FEDERAL CIVIL PROCEDURE — STANDING — D.C. CIRCUIT RAISES PRUDENTIAL STANDING SUA SPONTE TO DISMISS REGULATORY CHALLENGE ON JURISDICTIONAL GROUNDS. — *Grocery Manufacturers Ass'n v. EPA*, 693 F.3d 169 (D.C. Cir. 2012), *reh'g en banc denied*, No. 10-1380 (D.C. Cir. Jan. 15, 2013).

Plaintiffs challenging a regulatory action generally must demonstrate two kinds of standing: constitutional and prudential. Constitutional standing requires that a plaintiff present a case or controversy within the court's Article III jurisdiction,[1] while prudential standing encompasses judicial considerations beyond that constitutional minimum.[2] Recently, in *Grocery Manufacturers Ass'n v. EPA*,[3] a divided D.C. Circuit panel rejected, on standing grounds, a challenge to the Environmental Protection Agency's (EPA's) grant of a partial waiver allowing fuel providers to introduce a new fuel into the American market. Although the EPA had not challenged plaintiffs' standing, the court reasoned that it had an "independent obligation" to consider standing[4] and that this mandatory analysis included both constitutional and prudential standing.[5] This case extends splits both within the D.C. Circuit and across other circuits as to whether prudential standing is a mandatory jurisdictional question. The D.C. Circuit or the Supreme Court should clarify this jurisprudence by adopting a separation of powers–focused approach under which courts assess whether an executive branch decision not to challenge a plaintiff's standing furthers the proper functioning of the three branches.

The Energy Policy Act of 2005[6] directs the EPA to promulgate regulations requiring that fuel suppliers meet escalating annual targets for the amount of renewable fuel they introduce into the American market.[7] In effect, the law requires suppliers to develop new, more renewable fuels.[8] But under the Clean Air Act,[9] suppliers introducing a substantially new fuel must obtain a waiver from the EPA affirming the fuel's compatibility with vehicles already on the road.[10]

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1 *See* U.S. CONST. art. III, § 2; Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

2 *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11–12 (2004).

3 693 F.3d 169 (D.C. Cir. 2012), *reh'g en banc denied*, No. 10-1380 (D.C. Cir. Jan. 15, 2013).

4 *Id.* at 174 (quoting Sierra Club v. EPA, 292 F.3d 895, 898 (D.C. Cir. 2002)).

5 *See id.* at 179.

6 Pub. L. No. 109-58, 119 Stat. 594 (2005) (codified in relevant part at 42 U.S.C. § 7545 (2006)).

7 *See* 42 U.S.C. § 7545(o)(2).

8 *Grocery Mfrs. Ass'n*, 693 F.3d at 172.

9 42 U.S.C. §§ 7401–7671.

10 *See id.* § 7545(f)(1)(B)(4). Motor vehicle models must be certified as compliant with federal emissions standards based on the fuels on the market at the time; the restriction on new fuels ensures that the EPA considers the compatibility of new fuels with existing vehicles. *Id.*

In March 2009, an ethanol industry association applied for such a waiver for a new ethanol-blend fuel.[11] The EPA took the novel approach of granting partial waivers, allowing the distribution of this fuel for use only in "light-duty motor vehicles" of model years 2001 and later.[12] Three affected industry associations petitioned the D.C. Circuit for review of the decision to grant partial waivers.[13]

The D.C. Circuit, hearing the case on direct review, dismissed the petitions.[14] Writing for a divided panel, Chief Judge Sentelle[15] held that no association had standing to challenge the EPA's partial waivers and dismissed for lack of jurisdiction.[16] Although the EPA had not challenged petitioners' standing,[17] Chief Judge Sentelle explained that courts have an "independent obligation to be sure of [their] jurisdiction" under Article III.[18]

Chief Judge Sentelle held that two petitioners (the engine manufacturers and the petroleum suppliers) failed the constitutional standing test,[19] which requires that a petitioner have suffered an "injury in fact" that is "fairly traceable" to the agency action, and that a favorable decision would be "likely" to remedy petitioner's injury.[20] He would have also held that the third association (the food producers) did not have constitutional standing,[21] but lacking a two-judge majority on this point,[22] he turned to prudential standing.

