



Animals and "Standing to Sue"

In both the federal and state judicial systems, not just anyone can start a lawsuit against either a private party or the government. Generally speaking, the person (or entity) who would sue (the plaintiff) must have some connection with the grievance and with whomever the lawsuit is directed against (the defendant). This requirement is characterized as "standing to sue."

For about the past 50 years, the Supreme Court of the United States for the federal system, and the highest courts of the states for the non-federal system, have crafted increasingly complex rules to regulate "standing to sue." These rules are of crucial importance to would-be litigants, because they control no less than access to the courts.

In brief, for an individual, a group, or an organization to possess "standing to sue" - to be able to get into court and ask that it resolve the alleged dispute - the plaintiff must have suffered (or soon will suffer) some injury reasonably caused by the defendant, an injury that will be redressed if the plaintiff wins in court. The corollary of this "standing" requirement is that the plaintiff usually can't raise the claims of others (though there are exceptions), the plaintiff can't raise claims that are common to everyone else (e.g., taxpayers; though, again, there are exceptions), and the plaintiff can't sue for violation of a statute unless he (or it) is someone intended by the statute to be protected or otherwise affected.

These "standing to sue" requirements, as difficult to understand and apply in "normal" cases, have become all the more problematic since the 1950s when activists of all kinds - e.g., civil rights, abortion, anti-war, gun control, censorship - have turned from the legislatures to the courts to implement their agendas, be they political, moral, social, economic, or whatever.

In no area has the "standing to sue" problem proved more thorny than that of "Animal Rights."

The seminal case that raised the "standing to sue" issue on behalf of animals - *Jones v. Butz*, involved the federal Humane Slaughter Act. In essence, the law provided that before a livestock animal could be slaughtered at the end of a production line down which it was carried, the animal first had to be "rendered insensible" to pain by a "single blow" or similar means that was "rapid and effective." The intention was that from its

first moments on the killing floor until it was dead, the livestock animal would be unconscious and thus free of mental and physical pain.

While the statute was working its way through Congress, organized Jewish groups objected to the "render insensible" requirement. They contended that Jewish law prohibited the slaughter (by a ritual cutting of the animal's carotid artery) of an animal that was unconscious. Enlisting the help of New York's United States Senator Jacob Javits, and New Jersey's United States Senator Clifford Case, the lobbyists were able to have the proposed law amended. The Javits-Case amendment provided that if a livestock animal was to be killed at the end of the production line by a ritual Jewish throat cut (rather than some other way), the animal was exempted from the "render insensible" requirement that applied, for humane reasons, to all other animals who were to be killed differently. The net result of the amendment, then, was to allow the exempted animals to enter the killing floor, be shackled by a chain attached to a rear leg, be hoisted off the floor upside down, be conveyed to the other end of the slaughterhouse - *all the while conscious, horrifically fearful, and in tremendous physical pain* - and there have their throats cut.

Obviously, to advocates of Animal Rights, this treatment of sentient beings was obscene in the extreme, especially in light of the principal provisions of the federal Humane Slaughter Law, which aimed at alleviating the suffering of livestock animals destined to become human food. Equally objectionable was the Javits-Case amendment which made that treatment possible.

What to do?

Lawyers for the Animal Rights activists hit upon a theory to attack the abuse of the to-be-ritually-killed livestock animals: the amendment violated the Religion Clauses of the First Amendment because in providing an exemption to a law of general application for religious reasons, a prohibited "establishment of religion" occurred, and in obliging certain people to consume meat slaughtered in accordance with Jewish ritual practices the amendment violated their right to the "free exercise" of their own religion.

But who could sue?

The Animal Rights lawyers cobbled together a coalition of various plaintiffs, representing a wide spectrum of interests.

According to their "standing to sue" brief filed in the United States District Court for the Southern District of New York, "There are six individual and three organization plaintiffs here. In all - sometimes by themselves, and sometimes in combination - they present at least seven entirely separate and distinct interests, any one of which, it is alleged, suffices to satisfy the Supreme Court's requirement . . . for standing to challenge an unconstitutional statute. There are those who have given up eating livestock meat entirely: Landek, because she cannot ascertain at the consumer level whether the meat she might purchase came from a ritually slaughtered animal who was shackled and hoisted while conscious; Jones, who on ethical grounds is opposed to eating meat. There are those - Steinberg, Weiss, and Buick - who are faced with the dilemma of wanting to eat meat but having to risk violating their ethical, moral and/or religious beliefs because

they are unable to ascertain at the consumer level the meat's source, including Holohan who will probably cease eating meat if this action is unsuccessful. There are those who are non-Jews - Steinberg, Weiss, Buick, and Holohan - who because of the problem of identification of the meat's source at the consumer level, may unknowingly obtain meat from animals which have been ritually slaughtered and shackled and hoisted while fully conscious. There are those who are federal taxpayers: Landek, Jones, Steinberg, Weiss, Buick, and Holohan. There is Society for Animal Rights, Inc, a not-for-profit, tax exempt organization . . . devoted to the welfare of animals and the protection of animals from all forms of cruelty and suffering. . . . * * * The Society . . . sues here on its own behalf and that of its approximately 25,000 members. . . . There is the Committee for Humane Slaughter, an ad hoc unincorporated association of persons - including all of the individual plaintiffs here — . . . whose purpose is to assure that all livestock animals slaughtered, and to be slaughtered, for the meat, in the United States of America, are handled prior to slaughter, and slaughtered, in a humane manner. . . . There is the Committee for a Wall of Separation of Church and State in America, an ad hoc unincorporated association of persons - including all of the individual plaintiffs here — . . . whose purpose is to assure that the Establishment and Free Exercise Clauses of the First Amendment to the Constitution of the United States are strictly adhered to at all times. . . . " It's apparent that given the judicial requirements for "standing to sue," the Animal Rights lawyers sought to enlist human plaintiffs who represented virtually every kind of interest. This was in an effort to assure that someone would be able to invoke the power of the federal courts to decide the constitutional questions, and in so doing hopefully protect the animals who were the plaintiffs' primary concern.

However, because there is a provision in the Federal Rules of Civil Procedure allowing an individual to sue as the "next friend" of another, and because the fundamental intent of the lawsuit was to protect animals, there was one additional plaintiff: *Helen E. Jones as next friend and guardian for all livestock animals now and hereafter awaiting slaughter in the United States.*

In other words, in addition to the *human plaintiffs*, the Animal Rights lawyers sued, through a human plaintiff, on behalf of *animal plaintiffs*. This innovative - indeed, revolutionary idea - had never before been attempted. *Animals* - in this case, livestock - were suing to protect their own rights, albeit by using a claim that the federal statute that deprived them of those rights violated the Religion Clauses of the Constitution of the United States.

Although the underlying claims dealt with the constitutionality or unconstitutionality of the Javits-Case amendment's exception to the federal Humane Slaughter Act's "render insensible" requirement, the threshold issue was "standing to sue." To understand how the court resolved that question, and the implicit question of whether the animal had such standing, it's necessary to understand the court's entire opinion. It follows.

* * *

PALMIERI, District Judge.

This action involves a challenge, under the Free Exercise and Establishment Clauses of the First Amendment, [FN1] to the Humane Slaughter Act (the Act), 7 U.S.C. § 1901 et

seq. (1970), [FN2] and in particular to the provisions relating to ritual slaughter as defined in the Act and which plaintiffs suggest involve the Government in the dietary preferences of a particular religious group. The plaintiffs consist of a group of six individuals and three organizations hereinafter described. They seek injunctive relief as well as a declaration that the questioned statutory provisions are violative of the Constitution. Plaintiffs' application for the convening of a three-judge court, 28 U.S.C. §§ 2282, 2284, was granted by Judge Bonsal on October 25, 1973. The three-judge court was convened and a hearing held on February 11, 1974. Jurisdiction is alleged under 5 U.S.C. §§ 702 and 703 and 28 U.S.C. §§ 1331, 1343, 1361, 2201, and 2202. The complaint alleges that the amount in controversy exceeds \$10,000. The parties have made cross-motions for summary judgment. Rules 12(c) and 56, Fed.R.Civ.P. Additionally, the defendants have moved for an order dismissing the complaint for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted. Rules 12(b)(1) and 12(b)(6), Fed.R.Civ.P.

