Procedural Standing and the Hawaii Superferry Decision: How a Surfer, a Paddler, and an Orchid Farmer Aligned Hawaii’s Standing Doctrine with Federal Principles

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"Generalizations about standing to sue are largely worthless as such."¹
-- Justice William O. Douglas

“It is one of my favorite surf spots. On good days with a north swell and light winds, the harbor is full of people in surf canoes, body boards and short and long boards.”²

-- Superferry opponent Gregory Westcott, describing Kahului Harbor, Maui

INTRODUCTION

In January 2010, if all had gone as planned for the Hawaii Superferry, the venture’s massive, 349-foot vessel Alakai would have been shuttling as many as 800 passengers and 250 automobiles per trip between the Hawaiian Islands of Oahu, Maui, and Kauai.³ Instead, in a bizarre final twist in the Superferry’s tortuous saga, the ship was in Haiti on a relief mission for the vessel’s new owner, the U.S. government’s Maritime Administration.⁴

How the Alakai ended up running aid projects for the federal government is a long and winding tale involving a colorful cast of players. It was a classic David-and-Goliath narrative, pitting the powerful Governor of Hawaii and a former Secretary of the U.S. Navy⁵ against a trio of environmental groups and a crew of ordinary folks that included an outrigger canoe club coach, an orchid farmer, a snorkel tour operator, and a surfer. Tensions climaxed in August 2007 after the Hawaii Supreme Court sided with the activists.⁶ Although the State Department of Transportation had approved the Superferry’s operations, the Court ruled

² Declaration of Gregory Westcott, Sierra Club v. Dep’t of Transp., Haw. 2nd Cir. Ct., Civil No. 05-1-0114 (3) (on file with author). [hereinafter Westcott Declaration]
⁶ Sierra Club v. Dep’t of Transp., 115 Haw. 299 (2007). Although this case is captioned Sierra Club v. DOT, this paper refers to the case hereinafter as Superferry. The vessel or project will be called “Superferry” in plain type.
that the project violated Hawaii environmental law. After the ruling, but before a Maui judge enjoined the ferry from operating, protesters gathered at Kauai’s Nawiliwili Harbor. With several dozen protesters in the water swimming and on surfboards, and hundreds more cheering from the shore, the protesters blockaded the harbor, preventing the massive ferry from entering to let passengers disembark from the ship’s inaugural voyage. Perhaps more than any other single event, that protest has become a symbol of a saga that still touches raw nerves. As one Honolulu newspaper columnist put it recently: “The term ‘Superferry’ is used in political arguments to invoke either a colossal cutting of corners by politicians in awe of guys with money; or, a tragic loss of a valuable resource as a result of liberal zealots worried about whales.”

But often lost amid the cacophony of the Superferry controversy and its aftermath is what may be the case’s most important legal legacy: The Superferry decision made new law in Hawaii. Specifically, the Supreme Court decision firmly established Hawaii’s doctrine of procedural standing, a category of standing that is well established in federal courts and particularly relevant to environmental cases. Moreover, the environmentalists, who often were loudly derided by pundits and radio announcers – people like the surfer, the paddler, the orchid grower, and the snorkeler – proved instrumental to the evolution of the doctrine in Hawaii. Hawaii’s establishment of the federal procedural standing doctrine appears to make Hawaii the only state in the nation to have adopted the standard in the context of a state environmental review case.

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7 Id.
9 Id.
11 Superferry, supra note 6, at 322-28.
13 A LexisNexis search of state cases for the term “procedural standing” produces no other cases in which a state court has applied the principle to an environmental matter. It would require more research to determine authoritatively that Hawaii is the only state to have adopted the federal procedural standing doctrine in the context of a state environmental review law case. Such research is beyond the scope of this paper.
As one Superferry lawyer has said, “[T]he Supreme Court's decision on Superferry was probably most significant for its significant expansion of the standing doctrine.”

This paper will examine the background law and the procedures, strategies, and arguments the Superferry plaintiffs employed in order to attain standing, as well as the arguments the defendants used in an attempt to keep the plaintiffs out of court. Part II will outline federal and state environmental standing doctrine, paying specific attention to cases most relevant to Superferry. The section will conclude with a brief statement of Superferry’s factual background. Part III will analyze four subjects: (1) how the plaintiffs’ lawyers convinced the court to navigate precedent and firmly establish procedural standing in Hawaii, (2) the role of the individual environmentalists as an element necessary to obtain standing, (3) a recent law review article that argues the Superferry court expanded standing doctrine in Hawaii beyond reasonable boundaries, and (4) alternatives to the doctrine that Superferry articulates. The paper concludes with a suggestion to adopt one of the simplified alternatives.

I. BACKGROUND

Commentators often use the metaphor of a pendulum to describe the way courts effect doctrinal changes in the law. In the case of environmental standing, a more apt metaphor might be a volleyball. In federal courts especially, standing doctrine has bounced from liberal principles that opened the courts, to conservative principles that limited who could sue, back, it seems, to a more liberal stance. Hawaii courts

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15 After this paper was written, the Hawaii Supreme Court took a step toward adopting the simplified standard this paper suggests Hawaii courts should apply to standing in environmental suits. See Cnty. of Haw. v. Ala Loop Homeowners v. Wai’ola Waters of Life Charter Sch., Civ. No. 97-0383(2) (July 9, 2010). Although it is beyond the scope of this paper to explicate in detail the entire eighty-two page Ala Loop decision, it is essential to note that Ala Loop addresses the standard for bringing a private environmental lawsuit to enforce Hawaii’s land-use law. Although the right of action doctrine relates closely to standing doctrine, the two are separate. Thus, Ala Loop and Superferry combined help define the contours of who may bring an environmental lawsuit in Hawaii and in what circumstances. As the Court stated, “The private right of action inquiry focuses on the question of whether any private party can sue to enforce a statute, while the standing inquiry focuses on whether a particular private party is an appropriate plaintiff.” Cnty. of Haw. v. Ala Loop Homeowners at 32 n.20 (2010).


17 See Cassandra Barnum, Injury in Fact, Then and Now (and Never Again): Summers v. Earth Island Institute and the Need for Change in Environmental Standing Law, 17 MO. L. & Pol’y REV. 1 (2009). Barnum notes that while the 2007 U.S. Supreme Court case Massachusetts v. EPA significantly liberalized the federal environmental standing doctrine, the 2009 U.S. Supreme Court case Summers v. Earth Island Inst., 129
have tended to be consistently liberal, but even the Hawaii Supreme Court has shown an ability to shut the door abruptly on would-be plaintiffs.\(^{18}\)

A. Federal Standing Doctrine

Standing doctrine has a well-earned reputation as a conceptual, legal, and factual quagmire, and standing doctrine in environmental cases is particularly complex.\(^{19}\) Standing originates in Article III of the U.S. Constitution, which gives courts the power to hear “cases” and “controversies.”\(^{20}\) Unfortunately, the Constitution does not define “case” and “controversy,” so courts have been left to define the terms.\(^{21}\) Under the modern test, in order to satisfy Article III’s case and controversy requirements, the plaintiff must demonstrate (1) an “injury in fact” that is (2) “fairly traceable” to the defendant, and (3) capable of being redressed by the court.\(^{22}\) In addition to the Article III principles, federal courts apply prudential principles by which the “judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to federal courts to those litigants best suited to assert particular claims.”\(^{23}\) For example, a court may deny standing when a litigant presents a question of broad public policy significance, which is known as a generalized grievance.\(^{24}\) And the court may deny standing when a plaintiff’s claim relies on the interest of a third party.\(^{25}\)

1. Injury in fact: Article III standing

In light of these principles, most notably the injury-in-fact prong of the three-part standing test, it is relatively easy to understand why standing

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\(^{18}\) See Sierra Club v. Haw. Tourism Auth., 100 Haw. 242 (2002) (denying standing to an environmental group suing for state agency’s failure to perform an environmental assessment triggered by state’s expenditure of funds to promote tourism in Hawaii). This paper discusses Sierra Club v. HTA in considerable detail below. See infra text accompanying note 130.

\(^{19}\) Farber, supra note 16.


\(^{21}\) U.S. Const. art. III, § 2. “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, under the laws of the United States, and Treaties made, or which shall be made, under their authority … [and] to Controversies to which the United States shall be a party.”

\(^{22}\) Tribe, supra note 19, § 3-14; e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).


\(^{24}\) Tribe, supra note 19, § 3-14.

\(^{25}\) Id.
in environmental cases is such a thorny issue. When the government commits a statutory wrong against an individual, either because of the government’s action or inaction, it is fairly clear that the plaintiff may have a valid claim, and the plaintiff thus can satisfy at least the first prong of the standing test.\textsuperscript{26} But when the government commits the wrong against a third party or entity, such as the environment, it is not as clear when or why a particular person can meet the injury-in-fact test.\textsuperscript{27} As Justice Scalia has said of standing, “In more pedestrian terms, it is an answer to the very first question that is sometimes rudely asked when one person complains of another’s actions: ‘What’s it to you?’”\textsuperscript{28} In the context of an environmental matter, the question might be rephrased, “What gave you the right to speak for the environment?”

