redressability. This second contention again raises "psychic satisfaction" concerns that the relief is not sufficiently concrete.[234]

In section 101 of NEPA, Congress placed a "continuing responsibility [on] the Federal Government to use all practicable means, consistent with other essential considerations of national policy, . . . to the end that the Nation may" achieve a list of broad environmental goals.[235] At the top of that list was Congress's mandate that the government "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations."[236] Although section 102(C)'s EIS requirement has been the focus of NEPA for agencies, courts, and litigants alike,[237] some scholars have argued for renewed consideration of other elements of the statute.[238] Two commentators have

232. Baer, *supra* note 231, at 386–87.

233. Courts and commentators have explicitly recognized overlapping, co-trustee responsibilities in other contexts, such as the Comprehensive Environmental Response, Compensation, and Liability Act, which designates Federal, State, and Indian tribe officials as trustees with authority to recover under the Act for pollution damages to natural resources. *See* 42 U.S.C. § 9607(f) (2012). *See, e.g.*, Coeur D'Alene Tribe v. Asarco Inc., 280 F. Supp. 2d 1094, 1116 (D. Idaho 2003) *modified in part sub nom*. United States v. Asarco Inc., 471 F. Supp. 2d 1063, 1116 (D. Idaho 2005) ("The evidence has not shown nor have counsel provided legal authority that would prohibit or suggest that there cannot be co-trustees of our natural resources. In fact, the law clearly anticipates the same because in practice that is the only feasible way it could work. The migration of birds and fish from one area to another and the use of habitat as they move demonstrate that our natural resources are not static to one area."); Mave A. Gasaway, *Natural Resource Damages Co-Trusteeships Under CERCLA*, 43 COLO. LAW. 35, 37 (2014) (noting that the legal framework clearly "anticipate[s] the existence of multiple trustees with overlapping or concurrent jurisdiction," but is "mostly silent on the issue of how trust responsibility is allocated among cotrustees"); *Natural Resources Damages: Frequently Asked Questions*, EPA, https://www.epa.gov/superfund/natural-resource-damages-frequently-asked-questions#6 (Oct. 16, 2015) ("[T]here may be multiple Natural Resource Trustees because of coexisting or contiguous natural resources or concurrent jurisdictions.").

234. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 106–07 (1998).

235. 42 U.S.C. § 4331(b).

236. § 4331(b)(1).

237. *See* Kalen, *supra* note 39, at 116 ("Most discussions about NEPA are dominated by the 'action-forcing' mechanism—the NEPA document preparation process."); Houck, *supra* note 72, at 181 ("NEPA shrank to the rock-hard requirement of an environmental impact statement . . . [because i]t was the one provision in the statute that unarguably provided law to apply.").

238. *See, e.g.*, Joel A. Mintz, *Taking Congress's Words Seriously: Towards a Sound Construction of NEPA's Long Overlooked Interpretation Mandate*, 38 ENVTL. L. 1031 (2008) (arguing for consideration of Section 102(1)'s language that "the policies, regulations, and public laws of the United States shall be interpreted and administered according with the policies set forth in this chapter");

posited that, although NEPA's "congressional recognition of federal trust responsibilities is often overlooked, . . . its expression may have led to the scrutiny with which the courts have interpreted [the EIS requirement]."[239] Similarly, another commenter has interpreted NEPA's trustee language as "a direct and complete codification of the public trust doctrine."[240] Under this theory, NEPA's public trust component "at a minimum seem[s] to require close judicial oversight and administrative procedural rigor."[241]

NEPA's structure limits its expression of the public trust obligations to federal agencies. NEPA eschews the cooperative federalism approach taken by other "pillars of modern environmental regulation," such as the Clean Air Act and Clean Water Act, which "set up a federal structure for implementation that largely dictates the state response."[242] Even though Congress has imposed trustee duties on states in other contexts,[243] it has thus far declined to do so for environmental review. In this void, some states have chosen to enact their own state environmental procedure acts (SEPAs), expressing their trust responsibilities through a range of different statutory schemes.[244] Others have declined to do so.

The different approaches that states have taken further highlights the scope of possible agency responsibilities in the environmental review context. Some states extend the scope of their SEPAs to include local government action.[245] Additionally, some SEPAs, like the California Environmental Quality Act, apply to a broad range of actions, sweeping many private activities that require government approval under the statutes' jurisdictions.[246] Some SEPAs also impose the substantive mandates that NEPA lacks, such as enforceable mitigation requirements.[247]

NEPA, on the other hand, relies heavily on an aggregate approach to achieve its goals, which include fulfilling federal public trust obligations.