The Statutory Provisions Involved

Section 1 of the Act (7 U.S.C. § 1901) declares it to be the policy of the United States 'that the slaughtering of livestock and the handling of livestock in connection with slaughter shall be carried out only by humane methods.' And section 3 provides:

The public policy declared in this chapter shall be taken into consideration by all agencies of the Federal Government in connection with all procurement and price support programs and operations and after June 30, 1960, no agency or instrumentality of the United States shall contract for or procure any livestock products produced or processed by any slaughterer or processor which in any of its plants or in any plants of any slaughterer or processor with which it is affiliated slaughters or handles in connection with slaughter livestock by any methods other than methods designated and approved by the Secretary of Agriculture . . . 7 U.S.C. § 1903.

The plaintiffs' challenge to the Act is directed to sections 2(b), 5, and 6 (7 U.S.C. §§ 1902(b), 1905, and 1906). Section 2 provides: § 1902. Humane methods

No method of slaughtering or handling in connection with slaughtering shall be deemed to comply with the public policy of the United States unless it is humane. Either of the following two methods of slaughtering and handling are hereby found to be humane: (a) in the case of cattle, calves, horses, mules, sheep, swine, and other livestock, all animals are rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut; or (b) by slaughtering in accordance with the ritual requirements of the Jewish faith or any other religious faith that prescribes a method of slaughter whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument. Section 4(c) provides: Handling in connection with such slaughtering which necessarily accompanies the method of slaughter described in subsection (b) of this section shall be deemed to comply with the public policy specified by this section. [FN3]

Section 5 of the Act provides for the establishment of an advisory committee to assist in implementing the Act's provisions, with one of the members of the advisory committee

being a 'person familiar with the requirements of religious faiths with respect to slaughter.' 7 U.S.C. § 1905. Section 6 provides: 'Nothing in this chapter shall be construed to prohibit, abridge, or in any way hinder the religious freedom of any person or group. Notwithstanding any other provision of this chapter, in order to protect freedom of religion, ritual slaughter and the handling or other preparation of livestock for ritual slaughter are exempted from the terms of this chapter. For the purposes of this section the term 'ritual slaughter' means slaughter in accordance with 1902(b) of this title.' 7 U.S.C. § 1906.

The Parties

The plaintiffs are six individuals and three organizations having in common a professed commitment to 'the principle of the humane treatment of animals' and to 'the principle of the separation of church and state.' The complaint alleges that each of the individual plaintiffs is a taxpayer, that two of the individual plaintiffs abstain from eating any meat or meat products because of the alleged inhumane treatment of animals prior to slaughter, and that the other individual plaintiffs are consumers of meat who have at times unwittingly eaten meat that allegedly was slaughtered according to the 'religious exception' contained in sections 2(b) and 6 of the Act. Two of the organization plaintiffs are unincorporated associations whose members reside in the Southern District of New York; and one is a not-for-profit corporation organized under the laws of New York with its principal offices in New York City. **[Note: Despite Helen E. Jones having been named as the lead (first-named) plaintiff, suing "as next friend and guardian for all livestock animals now and hereafter awaiting slaughter in the United States," Judge Palmieri made no mention of her when he explained who the plaintiffs were.]**

Defendants are the Secretary of Agriculture, the Acting Administrator of Consumer and Market Services of the Department of Agriculture, and 'John Doe,' who has since been identified as Rabbi Joseph Soloveitchik, the member of the advisory committee authorized under section 5 who is familiar with the requirements of religious faiths with respect to slaughter.

Intervention has been permitted pursuant to Rule 24, Fed.R.Civ.P., to seven individuals and five organizations speaking for a large number of the estimated 6 million Jews in the United States and representative of the 'entire spectrum of Jewish organizational life.' [The two intervener organizations were the Joint Advisory Committee of the Synagogue Council of America and the National Jewish Commission on Law and Public Affairs.]

The intervenors contend that if the Act is held unconstitutional, they and their members will be deprived of their right to eat ritually slaughtered meat. The intervenors have an undoubted interest in the legislation under consideration here inasmuch as it affects the production of kosher [FN4] meat, which is slaughtered according to the ritual method described in section 2(b). This interest is different and distinct from the interest of the federal officials who have been named as defendants in this action and whose responsibility it is to administer the provisions of the Act. In addition, we are persuaded that intervention here will not delay the disposition of the action and will not cause any perceptible prejudice to any existing party. Moreover, the intervenors appeared before Congressional committees at the time the Act was under consideration by Congress and

were therefore in a unique position to inform the Court regarding factual matters raised by this action. See *Bass v. Richardson*, 338 F.Supp. 478, 492 (S.D.N.Y.1971).

Standing to Sue

The question of standing, vigorously contested in the briefs and upon the argument, presents no serious obstacle to a consideration of the merits. Defendants argue that plaintiffs cannot show that they have suffered any injury in fact by reason of the so-called religious exception of the Act and that therefore they lack standing to maintain this action. Plaintiffs, on the other hand, contend that they, *or that at least one of them* [emphasis added], have sustained the requisite injury either as taxpayers, in that the Act governs procurement of meat and meat products by the federal government; as consumers of meat who, as a practical matter, are unable to distinguish between meat produced according to subsection (a) and that produced according to subsection (b) of section 2 of the Act, and who therefore are 'forced to eat ritually prepared meat'; or as citizens whose moral, religious, and aesthetic beliefs are offended because they are unable to refrain from eating ritually prepared meat. Plaintiffs contend that these alleged injuries are sufficient to confer standing to challenge the constitutionality of the Act. **[Note: Again, no mention of Helen E. Jones suing on behalf of the livestock animals.]**

The Supreme Court has recently made it clear that the plaintiffs' asserted injury may reflect 'aesthetic, conservational, and recreational' as well as economic values.' *Sierra Club v. Morton*, 405 U.S. 727, 738, 92 S.Ct. 1361, 1368, 31 L.Ed.2d 636 (1972). The fact that the interests claimed to have been injured are shared by many rather than few does not make them less deserving of legal protection through the judicial process. To have standing it is only necessary that the plaintiffs be among the class of persons injured. [FN5] Thus, in *United States v. S.C.R.A.P.*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973), the Court held that an unincorporated association of law students in the Washington, D.C. metropolitan area had standing to challenge Interstate Commerce Commission orders pertaining to railroad tariff increases on the grounds that the agency action might be shown to have a detrimental impact on the environment and natural resources in the Washington metropolitan area, which the plaintiffs claimed to use for camping, hiking, fishing, and sightseeing. Justice Stewart writing for the Court quoted Professor Davis (*Standing: Taxpayers and Others*, 35 U.Chi.L.Rev. 601, 613 (1968)):

The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation. 412 U.S. at 689 n. 14, 93 S.Ct. at 2417.