Applying the "zone of interests" test, Chief Judge Sentelle held that the food producers lacked prudential standing.[23] Under this test, the interest the petitioner seeks to protect through litigation must be "arguably within the zone of interests to be protected or regulated by the statute."[24] The food producers sought to protect the price of corn,

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[11] *Grocery Mfrs. Ass'n*, 693 F.3d at 173.

[12] Partial Grant of Clean Air Act Waiver Application Submitted by Growth Energy to Increase the Allowable Ethanol Content of Gasoline to 15 Percent, 76 Fed. Reg. 4662 (Jan. 26, 2011) (granting the second of two partial waivers and describing history of waiver process).

[13] *Grocery Mfrs. Ass'n*, 693 F.3d at 173.

[14] *Id.* at 172.

[15] Judge Tatel wrote a concurring opinion; Judge Kavanaugh dissented.

[16] *Grocery Mfrs. Ass'n*, 693 F.3d at 172.

[17] *See* Corrected Final Brief of Respondent at 1, *Grocery Mfrs. Ass'n*, 693 F.3d 169 (No. 10-1380) ("This Court has jurisdiction to review the timely-filed petitions challenging EPA's decisions under 42 U.S.C. § 7607(b)."). However, intervenor Growth Energy did raise the issue of petitioners' standing. *Grocery Mfrs. Ass'n*, 693 F.3d at 174.

[18] *Grocery Mfrs. Ass'n*, 693 F.3d at 174 (quoting Sierra Club v. EPA, 292 F.3d 895, 898 (D.C. Cir. 2002)) (internal quotation marks omitted).

[19] *Id.* at 175–78.

[20] *Id.* at 174 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)) (internal quotation marks omitted).

[21] *Id.* at 179 n.1.

[22] *See id.* at 180 (Tatel, J., concurring).

[23] *Id.* at 179 (majority opinion).

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

which could rise significantly with increased production of ethanol, a corn-based fuel.[25] While the Energy Policy Act (the statute setting fuel targets) did require the EPA to consider "food prices" when setting renewable-fuel-volume requirements,[26] Chief Judge Sentelle concluded that the Energy Policy Act was not the statute at issue.[27] Rather, the challenge concerned the EPA's authority to waive the restrictions on new fuel under the Clean Air Act,[28] which does not identify the price of food as an interest to be protected.[29] Accordingly, the food producers' concerns were outside the zone of interests protected by the statute, and the association lacked prudential standing.[30]

Judge Tatel, concurring, expressed his preference for the approach of other circuits that have held prudential standing nonjurisdictional.[31] But Judge Tatel concluded that the D.C. Circuit's "clear prior holdings that prudential standing is jurisdictional" tied his hands, leading him to join Chief Judge Sentelle's prudential standing analysis.[32]

In dissent, Judge Kavanaugh argued that neither constitutional nor prudential standing barred the petitioners. He would have held that two of the petitioners would suffer injuries and had constitutional standing: the food producers (because of the waiver's effect on food prices) and the petroleum suppliers (because market pressures would force them to carry the new fuel).[33]

Turning to prudential standing, Judge Kavanaugh found it dispositive that the EPA had not challenged standing,[34] pointing to three sources of authority to argue that precedent did not require treating prudential standing as jurisdictional. First, while Judge Kavanaugh acknowledged that the Supreme Court has yet to address this question directly, he argued that the Court's recent opinions make clear that it would hold prudential standing nonjurisdictional. Judge Kavanaugh noted that in *Tenet v. Doe*,[35] the Court stated that it could resolve prudential standing "before addressing jurisdiction," suggesting that it regarded these questions as distinct.[36] He also pointed to recent Su-

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[25] *Grocery Mfrs. Ass'n*, 693 F.3d at 179.

[26] 42 U.S.C. § 7545(o)(2)(B)(ii)(VI) (2006 & Supp. V 2011).