Under the three-part test, what usually gives a person the right to speak for the environment is a concrete interest in the affected place.\textsuperscript{29} To have the requisite nexus a person actually must use the affected environment.\textsuperscript{30} It is not enough merely to intend some day to use the place.\textsuperscript{31} This use represents the concrete interest needed to show a concrete, particular harm.\textsuperscript{32}

2. The zone of interests test: Standing’s prudential requirement

To meet the prudential standing requirements, plaintiffs also often must show that their claims lie within the scope of the statute under which the plaintiffs are bringing their suit. The key question is “whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”\textsuperscript{33} This test is known as the “zone-of-interests test.”\textsuperscript{34}

\textsuperscript{26} See Defenders of Wildlife, supra note 22, at 561.
\textsuperscript{27} See id. at 561.
\textsuperscript{30} See Defenders of Wildlife, supra note 22, at 564.
\textsuperscript{31} Id.
\textsuperscript{32} Id.
\textsuperscript{33} Ass’n of Data Processing Serv. Orgs., supra note 1, at 153. The zone of interests formulation was first used in Association of Data Processing Service Organizations in the context of a case brought under the standing section of the Administrative Procedure Act, 5 U.S.C. § 702, which states that a person is entitled to judicial review of an agency action when the person is “adversely affected or aggrieved by agency action within the meaning of a relevant statute.” Since Association of Data
Sometimes the zone of interests test is fairly simple to pass. The Clean Water Act, 33 U.S.C. § 1251 et seq., and Endangered Species Act (“ESA”), 16 U.S.C. § 1531 et seq., for example, contain citizen suit provisions that expressly allow a member of the public to file suit if the executive agency in charge of enforcing the environmental statute fails to enforce the statute adequately. These statutes are relatively clear in their intention to grant standing to at least some members of the public. By stating that it is within the statute’s interest to let citizens file suit to enforce a statute, Congress effectively expands that statute’s zone of interests to a point that the “zone-of-interests” test is no longer necessary.

Other statutes are not so clear. For example, some environmental statutes, such as the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 et seq., contain no express citizen-suit provisions. Under such laws, a citizen plaintiff must bring suit under the Administrative Procedure Act, 5 U.S.C. § 702. The APA provides, “A person suffering legal wrong because of an agency action or inaction within the meaning of the relevant statute, is entitled to judicial review thereof.” The relevant question in those cases is whether the plaintiff’s claim falls within the substantive provisions of the law.

Processing Service Organizations, courts have applied the zone of interests test to cases not involving the Administrative Procedure Act. See, e.g., Bennett v. Spear, 520 U.S. 154, 163 (1997).


16 U.S.C. § 1540(g) (2006); but see Scalia Law Review, supra note 28, at 883. Justice Scalia argues that the use of citizen suits violates separation of powers principles because the suits represent an infringement of the executive branch by the courts and Congress.

Bennett v. Spear, supra note 32, at 163. Writing for the majority, Justice Scalia wrote, “The first question in this case is whether the ESA’s citizen-suit provision … negates the zone-of-interests test (or, perhaps more accurately expands the zone of interests). We think it does.” It is not clear from the opinion precisely why Justice Scalia was willing in this case to reject his long-standing opposition to citizen suits. See Scalia Law Review, supra note 27. Scalia might have changed his mind because the plaintiffs seeking standing included not the typical environmentalists seeking protections, but ranchers who were using the ESA to halt a U.S. Interior Department wilderness reclamation project. Thus, Scalia’s opinion in Bennett v. Spear gave developers standing to use the ESA to block environmental protection projects. Scalia noted, “It is true that the plaintiffs here are seeking to prevent application of environmental restrictions rather than implement them… . But there is no textual basis [in the ESA] for saying its expansion of standing requirements applies to environmentalists alone.”


Bennett v. Spear, supra note 33, at 175-76.
3. Standing in federal environmental cases

Since the early 1970s, the U.S. Supreme Court has issued a series of opinions defining the boundaries of environmental standing. Although the Court has swung back and forth on how much it would open the door to environmental plaintiffs, a key principle has emerged, which could be called the “principle of specificity.” A plaintiff must show that she has suffered an individual injury, the injury must involve reduced enjoyment of an affected place, and the injury must rest on a rational concern that the government’s action or failure to act will harm the place that the plaintiff uses. The plaintiff actually must use or otherwise enjoy the environment in question. And a temporal relationship must exist between the enjoyment and the feared harm. The injury may be aesthetic or recreational, but it must pertain to a particular person, not just an organization; that is, an environmental group must have something more than merely a broad special interest in an issue. Thus, key aspects of the doctrine are person and nexus: there must be a specific person whose specific enjoyment of a specific place faces harm.

For example, under this well-established standing law, an environmental organization such as the Sierra Club has standing only if the organization can show alleged harm to one or more of the organization’s members. Likewise, an individual plaintiff cannot obtain standing when the potentially affected area is vast or the plaintiff fails to allege nexus to a specific affected locale.

Several cases merit particular attention because they articulate the procedural standing doctrine that the *Superferry* Court adopted.

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40 See Pierce, *supra* note 34, § 16.4.
41 *Id.*
42 *Id.*
43 *Id.*
45 This principle transforms outdoor recreation and aesthetic enjoyment of nature from simple pastimes into an activities having significant legal relevance.
48 This paper does not discuss the causation and redressability requirements of the traditional standing doctrine because, as discussed below, under the procedural standing doctrine, the causation and redressability requirements are relaxed. E.g., *infra* note 99.
a. Footnote 7: Justice Scalia articulates procedural standing in dicta

The first case is the 1992 Supreme Court case *Lujan v. Defenders of Wildlife*, which involved a citizens’ group challenge to the federal government’s changes to regulations promulgated under the Endangered Species Act.\(^49\) The statute requires a federal agency to consult with the Secretary of the Interior if any action funded by the agency might jeopardize an endangered species, or destroy or adversely modify an endangered species’ habitat.\(^50\) After initially issuing a regulation stating that the law applied to projects taking place in foreign countries, the Interior Department changed the regulation so that it applied only to action on U.S. soil or the high seas.\(^51\) The conservation group Defenders of Wildlife sued the Secretary of the Interior Department, arguing that the regulation was not consistent with the Endangered Species Act and seeking an injunction requiring the Secretary to promulgate new rules expanding the rule’s geographic scope to apply once again to foreign lands.\(^52\)

In an attempt to demonstrate the requisite specificity needed to establish standing, Defenders of Wildlife submitted affidavits of two members.\(^53\) In one affidavit, member Joyce Kelly stated that she had traveled to Egypt in 1986 and “observed the traditional habitat of the endangered Nile crocodile” and intended to do so again; in another affidavit, member Amy Skilbred said that she had traveled to Sri Lanka and observed the habitat of endangered species such as the elephant and leopard.\(^54\) Kelly and Skilbred argued that development projects funded partially by U.S. government agencies threatened these animals and their habitats.\(^55\)

*Defenders of Wildlife* addressed several key issues relevant to the *Superferry* decision. In ruling against Defenders, the Court focused on a lack of temporal or imminent connection between Kelly and Skilbred and the habitats they sought to protect; the women merely planned to return to the locales “some day,” and that, the Court said, was not enough to give them standing.\(^56\) According to Justice Scalia, “Such some day intentions – without any description of concrete plans, or indeed any specification of

\(^{49}\) *Defenders of Wildlife*, supra note 22.


\(^{51}\) *Defenders of Wildlife*, supra note 22, at 558.

\(^{52}\) Id.

\(^{53}\) Id. at 563.

\(^{54}\) Id. at 563-64.

\(^{55}\) Id. at 563.

\(^{56}\) Id. at 555.
when the some day will be – do not support the finding of ‘actual or imminent’ injury that our cases require.”

The court also rejected the proffered doctrines of “eco-system nexus,” “animal nexus,” and “vocational nexus.” Under the “ecosystem nexus” argument, “any person who uses any part of a ‘contiguous ecosystem’ adversely affected by a funded activity has standing even if the activity is located a great distance away.” Under the “animal nexus” and “vocational nexus” doctrines, a person with sufficient interest in studying or working with an animal could have standing to protect that animal’s habitat anywhere in the world. In rejecting animal nexus, a plurality led by Justice Scalia upheld but diminished the significance of a 1986 case, Japan Whaling Assn. v. American Cetacean Society, which had granted standing to a U.S. conservation group asking the U.S. government to impose sanctions against the Japanese whaling fleet for the fleet’s repeated violations of an international treaty protecting whales.

Not everyone agreed with Scalia’s outright rejection of these doctrines. In a concurring opinion, Justice Kennedy asserted that Japan Whaling effectively established the “animal nexus” doctrine, even though the Japan Whaling court did not use that term of art. And in another concurring opinion, Justice Stevens argued that a plaintiff’s injury could be sufficiently concrete to establish standing if the plaintiff could show that the plaintiff was genuinely interested in a species and planned to study or observe the animal in the future. “Their injury will occur as soon as the animal is destroyed,” Justice Stevens wrote. And in a dissenting opinion, Justice Blackmun invoked Japan Whaling – and what amounted to the “animal nexus” doctrine – by stating that a plaintiff’s interest may lie not with a specific place but with an animal that roams “over vast geographical ranges.”

57 Id.
58 Id. at 565.
59 Id. at 566.
60 Id.
61 Id. at 565.
62 Id. at 566.
64 Defenders of Wildlife, supra note 22, at 579-80.
65 Id. at 583.
66 Id. at 583.
67 Id. at 594.
The plurality disagreed. What distinguished \textit{Japan Whaling} from the “animal nexus” doctrine posed in \textit{Defenders of Wildlife}, the plurality said, was that the American Cetacean Society plaintiffs observed or worked with “animals of a particular species in the very area of the world where the species is threatened by a federal decision” and some of those very animals might be killed. Again, the key to the Scalia-led plurality was specificity – of place, person, and animal.

All of this would suggest that environmental plaintiffs must walk an exceptionally straight and narrow path to have standing. But Justice Scalia qualified the scope of the Court’s narrow standing doctrine.