That the plaintiffs' commitment to the principles of humane treatment of animals and to the separation of church and state is deeply held and sincere is not doubted. The intervenors profess to be no less committed to the same principles, and indeed their religious beliefs have a long historical association with the humane treatment of animals. The sole question here is whether the *plaintiffs* [emphasis added] have suffered the requisite injury or have a personal stake in the outcome of this controversy so that the Court can be assured that the issues will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness, and that the litigation will be pursued with the necessary vigor as to make it capable of judicial resolution. See *Flast v.*

Cohen, 392 U.S. 83, 106, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). [**Note: Apparently, Judge Palmieri believed he could answer that "sole question" without explicit reference to Helen E. Jones' standing to sue on behalf of the livestock animals.**]

This is not a generalized dispute in which plaintiffs seek to air 'generalized grievances about the conduct of government,' *id.*; plaintiffs have raised a specific attack on a particularized legislative enactment, alleging that it is in violation of specific constitutional provisions in the First Amendment. The Act in question establishes as the policy of the United States that animals are to be treated humanely prior to and during the slaughtering process, and in addition provides that the Act's provisions with respect to what methods of slaughter are humane shall govern the procurement of all meat and meat products by the federal government through the expenditure of federal moneys. In addition to the moneys spent by the federal government for procurement, [FN6] there are some moneys spent to pay the travel and subsistence expenses of the members of the advisory committee authorized under section 5 of the Act and to administer the other provisions of the Act. Plaintiffs' allegations of injury in their role as federal taxpayers are therefore sufficient to meet the criteria of *Flast v. Cohen*, *supra*.

But apart from their status as taxpayers, *plaintiffs' allegations of injury as consumers and citizens are sufficient to confer standing here* (emphasis added). [**Note: The significance of this conclusion, and of all Judge Palmieri's previous statements about the "plaintiffs" generically without ever paying special attention to Helen E. Jones, is that she, too, had standing to sue in the capacity she alleged.**] Plaintiffs allege that the Act contains a religious exception making it impossible as a practical matter to be certain of purchasing meat from animals slaughtered by a process that they consider humane and consistent with the policy of the United States as declared in section 1 of the Act. Plaintiffs contend that this uncertainty causes injury to their moral principles and aesthetic sensibilities. These allegations are substantially comparable to the allegations of environmental injury in *United States v. S.C.R.A.P.*, *supra*, where the Court sustained the standing of plaintiffs. Although the Act in its operative provisions regulates directly only government procurement, we are willing to accept, *cf. United States v. S.C.R.A.P.*, *supra*, 412 U.S. at 688- 690, 93 S.Ct. 2405, that governmental refusal to purchase the meat of animals slaughtered by the ritual method would so influence production in the great packing houses as to save plaintiffs from the uncertainty of which they complain; indeed, the general structure of the Act rather suggests that Congress believed government procurement policy could have that kind of impact on methods of slaughter and handling in general.

Note: This concluded Judge Palmieri's discussion of "standing to sue" as it applied to plaintiffs' challenge to the federal Humane Slaughter Act's religious exemption. Next, he turned to the merits of plaintiffs' constitutional claims.

The Meaning of the Statutory Provisions

Two aspects of the legislative history deserve special mention; first, that in passing these provisions Congress was fully informed with respect to the method of slaughter according to the Jewish ritual method, as well as the handling of livestock prior to such slaughter; and secondly, that the legislative history indicates that opinion among Jewish

organizations regarding the inclusion of sections 2(b), 4(c) and 6 of the Act was divided. [FN7]

The declaration of humaneness becomes a focal point of inquiry in the case. The plaintiffs do not challenge the right of any slaughterer or religious group to slaughter livestock by means of a throat cut administered skillfully with a sharp knife— the Jewish ritual slaughtering method known as shehitah. Nor do the plaintiffs challenge the Congressional finding that the throat cut method is a humane method of slaughter. The crux of their complaint rests upon the proposition that in failing to require that the animal be rendered insensible to pain before the handling process, and thus before it is shackled and hoisted, the provisions permitting ritual slaughter are offensive to and inconsistent with the humane purposes of the Act and have a special religious purpose in contravention of the First Amendment. In effect, therefore, the plaintiffs contend that the provisions of the Act (sections 2(b) and 6) constitute an exemption from the application of subdivision (a), an act of cruelty to the animal so slaughtered, and a violation of the Religion Clauses of the First Amendment.

Congress characterizes as humane, in section 2 of the Act, either of two methods of 'slaughtering and handling.' The two methods are set forth in disjunctive paragraphs. The first, subdivision (a), relates to the method by which the animal is 'rendered insensible to pain' by some form of stunning— mechanical, electrical or chemical— before being shackled and hoisted. The second, subdivision (b), provides for an alternative method— slaughter 'in accordance with the ritual requirements of the Jewish faith or any other religious faith' without making any express reference to the shackling or hoisting or any preslaughter handling procedure. It was conceded, however, upon the argument by counsel for the intervenors, that in practice, because of Department of Agriculture regulations, that Jewish slaughter method often involves the animal's being shackled and hoisted before the animal suffers loss of consciousness. [FN8] It is precisely this to which the plaintiffs object. They contend that such prior hoisting and shackling is inhumane. The plaintiffs' argument can be paraphrased in substantially the following manner: section 2(a) specifically provides that the animal must be rendered insensible before being shackled and hoisted. The general declaration of policy by Congress contained in section 1 is that only humane methods of slaughter should be carried out. Yet section 2(b) appears to be opposed to the declaration of policy and to be inconsistent with 2(a) because the animal suffers no loss of consciousness during the preliminary shackling and hoisting procedure under the ritual method. Yet this method as well as the method described in 2(a) are both 'found to be humane' by the express provisions of the introductory paragraph of section 2; and perhaps by the misplaced provision in section 4(c) as well. Plaintiffs assert that such legislative inconsistency can be explained only as so clear a piece of deference to the tenets of one religious group as to violate the First Amendment. The intervenors have made a persuasive showing that Congress was fully and competently advised with respect to Jewish ritual practices. It developed at the argument that the shackling and hoisting were not part of the Jewish ritual; but that under Jewish ritual practice it was essential that the animal be conscious at the time of the administration of the throat cut. This appears to be the reason why ritually slaughtered animals are sometimes shackled and hoisted before being killed— a practice prohibited in the Act with respect to other animals. Accepting, arguendo, that this constitutes an

inconsistency in the statute, the question remains as to whether that inconsistency in any way violates the plaintiffs' rights under the Establishment Clause of the Free Exercise Clause of the First Amendment. Since Congress has determined that the Jewish ritual method is humane under the Act, the plaintiffs' arguments reduce themselves to whether they are really alleging an injury to themselves or an injury to the livestock to be slaughtered in the future, not by way of the throat cut which they concede is humane but because of the pre-slaughter handling which they suggest is not. In this connection section 4(c), the misplaced provision of the statute, expressly referred to section 2(b), setting forth the ritual method of slaughter, and stated that handling necessarily connected with such method 'shall be deemed to comply with the public policy specified' by the statute. The draftsmen apparently attempted, perhaps inartistically, to avoid the appearance of inconsistency. But if there is inconsistency in the statute the plaintiffs have not persuaded us that they have suffered a deprivation of rights under the First Amendment.

We note at the outset of the analysis that we do not read subdivision (b) to be an exception to subdivision (a) of section 2. Phrased as it is in the disjunctive, the statute makes neither (a) nor (b) an exception to the other. The described methods are alternative methods; neither is dependent upon the other for the ascertainment of its meaning, and each one is supported by legislative history as a justifiable legislative determination that the stated method of slaughter is indeed humane.

The Establishment Clause

Despite this, plaintiffs assert that subsection (b), in permitting slaughterers to slaughter in accordance with the ritual method and, by implication, to handle livestock by whatever means is appropriate prior to such slaughter, had a religious purpose—the protection of a religious belief—and therefore violated the Establishment Clause.

Congress considered ample and persuasive evidence to the effect that the Jewish ritual method of slaughter, and the handling preparatory to such slaughter, [FN9] was a humane method. It formulated a general policy after evaluating the abundant evidence before it. [FN10] Congress did not create a religious preference, nor did it create an exception to any general rule. The intervenors have made a persuasive showing that Jewish ritual slaughter, as a fundamental aspect of Jewish religious practice, was historically related to considerations of humaneness in times when such concerns were practically non-existent.