[27] *Grocery Mfrs. Ass'n*, 693 F.3d at 179.

[28] 42 U.S.C. § 7545(f)(4) (2006).

[29] *Grocery Mfrs. Ass'n*, 693 F.3d at 179.

[30] *Id.*

[31] *Id.* at 180 (Tatel, J., concurring).

[32] *Id.*

[33] *Id.* at 181 (Kavanaugh, J., dissenting).

[34] Had Judge Kavanaugh found that a prudential standing determination was appropriate, he would have held that the petroleum suppliers had prudential standing under the Administrative Procedure Act as a party regulated under the statutory provision at issue. *Id.*

[35] 544 U.S. 1 (2005).

[36] *Grocery Mfrs. Ass'n*, 693 F.3d at 184 (Kavanaugh, J. dissenting) (emphasis omitted) (quoting *Tenet*, 544 U.S. at 7 n.4) (internal quotation mark omitted).

preme Court cases (most notably *Reed Elsevier, Inc. v. Muchnick*[37]) urging lower courts to police more carefully the line between jurisdictional requirements and nonjurisdictional claim-processing rules.[38] Second, Judge Kavanaugh pointed to an emerging consensus in other circuit courts running contrary to the approach taken by the D.C. Circuit: six circuits, Judge Kavanaugh noted, have held since 1999 that prudential standing is a nonjurisdictional question that a defendant can forfeit.[39] Third, Judge Kavanaugh highlighted an internal split on this question within the D.C. Circuit: he cited four cases from the last decade in which the court distinguished between prudential standing and jurisdiction, and he characterized as "older cases" the cases cited by Judge Tatel as establishing a clear precedent.[40]

Advancing to the merits of the case, Judge Kavanaugh concluded that the EPA "ran roughshod over the relevant statutory limits" (which did not explicitly authorize a partial-waiver approach) in granting partial waivers from the Clean Air Act's restrictions on introducing new fuels.[41] Judge Kavanaugh would have granted the petition for review and vacated the EPA's waiver decision.[42]

This case leaves the D.C. Circuit's approach disputed and a circuit split unresolved. A subsequent D.C. Circuit panel or the Supreme Court should clarify this area of the law by adopting an approach that considers the executive branch's reasons for conceding prudential standing. While the courts should not simply defer to the executive on whether prudential standing should bar a challenge, it would nevertheless be consistent with the separation of powers principles underlying prudential standing to consider whether an executive branch decision to concede prudential standing respects the proper roles of the three branches, or instead is an attempt to advance the executive's own priorities at the expense of the other branches. The mandatory jurisdictional approach articulated by Judge Tatel and accepted by Chief Judge Sentelle would preclude such considerations and conflict with the separation of powers goals of prudential standing.

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[37] 130 S. Ct. 1237 (2010).

[38] *See Grocery Mfrs. Ass'n*, 693 F.3d at 185 n.4 (Kavanaugh, J., dissenting); *see also Reed*, 130 S. Ct. at 1243–44 ("Courts — including this Court — have sometimes mischaracterized claim-processing rules or elements of a cause of action as jurisdictional . . . . Our recent cases evince a marked desire to curtail such 'drive-by jurisdictional rulings.'" (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 91 (1998))).

[39] *See Grocery Mfrs. Ass'n*, 693 F.3d at 184–85 (Kavanaugh, J., dissenting).

[40] *Id.* at 185 n.4. Judge Tatel acknowledged the Supreme Court cases cited by Judge Kavanaugh, but dismissed them as "too thin a reed" given D.C. Circuit precedents. *Id.* at 180 (Tatel, J., concurring) (quoting *id.* at 184 (Kavanaugh, J., dissenting)) (internal quotation marks omitted).

[41] *Id.* at 190 (Kavanaugh, J., dissenting).

[42] *Id.* at 192.