Ferester, *supra* note 73, at 258–59 (suggesting that substantive mandates are necessary to "more fully incorporate[] [Section 101's goals] into administrative decision-making").

239. Blumm & Schaffer, *supra* note 231, at 429–30.

240. Baer, *supra* note 231, at 398–99.

241. Blumm & Schaffer, *supra* note 231, at 430.

242. Daniel P. Selmi, *Themes in the Evolution of the State Environmental Policy Acts*, 38 URB. LAW. 949, 949–50 (2006) ("If states do not choose to comply, EPA will not delegate authority over regulatory implementation to the states, and environmental decisions will continue to be largely made at the federal level.").

243. *See supra* note 233.

244. *See* Selmi, *supra* note 242 (discussing themes in the evolution of state environmental procedure acts). One state, Louisiana, explicitly based its statute in part on the public trust doctrine. Save Ourselves, Inc. v. La. Envtl. Control Comm'n, 452 So. 2d. 1152, 1157–59 (La. 1984) (noting that the state agency had "been designated to act as the primary public trustee of natural resources and the environment" and that the statute was in part "based on state constitutional provisions and the public trust concept").

245. Selmi, *supra* note 242, at 957.

246. *Id.*

247. *Id.* at 982.

NEPA sets out ambitious environmental purposes in section 101,[248] but the only tool it provides to fulfill these purposes is section 102(C)'s EIS requirement: an outcome-blind environmental analysis and disclosure procedure.[249] The requirement that agencies inform themselves of the environmental consequences of their actions functions as Congress's incentive to produce the aggregate goals articulated in section 101.[250] The EIS process is the "all practicable means" that Congress provided agencies in order to comply with their public trust duties.[251] To return to Justice Scalia's hypothetical dam, once the agency has completed an EIS, it has complied with its duty to act as "trustee for the environment," weighing the environmental harms of its actions, even if it ultimately decides that the harms are justified by other considerations.

Given this divergence in trust responsibilities, it makes sense to evaluate federal and non-federal actors as independent causes in NEPA cases. In a claim brought solely under NEPA, the underlying action is not illegal in itself; the harm from the federal agency is contingent upon its non-compliance with its public trust duties. For instance, if Wildlife Services' EIS is adequate, it can continue its predator management program unaltered without causing Guardians a legal injury. Guardians does not have a private right to the animals at stake, only to aesthetic and other interests protected by the government's public trust duties.

Whether the state agency, NDOW, would cause the same harm is contingent upon its non-compliance with Nevada's public trust duties. Indeed, the *WildEarth Guardians* court noted that if NDOW were to adopt a program fully replacing Wildlife Services, "nothing suggests that litigation challenging [the program] would be time barred or otherwise precluded."[252] Since these two sources of harm spring from different legal relationships, they do not provide pure replacements for each other. If they were equally situated under the law—that is, if they were both subject to NEPA—the case would involve co-defendants, not a third party. Thus, courts should be able to analyze whether they can redress the federal injury as an entirely separate question.

The public trust also provides a different lens through which to view the relief provided by NEPA compliance. In a sense, the public trust creates an intangible right, contained in the relationship between the government defendant and the public plaintiff. In other contexts, too, the relationship between the plaintiff and the defendant can form a component of the injury, and consequently, a component of judicially cognizable relief. For instance, in a

248. 42 U.S.C. § 4331(b) (2012).

249. § 4332(C); *see* Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 756 (2004) (quoting NEPA's purposes and then explaining that "NEPA itself does not mandate particular results *in order to accomplish those ends*") (internal citation and quotation marks omitted) (emphasis added).

250. § 4331; *see supra* note 207–210 and accompanying text (discussing how Congress uses procedural incentives to produce aggregate results).

251. Blumm & Schaffer, *supra* note 231, at 429.

252. WildEarth Guardians v. U.S. Dep't of Agric., 795 F.3d 1148, 1158 (9th Cir. 2015).

trespass onto private property, the injury is determined not by physical damage, but by the relationship of the entering party to the landowner.[253] A party who enters uninvited commits a trespass, while an invited guest does not.[254] It seems uncontroversial that a property owner has standing to recover for a past trespass, or to enjoin an ongoing or future trespass, even if the owner later invites that same party onto the land.