In a well-known footnote that is vital to \textit{Superferry}, the \textit{Defenders of Wildlife} court sketched the doctrinal contours of a type of standing known as “procedural standing.” The court below had held that the citizen suit provision of the Endangered Species Act granted all persons a “procedural right” to challenge an official’s failure to follow the proper consultation procedures. The \textit{Defenders of Wildlife} court rejected the lower court’s ruling using a complex line of reasoning based on separation of powers principles. Invoking ideas he had expressed in a 1983 Suffolk Law Review article, Justice Scalia, in a section of the opinion endorsed by a six-justice majority, ruled that the citizen suit provisions of the Endangered Species Act, and similar statutes, were unconstitutional as applied in the \textit{Defenders of Wildlife} case.

Scalia based his argument on a line of cases that had denied standing to citizens who had sought to bring citizen suits against the government for violations of the Constitution. The Court had rejected these as generalized grievances not allowed under Article III. Scalia wrote,

To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to

\begin{footnotesize}
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\item \textit{Id.} at 566-67.
\item \textit{Id.} at 567, (quoting \textit{Japan Whaling}, supra note 61, at 231. (emphasis added).
\item While reaffirming \textit{Japan Whaling}, Justice Scalia also denigrated the case by stating that its reasoning “is plausible – though it goes to the outer reaches of plausibility.” In this way the court defined \textit{Japan Whaling} as one of the outer limits of standing.
\item \textit{Defenders of Wildlife, supra} note 22, at 572.
\item \textit{Id.} at 576-577.
\item \textit{Scalia Law Review}, supra note 28, at 882.
\item \textit{Defenders of Wildlife, supra} note 22, at 575.
\end{itemize}
\end{footnotesize}
"take Care that the Laws be faithfully executed," Art. II, § 3. It would enable the courts, with the permission of Congress, "to assume a position of authority over the governmental acts of another and co-equal department," and to become "virtually continuing monitors of the wisdom and soundness of Executive action." We have always rejected that vision of our role.75

Some commentators have criticized Scalia’s analysis,76 and some more recent Supreme Court decisions have largely ignored Scalia’s strong stance against the constitutionality of citizen suit provisions.77 However, at least one commentator has mentioned the separation-of-powers principle in a criticism of the Superferry decision, so it is necessary to understand Scalia’s separation-of-powers idea in order to understand why it does not in fact apply to Superferry.

What makes it most clear that the holding of Defenders of Wildlife does not apply to the facts of Superferry, however, are dicta by Justice Scalia himself discussing procedural standing. “There is this much truth,” Scalia wrote in footnote 7 of the opinion, “to the assertion that ‘procedural rights’ are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.”78 In other words, according to Justice Scalia, procedural rights are so special that a plaintiff who has procedural standing does not necessarily have to meet all prongs of the three-prong test. So who could have procedural standing? According to Scalia, one example of a person with a valid procedural standing right would be someone living adjacent to a federally licensed dam who wanted to challenge an agency’s failure to produce an environmental impact statement.79 One problem with the plaintiffs’ allegations of standing in Defenders of Wildlife, Scalia wrote, was that

75 Id. at 577.

76 See Pierce, supra note 34, § 16.4. Pierce writes, “The plurality opinion referred to the requirements of ‘concrete and particularized’ and ‘actual or imminent’ injury as an ‘essential and unchanging part of the case and controversy requirement of Article III.’” But, Pierce notes, the oldest of the six cases cited for supporting that proposition was decided in 1975. “The Court could not support its assertion by citing older cases because the assertion is false. It could not cite any case with a holding that supports its assertion because no such case existed.” See also Cass R. Sunstein, What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III, 91 Mich. L. Rev. 163, 204 (1992) (stating, “the Court’s conclusion on injury in fact was probably incorrect, but plausible, and in any case no great innovation”); Farber, supra note 16, at 1516.

77 See Friends of the Earth, supra note 22, at 573 n.7.

79 Id. at 573.
they were analogous to people living at the other end of the country away from the dam.\(^8^0\)

b. Supreme Court disfavors Scalia’s critique of citizen suits

If Defenders of Wildlife closed the door for many environmental plaintiffs, a U.S. Supreme Court decision eight years later, Friends of the Earth v. Laidlaw Environmental Services (TOC), kicked the door ajar.\(^8^1\) Laidlaw involved the owner of a South Carolina hazardous waste incinerator that included a wastewater treatment plant.\(^8^2\) Under the Federal Clean Water Act, the South Carolina Department of Health and Environmental Control (“DHEC”) had permitted Laidlaw to discharge treated wastewater into the North Tyger River as long as the wastewater met pollution limits specified in a permit.\(^8^3\) But Laidlaw repeatedly exceeded the permit’s pollution limits, and DHEC never enforced the permit requirements.\(^8^4\) After Friends of the Earth (“FOE”) notified Laidlaw that FOE planned to file a citizen suit, Laidlaw’s attorney proceeded to confect a deal with DHEC. Under this cozy arrangement between the state and the polluter, the state’s attorney signed and filed a complaint drafted by the polluter’s lawyer, and then the two parties settled the suit before FOE had a chance to file its lawsuit.\(^8^5\)

Although the issue might have been moot, FOE sued anyway. The organization prepared affidavits from members who had once used the North Tyger River for canoeing, fishing, camping, picnicking, and bird watching, but who had quit using the river after they learned about the mercury contamination.\(^8^6\) Writing for a six-justice majority, Justice

\(^8^0\) Id. at 573. In an internal memo elucidating Justice Souter’s opinion on standing in environmental cases, Souter strongly endorsed Defenders of Wildlife’s requirement that a plaintiff would need a concrete injury underlying the procedural harm. However, Souter said the opinion should make clear that a plaintiff with a concrete interest could have standing even if the injury also affected people in general. In other words, the principle that an injury be particularized meant only that the injury was concrete to a specific person; it did not mean that widespread injury affecting everyone made a matter unjusticiable as a generalized grievance. As Souter stated, “Congress might, for instance, grant everyone standing to challenge government action that would rip open the ozone layer and expose all Americans to unhealthy doses of radiation.” Memorandum from Justice David Souter to Justice Antonin Scalia (May 28, 1992) (on file with author).

\(^8^1\) Laidlaw, supra note 77.

\(^8^2\) Id. at 174.

\(^8^3\) Id. at 176.

\(^8^4\) Id. at 176.

\(^8^5\) Id. at 176-77.

\(^8^6\) Id. at 181.
Ginsburg wrote that the members’ affidavits established a sufficient nexus to the river to give FOE standing, and the court remanded the case to the district court to deal with the issue of mootness.\(^8^7\)

Whereas Justice Scalia’s separation-of-powers argument concerning citizen suits had carried the votes of six justices in *Defenders of Wildlife*, only Justice Thomas joined Scalia in the *Laidlaw* dissent, in which Scalia again raised the separation-of-powers argument. Justice Scalia asserted that the citizen suit provision means “elected officials are entirely deprived of their discretion to decide that a given violation should not be the object of suit at all, or that the enforcement decision should be postponed.”\(^8^8\) Thus, according to Scalia’s reasoning, citizen suit provisions constitute an infringement by Congress on the executive branch’s powers.

Although *Laidlaw* liberalized the federal environmental standing doctrine by making it easier for parties to bring citizen suits, Justice Ginsburg’s decision also underscored a tenet of federal standing jurisprudence that has concerned some liberal environmental lawyers and commentators.\(^8^9\) Ginsburg wrote that, in environmental cases, the “relevant showing for purposes of Article III standing … is not injury to the environment but injury to the plaintiff.” In other words, a citizen suit plaintiff does not have to show that a violation of the Clean Water Act actually harms the environment, but merely that the violation somehow harms a human plaintiff -- perhaps by reducing the plaintiff’s ability to enjoy hiking or picnicking in the affected environment.\(^9^0\) So while *Laidlaw* kicked open the door for citizen suits, it also solidified a human-centered approach to environmental standing.\(^9^1\)

c. Federal courts use footnote 7 standing

Since *Laidlaw*, courts have repeatedly used the footnote 7 rule, firmly establishing the principle in the law.\(^9^2\) A typical case in point is a 1995 opinion in which the Ninth Circuit Court of Appeals elaborated on

\(^8^7\) *Id.* at 183-85.

\(^8^8\) *Id.* at 210.


\(^9^0\) See *Laidlaw*, supra note 77, at 181.


the procedural standing doctrine articulated in *Defenders of Wildlife*. After the U.S. Fish and Wildlife Service designated lands in Douglas County, Oregon, as critical habitat for the Northern Spotted Owl, the county sued the Secretary of the Interior under the National Environmental Policy Act (NEPA) for failing to conduct an environmental assessment.93 Writing for the majority, Judge Harry Pregerson said the test for procedural standing required a plaintiff to show two things: (1) a procedural right, which in Douglas County was bestowed by a statute, NEPA, and (2) a concrete interest underlying the procedural right, which in Douglas County was an interest in county lands that might be affected by the designation as critical habitat.94 Thus, the Douglas County court showed a plaintiff needed both a procedural right and a specific geographic nexus.

More recently, the U.S. Supreme Court again mentioned footnote 7 in the 2007 case *Massachusetts v. EPA*. The State of Massachusetts and eleven other states had sued the U.S. Environmental Protection Agency for shirking its duties under the Clean Air Act by failing to regulate carbon emissions, which were contributing to global warming and thereby harming Massachusetts’ coastal areas.95 A five-to-four majority found the plaintiffs had standing and reiterated *Defenders of Wildlife’s* footnote 7: “A litigant to whom Congress has ‘accorded a procedural right to protect his concrete interests’ – here, the right to challenge agency action unlawfully withheld – ‘can assert that right without meeting all of the normal standards for redressability and immediacy.’”96 Although the Court did not base the plaintiffs’ standing on the procedural standing doctrine, the Court nonetheless further elucidated the procedural doctrine, explaining that a litigant “who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been different.”97 This principle is important in the context of laws requiring environmental review of projects because such laws usually are “merely procedural.”

