

**New York Court of Appeals Holds that Claimant Under SEQRA
Must Show Special Injury to Establish Standing to Challenge
Environmental Assessment Performed by Local Agency**

Christopher P. Malloy

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CSA do not discover the "emotional ramifications of such abuse until years after the abuse occurred," the proposed "legislation would remove the barrier created by the . . . [strict accrual rule] in order to enable survivors of child sexual abuse to bring civil actions against their abusers."³¹

Under current New York law, adults who were sexually abused as children are often required to bring suit against their alleged abusers years before they are aware of the extent of psychological and emotional damage from which they suffer. Although the court in *Covenant House* recognized that such victims are afforded only an elusive opportunity to seek recompense from those who have abused them, the court was nonetheless bound by precedent to hold that any modification to the strict accrual rule should be left to the Legislature. The recent proposal to amend the CPLR by providing a discovery rule to the statute of limitations for victims of CSA suggests that the Legislature is responsive not only to the cries of CSA victims, who have been locked out of New York courts, but also to the judges who are bound by existing law to throw away the key. It is now incumbent upon the Legislature to enact the proposed amendment into law in order to prevent people who abuse children from using the law as a shield against those whom they have abused.

Melanie Mandery

New York Court of Appeals holds that claimant under SEQRA must show special injury to establish standing to challenge environmental assessment performed by local agency

Environmental policy acts such as the National Environmental Policy Act ("NEPA")¹ and New York's State Environmental Quality Review Act ("SEQRA")² require federal or state agencies³

³¹ Memorandum in Support of N.Y.S. 5461 (1991).

¹ 42 U.S.C. §§ 4321-4370c(a) (1988). The purpose of NEPA is to create a national policy of preventing damage to and promoting understanding of the environment. *Id.* § 4321. The Act mandates that federal, state, and local governments use all "practicable means" to further this policy. *Id.* § 4331(a); see also WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 697-704 (1977) (providing overview of NEPA's objectives); Neil Orloff, *SEQRA: New York's Reformation of NEPA*, 46 ALB. L. REV. 1128, 1129 (1982) (NEPA passed in response to "lack of attention by officials to environmental consequences of their decisions").

² N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117 (McKinney 1984 & Supp. 1991). Twenty-eight states have enacted environmental statutes modeled after NEPA (the so-

to evaluate and to factor into their decision-making the environmental impact⁴ of their proposed actions.⁵ The determination of

called "little NEPAs"); SEQRA is New York's version. See Orloff, *supra* note 1, at 1129. The stated purpose of SEQRA is similar to that of NEPA, i.e., to declare a state policy that will promote environmental awareness. N.Y. ENVTL. CONSERV. LAW § 8-0101. SEQRA mandates, inter alia, the following: that state policies and laws be interpreted with a view toward protection of the environment, *id.* § 8-0103(6); that environmental factors be considered together with social and economic factors in reaching decisions on proposed activities, *id.* § 8-0103(7); and that regulatory agencies focus on preventing damage to the environment, *id.* § 8-0103(9). For a discussion of the policy goals and mandates of SEQRA, see Langdon Marsh, *Symposium on the New York State Environmental Quality Review Act—Introduction—SEQRA's Scope and Objectives*, 46 ALB. L. REV. 1097, 1098-1105 (1982); Orloff, *supra* note 1, at 1130-32. See generally MICHAEL B. GERRARD ET AL., ENVIRONMENTAL IMPACT REVIEW IN NEW YORK (1990) (comprehensive analysis of SEQRA and related laws).

³ See N.Y. ENVTL. CONSERV. LAW § 8-0105(1)-(3) (McKinney 1984). SEQRA's broad definitions of state and local agencies encompasses virtually every governmental entity. *Id.* § 8-0105 commentary at 65 (McKinney 1984).

⁴ NEPA and SEQRA enforce their environmental policies by requiring that federal and state agencies comply with the environmental impact statement ("EIS") process. 42 U.S.C. § 4332(2)(C) (1988); N.Y. ENVTL. CONSERV. LAW § 8-0109 (McKinney 1984 & Supp. 1991). For an overview of the EIS process, see Peter R. Paden, *DEC's Part 617 Regulations, As Amended: A Guide to the Implementation of SEQRA*, 5 PACE ENVTL. L. REV. 51 *passim* (1987) (providing overview of EIS process under SEQRA); Fran Hoffinger, Comment, *Environmental Impact Statements: Instruments for Environmental Protection or Endless Litigation?*, 11 FORDHAM URB. L.J. 527, 531-38 (1983) (summarizing EIS process under NEPA).