This case leaves the federal courts divided, and the D.C. Circuit internally conflicted, over whether prudential standing is jurisdictional. Several other circuits[43] treat prudential standing as a nonjurisdictional question that courts may, but need not, raise sua sponte.[44] The D.C. Circuit decided this case against a backdrop of unclear and conflicting D.C. Circuit precedents, a clouded jurisprudence that this case has not fully resolved. Judge Tatel pointed to two 1994 D.C. Circuit cases stating that prudential standing is a nonwaivable jurisdictional question,[45] but Judge Kavanaugh cited several more recent D.C. Circuit cases distinguishing between prudential standing and jurisdiction.[46] Judge Tatel did not engage with these cases, and Chief Judge Sentelle did not directly address whether prudential standing is jurisdictional, although he did refer to prudential standing as a "jurisdictional issue[]."[47] While the most straightforward reading of this case on its own would be that it held prudential standing jurisdictional, future panels might find that Chief Judge Sentelle's lack of direct engagement on this question, and Judge Tatel's lack of engagement with recent precedents, counsel in favor of also considering circuit precedents taking the opposite view. This area of the law is thus ripe for clarification by the D.C. Circuit or the Supreme Court.

The principles underlying standing can provide guidance to the courts in clarifying prudential standing doctrine. The doctrine of standing is founded in concern for the separation of powers, and the Court has recognized the importance of standing doctrine in protecting

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[43] *See, e.g.*, Bd. of Miss. Levee Comm'rs v. EPA, 674 F.3d 409, 417–18 (5th Cir. 2012) ("[W]e have previously considered [prudential standing] *sua sponte* . . . [but] we decline to do so here." *Id.* at 418.); City of Los Angeles v. Cnty. of Kern, 581 F.3d 841, 845 (9th Cir. 2009) (explaining that, in the past, the court had "exercised [its] prerogative to 'deem' [prudential standing] waived" when not raised by defendants, but that "the permissive language in [its] caselaw . . . indicates that the choice to reach the question lies within [its] discretion"); Rawoof v. Texor Petrol. Co., 521 F.3d 750, 756–57 (7th Cir. 2008) ("[T]he court may raise an unpreserved prudential-standing question on its own, but unlike questions of constitutional standing, it is not obliged to do so." *Id.* at 757.); Finstuen v. Crutcher, 496 F.3d 1139, 1147 (10th Cir. 2007) ("We could therefore decline to address [prudential standing], as it was not raised in the court below."); Gilda Indus., Inc. v. United States, 446 F.3d 1271, 1280 (Fed. Cir. 2006) (explaining that the court did "not need to reach or decide" the standing question because the government waived that argument by not raising it in its brief); Am. Iron & Steel Inst. v. OSHA, 182 F.3d 1261, 1274 n.10 (11th Cir. 1999) (explaining that "prudential standing is flexible and not jurisdictional in nature").

[44] These circuits have not articulated a separation of powers rationale for this position.

[45] *See Grocery Mfrs. Ass'n*, 693 F.3d at 180 (Tatel, J., concurring) (citing Steffan v. Perry, 41 F.3d 677, 697 (D.C. Cir. 1994); Animal Legal Def. Fund, Inc. v. Espy, 29 F.3d 720, 723 n.2 (D.C. Cir. 1994)) (arguing that the court must follow "prior holdings that prudential standing is jurisdictional — no matter how much [it] may think those decisions are wrong").

[46] *See id.* at 185 n.4 (Kavanaugh, J., dissenting) (citing Am. Chiropractic Ass'n v. Leavitt, 431 F.3d 812, 816 (D.C. Cir. 2005); Toca Producers v. FERC, 411 F.3d 262, 265 n.* (D.C. Cir. 2005); Amgen, Inc. v. Smith, 357 F.3d 103, 111 (D.C. Cir. 2004)).