The *Massachusetts v. EPA* decision was just four months old when the Hawaii Supreme Court issued the *Superferry* decision.98 By then, as the cases above illustrate, the federal courts had defined the contours of procedural standing. Although some nuances remained ambiguous, one principle was fairly clear: Under federal principles, a plaintiff could assert

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94 *Id.* at 1499-1500.
96 *Id.* at 517-18.
97 *Id.*
98 *Massachusetts v. EPA* was decided April 2, 2007; *Superferry* was decided Aug. 31, 2007.
procedural standing under an environmental review statute when an agency failed to produce an environmental assessment or environmental impact statement as the statute required. 99

B. Hawaii Standing Doctrine

Hawaii’s standing doctrine generally is more liberal than the federal doctrine. 100 In environmental matters in particular, Hawaii standing doctrine is based on distinctly different constitutional principles; this is well within Hawaii’s powers, of course, because a state is not bound by Article III or U.S. Supreme Court standing doctrine. 101 Furthermore, Hawaii’s Constitution articulates a fundamental right to a clean environment. It states, “each person has the right to a clean and healthful environment,” 102 and continues, “any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.” 103 Also some Hawaii environmental laws, such as Hawaii’s environmental review law, include policy language not included in the federal counterpart. 104 Hawaii courts have used these principles to support a standing doctrine the keeps the courtroom doors open to plaintiffs in environmental cases.

99 See Bradford C. Mank, Standing and Future Generations: Does Massachusetts v. EPA Open Standing for Generations to Come? 34 COLUM. J. ENVTL. L. 1, 37 (2009). Although footnote 7 clearly states that the causation and redressability standards are relaxed in procedural cases, Mank notes that footnote 7 leaves unclear the extent to which the causation and redressability requirements are relaxed. Furthermore, Mank points out, footnote 7 fails to specify all of the types of procedural cases that might trigger the procedural rights. Mank speculates that Scalia used the example of a dam that failed to do an EIS because the federal EIS law is purely procedural and certainly would trigger procedural rights. One question is whether the procedural standing principles would be triggered not just in environmental cases, but in any case brought under the Administrative Procedure Act, or, in Hawaii, the Hawaii Administrative Procedure Act.


101 Interview with Jon Van Dyke, Professor of Law, William S. Richardson School of Law, University of Hawaii, in Honolulu, Haw. (Feb. 26, 2010).


103 Id.

104 HAW. REV. STAT. § 343-1 states, “The legislature finds that the quality of humanity’s environment is critical to humanity’s well being, that humanity’s activities have broad and profound effects upon the interrelations of all components of the environment, and that an environmental review process will integrate the review of environmental concerns with existing planning processes of the State and counties and alert decision makers to significant environmental effects which may result from the implementation of certain actions. The legislature further finds that the process of reviewing environmental effects is desirable because environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole.”
1. Professor Davis’s “needs of justice” standing principle

For decades, Hawaii courts have embraced an idea articulated forty years ago in a law review article analyzing what was then a U.S. Supreme Court trend of lowering standing barriers. After the U.S. Supreme Court established the three-prong injury-in-fact test in a series of cases in 1968 and 1970, Kenneth Culp Davis, a law professor at the University of Chicago, argued that the test liberalized standing doctrine but did not go far enough. The problem was that standing doctrine still was enormously complicated. “Complexities about standing are barriers to justice,” Davis wrote. “In removing the barriers, the focus should be on the needs of justice.” If a person has been injured by the illegal actions of a person or government agency, the injured person should have standing, Davis concluded. A year later, in 1971, the Hawaii Supreme Court quoted Davis’s idea in a decision, East Diamond Head Ass’n v. Zoning Bd. of Appeals, determining that residents had standing to challenge a zoning variance granted to a film studio used by the television show ‘Hawaii Five-O’ in Honolulu. Several other decisions have cited Davis since then, including the Superferry decision. As one Hawaii court put it, “Our touchstone [for standing] remains ‘the needs of justice.’” As a result, Hawaii courts have tended to let plaintiffs in the courthouse door. In a 1981 case challenging a reclassification of land by the Hawaii Land Use Commission, for instance, the Hawaii Supreme Court granted standing to people who were neither owners of reclassified land nor owners of adjacent lands. In such a case, a court may grant an organization standing to sue for a violation of the Hawaii Administrative Procedures Act. Hawaii courts take a broad view of what it means to have a “‘personal stake’ in cases in which the rights of the public otherwise might be denied hearing in a judicial forum.” A member of

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106 Davis, supra note 105, at 472-73.

107 Id. at 450.

108 Id. at 473.


111 Life of the Land, supra note 105, at 176.

112 Id.

113 Id. at 177.

114 Pele Def. Fund v. Paty, 73 Haw. 578, 593 (1992) (citing Hawaii’s Thousand
the public has standing to sue to enforce the rights of the public generally if she can show that she has suffered an injury in fact.\textsuperscript{115}

2. Hawaii’s environmental standing limits

This line of cases does not mean that Hawaii courts have been a standing free for all. One case to test the outer limits of Hawaii standing doctrine, the 1989 case \textit{Hawaii’s Thousand Friends v. Anderson}, involved claims by an environmental organization that the City and County of Honolulu’s advertisements of a proposed low-income public housing development had misled the public and thereby defrauded the taxpayers, included the organization’s members, and thus defrauded them. Hawaii courts had previously granted standing to organizations on behalf of their membership.\textsuperscript{116} But the Court in \textit{Hawaii’s Thousand Friends v. Anderson} said any injuries suffered because of the alleged advertising misrepresentations would be particular to the organization’s members and not the organization’s membership generally.\textsuperscript{117} Therefore, the Court dismissed the case based on the plaintiff’s lack of standing.\textsuperscript{118}

Hawaii courts impose a more basic limit on standing by applying principles from the federal courts to determine whether a plaintiff has standing.\textsuperscript{119} Even in environmental cases, Hawaii courts employ the same three-part standing test used by federal courts.\textsuperscript{120} The 2002 Hawaii Supreme Court case \textit{Sierra Club v. Hawaii Tourism Authority}\textsuperscript{121} particularly shows the limits of Hawaii’s environmental standing doctrine. \textit{Sierra Club v. HTA} is important because it involved many of the same issues as Superferry, and even some of the same key players, including the plaintiff, Sierra Club, and the plaintiff’s attorney, Isaac Hall, a sole practitioner on Maui. The case also marked the first time a court in Hawaii addressed procedural standing.\textsuperscript{122} Before discussing \textit{Sierra Club v. HTA} it is useful to understand some key aspects of Hawaii’s

\textit{Friends v. Anderson}, 70 Haw. 276, 281 (1989)).

\textsuperscript{115} \textit{Pele Def. Fund, supra} note 114, at 593 (quoting \textit{Akau v. Olohana Corp.}, 65 Haw. 383, 388-89 (1982)).

\textsuperscript{116} See, e.g., \textit{Waianae Model Neighborhood Ass’n v. City & County}, 55 Haw. 40, (1973).

\textsuperscript{117} \textit{Pele Def. Fund, supra} note 115, at 593, (citing \textit{Hawaii’s Thousand Friends v. Anderson, supra} note 112, at 284-85).

\textsuperscript{118} \textit{Id}.

\textsuperscript{119} \textit{Life of the Land, supra} note 105, at 171-72.

\textsuperscript{120} \textit{HTA, supra} note 18, at 250.

\textsuperscript{121} \textit{Id}.

\textsuperscript{122} \textit{Id.} at 273 (Moon, C.J., dissenting).
environmental review law, which is commonly referred to as the Hawaii Environmental Policy Act (“HEPA”).

Modeled on NEPA, HEPA requires an agency or applicant to conduct an environmental assessment (“EA”) before an agency performs any one of several listed actions with the potential to affect the environment. These actions include the use of state or county land, shoreline areas, historic areas, or conservation districts. A government agency’s decision to use state funds also triggers the need for an EA. An EA is a screening or preliminary assessment; if the EA determines that a project is likely to have significant impacts, then the agency is required to do a more thorough environmental impact statement (“EIS”). The studies are public documents, and the process allows the public to comment. HEPA is merely procedural, however.

The statute is designed to make a government agency carefully consider the environmental consequences of the agency’s actions before the agency acts. In other words, HEPA requires agencies to look before they leap. But once the agency has examined its actions, HEPA does not bar the agency from acting – even if the EIS finds the agency’s actions will likely harm the environment significantly. Thus, the rights HEPA protects are purely procedural.

HEPA largely mirrors its federal counterpart, the National Environmental Policy Act. There is one exception, however, which is notable for the attention it drew from the HTA court. This difference involves who may file a suit under the two laws. Under NEPA, a citizen wishing to file a suit must file it under provisions of the Administrative Procedures Act. HEPA, however, is different. The act includes a provision giving the right to sue under HEPA to “[o]thers . . . adjudged aggrieved” by the failure to do an EA or EIS. That difference may seem minor, but it had a significant effect on the reasoning of the HTA court’s plurality.