SEQRA requires that an EIS be prepared before any agency action is taken that "may have a significant effect on the environment." N.Y. ENVTL. CONSERV. LAW § 8-0109(2) (McKinney 1984 & Supp. 1991) (emphasis added). "The threshold for requiring an EIS is relatively low and the standard for compliance is strict." *Save the Pine Bush, Inc. v. Planning Bd.*, 96 A.D.2d 986, 987, 466 N.Y.S.2d 828, 830 (3d Dep't), *appeal dismissed*, 61 N.Y.2d 668, 460 N.E.2d 230, 472 N.Y.S.2d 89, *appeal denied*, 61 N.Y.2d 602, 460 N.E.2d 231, 472 N.Y.S.2d 1025 (1983); see also [1991] 6 N.Y.C.R.R. § 617.11 (criteria for determining environmental significance). Certain types of actions, such as replacing an existing facility in kind or repaving an existing highway, are presumed to have no significant environmental effects. *Id.* § 617.13. As to other actions, an agency may make a determination that no significant environmental harm will result from its proposed action and issue a "negative declaration" to that effect, thus avoiding the necessity of preparing an EIS. See *id.* § 617.2(y) (defining negative declaration); *id.* § 617.6(g)(1)(ii) (determination of nonsignificance must be made to avoid EIS). In assessing the significance of environmental harm, the agency must take a "hard look" at the available information and set forth its findings in writing with a reasoned elaboration and reference to supporting documentation. See *id.* § 617.6(g)(2) (setting forth requirements for determining significance); *H.O.M.E.S. v. New York State Urban Dev. Corp.*, 69 A.D.2d 222, 232, 418 N.Y.S.2d 827, 832 (4th Dep't 1979) (discussing "hard look" standard for determining significance); see also Paden, *supra*, at 68-77 (discussing requirements for determining environmental significance); Donald S. Snider & Gerald M. Levine, *SEQRA: Declaration of Nonsignificance and Issuing a Negative Declaration*, N.Y. Sr. B.J., July 1986, at 42 *passim* (providing overview of negative declarations).

⁵ N.Y. ENVTL. CONSERV. LAW § 8-0105(4)-(5) (McKinney 1984) (defining actions governed by SEQRA). The definition encompasses activities directly undertaken by the agency

who should have standing⁶ to challenge the sufficiency of environmental assessments required under SEQRA and NEPA has been left to the courts, since neither act contains provisions for direct judicial review of such assessments.⁷ Under the traditional stand-

or supported or regulated by the agency and also includes decisions involving policy, regulations, and procedure-making, *id.*, as well as local laws, codes, ordinances, executive orders, and resolutions that may affect the environment. [1991] 6 N.Y.C.R.R. § 617.2(b).

⁶ See *Dairyalea Coop., Inc. v. Walkley*, 38 N.Y.2d 6, 9, 339 N.E.2d 865, 867, 377 N.Y.S.2d 451, 453-54 (1975) ("Whether a person seeking relief is a proper party to request an adjudication is an aspect of justiciability which must be considered at the outset of any litigation."); SIEGEL § 136, at 205 (issue of standing, though arising infrequently in New York, is "likely to be where administrative action is involved").

Under federal standing doctrine, in order to satisfy the constitutional restriction of judicial authority to "Cases and Controversies," a plaintiff must, at a minimum, show that he has suffered "injury in fact" fairly traceable to the defendant's actions. See *Allen v. Wright*, 468 U.S. 737, 750-51 (1975); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-16, at 114-24 (2d ed. 1988). Additional limits on standing are imposed for "prudential" reasons. *Allen*, 468 U.S. at 751-52. Standing to challenge administrative action is provided by § 10 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 (1988), to any person "adversely affected or aggrieved by agency action within the meaning of a relevant statute." *Id.* In *Association of Data Processing Serv. Org. v. Camp*, 397 U.S. 150 (1970), the Supreme Court held that, under the APA, a plaintiff must show injury in fact to an interest that is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 153.

New York has adopted the requirement that the plaintiff show injury in fact to an interest within the "zone of interests" of the relevant statute to establish standing to challenge state agency action. *Dairyalea*, 38 N.Y.2d at 9, 339 N.E.2d at 867, 377 N.Y.S.2d at 454; see also *New York State Builders Ass'n v. State*, 98 Misc. 2d 1045, 1049-50, 414 N.Y.S.2d 956, 959 (Sup. Ct. Albany County 1979) (plaintiff in SEQRA action must show actual injury within the zone of interests of SEQRA); *infra* note 8 (discussing zone of interests of SEQRA). See generally GERRARD ET AL., *supra* note 2, § 7.07 (standing in SEQRA litigation).