[47] *Id.* at 179 (majority opinion) (quoting Grand Council of the Crees (of Quebec) v. FERC, 198 F.3d 950, 954 (D.C. Cir. 2000)) (internal quotation mark omitted).

the executive branch from infringement by both Congress and the courts. First, the Court has ruled against congressional attempts to enlist the judiciary in monitoring the executive branch, holding that such efforts infringe upon the executive branch's duty to "take Care that the Laws be faithfully executed."[48] Second, the Court has explained that prudential standing ensures that the courts do not intrude into "abstract questions of wide public significance" that are properly resolved by the executive and legislative branches in a democratic society.[49] Further, the Court has recognized that certain executive branch decisions may deserve a level of insulation from litigation even greater than that accorded to congressional decisions because otherwise too great a share of federal activity would be subject to review by the courts.[50] Thus, the Court has recognized the importance of standing in protecting the political branches from infringement both by the courts and by each other. While constitutional standing cannot be altered absent a constitutional amendment, Congress or the courts may alter prudential standing,[51] such that it is possible to incorporate separation of powers goals into prudential standing more effectively.

Federal agencies frequently do not challenge the standing of plaintiffs challenging regulatory actions.[52] While this inaction may at times be simple oversight,[53] agencies may deliberately forfeit prudential standing objections or other procedural limitations for a number of

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[48] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992) (declining, in the constitutional standing context, "to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed'" (quoting U.S. CONST. art. II, § 3)); *see also* Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 493 (2008) ("From *Lujan* to the recent opinions from the Supreme Court and the D.C. Circuit in *Massachusetts v. EPA*, this concern for executive power emerges again and again." (footnotes omitted)).

[49] Warth v. Seldin, 422 U.S. 490, 500 (1975); *see also* Bennett v. Spear, 520 U.S. 154, 162 (1997) (noting that prudential standing is a "judicially self-imposed limit[] on the exercise of federal jurisdiction," *id.* (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)) (internal quotation marks omitted), which is "founded in concern about the proper — and properly limited — role of the courts in a democratic society," *id.* (quoting *Warth*, 422 U.S. at 498) (internal quotation marks omitted)).

[50] *See* Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 610 (2007) (plurality opinion) (declining to extend federal taxpayer standing to allow the assertion of Establishment Clause claims regarding executive expenditures, on the ground that such an extension "would effectively subject every federal action . . . to Establishment Clause challenge").

[51] *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 885 (1983) (noting that prudential standing is regarded as "subject to elimination by the Court or by Congress").

[52] *See* Cassandra Sturkie & Suzanne Logan, *Further Developments in the D.C. Circuit's Article III Standing Analysis: Are Environmental Cases Safe from the Court's Deepening Skepticism of Increased-Risk-of-Harm Claims?*, 38 ENVTL. L. INST. 10460, 10472 (2008).

[53] *See, e.g.*, Am. Immigration Lawyers Ass'n v. Reno, 199 F.3d 1352, 1357 (D.C. Cir. 2000) ("The government's brief contained nothing on third-party standing. Government counsel said at oral argument that there was no intention to waive an objection on this ground. Normally the proper method of preserving an argument on appeal is to make it.").

reasons. First, executive agencies might forfeit prudential standing to obtain an accelerated judgment on the merits.[54] For regulatory actions that an agency considers likely to face challenges, the agency might wish to obtain a final judgment that would allow it to raise an issue-preclusion defense in subsequent cases, rather than win one case on procedural grounds only to face further challenges. This approach would allow the agency to move forward with a regulatory action unclouded by legal uncertainty and would provide clarity to regulated parties. The executive would not be arrogating power to itself, but rather carrying out Congress's legislation through the speediest and least wasteful route possible.

The Department of Justice took an analogous approach in defending the constitutionality of the Patient Protection and Affordable Care Act.[55] Rather than seek a short-term victory by arguing for dismissal because the Tax Anti-Injunction Act (AIA)[56] bars preemptive challenges to taxes, the Department argued against dismissal on AIA grounds: "Congress would not have wanted to wait until after these interconnected provisions were implemented . . . for challenges to the constitutionality of the minimum coverage provision to be resolved."[57] Treating prudential standing as jurisdictional would prevent similar litigation strategies, prolonging the uncertainty for both the agency and regulated parties concerning the ultimate legality of a regulatory action.