Since we regard the questioned statute as a Congressional declaration of policy, it necessarily follows that the proper forum for the plaintiffs is the Congress and not the courts. *Ferguson v. Skrupa*, 372 U.S. 726, 729-730, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963); *Fleming v. Nestor*, 363 U.S. 603, 617, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960). See Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 *Yale L.J.* 1205 (1970). The court cannot be asked to choose among methods of slaughter or pre-slaughter handling of livestock and to decide which is humane and which is not. We do not sit as a 'super-legislature to weigh the wisdom of legislation.' *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423, 72 S.Ct. 405, 407, 96 L.Ed. 469 (1952), quoted with approval in *Ferguson v. Skrupa*, *supra*, 372 U.S. at 731, 83 S.Ct. 1028.

The Constitutional clause against establishment of religion by law 'does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions.' *McGowan v. Maryland*, 336 U.S. 420, 442, 81 S.Ct. 1101, 1113, 6 L.Ed.2d 393 (1961). Thus the Congressional finding of humaneness in section 2 of the Act was an appropriate legislative function; and its coincidence with a ritual procedure under Jewish religious law does not undercut its validity or propriety.

Even assuming, *arguendo*, that Congress permitted the throat-cutting method of slaughter out of deference to the religious beliefs of many orthodox Jews, and chose out of similar deference not to restrain the prior handling of livestock attendant upon such ritual slaughter, Congress did not thereby violate the First Amendment. The accommodations of religious practices by granting exemptions from statutory obligations have been upheld in the Sunday closing cases and in the conscientious objector cases. In *Braunfeld v. Brown*, 366 U.S. 599, 608, 81 S.Ct. 1144, 1148, 6 L.Ed.2d 563 (1961), Chief Justice Warren, writing for himself and three other justices, made the following statement though rejecting a free exercise claim by Sabbatarians in the absence of statutory exemption: 'A number of States provide such an exemption, and this may well be the wiser solution to the problem.'

A year later the *per curiam* opinion of the Supreme Court in *Arlan's Department Store v. Kentucky*, 371 U.S. 218, 83 S.Ct. 277, 9 L.Ed.2d 264 (1962), disposed of this issue. In that case an appeal from a judgment of the Kentucky Court of Appeals, 367 S.W.2d 708 (1962), upholding a Sunday closing law that included a blanket exemption for Sabbatarians was dismissed for want of a substantial federal question. The Kentucky court had relied partly on the *Braunfeld* language quoted above and partly on the fact that the Supreme Court had upheld the Massachusetts closing law in *Gallagher v. Crown Koshier Super Market*, 366 U.S. 617, 81 S.Ct. 1122, 6 L.Ed.2d 536 (1961), without discussing its rather more limited exemptions for Sabbatarians.

Additionally, the Supreme Court has found no conflict between the conscientious objector exemptions of the military draft laws and the Religion Clauses of the First Amendment. *Selective Draft Law Cases*, 245 U.S. 366, 389-390, 38 S.Ct. 159, 62 L.Ed. 349 (1918). Chief Justice White there stated in effect that the soundness of the proposition that no such conflict existed was such that no more was required than its statement. [FN11] As Mr. Justice White said in *Welsh v. United States*, 398 U.S. 333, 90 S.Ct. 1792, 26 L.Ed.2d 308 (1970), 'legislative exemptions for those with religious convictions against war date from colonial days.' *Id.* at 370, 90 S.Ct. at 1812. Although writing in dissent, on another issue in the case, he added that the conscientious objector exemption from the draft may have been granted 'because otherwise religious objectors would be forced into conduct that their religions forbid and because in the view of Congress to deny the exemption would violate the Free Exercise Clause or at least raise grave problems in this respect.' *Id.* at 369-370, 90 S.Ct. at 1812.

The lesson to be drawn from these Sunday closing and conscientious objector cases is this: that if Congress acted here out of deference to the religious tents of many orthodox Jews it did so constitutionally and in substantially the same way as it accommodated the Sabbatarians and conscientious objectors by the exemptions in the applicable statutes.

The plaintiffs have placed much emphasis upon the holding of the Supreme Court in *Abington School District v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963), which held Bible reading in the public schools required by state action to be a violation of the Establishment Clause. We do not regard this holding as inconsistent with our views. The requirement in *Abington* that there be a secular legislative purpose [FN12] is met here by the manifest Congressional intent to establish humane standards for the slaughter of livestock. That one of the provisions of the Act defining humaneness coincided with the method for Jewish ritual slaughter, and even that a wholesale exemption was provided for ritual slaughter and accompanying preparation of livestock to accommodate a religious practice quite apart from the finding of humaneness, neither advanced nor inhibited religion within the intendment of the holding in *Abington*. In its later decision in *Lemon v. Kurtzman*, 403 U.S. 602, 612-613, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971), the Supreme Court set forth the three tests to be applied in determining whether a law violates the Establishment Clause: 'First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion * * * finally, the statute must not foster 'an excessive government entanglement with religion.'" It is clear that the sections of the Act here under attack do not violate these tests. Read in the context of the entire statute, they have a secular purpose; their principal or primary effect is to provide for humane slaughter; and they do not foster excessive government entanglement with religion. We do not find it necessary to discuss the holdings of the Supreme Court under the Establishment Clause which are concerned with an excessive entanglement of government with religion [FN13] because there is no entanglement here. The governmental functions involved have no connection with any religious practices. The only government expenditure attributable to allegations in the complaint is the sum of \$210.05 paid to Rabbi Joseph Soloveitchik for travel and subsistence expenses as a member of the advisory committee authorized under section 5. These expenses were paid for the period January 28, 1959 to July 15, 1963. We attribute no significance to this expenditure because it is both de minimis and stale.

The Free Exercise Clause

Insofar as plaintiffs' attack is based on the Free Exercise Clause rather than the Establishment Clause, the answer to it is that they have failed to demonstrate any coercive effect of the statute with respect to their religious practices. The plaintiffs suggest that they are being forced 'knowingly or unknowingly' to eat ritually slaughtered meat, while in some cases they have been forced to cease eating meat. Apart from other failings in the claim, they do not allege any impingement upon the practice of any religion of their own. The plaintiff's assertion of ethical principles against eating meat resulting from ritual slaughter is not sufficient. In the absence of a showing of coercive effect on religious practice, a meritorious claim under the Free Exercise Clause has not been made out. *Board of Education v. Allen*, 392 U.S. 236, 246-249, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968); *Abington School Dist. v. Schempp*, supra, 374 U.S. at 222-223, 83 S.Ct. 1560; *Zorach v. Clauson*, 343 U.S. 306, 311, 72 S.Ct. 679, 96 L.Ed. 954 (1952). By making it possible for those who wish to eat ritually acceptable meat to slaughter the animal in accordance with the tenets of their faith, Congress neither established the tenets of that faith nor interfered with the exercise of any other.

Defendants' motion for summary judgment is granted, dismissing the complaint with prejudice.

Plaintiffs' motion for summary judgment is denied.

It is so ordered.

* * *

The significance of *Jones v. Butz* far transcends the court's conclusion that the religious exemption to the federal Humane Slaughter Law does not violate either the Establishment or the Free Exercise Clauses of the First Amendment to the Constitution of the United States. The case's importance is that against an allegation that a human being sued "as next friend and guardian for all livestock animals now and hereafter awaiting slaughter in the United States," a federal court not only held that all named plaintiffs, including that one, possessed standing to sue, but the court never held that the Jones plaintiff lacked standing. Thus, as implicit as the federal district court's holding may have been, it nonetheless arguably stood for the proposition that, at least under certain circumstances, *animals can have standing to sue*. The ripples from that decision would later be felt, and although no tidal wave of animal standing has yet occurred, still, the *Jones* decision was the beginning. What it has led to will be considered in the next Part of this article.