⁷ See Philip Weinberg, *A Powerful Mandate: NEPA and State Environmental Review Acts in the Courts*, 5 PACE ENVTL. L. REV. 1, 19 (1987). A number of federal statutes contain "citizen suit" provisions that expressly grant standing to "any person" to enforce the provisions of the statute. See, e.g., Clean Air Act, § 304, 42 U.S.C. § 7604(a) (1988). See generally RODGERS, *supra* note 1, at 75-89 (discussing citizen suit provisions in federal statutes). Several state environmental policy acts ("little NEPAs") contain provisions for citizen suits. See, e.g., Michigan Environmental Protection Act, MICH. COMP. LAWS § 691.1202(1) (1989) ("any person . . . may maintain an action . . . for the protection of the air, water and other natural resources . . . from pollution, impairment or destruction"); New Jersey Environmental Rights Act, N.J. STAT. ANN. § 2A:35A-4 (West Supp. 1991) (any person has standing to bring civil suit to enforce statutes or to restrain violation of regulations or ordinances designed to protect environment). New York rejected a proposed citizen suit bill that would have granted standing to "any person, whether or not aggrieved . . . to make timely intervention before any agency in any proceedings in which damage to the environment might be at issue." N.Y.S. 3618, 198th Sess. (1975), reprinted in [1975] N.Y. LEGIS. REC. & INDEX § 353; see also *Society of the Plastics Indus., Inc. v. County of Suffolk*, 77 N.Y.2d 761, 770-71, 573 N.E.2d 1034, 1039, 570 N.Y.S.2d 778, 783 (1991) (discussing reasons for rejection of bill).

ing analysis, the plaintiff must demonstrate "injury in fact" within the "zone of interests"⁸ protected by the statute. Courts employ this requirement to prevent pressure groups from misusing environmental statutes to obstruct government action and further their own economic goals.⁹ Recently, in *Society of the Plastics Industry, Inc. v. County of Suffolk* ("Plastics Society"),¹⁰ the New York Court of Appeals further limited the pool of complainants that can challenge agency compliance with SEQRA by requiring claimants to show that the agency action has caused them special injury, different in kind or degree from that suffered by the general public.¹¹

In *Plastics Society*, the plaintiffs, a Suffolk County manufacturer of fiberglass products and a trade organization representing the plastics industry, challenged a Suffolk County law banning the use of nonbiodegradable point-of-sale packaging (the "Plastics Law").¹² The plaintiffs alleged, inter alia, that the county legislature, in passing the law, had failed to comply with the requirements of SEQRA.¹³ The Plastics Law would require the substitu-

⁸ See Peter S. Cray, *Procedural Issues Under SEQRA*, 46 ALB. L. REV. 1211, 1211-23 (1982). Although social and economic interests are to be considered along with environmental concerns, N.Y. ENVTL. CONSERV. LAW § 8-0109(8) (McKinney 1984 & Supp. 1991), SEQRA was intended to protect the environment, see *supra* note 2, and only environmental injury will confer standing. See *Mobil Oil Corp. v. Syracuse Indus. Dev. Agency*, 76 N.Y.2d 428, 433, 559 N.E.2d 641, 644, 559 N.Y.S.2d 947, 950 (1990); see also *New York State Builders Ass'n*, 98 Misc. 2d at 1050, 414 N.Y.S.2d at 959 ("Economic injury . . . is not within the zone of interests and cannot serve as a basis for standing under the [SEQRA].").

⁹ See *Mobil Oil*, 76 N.Y.2d at 433-34, 559 N.E.2d at 644, 559 N.Y.S.2d at 950 (denying standing because only economic harm would result to oil company that may have to relocate facilities on account of challenged redevelopment plan); *Young v. Pirro*, 170 A.D.2d 1033, 1033-34, 566 N.Y.S.2d 177, 178 (4th Dep't 1991) (standing denied because only economic harm would result from loss of sales tax revenue to City of Syracuse); *New York Horse & Carriage Ass'n v. Council of the City of New York*, 169 A.D.2d 547, 547-48, 564 N.Y.S.2d 399, 400 (1st Dep't) (denying standing because potential harm to New York City's Central Park would not constitute cognizable injury to enable petitioner to challenge law regulating horse-drawn carriages), *appeal denied*, 78 N.Y.2d 851, 577 N.E.2d 60, 573 N.Y.S.2d 69 (1991).

¹⁰ 77 N.Y.2d 761, 573 N.E.2d 1034, 570 N.Y.S.2d 778 (1991).

¹¹ *Id.* at 774, 573 N.E.2d at 1041-42, 570 N.Y.S.2d at 785-86.

¹² Suffolk County, N.Y., [1988] N.Y. Local Laws 10-1988. Section 3 of the law prohibits retail food establishments from selling or conveying food "directly to ultimate consumers within the County of Suffolk unless such food is placed, wrapped, or packed in biodegradable packaging at the conclusion of a sales transaction for the sale of such food." *Id.*; see *Plastics Society*, 77 N.Y.2d at 765-66, 573 N.E.2d at 1036, 570 N.Y.S.2d at 780. For a discussion of local ordinances banning plastic packaging products, see Stephen M. Reck, Note, *The Expanding Environmental Consciousness of Local Government: Municipalities That Have Banned Styrofoam and the Legal Consequences*, 11 U. BRIDGEPORT L. REV. 127 *passim* (1990).