123 HAW. REV. STAT. § 343 actually is titled “Environmental Impact Statements.” However, because the statute is the state analog to NEPA, the public and Hawaii courts referred to § 343 as “HEPA.” See, e.g., Superferry, supra note 6, at 304 n.4. The Hawaii statute titled “State Environmental Policy” actually is HAW. REV. STAT. § 344. Following custom, this paper will refer to HAW. REV. STAT. § 343 as “HEPA.”
126 HTA, supra note 18, at 266-67.
127 See id. at 266.
128 Id. at 266.
129 Id. at 271.
130 Id. at 258.
131 HAW. REV. STAT. § 343-7(a)(b) (2009).
In 1999, the Hawaii Tourism Authority approved a plan to spend $114 million in state money to market the Hawaiian Islands as a tourist destination.\textsuperscript{132} Sierra Club sued, arguing that HEPA required the HTA to conduct an environmental assessment before the agency approved an expenditure of funds on a marketing plan.\textsuperscript{133} Sierra Club argued that the state’s HEPA-triggering action – spending state money – would lead to more tourists visiting the islands and directly affect Sierra Club members’ enjoyment of the air, water, land, and other natural resources.

The matter went directly to the Hawaii Supreme Court, which had original jurisdiction over any action to which HTA is a party or in which questions arise concerning the validity of HTA activities.\textsuperscript{134} To show the requisite nexus to have standing under the injury-in-fact standard, Sierra Club supplied affidavits of several members. One member, David Kimo Frankel, attested that increased tourists at his favorite surf spot and beaches would make it harder for him to catch waves and otherwise disrupt his enjoyment.\textsuperscript{135} Blake Oshiro, another member, argued that increased tourists had already disrupted his enjoyment of Hanauma Bay and that more tourists would do more of the same, plus would lead to more traffic.\textsuperscript{136} Margery Freeman of Kauai said more tourists would further crowd her favorite beaches at Poipu.\textsuperscript{137} The argument turned on informational harm: the members said they had relied on EAs in the past for various reasons. For example, Frankel, a public interest lawyer, said he had relied on EAs to help him develop policy recommendations.\textsuperscript{138}

Although the claims concerned informational harm, the Court raised the issue of procedural standing sua sponte.\textsuperscript{139} Arguments over procedural standing, both its definition and application to case, occupied the bulk of the opinion.

The Court’s decision was close. Justice Ramil joined Justice Acoba’s opinion, which rejected Sierra Club’s claims entirely, saying that Sierra Club failed to meet the injury-in-fact test. In Acoba’s view, the affidavits failed to show an adequate nexus between the places used by the

\textsuperscript{132} HTA, supra note 18, at 247.

\textsuperscript{133} Id. at 248.

\textsuperscript{134} Id. at 247-48, citing HAW. REV. STAT. § 201B-15 (2009).

\textsuperscript{135} HTA, supra note 18, at 282.

\textsuperscript{136} Id.

\textsuperscript{137} Id. at 282.

\textsuperscript{138} Id. at 281.

\textsuperscript{139} See id. at 272 n.5 (Moon, J. dissenting). Standing is so essential to whether a court has jurisdiction to hear a case that the court may raise the issue on its own, even though neither party has briefed the issue fully. That is what Justice Moon did in HTA concerning procedural standing.
plaintiffs and something as diffuse as a marketing plan.\(^{140}\) Sierra Club failed on the causation prong because, to Acoba, the connection between spending money on a tourism marketing plan and more tourists coming to Hawaii and harming the environment was too attenuated.\(^{141}\) And finally, even if HTA did an EA or EIS, that would not solve the injury of tourists invading the plaintiffs’ favorite beaches and surf spots.\(^{142}\)

More important for Hawaii’s procedural standing doctrine, which the court was addressing head on for the first time, Acoba said procedural standing simply could not apply to HEPA cases.\(^{143}\) Acoba’s reasoning is described in more detail below.

Justice Levinson joined Chief Justice Moon’s dissent, which argued that Sierra Club did have procedural standing and that Sierra Club should prevail.\(^{144}\) Justice Nakayama cast the swing vote. Nakayama agreed with Moon’s definition of procedural standing and rejected Acoba’s analysis of procedural standing.\(^{145}\) But Nakayama also said that in the case before the Court, Sierra Club had failed to meet the test to establish procedural standing.\(^{146}\) Therefore, Nakayama concurred with Acoba and Ramil in rejecting Sierra Club’s suit.\(^{147}\)

Justice Moon provided an in-depth analysis of procedural standing. Moon first defined procedural standing, discussing the nature of HEPA as a procedural law and defining procedural injury as the failure of an agency to follow the process the law prescribes, regardless of whether there is environmental harm.\(^{148}\) In addition, Moon outlined federal case law on procedural standing, including footnote 7 of Scalia’s opinion in \textit{Defenders of Wildlife}, which specifically explains procedural standing in the context of a citizen’s challenge to a government agency’s failure to perform an EIS.\(^{149}\) Moon also applied the federal procedural standing test established in \textit{Douglas County v. Babbitt}, which could be met when: (1) the law accorded the person a procedural right to protect a concrete interest, and (2) the person had a concrete interest at stake, such as a geographic nexus to a place that could be affected.\(^{150}\) Moon furthermore explained the zone

\(^{140}\) \textit{Id.} at 242.

\(^{141}\) \textit{See id.} at 253-54.

\(^{142}\) \textit{Id.} at 256.

\(^{143}\) \textit{Id.} at 264.

\(^{144}\) \textit{Id.} at 258.

\(^{145}\) \textit{Id.} at 265-66.

\(^{146}\) \textit{Id.}

\(^{147}\) \textit{See id.} at 265-68.

\(^{148}\) \textit{Id.} at 272.

\(^{149}\) \textit{Id.} at 273.

\(^{150}\) \textit{Id.} at 274.
of interest test, which relates to NEPA cases that must be brought under the APA.\textsuperscript{151} Finally, Moon discussed article XI, section 9 of the Hawaii Constitution, which Moon said “states unambiguously that ‘each person has the right to a clean and healthy environment’ and that ‘any person may enforce this right against any party, public or private.’”\textsuperscript{152} Applying these principles to the facts of the \textit{HTA} case, Moon concluded that Sierra Club should have standing under HEPA.

Acoba rejected Moon’s analysis of procedural standing. Acoba had no problem with the framework that Moon laid out for federal procedural standing.\textsuperscript{153} Indeed, Acoba acknowledged Moon’s framework was correct.\textsuperscript{154} But Acoba distinguished HEPA from NEPA by noting that HEPA, unlike NEPA, specifically states who may challenge the failure to produce an EA.\textsuperscript{155} Thus the federal case law laying out the framework for procedural standing was inapplicable to HEPA cases, and a plaintiff such as Sierra Club simply “cannot be afforded so-called ‘procedural standing’ under HEPA.”\textsuperscript{156}

Justice Nakayama criticized Acoba’s analysis, even though she agreed with Acoba’s conclusion. Acoba, she wrote, “misconstrues the very nature of the rights asserted.”\textsuperscript{157} The plurality, Nakayama wrote, erroneously applied the rules of substantive standing to what should be a procedural standing issue.\textsuperscript{158} HEPA is analogous to NEPA because both grant procedural rights, Nakayama wrote.\textsuperscript{159} In essence, both statutes require the government to examine the effects of its actions before the government takes actions that could affect the environment -- to look, in effect, before it leaps, or when the leap is imminent.\textsuperscript{160}

\textsuperscript{151} \textit{Id.} at 273.

\textsuperscript{152} \textit{Id.} at 276, (quoting HAW. CONST. art. XI, § 9 (1978)).

\textsuperscript{153} \textit{HTA, supra} note 18, at 259.

\textsuperscript{154} \textit{Id.} Footnote 25 implies there was a fair amount of acrimony between the Acoba plurality and the Moon dissenters; although the introduction of Acoba’s discussion of procedural standing uses the same framework that Moon uses, Acoba takes issue with Moon’s comment that the majority had “acknowledged” Moon’s analysis was correct. “We are not ‘acknowledging’ the dissent’s outline of the procedural injury framework, but are simply setting forth the procedural standing requirements in federal court to give context to our discussion,” Acoba wrote.

\textsuperscript{155} \textit{Id.} at 260, (citing HAW. REV. STAT. § 343-7(a) (2009)).

\textsuperscript{156} \textit{Id.} at 260.

\textsuperscript{157} \textit{Id.} at 266.

\textsuperscript{158} \textit{Id.} at 266.

\textsuperscript{159} \textit{Id.} at 267.

\textsuperscript{160} See \textit{id.} at 266.
How the statutes grant a party the right to sue – either directly or through the APA – is not the key factor. By denying that procedural standing applied to HEPA, Nakayama argued, Acoba had determined that a plaintiff in a HEPA case must establish substantive standing. That means the plaintiff would have to show his concrete interest had been harmed or imminently would be harmed. Under this doctrine, a plaintiff could not require the government to look before it leapt; instead, a plaintiff could sue only after the government had already leapt or was just about to leap. Acoba’s analysis, Nakayama concluded, “would render HEPA meaningless.”

Although Moon’s argument failed on whether Sierra Club could have standing in the case before the Court, one thing was clear: a majority of justices on the Hawaii Supreme Court had agreed with Moon’s analysis of procedural standing. This fact would not be lost on Sierra Club’s lawyers in the Superferry case.