In the context of NEPA and the public trust, the relationship is admittedly different, and the plaintiff's right is far weaker. NEPA does not give the public plaintiff the legal power to dictate the agency's ultimate action—the plaintiff cannot "exclude" the agency from utilizing those public resources. In effect, members of the public have vested the federal government with the decision to act, and potentially harm public trust resources, as part of the public trust.[255] But NEPA imposes a prerequisite of informed action on that decision: agencies must study and weigh the action's consequences to trust resources. Forcing compliance with this duty prevents unconsidered harm to trust resources that may impair a plaintiff's concrete interests. As with trespass, there is some measure of relief in compelling a change in the relationship between the plaintiff and defendant.

Acknowledging this change as sufficient for redressability may require a different type of "loosening redressability." As discussed above, courts have generally relaxed redressability by tolerating great uncertainty as to whether relief will occur in an individual case,[256] in deference to the structures that Congress has enacted.[257] This Note acknowledges that this approach to NEPA relief incorporates some novel elements and might meet resistance in some courts,[258] but argues that it should not be more problematic for standing

253. Restatement (Second) of Torts § 158 (1965) ("One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally [enters land in possession of the other].").

254. *Id.* ("Conduct which would otherwise constitute a trespass is not a trespass if it is privileged.").

255. The perceived strength of this delegation may vary with how directly one equates the public trust and NEPA. *See supra* note 231.

256. *See supra* Part III.B.

257. *See generally* Seidenfield & Akre, *supra* note 203 (arguing for judicial deference to statutory structure and purpose in applying standing).

258. In particular, some might question whether providing only this type of intangible relief renders the underlying injury insufficiently concrete. Yet in a recent decision, the Supreme Court reaffirmed that while a concrete injury "must actually exist," concrete is not "necessarily synonymous with 'tangible.'" Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548–49 (2016). Justice Alito, writing for a six-Justice majority, instructed that when "determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles." *Id.* at 1549. He repeatedly emphasized that the plaintiff could not "allege a bare procedural violation." *Id.* at 1549–50. At the same time, Justice Alito acknowledged that, in some cases, Congress creates a procedural right to protect against "the risk of real harm" such that "a plaintiff . . . need not allege any *additional* harm beyond the one Congress has identified." *Id.* It is far from certain how NEPA would fare in this inquiry. The *Spokeo* majority did not actually apply these principles to the facts at hand—a violation of the Fair Credit Reporting Act—but instead remanded the task to the lower court to determine the risk of harm associated with the alleged violation. *See id.* at 1550. However, unlike the credit-reporting statute, the

purposes than the extreme uncertainty that courts already tolerate in procedural standing.[259] In these NEPA third-party-replacement cases, recognizing federal public trust compliance as a component of relief is necessary to avoid barring judicial review of certain types of programs or projects that are within NEPA's scope. This adjustment appears less problematic when considering the plaintiff's view of the situation.

From the plaintiffs' perspective, the asserted replacement is unlikely to undermine their concrete, adverse stake—standing's ultimate concern.[260] If they do not litigate the issue, then the federal agency action they are contesting will certainly occur. If they successfully litigate, then the federal agency will have to conduct more analysis, during which the plaintiffs will have a chance to make their opinions heard, and the agency might ultimately modify or halt the action. Even if a third party claims that it will step in to replace the federal agency, that replacement is less certain than leaving the status quo in place.[261] Additionally, the plaintiffs may have a separate cause of action against the third party if replacement does occur.[262]

D. Practical Benefits and Costs to the Independent-Cause Framework

Substituting the independent-cause framework for replaceability would remove third-party replacement as a barrier to review of certain actions under NEPA. It would also simplify the standing determination in these cases. This subpart briefly considers how these changes would affect NEPA's functioning and consumption of judicial resources.

The independent-cause framework would more closely match the scope of judicial review to the scope of projects to which NEPA applies. The two primary recognized benefits of NEPA are (1) that it improves internal agency

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role of NEPA is not simply to report information, but to discover it in the first instance. Thus, courts have presumed that inadequate study of environmental impacts poses a real risk of harm to the area and resources affected by the project, and by extension, to any plaintiff with a sufficiently particularized and concrete interest in that area. The question of whether a third-party's potential action can make the harm no longer attributable to the federal agency is not one that *Spokeo* addresses. Still, *Spokeo* underscores that key relevant considerations remain unresolved amongst the Justices, such as the balance between "actual" and "abstract" injuries, as well as the proper weight to accord historical analogues and congressional intent when assessing a statutory violation.