¹³ See *Plastics Society*, 77 N.Y.2d at 767, 573 N.E.2d at 1037, 570 N.Y.S.2d at 781; see

tion of biodegradable paper products in place of nonbiodegradable plastic products.¹⁴ Although this law was intended to reduce problems associated with solid waste disposal,¹⁵ opponents introduced evidence that the paper substitutes, when introduced into the waste stream, could create serious adverse consequences to the environment.¹⁶ These effects included increased truck traffic resulting from a greater volume of solid waste, as well as pollution of the ground water by chemicals released from the disintegrating biodegradable products.¹⁷ The plaintiffs alleged that the Suffolk County Legislature had failed to comply with SEQRA's mandate to take a "hard look" at the potential environmental effects of the proposed law¹⁸ and that an environmental impact statement ("EIS") should have been prepared before the law was enacted.¹⁹ Suffolk County moved to dismiss the plaintiffs' claims for lack of standing.²⁰ To support standing to sue, L. Wittman & Co., a local fiberglass products manufacturer,²¹ alleged, inter alia, that it would be injured by the increased truck traffic and the potentially polluted ground water.²² The Society of the Plastics Industry ("SPI"), a nationwide trade organization, expressed its members' commitment to the production of plastic products in an environmentally

also *supra* note 2 (discussing SEQRA requirements). The plaintiffs also challenged the Plastics Law on the grounds that the local law was preempted by state law, that the law violated the equal protection and due process clauses of the state and federal constitutions, and that it placed an undue burden on interstate commerce. *Plastics Society*, 77 N.Y.2d at 766-67, 573 N.E.2d at 1037, 570 N.Y.S.2d at 781. See generally Reck, *supra* note 12, at 140-59 (exploring possible challenges to laws banning plastic packaging products).

¹⁴ See *Plastics Society*, 77 N.Y.2d at 766, 573 N.E.2d at 1036, 570 N.Y.S.2d at 780.

¹⁵ *Id.* at 765-66, 573 N.E.2d at 1036, 570 N.Y.S.2d at 780.

¹⁶ *Id.* at 767-68, 573 N.E.2d at 1037, 570 N.Y.S.2d at 781.

¹⁷ *Id.* at 767, 573 N.E.2d at 1037, 570 N.Y.S.2d at 781. The intent of the Plastics Law is to replace nonbiodegradable plastics with paper and biodegradable plastic products. Since recyclers prefer "clean paper," generally either office waste or newspaper, the paper food wrappers would probably not be recycled. The result would be an increase in the amount of solid waste produced in the county and a consequent increase in the truck traffic required to transport the additional solid waste to the landfills. Once in the landfills, the paper wrappings would disintegrate, releasing chemicals into the landfill, with the resultant risk of seepage into the Magothy aquifer, Long Island's sole source of drinking water. *Id.*

¹⁸ See *supra* note 4 (environmental impact evaluation).

¹⁹ Suffolk County had classified the Plastics Law as an unlisted action under SEQRA, having no significant environmental effects and therefore not requiring an EIS. *Society of the Plastics Indus., Inc. v. County of Suffolk*, 154 A.D.2d 179, 182, 552 N.Y.S.2d 138, 140 (2d Dep't 1990), *rev'd*, 77 N.Y.2d 761, 573 N.E.2d 1034, 570 N.Y.S.2d 778 (1991).

²⁰ *Plastics Society*, 77 N.Y.2d at 768, 573 N.E.2d at 1038, 570 N.Y.S.2d at 782.

²¹ *Id.* at 776, 573 N.E.2d at 1043, 570 N.Y.S.2d at 787.

²² *Id.* at 767-68, 573 N.E.2d at 1037, 570 N.Y.S.2d at 781.

sound manner and identified potential environmental injuries to its Suffolk County members.²³

The Supreme Court, Suffolk County, upheld the plaintiffs' standing,²⁴ determined that Suffolk County had violated SEQRA, and stayed implementation of the Plastics Law pending preparation of an EIS.²⁵ The Appellate Division, Second Department, affirmed the supreme court's findings and vacated the Plastics Law *ab initio*,²⁶ stating that the Suffolk County Legislature had ignored significant evidence of potential environmental harm, in clear violation of SEQRA.²⁷

A divided Court of Appeals reversed, dismissing the plaintiffs' SEQRA claims for lack of standing.²⁸ Writing for the majority, Judge Kaye determined that the lead plaintiff, SPI, "plainly" did not have standing to maintain a SEQRA challenge.²⁹ To establish standing to sue on behalf of its members, Judge Kaye noted that an association must demonstrate that the interests it asserts are germane to its purpose.³⁰ SPI had sought to protect its members' rights "themselves to be free of any adverse effects a local law might have on their own immediate environment," a matter bearing no relation to SPI's concerns as a nationwide trade organization.³¹

The majority of the court decided that L. Wittman & Co., the only remaining plaintiff, had failed to demonstrate that it would suffer injury "different in kind or degree" from that suffered by the public at large and, therefore, lacked standing to sue.³² The court determined that the impact of the law would fall on those residing closest to the points of disposal.³³ Harmful effects from

²³ *Id.*

²⁴ *Id.* at 768, 573 N.E.2d at 1037-38, 570 N.Y.S.2d at 781-82.