C. The Superferry Case

The general facts of the Superferry case are well-known to anyone living in Hawaii in recent years. The Superferry story made headlines almost daily for more than two years. The Hawaii Department of Transportation (“DOT”) spawned the controversy and ensuing litigation when DOT determined, in February 2005, that proposed improvements at Kahului Harbor on Maui were exempt from HEPA’s EA and EIS requirements. The improvements included enhanced utility service, fencing, and the construction of a floating barge with a removable ramp to let passengers and vehicles board and disembark the ship. The Sierra Club, Maui Tomorrow, and Kahului Harbor Coalition sued DOT for failing to conduct an EA. On July 12, 2005, Judge Joseph Cardoza of the Second Circuit Court on Maui ruled for DOT and Superferry, finding among other things that Sierra Club lacked standing and that HEPA’s exemptions meant that DOT did not have to do an EA for the harbor improvements.

For many people in Hawaii, Judge Cardoza’s ruling was a cause for celebration. For Hawaii residents, interisland travel is expensive, not

161 See id. at 267.
162 Id. at 267.
163 Id. at 267.
164 Id. at 267-68.
165 Superferry, supra note 6, at 308-10.
166 Id. at 309.
167 See id. at 308-12; for a concise procedural history of Superferry, see Lisa Bail, Standing Aboard the Superferry, AMERICAN BAR ASSOCIATION ENVIRONMENTAL IMPACT ASSESSMENT COMMITTEE NEWSLETTER, at 9, May 2008.
only because of the cost of airplane tickets but also because most travelers must rent a car upon arriving at a neighbor island. Superferry promised low fares and a way for passengers to transport their own cars. Furthermore, Superferry was launching its service during a critical time for Hawai‘i’s interisland airline business, as the long-time interisland air carriers Aloha Airlines and Hawaiian Airlines engaged in financially self-destructive fare wars with Mesa Airlines’ go! brand, which had come to Hawaii with rock-bottom fares and the intent to drive Aloha Airlines out of business.168 Compared to the airlines, whose woes also were in the newspapers almost daily, Superferry seemed comparatively stable. So as Superferry overcame its first legal obstacles, the editorial page of The Honolulu Advertiser expressed the views of many in the community when it wrote: “Something worth celebrating: The prospects for an interisland ferry appear to be revving up.”169

Parallel stories were unfolding. As the plaintiffs prepared their appeal of Judge Cardoza’s ruling, Superferry was steaming toward a launch.170 The plaintiffs transferred the case from Hawaii’s Intermediate Court of Appeals directly to the Hawaii Supreme Court, as allowed by the Hawaii Rules of Appellate Procedure.171 The result was a dramatic countdown, as the lawyers were preparing for oral argument before the Hawaii Supreme Court, to be held just two or three days before the Superferry was expected to begin service.172

On August 31, 2007, the Hawaii Supreme Court unanimously overturned Judge Cardoza’s decision, ruling that Sierra Club in fact had standing and that the Hawaii environmental review law required DOT to conduct the EA. The ruling opened a whole new chapter in the Superferry saga -- a chapter that involved an injunction preventing Superferry’s operations and a special session in which the Hawaii Legislature passed an

168 See Stewart Yerton, Airline’s ticket-sales complaint is grounded: A judge criticizes both plaintiff Hawaiian and defendant Mesa Air, HONOLULU STAR-BULLETIN, Oct. 6, 2006, available at http://archives.starbulletin.com/2006/10/06/news/story03.html. In a memo, Mesa’s chief financial officer described to a consultant Mesa’s strategy behind the airline’s move to Hawaii: “I agree that if we assume (Aloha) stays in market and in business forever, this project makes no sense. We definitely don’t want to wait for them to die, rather we should be the ones who give them the last push. . . . Clearly, if we can get (Aloha) out of the market without anyone else stepping in this is a home run.”

169 Let’s move ahead with Superferry plans, HONOLULU ADVERTISER, Oct. 3, 2005, 10A. The Advertiser actually published this piece in response to a companion lawsuit that Isaac Hall had filed in federal court. Nonetheless, the editorial illustrates the positive feelings many people had for the Superferry and the sense of relief some expressed over the apparent news that the project was free of any legal obstacles.

170 Telephone interview with Isaac Hall (Apr. 22, 2010). [hereinafter Hall interview 1]

171 See Hawaii Rules of Appellate Procedure § 40.2.

172 Hall interview 1, supra note 170.
unconstitutional bill giving Superferry a special privilege.\textsuperscript{173} That chapter is not within the scope of this paper.

Although the result of the 2007 Superferry decision has been widely publicized, what often has been overlooked is the legal implications of the decision: how the Sierra Club and its ally organizations, the Kahului Harbor Coalition and Maui Tomorrow Inc., convinced the Hawaii Supreme Court to narrow the significance of HTA to near irrelevancy and for the first time apply procedural standing to Hawaii courts.

II. ANALYSIS

In the five years between HTA and Superferry, the composition of the Hawaii Supreme Court changed. In December 2002, the same month that the Court issued its HTA opinion, Justice Ramil resigned from the bench to go into private practice.\textsuperscript{174} To replace Ramil, Hawaii’s Republican Governor, Linda Lingle, appointed James E. Duffy, Jr.,\textsuperscript{175} a Honolulu attorney whom President Clinton had once nominated to the Ninth Circuit Court of Appeals.\textsuperscript{176} Ramil had been the only justice to support fully Chief Justice Acoba’s opinion in HTA. One obvious question in Superferry was whether Justice Acoba could muster the votes needed to support what had seemed his absolute rejection of procedural standing in HEPA cases.

A. Sierra Club’s Bold Litigation Strategy

It would be difficult to overstate the importance of HTA. Sierra Club and the other plaintiff organizations would have to distinguish Superferry from HTA. Superferry’s lawyers, meanwhile, would argue the cases were exactly the same. But first, Sierra Club would need to find members with a concrete interest in the places that Superferry was likely to affect.


The Surfer, the Paddler, and the Orchid Farmer: How Sierra Club established the requisite nexus

To some members of Hawaii’s community of environmental activists, it seemed clear that the Superferry would seriously affect them. Jeffrey Parker was a case in point. The owner of Tropical Orchid Farm Inc. in Haiku, Maui, Parker had spent three decades building a business that specialized in growing endangered orchids. In addition to the typical challenges associated with an agriculture business, Parker faced the additional burden of complying with the extensive regulatory burdens associated with propagating endangered species, including complex export permit requirements imposed by the Convention on International Trade in Endangered Species of Wild Fauna and Flora, an international law. For years, Parker had seen what invasive species could do to farmers. An infestation of invasive Singapore orchid stalk blight, light brown apple moth, or coqui frogs could effectively shut down a farm. Parker already spent considerable time battling newly arrived pests such as the big-headed red ant, a new species of black ant, spiral whiteflies, mealy bug, and two species of microscopic spider mites.

Parker knew that the threat of species coming in through ports was real. Years before, Parker was part of a citizens group that called for an EIS when the Hawaii and U.S. transportation departments were planning to expand Kahului Airport. Initially, Parker says, the citizens were laughed at. But the EIS showed the impacts of invasive species to be so significant that the airport was required to mitigate the impacts by building a state-of-the-art cargo center that included an industrial air curtain barrier to prevent escape of any insects during inspection of air cargo containers, as well as lab space, freezer and sterilization and incineration facilities.

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177 See Declaration of Jeffrey Parker, Sierra Club v. Dep’t of Transp., Haw. 2d Cir. Ct., Civil No. 05-1-0114 (3) (on file with author). [hereinafter Parker Declaration]

178 Telephone interview with Jeffrey Parker, member of Kahului Harbor Coalition and President of Tropical Orchid Farm, Inc. (Feb. 5, 2010). [hereinafter Parker interview]

179 Id.

180 Id.

181 Id.

182 Parker Declaration, supra note 177, at Para. 7.

183 Parker interview, supra note 178.

184 Id.

185 Id.

186 United States Department of Transportation Federal Aviation Administration Western-Pacific Region Hawthorne, California, RECORD OF DECISION FOR THE PROPOSED MASTER PLAN IMPROVEMENTS AT KAHULUI AIRPORT, KAHULUI, MAUI,
During the airport controversy, Parker recalled transportation officials telling him, “Why are you so worried about this? What you really should be looking at is the harbor.” So when the Superferry project was announced, Parker was more than a little concerned. “People don’t understand how bad this is,” he says, looking back. “I don’t think people understand the invasive species issue is real.”

For Anne Fielding, a member of the Sierra Club and Maui Tomorrow, Superferry posed not a terrestrial concern, but a marine one. A zoologist by training, Fielding had spent three decades leading field trips to study marine life; first, in the 1970s, as an employee of the Waikiki Aquarium, and later as the owner of her own snorkel tour business based in Maui. Marine life, she said, is her passion, and her favorite thing is sharing this passion with others, particularly children for whom her excursions would open a door onto a new world. Like Parker, Fielding was concerned about invasive species and thought Superferry’s potential impact should be assessed.

The third activist, Karen Chun, shared an interest in the ocean, except Chun’s was recreational and cultural. As the head coaches of Na Kai ‘Ewalu Canoe Club based in Kahului Harbor, Chun and her husband, Malama, devoted themselves to perpetuating the traditional Hawaiian sport of outrigger canoe paddling, paddling from the harbor on weekday practices, and gathering on weekends for regattas involving clubs from around Maui. The harbor is a special place, with sheltered waters, a white sand beach, and the spot where the legendary surfer Eddie Aikau grew up surfing. Chun, a member of the Kahului Harbor Coalition, was concerned that the ferry would ruin all of this.