FN1. 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ' U.S.Const. amend. I.

FN2. Act of August 27, 1958, Pub.L.No. 85-765, 72 Stat. 862 (1959).

FN3. Although this sentence appears in § 1904(c) it is manifest that it was placed there by mistake since it makes reference to the method set out in § 1902(b).

FN4. Although the plaintiffs have apparently avoided use of the term 'Kosher' and have used the expression 'ritually prepared meat' in describing their alleged grievances, the defendants and the intervenors have occasionally used the term 'Kosher.' It has not been made clear that the two are not interchangeable. Kosher is the Jewish term for any food or vessels for food made ritually fit for use. Ritually slaughtered meat is not necessarily Kosher meat. Not all animals slaughtered in accordance with the ritual requirements of the Jewish faith are Kosher. See 13 Encyclopedia Britannica, Verbo 'Kosher,' at 493 (1959 ed.).

FN5. The injury need not be large; it may be a fraction of a vote as in *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), a five dollar fine and costs, as in *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961), or a \$1.50 poll tax as in *Harper v. Virginia Board of Elections*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966). Cf. *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974)

FN6. The United States Department of Agriculture, for example, procures meat under the National School Lunch Act, 42 U.S.C. § 1751 et seq., the Child Nutrition Act of 1966, 42 U.S.C. §§ 1771-1786, and under 7 U.S.C. § 612c as implemented by 15 U.S.C. § 713c.

FN7. Certain members of the orthodox Jewish community were alarmed with respect to the implications of the proposed legislation both with regard to the possible restriction of pre-slaughter handling and to the possibility of anti-Semitic propaganda which had accompanied similar legislation in other countries.

FN8. Upon the argument counsel for the intervenors made the following uncontradicted statement:

'In Israel, and indeed, in the old traditional Jewish method, the animal would be laying down on its side, and the throat would be cut on the floor. That is not permitted under Department of Agriculture regulations for sanitary reasons. You can't put an animal down in a Department of Agriculture inspected plant on the ground. The consequence is that the way the animal is positioned for slaughter in many slaughter houses that use the Jewish ritual method is that it is what is called shackled and hoisted. It is picked up by its legs, and it is turned upside down so that the throat cut can be administered.'

FN9. See *Humane Slaughtering of Livestock*, Hearings Before the Senate Committee on Agriculture and Forestry on S.1213, S.1497, and H.R.8308, 85th Cong., 2d Sess. (1958). See also 104 Cong.Rec. 15368-415 (1958).

FN10. See *Humane Slaughtering of Livestock and Poultry*, Hearings Before a Subcommittee of the Senate Committee on Agriculture and Forestry on S.1636, 84th Cong., 2d Sess. (1956), which summarizes the testimonials and reports of a number of physiologists and others from the scientific community with respect to the humaneness of the Jewish ritual method of slaughter. Senator Hubert H. Humphrey, chairman of the Subcommittee and one of the principal proponents of the legislation, said on the floor of the Senate during debate that 'because the subject matter of kosher slaughter came before the committee, we asked for scientific information relating to the matter. A substantial body of evidence was presented, which is in the files of the Committee on Agriculture and Forestry, and was included by reference in our report . . . Not only is such a procedure accepted as a humane method of slaughter, but it is so established by scientific research.' 104 Cong.Rec. 15391 (1958). See also *Humane Slaughter*, Hearings Before the Subcommittee on Livestock and Feed Grains of the House Committee on Agriculture, 85th Cong., 1st Sess. (1957).

FN11. 'And we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act . . . because we think its unsoundness is too apparent to require us to do more.' 245 U.S. at 389-390, 38 S.Ct. at 165.

FN12. The Supreme Court there stated:

'The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment

exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.' 374 U.S. at 222, 83 S.Ct. at 1571.

FN13. The government brief cites the following cases in support of the proposition that in order to establish a meritorious constitutional claim under the Establishment Clause the plaintiffs must demonstrate an excessive entanglement of Government with religion. *Tilton v. Richardson*, 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971); *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971); *Gillette v. United States*, 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971); *Walz v. Tax Comm'n*, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970); *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963); *Zorach v. Clauson*, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952).

In Part I of this article, the case of *Jones v. Butz* was examined. Unfortunately, in 1973 the United States District Court for the Southern District of New York had little to say about the "standing to sue" of the animals on whose behalf, among others, the case was brought. Some twenty years later, another federal district judge had considerably more to say on the subject of "standing to sue" in general, and the standing of animals in particular. (The part of his opinion not dealing with "standing to sue" has been deleted, as have been other issues not relevant to standing. Footnotes have been omitted. Asterisks signify that material has been deleted).

United States District Court District of Massachusetts.

CITIZENS TO END ANIMAL SUFFERING AND EXPLOITATION, INC., et al.,

Plaintiffs,

v.

The NEW ENGLAND AQUARIUM, et al.,

Defendants.

Civ. A. No. 91-11634-WF.

Oct. 25, 1993.

836 F.Supp. 45.

WOLF, District Judge.

This case is brought by Kama, a dolphin, Citizens to End Animal Suffering and Exploitation ("CEASE"), the Animal Legal Defense Fund, Inc. ("ALDF"), and the Progressive Animal Welfare Society, Inc. ("PAWS"), to protest the transfer of Kama from the New England Aquarium to the Department of the Navy.

The parties have named as defendants the New England Aquarium ("the Aquarium"), the Department of the Navy ("the Navy"), the Department of Commerce and two of its subagencies, the National Oceanic and Atmospheric Administration and the National Marine Fisheries Service (collectively referred to as "Commerce").

Defendants . . . contest the standing of the plaintiffs

Plaintiffs' factual contentions primarily concern the transfer of Kama from the Aquarium to the Navy. Except as noted, the following relevant facts are undisputed. Kama was born in captivity at Sea World in San Diego in 1981. Kama was transferred to the Aquarium in 1986 for breeding purposes and/or for public display. * * * Kama, however, did not fit into the social climate at the Aquarium As a result, he was not regularly on public display, nor featured in the Aquarium dolphin shows

In 1987, the Aquarium wrote to Commerce requesting authorization to transfer Kama and another dolphin to the Naval Oceans Systems Center. * * * The Navy also wrote to Commerce, requesting authority to purchase and transport the two dolphins, noting, "These two dolphins will be housed in floating bay pens as specified in Marine Mammal Permit Number # 195. * * * Commerce authorized both requests, and sent the Navy a Letter of Agreement . . . to be signed by the Navy, which set forth the obligations of the Navy to ensure the safety and well-being of the dolphins

In late 1987, Kama was transferred from the Aquarium to the Navy pursuant to this Letter of Agreement Kama is now located in Hawaii, where he is being studied for his sonar capabilities The Navy has invested over \$700,000 and over 3,500 man hours training Kama The Navy contends that Kama is able to associate with wild dolphins on a daily basis, and could swim away if he so desired

Plaintiffs' . . . [claim] is based upon the Marine Mammal Protection Act ("MMPA"), which was passed in 1978 in order to protect marine mammal populations. * * * The primary focus of the statute was to impose a moratorium on the "taking" and importation of marine mammals and marine mammal products. * * * To "take" is defined in the statute as: "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." * * * In essence, the MMPA provides that such takings and importations of marine mammals are generally allowed only upon the grant of a permit by Commerce. * * *

At issue in this case is whether the transfer, purchase, or sale of an already- captive dolphin constitutes a "taking" which requires a permit. * * *

Defendants assert . . . that plaintiffs lack standing to maintain this suit. The standing requirement is rooted in the constitutional command in Art. III, § 2, that the federal courts' jurisdiction is limited to "Cases" and "Controversies." The standing doctrine serves to preserve the separation of powers, to prevent a flood of lawsuits, to improve judicial decision-making by focusing on actual controversies, and to ensure that "people cannot be intermeddlers trying to protect others who do not want the protection sought." * * * The issue of standing in this case must be addressed on two bases: the standing of Kama, the dolphin, and the standing of the organizational plaintiffs.