²⁵ *Id.*

²⁶ *Society of the Plastics Indus., Inc. v. County of Suffolk*, 154 A.D.2d 179, 183, 552 N.Y.S.2d 138, 141 (2d Dep't 1990), *rev'd*, 77 N.Y.2d 761, 573 N.E.2d 1034, 570 N.Y.S.2d 778 (1991).

²⁷ *Id.*

²⁸ *Plastics Society*, 77 N.Y.2d at 768, 573 N.E.2d at 1038, 570 N.Y.S.2d at 782.

²⁹ *Id.* at 776, 573 N.E.2d at 1043, 570 N.Y.S.2d at 787.

³⁰ *Id.* at 776, 573 N.E.2d at 1043, 570 N.Y.S.2d at 787. When an organization is the petitioner, it must satisfy three requirements in order to establish standing: (1) one or more of its members must have standing; (2) it must demonstrate that the interests it is asserting are germane to its purpose; and (3) the participation of the individual members must not be necessary. *Id.* at 775, 573 N.E.2d at 1042, 570 N.Y.S.2d at 786.

³¹ *Id.* at 776, 573 N.E.2d at 1043, 570 N.Y.S.2d at 787.

³² *Id.* at 778, 573 N.E.2d at 1044, 570 N.Y.S.2d at 788.

³³ *Id.*

the increased volume of solid waste flowing into the landfills would be greatest near the landfills, and any harm resulting from increased truck traffic to and from the landfills would fall on those near this traffic.³⁴ Thus, these residents would be able to show the required "special or differentiating harm."³⁵ Denying standing to these plaintiffs would therefore not have the effect of immunizing the governmental action from judicial review.³⁶ Finally, noting that the plaintiffs' ultimate interests in challenging the law were economic rather than environmental,³⁷ the court suggested that judicial review should be limited when pressure groups seek to use remedial legislation, such as SEQRA, to obstruct government action.³⁸

Judge Hancock, in a dissent joined by Judges Simons and Titone,³⁹ argued that the use of the special injury requirement is limited to cases in which the environmental harm would be site-specific⁴⁰ and asserted that there was no support in the record for the majority's characterization of the alleged environmental effects as "localized."⁴¹ In addition, the dissent disagreed with the majority's suggestion that the plaintiffs' economic interests were relevant to the standing analysis and maintained that the only issue is whether the plaintiff established environmental harm.⁴²

It is submitted that the special injury requirement imposed by the Court of Appeals has effectively closed the courts for review of significant environmental issues and is not necessary to prevent the misuse of the statute by pressure groups. It is further asserted that when evaluating a plaintiff's standing under SEQRA, courts should focus on the legitimacy of the environmental claims rather than the ulterior motives behind the suit.

³⁴ *Id.* at 778-79, 573 N.E.2d at 1044, 570 N.Y.S.2d at 788.

³⁵ *Id.* at 779, 573 N.E.2d at 1044, 570 N.Y.S.2d at 788.

³⁶ *Id.* Since this case presented a "large pool of potential plaintiffs" who could allege the special injury necessary for standing, the court decided that it "need not . . . reach the issue whether, in instances where solely general harm would result from a proposed action, a plaintiff would have standing to raise a SEQRA challenge based on potential injury to the community at large." *Id.*

³⁷ *Id.* at 777, 573 N.E.2d at 1043-44, 570 N.Y.S.2d at 787-88.

³⁸ *Id.* at 779, 573 N.E.2d at 1045, 570 N.Y.S.2d at 789.

³⁹ *Id.* at 794, 573 N.E.2d at 1054, 570 N.Y.S.2d at 798 (Hancock, J., dissenting).

⁴⁰ *Id.* at 787-88, 573 N.E.2d at 1050, 570 N.Y.S.2d at 794 (Hancock, J., dissenting).

⁴¹ *Id.* at 791, 573 N.E.2d at 1052, 570 N.Y.S.2d at 796 (Hancock, J., dissenting). Judge Hancock argued that the Plastics Law is not a regulation of landfills; the potential contamination of drinking water is a threat to every resident. *Id.*

⁴² *Id.* at 791-92, 573 N.E.2d at 1053, 570 N.Y.S.2d at 797 (Hancock, J., dissenting).