259. *See supra* Part III.B.

260. Massachusetts v. EPA, 549 U.S. 497, 517 (2007) (citation and internal quotation marks omitted); *see also* Lujan v. Defs. of Wildlife, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring) ("[The concrete and personal injury] requirement is not just an empty formality. It preserves the vitality of the adversarial process by assuring that the parties before the court have an actual, as opposed to professed, stake in the outcome.").

261. *See supra* notes 126–130 and accompanying text (explaining the uncertainties in replaceability analysis). Moreover, the plaintiff's interest in litigating the case is likely to depend not just on the likelihood of a different outcome, but also on the importance of the concrete interest and the severity of the risks posed. The replaceability inquiry looks solely at certainty as a proxy for adversity.

262. *See* WildEarth Guardians v. U.S. Dep't of Agric., 795 F.3d 1148, 1158 (9th Cir. 2015).

decision making, and (2) that it facilitates external public participation.[263] Consistent judicial enforcement of NEPA in situations where agencies collaborate with third parties provides a greater incentive to agencies to thoroughly comply with NEPA in advance of any lawsuits, and also provides a greater possibility that a court will be able to rule on the adequacy of an agency's compliance. Thus, it should enhance NEPA's internal and external benefits in these areas.

By simplifying the standing inquiry, the independent-cause framework also focuses judicial resources on the merits of claims. Cases will be less likely to get bogged down in the lengthy preliminary issues that delayed Guardians' claim for three years.[264] Agencies who know their case is weak on the merits may also be more willing to comply with NEPA rather than litigate if they know that they cannot rely on the third-party replacement defense. Courts will also not have to confront difficult questions of evaluating the hypothetical conduct of parties not before the court, at least at the standing stage.[265]

However, it is worth noting that courts may still confront some elements of the replaceability analysis in determining the scope of NEPA's application. Often referred to as the "small handles" problem, this question concerns whether federal funding or authorization for part of a project subjects the entire project to NEPA.[266] This issue becomes particularly important where the impacts of the federal "handle" are too minimal to trigger an EIS, but the project as a whole would have significant impacts.[267] Although an evolving and uncertain area of law,[268] courts have generally analyzed small handles by looking at whether the federal agency exercises "sufficient control and responsibility" over the entire project.[269] Where the agency funds part of the project, the courts have looked to "the nature of the federal funds used and the extent of federal involvement."[270] This may involve looking at the proportion

263. *See* Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 768 (2004); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350–51 (1989).

264. Indeed, one commentator notes the analogous benefits from a clear and low bar for standing in Freedom of Information Act litigation. Kimberly N. Brown, *What's Left Standing? FECA Citizen Suits and the Battle for Judicial Review*, 55 U. KAN. L. REV. 677, 717 (2007) ("But the horribles expected to flow from an overbearing judiciary in the citizen-suit arena have not occurred with FOIA litigation. Aside from delays in administrative processing, the statute seems to work; one searches in vain for lower-court decisions addressing standing to bring a FOIA case. Once in court, the cases go right to the merits, without long and expensive preliminary litigation to divine injury within the meaning of conflicting Supreme Court case law.").

265. *See supra* Part I.C.

266. HOLLY DOREMUS ET AL., ENVIRONMENTAL POLICY LAW: PROBLEMS, CASES, AND READINGS 267 (6th ed. 2012).

267. *See, e.g.*, Sierra Club v. U.S. Army Corps of Eng'rs, 990 F. Supp. 2d 9 (D.D.C. 2013).

268. *See id.* at 33 (describing the small handles problem as a "dilemma that has vexed courts and commentators for some time").

269. *Id.* at 34 (quoting Winnebago Tribe of Neb. v. Ray, 621 F.2d 269, 273 (8th Cir. 1980)).