Isaac Hall, the solo Maui lawyer who had brought the HTA case for Sierra Club, knew it was essential to have people like Parker, Fielding,

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187 Parker interview, supra note 178.
188 Id.
189 Telephone interview, Anne Fielding, (Feb. 5, 2005). [hereinafter Fielding interview] See also Declaration of Anne Fielding, Sierra Club v. Dep’t of Transp., Haw. 2d Cir. Ct., Civil No. 05-1-0114 (3) (on file with author). [hereinafter Fielding Declaration]
190 Fielding interview, supra note 189.
191 E-mail from Karen Chun, Feb. 1, 2010, 9:30 HST, on file with author. [hereinafter Chun e-mail]; Declaration of Karen Chun, Sierra Club v. Dep’t of Transp., Haw. 2d Cir. Ct., Civil No. 05-1-0114 (3) (on file with author). [hereinafter Chun Declaration]
192 Chun e-mail, supra note 191.
193 Id.
and Chun on board if Sierra Club and the other organizations were going to have standing to sue the Department of Transportation under HEPA for the DOT’s failure to do an EA or EIS for the Superferry harbor improvements. This would mean getting signed declarations, documents akin to affidavits, from the people attesting that they had the concrete interest in the place required by the federal cases alluded to in HTA. But even with statements from these members, Hall knew that standing was hardly a slam dunk. The HTA case had been, Hall recalls, an interesting experiment in whether Hawaii courts would require the state to do an EA for a tourism marketing plan. Still, HTA had real-world implications: Justice Acoba’s decision stood like some monolithic obstacle blocking environmental plaintiffs’ access to the courts under HEPA; how wide this obstacle would be, just how much it would block, was far from clear. But one thing was certain: Superferry’s lawyers were relying on HTA.

Whether the court would follow Acoba or Moon was anyone’s guess. “Nobody knew, we certainly didn’t know,” Hall recalls. “And the Superferry attorneys were using HTA [in their briefs]. So it was making life harder for us.”

2. Invoking procedural standing: Sierra Club distinguishes Superferry from HTA

It probably would have been enough for Hall to argue that Sierra Club had standing because it met the injury-in-fact test: Sierra Club met the test of specificity – there were specific people with a specific interest in Kahului Harbor. In that way, Superferry was “nothing like HTA,” Hall argued.

But Hall went a step further. Arguing that Sierra Club also had procedural standing, he addressed the HTA decision head on. Even though Acoba’s plurality opinion in HTA had clearly said that procedural standing simply did not apply to HEPA, Hall noted in his brief that a majority of justices in HTA – Moon, Levinson, and Nakayama – had said

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194 Telephone interview with Isaac Hall (Feb. 4, 2010). [hereinafter Hall interview 2]
195 Id.
196 Id.
197 See Defendants-Appellees Hawai’i Superferry, Inc. and the State of Hawai’i’s Answering Brief, Sierra Club v. Dep’t of Transp., Haw. 2d Cir. Ct., Civil No. 05-1-0114 (3) filed Dec. 27, 2005, on file with author. [hereinafter Superferry brief]
198 Hall interview 2, supra note 194.
199 Opening Brief of Plaintiffs—Appellants, Sierra Club v. Dep’t of Transp., Haw. 2d Cir. Ct., Civil No. 05-1-0114 (3) at 20, filed 2005. [hereinafter Sierra Club brief]
200 Id. at 19-22.
Citing Moon’s dissent and Nakayama’s concurrence in *HTA*, Hall wrote, “A different majority of the *HTA* Court, led by Chief Justice Moon (‘Moon majority’) recognized that, in actions like this one challenging a failure to follow a procedure for environmental protection, the test is even more liberal than usual.”

Superferry’s lawyers were hardly ready to accept this argument. The lawyers sought to analogize *Superferry* to *HTA*, arguing, in part, that Sierra Club’s “threatened injury claims in this case are virtually identical to those claimed in *Sierra Club v. Hawaii Tourism Authority*.”

Superferry’s lawyers also argued that Sierra Club failed to meet Hawaii’s test for organizational standing. Under a 1989 Hawaii Supreme Court case, Hawaii’s *Thousand Friends v. Anderson*, Superferry argued that an organization could have standing only if the injury would affect the each member of the organization in the same way. If the injury would affect each member differently, the injury would create numerous separate claims, and the organization would not assert standing for everyone.

As for the procedural standing arguments made in *HTA* by Moon, Levinson, and Nakayama -- which Isaac Hall called the “Moon majority” -- Superferry’s lawyers sought to marginalize the argument by noting that the opinion of the “Moon majority” was really just a minority opinion. “In a final attempt to plead their case on standing,” Superferry’s lawyers argued, “Appellants attempt to rely on the minority opinions in the *HTA* case.”

The move paid off for Hall. The Hawaii Supreme Court unanimously held that Sierra Club had established injury-in-fact standing, essentially agreeing with Hall that Superferry’s alleged potential harms had a level of specificity that *HTA* had lacked.

Concerning organizational standing, the Court distinguished *Superferry* from the *Anderson* case cited by Superferry’s lawyers. The Court concluded that *Anderson* did not apply because *Anderson* involved a misrepresentation claim; accordingly if members of the plaintiff organization suffered an injury because the member took action in reliance of the defendant’s misrepresentation, the member would have suffered an injury unique to that member -- not an injury that the whole organization

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201 *Id.* at 20.
202 *Id.* at 20.
203 *Id.* at 11.
204 *Superferry brief,* supra note 197, at 16.
205 *Id.* at 16-17.
206 *Id.*
207 *Id.* at 17.
208 *Superferry,* supra note 6, at 332.
could have suffered. In *Superferry*, by contrast, the individual members have alleged a common injury – the failure to do an EA. Also, the Court pointed to a 2006 Hawaii Supreme Court case that the Court had decided after Sierra Club had filed the Superferry suit, but before the *Superferry* decision. In that case, *Hawaii Medical Ass’n v. Hawaii Medical Service Ass’n, Inc.*, the Court adopted a longstanding federal test for organizational standing that was created by the 1977 U.S. Supreme Court case *Hunt v. Washington State Apple Advertising Comm’n*. The Sierra Club plaintiffs met the *Hunt* test, the *Superferry* Court ruled.

The big change effected by the *Superferry* Court, however, was procedural standing. In its unanimous decision, the *Superferry* Court established the doctrine of procedural standing in Hawaii. In doing so, the Court adopted much of Moon’s analysis in *HTA* and overturned Acoba’s ruling that procedural standing did not apply to HEPA. For his part, Acoba did not dissent. In *HTA*, Acoba had asserted that procedural standing did not apply to HEPA. Given Justice Acoba’s statement on that issue in *HTA*, it would have been helpful for Justice Acoba to explain, possibly in a concurring opinion, why he was utterly abandoning the position he had emphatically taken in *HTA* in opposition to Moon, Levinson, and Nakayama. Instead, in the *Superferry* decision, Acoba remained silent on the issue and quietly joined the rest of the Court to adopt a doctrine he had declared invalid just three years earlier.

Under Hawaii’s test for establishing procedural standing under HEPA, a plaintiff must show that: “(1) the plaintiff has been accorded a procedural right, which was violated in some way, (2) the procedural right protects the plaintiff’s concrete interests, and (3) the procedural violation threatens plaintiff’s concrete interests, thus affecting the plaintiff ‘personally.’” To show that the plaintiff was affected personally, the plaintiff may demonstrate a concrete nexus to the site in question and that the procedural violation increases a risk of harm to these concrete interests. The Sierra Club met these tests, the Court ruled, largely because the declarations of the Westcott, Parker, and Chun showed the

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209 *Id.* at 334 n.42.

210 *Id.*


213 *HTA*, supra note 18, at 260.

214 Why Justice Acoba appears to have abandoned his earlier position merits a lengthy analysis that is not within the scope of this paper.

215 *Superferry*, supra note 6, at 329 (citations deleted).

216 *Id.* at 329.
Thus, for all of the sound and fury surrounding Superferry, probably the most legally significant aspect of the whole matter is that it created a procedural standing doctrine in Hawaii.  

B. Superferry Decision Aligns Hawaii Procedural Standing Doctrine with Federal Doctrine

Critics have charged the Superferry Court with having gone too far. At least some of these charges, however, are misplaced. For example, writing in a 2008 University of Hawaii Law Review article, law student Kevin Hallstrom argues that the Superferry opinion is an example of the Hawaii Supreme Court’s inclination “to depart from the federal approach and broaden standing.” Hallstrom suggests that Hawaii courts should follow principles from the federal judicial system to develop a standing doctrine “that is both predictable and serviceable to the public, while still maintaining a separation of powers.” More specifically, Hallstrom contrasts Superferry with Defenders of Wildlife and argues that the outcome in Superferry would have been different had the Superferry Court followed the principles of Defenders of Wildlife. Finally, Hallstrom criticizes the principle of organizational standing, whereby an environmental group such as Sierra Club gets standing by calling on one of its members who has the requisite nexus to the environment to establish standing.

Hallstrom’s argument is misplaced for several reasons. First, Superferry’s procedural standing doctrine hardly marks a departure from federal procedural standing. In fact, the federal procedural standing doctrine, and the procedural standing doctrine adopted by Superferry, derives from Defenders of Wildlife. Hallstrom is technically correct to state that Superferry “contrasts with the United States Supreme Court’s holding in Lujan v. Defenders of Wildlife.” After all, in contrast to Superferry, Defenders of Wildlife found the plaintiffs did not have

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217 Id. at 330-31.
219 Kevin Hallstrom is currently an associate at Starn O’Toole Marcus & Fisher in Honolulu, Hawaii.
221 Id. at 475.
222 Id. at 488.
223 Id. at 489.
224 Defenders of Wildlife, supra note 22, at 573 n.7.
225 Id. at 488 (emphasis added).
standing. But the contrast ends there. Writing for the majority in *Defenders of Wildlife*, Justice Scalia wrote that procedural rights were special and that the *Defenders of Wildlife* holding would not apply to a situation in which a person living near a federally funded project was suing the federal government for the failure to perform an EIS. Under those facts, which are analogous to the facts in *Superferry*, the plaintiff would have standing to sue, Scalia wrote. Thus, *Defenders of Wildlife* contrasts with *Superferry* only superficially. *Superferry* actually follows *Defenders of Wildlife* in its conception of procedural standing. Even *Superferry*’s attorneys have recognized the connection between the procedural standing rule outlined in footnote 7 of *Defenders of Wildlife* and the doctrine established in *Superferry*.