The special injury requirement is at odds with federal standing doctrine⁴³ and represents a new and unfavorable development in New York's law on standing to challenge compliance with SEQRA.⁴⁴ The special injury requirement creates the possibility

⁴³ See *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688 (1973). "To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody." *Id.*

To establish standing to challenge agency action under NEPA, injury in fact requires "simple allegations that plaintiff[s] . . . use the land or resources affected by agency action." Katherine B. Steuer & Robin L. Juni, Note, *Court Access for Environmental Plaintiffs: Standing Doctrine in Lujan v. National Wildlife Federation*, 15 HARV. ENVTL. L. REV. 187, 194 (1991) (analyzing *SCRAP* and *Sierra Club v. Morton*, 405 U.S. 727 (1972)). Under federal doctrine, in order to survive summary judgment, a plaintiff must establish that the agency action affects him in some *specific* manner. *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177, 3187-88 (1990). Thus, a conclusory allegation of injury arising from the use of large tracts of land potentially affected by agency action was insufficient to establish standing. *Id.*; see also Steuer & Juni, *supra*, at 187 (nexus required between agency action and land used by plaintiff).

The federal courts deny standing to assert "generalized grievances," *Warth v. Seldin*, 422 U.S. 490, 499 (1975), but in the sense that abstract or ideological injuries do not amount to injury in fact for standing purposes. See *TRIBE*, *supra* note 6, § 3-17, at 124-29.

⁴⁴ *Plastics Society*, 77 N.Y.2d at 785-88, 573 N.E.2d at 1048-50, 570 N.Y.S.2d at 792-94 (Hancock, J., dissenting). The dissent points out a number of cases in which plaintiffs alleging harm common to the general public were allowed to sue. *Id.*; see also *Industrial Liaison Comm. v. Williams*, 131 A.D.2d 205, 521 N.Y.S.2d 321 (3d Dep't 1987), *aff'd*, 72 N.Y.2d 137, 527 N.E.2d 274, 531 N.Y.S.2d 791 (1988). The plaintiff in *Industrial Liaison* had standing even though it asserted "speculative" injury resulting merely from its "use" of potentially polluted surface waters. *Id.* at 210, 521 N.Y.S.2d at 324-25. The New York Court of Appeals affirmed without addressing the plaintiff's standing. *Industrial Liaison Comm. v. Williams*, 72 N.Y.2d 137, 527 N.E.2d 274, 531 N.Y.S.2d 791 (1988). Similarly, the holding in *Plastics Society* is at odds with the policy announced by the Court of Appeals in 1974: that disposing of land-use disputes over questions of standing is inconsistent with the rules of standing in other fields. *Douglaston Civic Ass'n v. Galvin*, 36 N.Y.2d 1, 6, 324 N.E.2d 317, 320, 364 N.Y.S.2d 830, 834 (1974); see also *Dairylea Coop., Inc. v. Walkley*, 38 N.Y.2d 6, 10, 339 N.E.2d 685, 689, 377 N.Y.S.2d 451, 455 (1975) ("The increasing pervasiveness of administrative influence on daily life on both the State and Federal level necessitates a concomitant broadening of the category of persons entitled to a judicial determination as to the validity of proposed action."); *Plastics Society*, 77 N.Y.2d at 793-94, 573 N.E.2d at 1054, 570 N.Y.S.2d at 798 (Hancock, J., dissenting) (court's ruling is counter to established policy).

Plastics Society is the first case in which the Court of Appeals has denied standing to challenge compliance with SEQRA based on failure to show special injury. The dissent in *Plastics Society* argued that the court's earlier statement in *Mobil Oil Corp. v. Syracuse Indus. Dev. Agency*, 76 N.Y.2d 428, 559 N.E.2d 641, 559 N.Y.S.2d 947 (1990), to the effect that special injury was required for standing to challenge SEQRA compliance, *id.* at 433, 559 N.E.2d at 644, 559 N.Y.S.2d at 950, was based on the plaintiff's failure to allege *any* environmental harm, which was not the case here. See *Plastics Society*, 77 N.Y.2d at 791 n.8, 573 N.E.2d at 1052 n.8, 570 N.Y.S.2d at 796 n.8. (Hancock, J., dissenting); *cf. id.* at 774-75 & n.1, 573 N.E.2d at 1046 & n.1, 570 N.Y.S.2d at 786 & n.1. In *HAR Enters. v. Town of Brookhaven*, 74 N.Y.2d 524, 548 N.E.2d 1289, 549 N.Y.S.2d 638 (1989), the court held that the owner of property that is the subject of agency action is presumptively aggrieved and

that relatively fewer parties will have standing as the number of parties injured by agency action multiplies.⁴⁵ In addition, application of a special injury standard creates a paradox: the plaintiff must first demonstrate to the court that the potential environmental harm threatens him to a greater degree than the public at large before he may obtain the relief requested—that the agency must investigate the extent of this harm.⁴⁶