270. Ka Makani 'O Kohala Ohana Inc. v. Water Supply, 295 F.3d 955, 960–61 (9th Cir. 2002); *see also* Rattlesnake Coal. v. EPA, 509 F.3d 1095, 1101 (9th Cir. 2007) ("While significant federal funding can turn what would otherwise be a state or local project into a major federal action, consideration must

of federal funds and whether the project could, and would, continue without them—duplicating some of the problematic elements of the replacement inquiry.[271]

While this Note has proposed that third-party replacement should not protect a federal agency from having to consider the impacts of its own actions, it does not adopt a position as to how broadly those impacts extend in the small-handles context. Though the inquiries may overlap, the focus of this Note is aligning the scope of standing with the scope of NEPA, not extending or contracting NEPA's scope. Moreover, considering replaceability at the merits stage may still be justified, as courts may adopt a more stringent approach to the same issue when it arises from a merits, rather than a standing, question.[272] The current small-handles doctrine, then, acts as a moderating influence on the effects of the independent-cause framework. It serves as a filter against NEPA claims involving trivial federal contributions, limiting concerns that a lower bar for standing will waste judicial resources and hinder agency action.[273] But it also reduces the benefits of the framework in the subset of third-party cases where courts still have to conduct a replaceability-type inquiry.[274]

Although a lower bar for standing could facilitate the more efficient adjudication of an individual third-party case, a lower bar could also incentivize potential plaintiffs to bring more third-party cases, diminishing or even erasing the benefits to judicial economy. But relaxing standing will not necessarily flood the courthouse. As one scholar notes, citizen suits actually decreased

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be given to a great disparity in the expenditures forecast for the local and federal portions of the entire program.") (internal quotation marks omitted); Sierra Club v. U.S. Dep't of Agric., 777 F. Supp. 2d. 44, 61 (D.D.C. 2011) ("[F]ederal courts have in some instances looked to the proportion of federal funding to non-federal funding to determine whether there is major federal action."); Sancho v. U.S. Dep't of Energy, 578 F.Supp.2d 1258, 1267 (D. Haw. 2008) (holding that the contribution by a federal agency of $531 million toward a project did not constitute a major federal action because the funding represented less than 10 percent of the $5.84 billion project cost). In one of the third-party replacement cases discussed in Part I.C, *Sierra Club v. U.S. Fish and Wildlife Service*, 235 F. Supp. 2d 1109, 1121 (D. Or. 2002), the court found sufficient federal control based on the proportion of the federal contribution and ongoing oversight over the elk management study.

271. *See* sources in *supra* note 270. For an argument that looking at the proportional size of the federal handle leads to the anomalous result of allowing projects to escape NEPA review when they are larger and have greater environmental impacts, see Patrick A. Parenteau, *Small Handles, Big Impacts: When Do Corps Permits Federalize Private Development?*, 20 ENVTL. L. 747, 756–57 (1990).

272. *See, e.g.*, Ocean Advocates v. U.S. Army Corps of Eng'rs, 402 F.3d 846, 860 (9th Cir. 2004) ("[T]he causal connection put forward for standing purposes . . . need not be so airtight at this stage of the litigation as to demonstrate that the plaintiffs would succeed on the merits.") (quoting Ecological Rights Found. v. Pac. Lumber Co., 230 F.3d 1141, 1152 (9th Cir. 2000)).

273. *See* Karkkainen, *supra* note 12, at 917–19 (summarizing the extensive resources that go into an EIS and questioning its effectiveness).

274. In cases like *WildEarth Guardians v. U.S. Dep't of Agric.*, courts should be able to analyze the federal contribution separately because a certain portion of the predators killed can be traced directly to Wildlife Services. WildEarth Guardians v. U.S. Dep't of Agric., 795 F.3d 1148 (9th Cir. 2015). Small handles concerns only seem to dictate a replaceability analysis where the federal agency contributes to a single project, like a power plant. *See, e.g.*, Sierra Club v. U.S. Dep't of Energy, 825 F. Supp. 2d 142 (D.D.C. 2011). In the case of a power plant, it would be counterintuitive, and somewhat arbitrary, to trace only a portion of the plant's emissions to the federal contribution.

following *Friends of the Earth v. Laidlaw Environmental Services*,[275] despite some early predictions that its liberalization of standing would lead to an onslaught of citizen suits.[276] Certainly compared to *Laidlaw*'s broad reach,[277] imposing a categorical rule for the more limited set of third-party NEPA cases would not necessarily swing the courthouse doors wide open.