There is little case law addressing whether an animal who has allegedly been injured has standing to bring a suit. Plaintiffs assert that Kama has standing, relying on *Palila v. Hawaii Dept. of Land and Natural Resources*, (852 F.2d 1106, 1107 (9th Cir.1988)). In *Palila*, the court stated in its introduction: "As an endangered species under the Endangered Species Act . . . the bird (*Loxioides bailleui*), a member of the Hawaiian honey-creeper family, also has legal status and wings its way into federal court as a plaintiff in its own right . . . represented by attorneys for the Sierra Club, the Audubon Society, and other environmental parties." * * * However, in *Palila*, the defendants did not challenge the propriety of having an animal as a named plaintiff. Similarly, animal species have remained named plaintiffs in other cases in which the defendants did not contest the issue. * * *

However, in the only reported case in which the naming of an animal as a party was challenged, the court found that the animal did not have standing to bring suit. In *Hawaiian Crow* . . . the court ruled that the 'Alala, an endangered species of birds, did not have standing to maintain a suit challenging the implementation of a program under the Endangered Species Act ("ESA"). The court, while recognizing the authority cited above, denied the 'Alala standing on the bases that: (1) the ESA provided for citizen suits brought by "persons;" (2) the other named parties—various Audubon Societies—could obtain the relief sought; and (3) . . . [a federal rule of procedure] which provides for suits on behalf of infants or incompetent persons does not apply to animals.

The same considerations apply in this case. The MMPA does not authorize suits brought by animals. Rather, the MMPA provides for judicial review of the grant or denial of permits for permit applicants or "any party opposed to such permit" . . . [:] "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." (Emphasis added).

Thus, as with regard to the ESA in 'Alala, the MMPA expressly authorizes suits brought by persons, not animals. This court will not impute to Congress or the President the intention to provide standing to a marine mammal without a clear statement in the statute. If Congress and the President intended to take the extraordinary step of authorizing animals as well as people and legal entities to sue, they could, and should, have said so plainly.

Furthermore, as in 'Alala, citizen groups, if they satisfy the standing requirements, could seek to obtain the relief the amended complaint requests for Kama. This conclusion is reinforced by consideration of [a federal rule of procedure] . . . entitled "Parties," and discusses the "capacity of an individual . . . to sue or be sued." It provides that such capacity "shall be determined by the law of the individual's domicile." While this provision generally addresses the capacity of corporations, partnerships, and other business entities to litigate, there is no indication that it does not apply to other non-human entities or forms of life. While neither Massachusetts nor Hawaii law addresses the precise question of animal standing, cases in each state indicate that animals are treated as the property of their owners, rather than entities with their own legal rights. Accordingly, the MMPA and the operation of . . . [a federal rule of procedure] indicate that Kama the dolphin lacks standing to maintain this action . . . * * *

The MMPA does not authorize citizen suits to challenge the transfer of a marine mammal. Therefore, plaintiffs bring this case under [a certain federal statute], which provides: “A person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”

In two recent cases, the Supreme Court has reviewed and clarified the requirements for standing for organizations challenging agency actions relating to animals. * * * As the Court explained in . . . [one of those cases] the requirements for standing are as follows: First the plaintiff must have suffered an "injury in fact"—an invasion of a legally-protected interest which is (a) concrete and particularized . . . and (b) "actual or imminent," not “conjectural” or “hypothetical”. . . . Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly traceable to the challenged action of the defendant, and not . . . the result of the independent action of some third party not before the court." * * * Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." * * *

In *Lujan v. DOW*, plaintiffs challenged a government regulation that indirectly affected endangered species outside of the United States. The Court noted that when a party asserts an injury arising from government regulation of another party, standing is more difficult to establish. The Court explained: “In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well. * * * The Court concluded that: “When the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish.” * * *

The plaintiff organizations in this case claim standing on two bases. Each claims that it has standing to sue representatively, on behalf of its members, and for the injuries the organization has itself suffered. Their allegations of harm fall into four broad categories. First, plaintiffs allege that their members have suffered injury to their aesthetic, conservational, or recreational interests because they can no longer observe Kama at the Aquarium. * * * Second, they allege injury to their members' aesthetic, conservational, or recreational interests in that Commerce's actions result in the reduction in number of wild dolphins available for members to observe, study, or photograph. * * * Third, they allege a variety of procedural harms suffered both by their members and by the organizations themselves. As Commerce now allows transfers to take place pursuant to Letters of Agreement (written from Commerce to the transferor and transferee), without public notice or opportunity for public comment, plaintiffs claim they are deprived of their opportunity to participate in the public process established by the MMPA. * * * Finally, plaintiffs allege that the organizations themselves suffer informational harm, in that Commerce's practices of using Letters of Agreement, failing to publicize permit modifications, and failing to produce environmental impact statements deprive plaintiff-organizations of information which they seek to disseminate to their members. * * * As plaintiffs have alleged sufficient harm to withstand a motion to dismiss, their allegations of harm must be reviewed in the context of summary judgment.

For an organization to have standing to sue on behalf of its members, it must demonstrate that: (1) at least one of the members possesses standing to sue in his or her own right; (2) the interests that the suit seeks to vindicate are pertinent to the objectives for which the organization was formed; and (3) neither the claim asserted nor the relief demanded necessitates the personal participation of affected individuals. * * *

In this case, both the second and third prongs of this test have been met. Each of the three plaintiff organizations has submitted a general purpose statement of its organization, which includes, in some fashion, the protection of animals. As damages are not sought, individual plaintiffs need not participate. Plaintiffs fail, however, to offer evidence sufficient to permit a reasonable fact finder to conclude that any of their individual members possesses standing to sue.

Plaintiffs allege that as a result of Kama's transfer, they have suffered harm by having been deprived of the opportunity to observe and study Kama. In *Lujan v. DOW*, the Court stated: "Of course, the desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for the purpose of standing But the "injury in fact" requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured. To survive . . . [dismissal] respondents had to submit affidavits or other evidence showing, through specific facts . . . that one or more of respondents' members would thereby be 'directly' affected apart from their 'special interest' in the subject." * * * In *Lujan v. DOW* the respondents had sued the Secretary of the Interior for violating the ESA by revising a regulation that required agency review of the environmental consequences of any federal agency action. The revised regulation required review only of actions taken in the United States or on the High Seas. Members of the organization, Defenders of Wildlife, submitted affidavits which stated that they had visited specific foreign countries to observe wildlife, and noted that specific federal agency actions in those countries would have the effect of destroying the natural habitats of the wildlife. * * * The affidavits also alleged that the members planned to return to these countries for further wildlife observation at unspecified times in the future.

The Court held that these allegations of harm were insufficient to create standing. The Court specifically noted that the allegations of unspecified, future visits failed to establish that imminent harm would occur. The Court stated: "Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require. * * *

In the present case, plaintiffs also fail to allege actual or imminent harm. Plaintiffs have submitted two affidavits of their members relating to the observation of Kama. Both affidavits state that: "During the time Kama was at the New England Aquarium, I attended dolphin shows and saw dolphins on public display there several times. I saw three dolphins perform at these dolphin shows." The affiants do not state either that they have returned to the Aquarium and have suffered injury because of Kama's absence, or intend to return in the near future. As in *Lujan v. DOW*, the failure to allege that any actual or imminent harm is fatal to an assertion of standing. * * *

More significantly, the affiants have not alleged the particular relationship with Kama necessary to cause them to be harmed by his absence even if they plan to return to the Aquarium. In *Lujan v. DOW*, the Court stated that: "It is clear that the person who observes or works with a particular animal threatened by a federal decision is facing perceptible harm, since the very subject of his interest will no longer exist. It is even plausible—although it goes to the outermost limit of plausibility—to think that a person who observes or works with animals of a particular species in the very area of the world where that species is threatened by a federal decision is facing such harm, since some animals that might have been the subject of his interest will no longer exist. * * * The affiants in this case do not, and evidently cannot, state that they ever observed Kama in particular, as opposed to dolphins in general, at the Aquarium.