Although deeply rooted in public nuisance doctrine,⁴⁷ this special injury requirement has been criticized and, in some cases, phased out of this area of the law in order to allow private enforcement of public environmental interests.⁴⁸ The *Plastics Society*

need not show special injury. *Id.* at 529, 548 N.E.2d at 1293, 549 N.Y.S.2d at 642. *But see* New York Horse & Carriage Ass'n v. Council of the City of New York, 169 A.D.2d 547, 547-48, 564 N.Y.S.2d 399, 400 (1st Dep't) (environmental impact on Central Park not an injury different in kind from that suffered by community generally), *appeal denied*, 78 N.Y.2d 851, 577 N.E.2d 60, 573 N.Y.S.2d 69 (1991); Big V Supermarkets v. Town of Wallkill, 154 A.D.2d 669, 669-70, 546 N.Y.S.2d 668, 669-70 (2d Dep't 1990) (distance from plaintiffs' property to proposed shopping center creates no inference of injury in fact).

⁴⁵ See *supra* notes 39-41; *Plastics Society*, 77 N.Y.2d at 788-89, 573 N.E.2d at 1050-51, 570 N.Y.S.2d at 794-95; David R. Hodas, *Private Actions for Public Nuisance: Common Law Citizen Suits for Relief from Environmental Harm*, 16 *ECOLOGY L.Q.* 883, 891 (1989) (illogical and dangerous to retain rule that produces less liability as harm becomes more widespread). The *Plastics Society* court expressly reserved the question of standing to challenge actions that affect the public in a purely indiscriminate manner. 77 N.Y.2d at 781, 573 N.E.2d at 1046, 570 N.Y.S.2d at 790. It is not clear what constitutes indiscriminate harm nor is it clear whether plaintiffs suffering from indiscriminate harm should be allowed access to the courts. See *id.* at 769, 573 N.E.2d at 1038, 570 N.Y.S.2d at 782. (issue of wide public concern can be addressed by legislatures).

In *Motor Vehicle Mfrs. Ass'n, Inc. v. Jorling*, 577 N.Y.S.2d 346 (Sup. Ct. Albany County 1991), the plaintiffs challenged a regulation that would require all new motor vehicles sold in New York state to comply with stricter "California" emissions standards. *Id.* at 347. The plaintiffs alleged that the new emissions standard could increase ozone and carbon monoxide pollution levels and that as landowners they would suffer injury. *Id.* at 349-50. The court granted standing to the plaintiffs, concluding that the potential air pollution would be "entirely indiscriminate in effect," and as such, the special injury requirement was inapplicable. *Id.*

⁴⁶ William A. Fletcher, *The Structure of Standing*, 98 *YALE L.J.* 221, 259 & n.179 (1988). The paradox explained in the text arises to an extent out of the injury in fact requirement for standing. By requiring injury different in kind or degree from the public at large, this effect is exacerbated. *Id.*

⁴⁷ William L. Prosser, *Private Action for Public Nuisance*, 52 *VA. L. REV.* 997, 1005 (1966) (tracing rule to 1536). This requirement was imposed on the standing doctrine because, *inter alia*, the duty to enforce the law was properly left to the king (or state), and normally the interference with the public at large was petty or trivial. The special injury requirement also promotes the interest in preventing multiple suits arising from the same acts. *Id.* at 1007.

⁴⁸ See *Akau v. Olohana Corp.*, 652 P.2d 1130, 1133 (Haw. 1982) (plaintiff without special injury had standing as long as injury in fact could be demonstrated); Hodas, *supra* note

court contended that denying standing to these plaintiffs was consistent with the policy of limiting challenges by pressure groups seeking to delay governmental action in order to further their own economic interests.⁴⁹ If applied uniformly, however, the added special injury requirement will also bar environmentally concerned groups.⁵⁰ The court may be interested in granting standing more freely to claimants who have purely environmental interests,⁵¹ but this objective can be accomplished more fairly by relaxing standards for environmental groups⁵² rather than barring legitimate claims of environmental harm by claimants with economic interests at stake as well.⁵³

The special injury requirement creates the possibility that state agency action with potentially damaging effects on New York's parks, forests, beaches, and water supply can elude review. It is suggested that the *Plastics Society* court erred in denying standing to the ordinary citizen who uses these resources and who may be aggrieved by area-wide rather than localized environmental

45, at 888-903. The potential for widespread harm resulting from modern environmental nuisances outweighs the policy reasons for the special injury requirement. *See id.* at 884-85; *supra* note 42 (discussing *Plastics Society* dissent). The courts have at their disposal other methods of limiting the multiplicity of lawsuits that can arise out of a public nuisance, including joining the plaintiffs as a class or imposing sanctions for frivolous lawsuits. Hodas, *supra* note 45, at 889.