In a case such as *Grocery Manufacturers Ass'n*, it is plausible that an executive agency might wish to obtain an accelerated judgment on a novel administrative action like the partial waiver, which was likely to face litigation because the statute did not explicitly authorize it. Such an approach would be in harmony with the proper functioning of the three branches, as the executive branch would effectively be inviting the judiciary to consider whether the executive was making proper use of the statutory authority delegated to it by Congress. If the partial waivers were not a proper use of the EPA's statutory authority (as Judge Kavanaugh would have held[58]), then dismissing the case on

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[54] *See Grocery Mfrs. Ass'n*, 693 F.3d at 186 n.5 (Kavanaugh, J., dissenting) (suggesting that the executive may deliberately cede standing "so as to permit or obtain a ruling on the merits").

[55] Pub. L. No. 111-148, 124 Stat. 119 (2010).

[56] 26 U.S.C. § 7421 (2006).

[57] Supplemental Brief for Appellees at 6–7, Liberty Univ., Inc. v. Geithner, 671 F.3d 391 (4th Cir. 2011) (No. 10-2347). The Department of Justice had argued for dismissal on AIA grounds in the court below, but changed its approach on appeal. *See id.* at 2; *see also* JEFFREY TOOBIN, THE OATH 270 (2012) (describing Acting Solicitor General Neal Katyal's decision not to pursue dilatory tactics as based in part on the significant costs federal agencies were already incurring in preparing to implement the law).

[58] *See Grocery Mfrs. Ass'n*, 693 F.3d at 190–92 (Kavanaugh, J., dissenting).

prudential standing grounds would further an arrogation of power by the executive.[59]

Second and relatedly, an administration might set a general policy of never challenging standing in cases where such a challenge would either delay an inevitable judgment on the merits or indefinitely insulate a decision from judicial review. For the reasons discussed above, such a policy would likely be in harmony with congressional intent.

Third and more problematically, an executive agency might decline to challenge prudential standing as a way of advancing policy goals it could not otherwise achieve. For instance, the Obama Administration, which has had difficulty furthering its environmental agenda through legislation,[60] might have welcomed a court order directing heightened EPA regulation, rather than raise a standing objection as the government did in *Massachusetts v. EPA*.[61] Similarly, the Carter Administration, after advocating for legislative broadening of standing,[62] consistently declined to challenge plaintiff standing in environmental litigation.[63] The courts should look skeptically on such motivations for conceding standing, as they present a case of the executive advancing policy preferences not necessarily shared by Congress.

In *Grocery Manufacturers Ass'n*, the D.C. Circuit panel splintered into three opinions that extended both the court's own intracircuit uncertainty and an intercircuit split. It is especially important for litigants in the circuit court that hears a large share of challenges to federal regulations to have clarity on when prudential standing will bar plaintiffs from suing the federal government, increasing the urgency of resolving this uncertainty through a subsequent D.C. Circuit panel or Supreme Court review. Clarifying this area of the law with a separation of powers–focused approach would avoid this decision's limits on judicial discretion while realizing the benefits of allowing the executive to concede prudential standing in certain cases.

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[59] Of course, a federal agency might also seek to forfeit prudential standing objections in order to allow what it considers to be a particularly weak case for challengers to proceed to a favorable judgment. In such a case, a court might find the agency's litigating strategy to be less focused on furthering the goals of Congress and establishing legal clarity, and therefore less worthy of deference.

[60] *See* Carl Hulse & David M. Herszenhorn, *Democrats Call Off Climate Bill Effort*, N.Y. TIMES, July 23, 2010, at A15.

[61] 549 U.S. 497 (2007).

[62] Jimmy Carter, Consumer Protection Legislation: Message to the Congress (Apr. 6, 1977), *in* 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JIMMY CARTER 575 (1977) (citing consumer protection goals in declaring support for "legislation which will give citizens broader standing to initiate suits against the government").

[63] *See* JEFFREY G. MILLER ET AL., INTRODUCTION TO ENVIRONMENTAL LAW 112 (2008).