Plaintiffs seek . . . [information about] whether Kama was ever on public display or included in any dolphin shows at the Aquarium. The Aquarium asserts that Kama was not regularly on display, nor included in any dolphin shows. The fact that neither affiant knows if she actually observed Kama belies any possible assertion that either of them had established a relationship with Kama such that, as a result of his transfer, "the very subject of [the member's] interest will no longer exist." The affiants only allege that they observed dolphins during the time that Kama was at the Aquarium. * * * After Kama's departure, dolphins were still available for observation. * * * Furthermore, the fact that plaintiffs were, by their own admission, unaware of Kama's transfer until 1990, three years after the transfer took place, indicates that none of plaintiffs' members noted or were harmed by Kama's absence. Rather, the affiants observed dolphins at the Aquarium, and were able to continue to do so after Kama's transfer. As they do not know if they ever observed Kama, did not notice his absence for three years, and because he was not regularly on display, it is unlikely that they ever observed him. In these circumstances, it is evident that the discovery plaintiffs seek would not be helpful. There is simply insufficient evidence for a reasonable fact finder to conclude that they are or will be harmed by Kama's transfer.

Plaintiffs allege that Commerce's actions in allowing the transportation of dolphins, permit modifications, and the rescue of beached or stranded dolphins will result in fewer dolphins in the wild for plaintiffs' members to observe and study. Pursuant to the Court's decision in *Lujan v. DOW*, these allegations, with the accompanying evidence, are also insufficient to permit a reasonable fact finder to conclude that plaintiffs have suffered actual or imminent harm.

Whether plaintiffs have sustained an injury that is "actual or imminent" and "concrete and particularized" is determined by the nature of plaintiffs' relationship to the party or thing being regulated. * * * As noted above, the Court stated: "It is even plausible—although it goes to the outermost limit of plausibility—to think that a person who observes or works with animals of a particular species in the very area of the world where that species is threatened by a federal decision is facing such harm, since some animals that might have been the subject of his interest will no longer exist." * * *

Plaintiffs have not offered sufficient evidence of harm to have standing even under this "outermost limit" test. Even if plaintiffs could demonstrate that Commerce's actions have resulted in the depletion of wild dolphins somewhere, plaintiffs have not offered any

evidence that the depletion occurs in any particular place, or that their members have or will be harmed by the depletion in that place. * * * In *Lujan v. DOW*, the Court expressly rejected the "animal nexus" test for standing "whereby anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing." * * * The Court found that this test lacking because it did not require "a factual showing of perceptible harm." * * * Thus, plaintiffs' allegations and evidence regarding their general concern for the depletion of dolphins is insufficient. Second, and more significantly, "there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly traceable to the challenged action of the defendant.'" * * *

Plaintiffs have not produced evidence to support the contention that the practices of Commerce which are challenged in this case actually cause a reduction in number of wild dolphins. With respect to the permit modifications, the plaintiffs provide no evidence that the challenged modifications, which only affect the time span during which takings are permitted and do not increase the number of dolphins to be taken from the wild, have caused or will cause a reduction in wild dolphins. Similarly, they have provided no evidence of the effects of the beached and stranded marine mammal practice. Common sense, however, indicates that it is the beaching or stranding, not the rescue, of marine mammals that may cause a reduction in the number of wild marine mammals. * * *

With respect to the transportation of dolphins, plaintiffs allege that dolphins may be injured or die when transported, and that the injured or dead dolphins will then be replaced by wild dolphins, resulting in fewer dolphins in the wild. * * * The single specific transfer which plaintiffs protest, however, the transfer of Kama, did not result in any injury.

Even if plaintiffs could prove that dolphins are frequently injured during transport, this alone would not establish the required causal connection between plaintiffs' harm and agency action. Plaintiffs allegation of injury is that as observers of dolphins, they are harmed by the removal of dolphins from the wild. In order to establish standing, they must show that the reduction in the number of wild dolphins is "fairly traceable" to Commerce's failure to require permits for transporting dolphins. * * * Plaintiffs have, however, failed to offer evidence that the harm alleged is sufficiently linked to the agency violation. Actual reduction in the number of wild dolphins is not dependent on the actions of the agency, but on the actions of third parties who may seek to replace those dolphins that are injured or killed in transport. As noted earlier, the Court explained in *Lujan v. DOW* that: "[When] the existence of one or more of the essential elements of standing 'depends on the unfettered choices of independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict . . . it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury.'"

Even if plaintiffs satisfy this burden by showing that owners of dolphins actually do seek to replace dolphins injured or killed in transport, plaintiffs already have an adequate opportunity to cure the harm alleged as a result of the current practice. If dolphins are injured or killed in transport and their owners seek to replace them, the owners must obtain permits to remove the replacement dolphins from the wild. During this permit

process, plaintiffs will have the opportunity to present their case to Commerce, and to seek judicial review of any permits granted.

Plaintiffs' alleged injury on the basis of the depletion of the number of dolphins stems from the general policy allowing transportation of dolphins without a permit. Such generalized challenges, absent specific injury, are "rarely if ever appropriate for federal-court adjudication." * * * The Supreme Court has held that challenges to an agency regulation are not appropriate for review "until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." * * * The Court further explained: "It is . . . entirely certain that the flaws in the entire "program"—consisting principally of the many individual actions referenced in the complaint, and presumably actions yet to be taken—cannot be laid before the courts for wholesale correction under the APA, simply because one of them that is ripe for review adversely affects one of respondent's members." * * *

With respect to the transfer practice, plaintiffs oppose 316 individual actions—Letters of Agreement issued in lieu of permits for transfers of marine mammals—but essentially challenge the practice in general. They have not alleged any specific facts with regard to any transfer except Kama's. If plaintiffs' had established standing with respect to Kama's transfer, the court could address the propriety of the practice of issuing Letters of Agreement as it affected Kama's situation. The court understands that it should not, however, address the practice in general, especially when plaintiffs cannot establish standing as to any one agency action.

Similarly, plaintiffs challenge the "over 350" permit modifications, including one specific modification, but fail to offer evidence of any harm the modifications have actually caused. Finally, they offer no evidence of any particular agency action, or any harm such actions might cause, with respect to their challenge to Commerce's practice of issuing Letters of Agreement for persons who rescue beached and stranded marine mammals. Thus, a reasonable fact finder would not conclude that plaintiffs have suffered harm concerning the depletion of wild dolphins which gives them standing to maintain this action.

Plaintiffs allege that they have suffered and will suffer procedural harm as a result of Commerce's practices. In essence, they contend that Commerce's practices of issuing Letters of Agreement for transfers and for beached or stranded marine mammals, of modifying permits without public notice or opportunity to comment, and of failing to prepare environmental impact statements, deny plaintiffs—both the individual members and the organizations themselves—the opportunity to participate in the public proceedings that would otherwise occur. In *Lujan v. DOW*, plaintiffs claimed that they had been deprived of their right to bring a citizen suit to allege a violation of the Endangered Species Act even though they could not show that they had suffered any concrete harm from the violation itself. * * * The Court found that the citizen-suit provision, available to the public at large, could not alone provide a basis for standing. The Court reasoned . . . that when the procedural right is available to all members of the public, and the plaintiffs cannot show any injury apart from that suffered by the public at large, plaintiffs do not have standing. * * * The Court concluded that procedural harm

could be a basis for standing only upon a showing that the "disregard of [a procedural requirement] could impair a separate concrete interest of the plaintiffs."