⁴⁹ *Plastics Society*, 77 N.Y.2d at 779, 573 N.E.2d at 1045, 570 N.Y.S.2d at 789; *see also supra* note 9 and accompanying text (discussing instances in which groups were denied standing).

⁵⁰ *See, e.g.,* Otsego 2000, Inc. v. Planning Bd., 171 A.D.2d 258, 575 N.Y.S.2d 584, 585 (3d Dep't 1991) (denying standing to environmental conservation group who failed to show any members suffered special injury).

⁵¹ *Plastics Society*, 77 N.Y.2d at 793, 573 N.E.2d 1053-54, 570 N.Y.S.2d at 797-98 (Hancock, J., dissenting) (if majority suggests that new rule might not apply to groups with "pure" environmental interests, it has not explained why remedy should be foreclosed merely because plaintiff has economic interest).

⁵² *See* Jeanne A. Compitello, Comment, *Organizational Standing in Environmental Litigation*, 6 *TOURO L. REV.* 295, 296 (1990) (standing should be granted to environmental groups to protect public's interest); RESTATEMENT (SECOND) OF TORTS § 821(C) (1977) (standing should be given to representative of general public to enjoin or abate public nuisance).

⁵³ *See* Motor Vehicle Mfrs. Ass'n, Inc. v. Jorling, 577 N.Y.S.2d 346 (Sup. Ct. Albany County 1991). In *Motor Vehicle Mfrs.*, the plaintiffs, including Chrysler Corp., Ford Motor Co., General Motors Corp., and Bob Johnson Chevrolet, were granted standing to challenge, on environmental grounds, an automobile emissions regulation. *Id.* at 350. Although these plaintiffs seemed to be the type of economically interested parties to whom the *Plastics Society* court would have denied judicial review, the supreme court focused instead on the claimant's environmental injuries and allowed them to challenge the regulation. *Id.* at 349-50; *see also supra* note 45 (discussing *Motor Vehicle Mfrs.*).

harm. It is further suggested that a standing doctrine which requires the claimant to establish only "injury in fact" rather than "special injury" will be adequate to eliminate frivolous claims of environmental injury while ensuring that clear violations of SEQRA do not go unpoliced. New York claimants, especially those with economic interests at stake, who have suffered environmental harm but cannot demonstrate special injury, may not be able to challenge the agency action causing this harm. As a practical matter, environmental groups intending to challenge agency actions must be careful to identify members who have suffered special injury.⁵⁴

Christopher P. Malloy

New York Court of Appeals holds that court may look beyond four corners of complaint to determine insurance company's duty to defend

Traditionally, when determining the sufficiency of pleadings on a motion to dismiss,¹ New York courts examine the allegations set forth within the "four corners of the complaint."² As long as allegations in the complaint state a valid cause of action, the motion to dismiss will fail.³ Similarly, an insurer's obligation to de-

⁵⁴ Implementation of the Suffolk Lantz Plastics Law is expected to begin early in 1992. See John Barbanel, *Suffolk County's Ban on Plastics Loses Allies*, N.Y. TIMES, Dec. 31, 1991, at A1. The decision to implement the law was made despite requests from the New York State Department of Environmental Conservation to delay enforcement of the law pending a study of its potential impact on Long Island's garbage disposal pollutants. *Id.* Environmentalists and plastics industry representatives alike question whether the law will have a positive impact on Suffolk's solid waste disposal problems, and small business owners and supermarket chains are concerned about the law's potential adverse affects on the economy. *Id.*

¹ See CPLR 3211 (McKinney 1970 & Supp. 1991); see also SIEGEL §§ 257-258, at 387-89 (discussing motion to dismiss for failure to state cause of action); 4 WK&M ¶ 3211.29 (same).

² See, e.g., *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 372 N.E.2d 17, 20, 401 N.Y.S.2d 182, 185 (1977) (stating that sole determining factor in deciding motion to dismiss is whether allegations in complaint state cause of action); *Foley v. D'Agostino*, 21 A.D.2d 60, 64-65, 248 N.Y.S.2d 121, 126-27 (1st Dep't 1964) (same).

³ See *Meyers & Sons Corp. v. Zurich Am. Ins. Group*, 74 N.Y.2d 298, 302, 545 N.E.2d 1206, 1208, 546 N.Y.S.2d 818, 820 (1989); *Guggenheimer*, 43 N.Y.2d at 275, 372 N.E.2d at 20, 401 N.Y.S.2d at 185. In *Guggenheimer*, the Court of Appeals explained that "[i]nitially, the sole criterion [in determining whether a motion to dismiss should be granted] is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for