A related concern is that increased NEPA challenges will deter third parties from seeking to cooperate with the federal government. At a certain point, this could lead to the perverse result that fewer projects receive NEPA review.[278] However, the merits issue in third-party replacement has generally been the adequacy and the level of the agency's analysis, not whether the project is within NEPA's scope.[279] If third parties are already willing to become entangled with NEPA, despite its potential burdens,[280] then there must be significant incentives to seek federal contributions. These incentives could lessen the deterrent effect if a substantial increase in NEPA claims actually materializes. However, some deterrence may also be a necessary byproduct of NEPA's structure, which imposes a unique federal responsibility without seeking to regulate purely non-federal action.[281]

While these concerns are legitimate, they must be balanced against the benefits of correcting the misplaced emphasis on replaceability. The independent-cause framework avoids the need for courts to engage in an uncertain and fact-specific inquiry to predict a third party's hypothetical action. Moreover, it prevents federal agencies and courts from systematically shielding funding or other joint federal/non-federal programs from NEPA review.[282]

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275. Sakas, *supra* note 82, at 190. For a more thorough consideration of the functional effects of a lower standing threshold, see *id.* at 190–92.

276. *See* Friends of the Earth v. Gaston Copper Recycling Corp., 204 F.3d 149, 165 (4th Cir. 2000) (Hamilton, J., concurring) (writing separately to criticize *Laidlaw* for "unnecessarily open[ing] the standing floodgates").

277. *See* Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L & POL'Y F. 39, 39–41 (2001).

278. *Cf.* Kevin T. Haroff & Katherine Kirwan Moore, *Global Climate Change and the National Environmental Policy Act*, 42 U.S.F. L. REV. 155, 181 (2007) (suggesting that more stringent NEPA requirements for funding foreign projects may cause developing countries to seek sponsors from countries with less environmental review, leading to the perverse effect of less environmental scrutiny).

279. *See, e.g.*, *WildEarth Guardians*, 795 F.3d at 1152–53; Sierra Club v. U.S. Dep't of Energy, 825 F. Supp. 2d 142, 146 (D.D.C. 2011); Sierra Club v. U.S. Fish & Wildlife Serv., 235 F. Supp. 2d 1109, 1117 (D. Or. 2002).

280. *See* Karkkainen, *supra* note 12, at 917–19 (summarizing the burdens of the EIS).

281. *See supra* Part III.C.

282. The Ninth Circuit has expressed concern with this type of systematic shielding, finding standing to challenge programmatic rules because "if the agency action could only be challenged at the site-specific development stage, the underlying programmatic authorization would forever escape review." Citizens for Better Forestry v. U.S. Dep't of Agric., 341 F.3d 961, 973–74 (9th Cir. 2003) (quoting Idaho Conservation League v. Mumma, 956 F.2d 1508, 1516 (9th Cir. 1992)).

CONCLUSION

The independent-cause framework offers several advantages over the current replaceability approach. Primarily, it serves the purposes of NEPA by eliminating a gap between NEPA's coverage and judicial reviewability. Additionally, it provides certainty in third-party NEPA cases. In Guardians' case, it would have saved three years of litigation over a threshold issue that bears little relation to whether Wildlife Services has adequately informed itself and the public about the environmental impacts of its predator-management program. Under the replaceability approach, parties and courts will waste resources deciding whether an incrementally smaller federal contribution or a more convincing third-party statement distinguishes the case from *WildEarth Guardians*.

Perhaps most importantly, it fits better with notions of fairness and the ideal that the federal government should have a leading role as a guardian of natural resources, as expressed in section 101 of NEPA. When a federal agency shirks its duty to know the consequences of its actions by pointing at the potential actions of another party, it seems to abdicate that responsibility. In general, courts do not let parties escape responsibility by pointing to a co-offender. Under NEPA, the reason that the plaintiff cannot bring the third party in as co-defendant is because the third party is not subject to the same standard as the federal agency. The independent-cause framework provides a mechanism to actually hold the federal agency to that high standard.

All of this is not to say that standing is only an obstacle that must be removed. Standing serves an important role in protecting the courts' efficiency and integrity. But the ultimate goal of standing is to ensure that there are adverse parties with concrete interests.[283] This goal should guide the application of the three-part formula: when it systematically excludes those parties, adjustments are necessary. Although the independent-cause framework might require courts to consider some elements of redressability differently, it provides the best way to give effect to the unique elements of NEPA's statutory structure and purpose in third-party cases.

283. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 581 (Kennedy, J., concurring).