Just prior to the decision in *Lujan v. DOW*, the Court of Appeals for the First Circuit also addressed the issue of procedural harm, rejecting National Wildlife Federation's ("NWF") motion to intervene in a suit between the United States government and AVX Corporation concerning the clean up of the New Bedford Harbor. * * * NWF alleged that it suffered procedural harm because the government and AVX entered into a consent decree which deprived NWF of the ability to comment, in violation of CERCLA. The court found that NWF and its members had failed to establish actual injury apart from the procedural harm. The court held, therefore, NWF did not have standing to intervene, explaining: "Here, the actual injury, if there is any, can only stem from the potential for an inadequate cleanup of the Harbor area rather than from an alleged impairment of the citizenry's right to comment. It follows ineluctably that, in order for standing to arise out of procedural harm, NWF must show that its members have suffered, or are in imminent danger of, some distinct and palpable injury flowing from the possibility of an inadequate clean up." * * *

In the present case, plaintiffs allege that they have been denied their rights to notice, to comment, to request a hearing, and to seek judicial review of the grant of permits, all in violation of the MMPA. However, these rights are not particular to plaintiffs, but are granted to any member of the public. * * * Since plaintiffs other allegations of harm are insufficient, there is no "distinct and palpable" injury that they will suffer as a result of their inability to participate in the permit process. Without more, the allegations of procedural harm do not suffice to provide plaintiffs with standing.

Plaintiffs' allege that they have standing, apart from the standing of their members, to sue for injuries to the organizations themselves. It is true that an organization may have standing to sue if a defendant's actions injure the organization itself. * * * Such injuries typically impair an organization's ability to achieve its corporate purpose. * * * Plaintiff organizations allege procedural and informational harm. * * * More specifically, they allege that Commerce's practice of: (1) refusing to require permits in order to transfer, sell or purchase dolphins; and (2) modifying permits without public notice, render the organizations unable to participate in public affairs concerning activities affecting the marine mammal population or to disseminate information about such activities to their members. They specifically note that the transfer of Kama involved a transfer made without a permit. * * *

The plaintiffs' memoranda interweave their arguments concerning procedural and informational harm. This interweaving is easily understandable because the strongest argument which can be made concerning informational harm is that the improper failure of the government to disseminate information injures the ability of organizations and their members to participate in the political process to promote public policies they prefer. Adequate information about government activity is important to the exercise of fundamental political rights, including the rights to vote, to speak and write in an effort to influence the votes of others, and to lobby Congress and the President. In this sense, informational rights are instrumental to the exercise of procedural rights; the two rights are integrally related.

As described earlier, however, the Supreme Court and the Court of Appeals for the First Circuit have recently clarified that procedural harm alone is insufficient to confer standing. * * * Because informational harm is so intimately linked with procedural harm, this court believes that it necessarily follows that informational harm alone is insufficient to establish standing.

This view is consistent with the evolution of the case law in the Court of Appeals for the District of Columbia Circuit, the most active court in this area of the law. Prior to 1991, the Court of Appeals for the District of Columbia had held that informational harm could satisfy the injury prong of the test for standing in certain circumstances. * * * In *Competitive Enterprise Institute*, the court stated: "Allegations of injury to an organization's ability to disseminate information may be deemed sufficiently particular for standing purposes where that information is essential to the injured organization's activities, and where lack of the information will render those activities infeasible To establish standing on this basis, however, petitioners must assert a plausible link between the agency's action, the informational injury, and the organization's activities." * * * The court concluded that the plaintiff organization did not have standing because the injuries alleged were not in the "zone of interests to be protected or regulated" by the statute at issue." * * * If the test stated in *Competitive Enterprise Institute* were applicable, the plaintiff organizations would evidently be entitled to a trial on the question of whether they have standing on the basis of informational injury. Each of the organizations avers that it uses information about marine mammals to inform its membership and to educate itself, all in an effort to pursue its corporate purpose of promoting the well-being of animals. * * * They also assert that the failure of Commerce to publicize information about its actions regarding transfers of dolphins and modifications of permits renders the organizations incapable of disseminating such information to their members in an effort to promote animal welfare. In *Foundation on Economic Trends v. Lyng* . . . however, the Court of Appeals for the District of Columbia more recently revisited the issue of informational standing. In *Lyng*, plaintiffs, a public interest biotechnology group, sued the Department of Agriculture for the failure to prepare an environmental impact statement ("EIS") for its "germ plasm protection program" in violation of NEPA. Plaintiffs alleged injury as a result of its inability to disseminate the information an EIS would contain.

Although the court found that plaintiffs did not have standing for another reason—the failure to identify a particular agency action—the court reviewed the development of the doctrine of informational harm, noting that it could not find any cases in which standing had been found solely based on informational harm. * * * The court warned against an expansive view of informational injury particularly where statutes such as NEPA, which provide for the preparation of public information, were involved. The court noted: "'informational injury,' in its broadest sense, exists day in and day out, whenever federal agencies are not creating information a member of the public would like to have. If such injury alone were sufficient, a prospective plaintiff could bestow standing upon itself in every case merely by requesting the agency to prepare the detailed statement NEPA contemplates, which in turn would prompt the agency to engage in 'agency action' by failing to honor the request." * * * The court further observed that the broad approach to standing based on informational harm runs contrary to the language in *Sierra Club v.*

Morton "that 'a mere interest in a problem, no matter how long-standing the interest and no matter how qualified the organization is in evaluating the problem,' is not sufficient to confer standing."

The decision in *Lyng* speaks persuasively to this case. Having found the evidence supporting plaintiffs' other claims of injury insufficient, this court must find the evidence is adequate to establish standing on the basis of informational injury alone, or not at all. While *Lyng* focussed on NEPA, which provides for the dissemination of information concerning the environmental impact of an agency action, its reasoning is also applicable to the MMPA, a statute that explicitly provides for public notice before a permit is issued. In this case, plaintiffs' desire for information cannot be said to evidence more than the organizations' and their members' "long-standing . . . interest" in the issue of animal welfare. * * * The court in *Lyng* also warned against a broad interpretation of informational standing because such an interpretation would open the court's doors to any plaintiff who wished to contest the government's failure to publicize information under NEPA. "It is not apparent why an organization's desire for information about the same environmental problem should rest on a different footing. We also have trouble seeing how 'informational standing' could be confined to organizations. If one of NEPA's purposes is to provide information to the public, any member of the public—anywhere—would seem entitled to receive it." * * *

Similarly, under the MMPA, the permit process requires public notice. If informational harm alone were sufficient to confer standing, any individual or appropriate organization could obtain standing to challenge any action taken by Commerce pursuant to the MMPA simply by asserting that such action required the use of the permit process.

The Supreme Court's subsequent decision in *Lujan v. DOW* implicitly confirms that the Court of Appeals in *Lyng* correctly analyzed the question of standing based upon informational harm alone. In *Lujan v. DOW*, the Court reemphasized the requirement of "concrete and particularized harm." * * * The concept of standing based only on informational harm is inconsistent with this requirement. Similarly, in *Lujan v. DOW*, the Court reiterated that it is "substantially more difficult" for a plaintiff to establish standing when he is not himself the object of the government action or inaction he seeks to challenge. * * * This principle would be substantially undermined if informational harm alone were deemed sufficient to confer standing.

Accordingly, this court concludes that where, as here, there is insufficient evidence of any other "concrete and particularized injury" to confer, or contribute to, a finding of standing, evidence of informational harm alone is inadequate

In this case, viewing the facts in the light most favorable to the plaintiffs, a reasonable fact finder could not find that plaintiffs have suffered, or will suffer, the type of harm required to establish standing. In the absence of adequate evidence that any plaintiff has been harmed by Commerce's actions, this court may not address the legality of those actions