Second, Hallstrom also is misguided on the separation-of-powers problem that he implies the procedural standing doctrine creates. In fairness, Hallstrom does not clearly and succinctly state that *Superferry*’s procedural standing doctrine creates separation-of-powers problems. Instead, he discusses the issue generally, stating that “[e]specially in public interest cases, [Hawaii] judges are perceivably taking cases away from other governmental branches,” and, according to Hallstrom, *Superferry* is one example of this alarming trend. Hallstrom examines other recent Hawaii cases to support his thesis, and those cases may in fact be on point with the analysis. *Superferry*, however, is not.

As discussed above, Justice Scalia’s argument concerning the separation of powers in environmental cases turns on what Scalia sees as limits to the legislative branch’s power to grant standing by statute. By letting just any citizen step in and assume the function normally performed by the Attorney General, the argument goes, Congress is effectively encroaching onto the executive’s turf, essentially granting onto the courts and the general public the executive’s Article II power to “take Care that the Laws be faithfully executed.” In *Defenders of Wildlife*, the Court applied this principle to a situation in which the plaintiffs had only an attenuated stake in the matter at hand. The result was the Supreme Court ruled the plaintiffs lacked standing.

There are two problems with applying Justice Scalia’s separation-of-powers principle to *Superferry*. First, as a public policy matter, it is a

226 *Defenders of Wildlife*, supra note 22, at 573 n.7.
227 *Id.*
228 See Bail, supra note 218, at 10.
229 Hallstrom, supra note 220, at 475
230 See *Defenders of Wildlife*, supra note 22, at 577.
231 U.S. CONST. art. II, § 3.
232 *Defenders of Wildlife*, supra note 22 at 577.
bad idea to expand executive discretion so much that the executive simply can choose to ignore laws.\textsuperscript{233} Article II states that the executive must “take Care that the Laws be faithfully executed.”\textsuperscript{234} It does not state that, the executive must “take Care that the Laws be faithfully executed as long the Executive agrees with the Law that the Congress has passed and the Executive (presumably a former one) has Signed into Law.” In effect, as Professor Farber has put it, Scalia views citizen suit provisions in environmental laws as an “incursion on the executive’s discretion to turn a blind eye to the law.”\textsuperscript{235} If Congress wants to make sure the executive does not turn a blind eye to the law by granting citizens the right to enforce the law if the executive fails to do so, Congress – or the Hawaii Legislature – should have that power.\textsuperscript{236}

But even if one agrees with Hallstrom or Scalia in principle, and believes that the executive should have the power to ignore a law no matter what the legislature says, the Superferry case would not be on point with that concern. As discussed above, the Defenders of Wildlife plaintiffs lacked the requisite specific interests in the issue at hand. They were equivalent to persons living across the country from a proposed dam. They lacked a clear geographic nexus. So to grant standing to these plaintiffs under ESA’s citizen suit provision would have meant that plaintiffs would be relying entirely on the citizen suit provision of the ESA to make up for an utter lack of specificity normally required under Constitutional standing doctrine. That was not the situation in Superferry. The parties in Superferry did establish a concrete interest and geographic nexus. Even if these interests were merely aesthetic or recreational, that would have been adequate under federal standards.\textsuperscript{237} As discussed above, the Superferry plaintiffs were most analogous to Scalia’s hypothetical plaintiffs in Defenders of Wildlife’s footnote 7.

It is also peculiar for Hallstrom to suggest Hawaii courts have departed from federal doctrine by letting an environmental organization have standing as long as the organization can show that one of its members is injured. The principle has been applied in federal courts for nearly forty years, originating in the 1972 U.S. Supreme Court case Sierra Club v. Morton, which stated, “It is clear that an organization whose

\textsuperscript{233} See Farber, \textit{supra} note 16 at 1537; Sunstein \textit{supra} note 74, at 212-14.

\textsuperscript{234} Art. II. § 3.

\textsuperscript{235} Farber, \textit{supra} note 16 at 1535.

\textsuperscript{236} As Barnum notes, Justice Scalia generally considers the executive’s failure to enforce the law as a problem that voters can remedy by voting law-ignoring executives out of office. See Barnum, \textit{supra} note 16, at 44 n.200. But, as Barnum phrases it, “there is little justification for having such intense concern about political excessive enforcement and no concern about what would seem to the parallel problem of lack of enforcement.”

\textsuperscript{237} See Laidlaw, \textit{supra} note 77, at 184-85.
members are injured may represent those members in a proceeding for judicial review.”\textsuperscript{238} The U.S Supreme Court further clarified this principle in 1977 in \textit{Hunt v. Washington State Apple Advertising Comm.’n}. It is true that the ritual dance that organizations such as Sierra Club must perform in order to get standing by finding a member with the requisite nexus may be contrived and generally a waste of time for everyone involved, including the courts.\textsuperscript{239} But it is hardly unique to Hawaii courts.\textsuperscript{240}

This is not to suggest that Hallstrom’s thesis is entirely invalid. One of Hallstrom’s overarching concerns, that the “needs of justice” principle has led Hawaii courts to adopt a standing doctrine more expansive than the federal doctrine, may be true. The scope of this paper does not address that broad question. This paper examines only the \textit{Superferry} decision and how it affected Hawaii’s environmental standing doctrine. Furthermore, as Hallstrom notes, the outer limits of standing in Hawaii are unclear.\textsuperscript{241} Again, this paper does not address the sweeping question of standing in Hawaii in general. But even assuming for the sake of discussion that Hawaii’s standing doctrine has departed significantly from federal doctrine,\textsuperscript{242} \textit{Superferry} would not be a good example of this departure because the case actually makes Hawaii law consistent with federal law. What Hallstrom actually appears to dislike is not Hawaii’s departure not from federal standing doctrine in environmental cases, but rather, Hawaii’s apparent decision to disregard the most restrictive aspects of Scalian doctrine that would keep environmental plaintiffs out of court. But, as this paper discusses above, Hawaii is not alone in largely rejecting the Scalian doctrine. Federal courts also have begun to reject the more conservative aspects of Scalia’s approach to standing, beginning with \textit{Laidlaw} in 2000.\textsuperscript{243} Thus, Hawaii is largely following the federal standard by rejecting Scalia’s more restrictive standing principles. One Scalian standing principle that remains firmly ensconced in the federal courts, however, is Scalia’s concept of procedural standing articulated in footnote 7. And \textit{Superferry} actually follows this principle and adopts it.\textsuperscript{244}

\textsuperscript{238} \textit{Sierra Club v. Morton}, supra note 44, at 739.

\textsuperscript{239} Interview with Denise Antolini, Professor of Law, William S. Richardson School of Law, April 8, 2010.

\textsuperscript{240} \textit{Haw. Med. Ass’n}, supra note 209, at 95-100.

\textsuperscript{241} Hallstrom, supra note 220, at 491.

\textsuperscript{242} I assume for the sake of discussion that there is in fact something wrong with Hawaii departing from the federal standing doctrine. A more basic response to the critique that Hawaii has departed from the federal standard might be, “So what?”


\textsuperscript{244} \textit{Defenders of Wildlife}, supra note 22, at 573 n.7.
C. Three Alternative Approaches to Environmental Standing in Hawaii?

That Hawaii’s standing doctrine often parallels the federal doctrine hardly means Hawaii’s doctrine is ideal. Courts are spending enormous resources dealing with this threshold question in environmental cases. A LexisNexis search using the terms “standing to sue” and “environment” generated 2,965 federal cases including district court, circuit court, and Supreme Court decisions; among federal circuit courts of appeal alone the number was 749. The situation has led one notable federal judge to lament whether this a good way for “sophisticated adult jurists” to spend their time -- poring over facts to determine if a plaintiff has in fact hiked on a particular piece of land, or surfed a reef, or watched particular whales sufficiently to give the plaintiff standing to sue.

The problem is that a good alternative is hard to find.

1. Justice Douglas’s Standing for Inanimate Objects

In his dissenting opinion in the seminal federal environmental standing case Sierra Club v. Morton, Justice Douglas called for a doctrine that would give standing to inanimate natural objects, such as forests, rivers, and mountains. Citing Christopher D. Stone’s article, Should Trees Have Standing – Toward Legal Rights For Natural Objects, Douglas wrote that the wilderness itself should have standing. “Those who hike it, fish it, hunt it, camp in it, frequent it, or visit it merely to sit in solitude and wonderment are legitimate spokesmen for it,” Douglas wrote. Douglas likened the users of the forest to guardians ad litem who could represent the interests of natural objects.

The Douglas-Stone proposal is rhetorically appealing. Much of Douglas’s dissent reads like an essay by Thoreau or Emerson, and Stone’s article has such rhetorical elegance that one environmental lawyer has described the piece as “legal poetry.” Theoretically, giving nature standing would simplify standing for groups such as Sierra Club. It would shift from the human-centered principles articulated in Laidlaw to a

245 I did this search on my own but cannot claim credit for the idea of doing it to make this point. Professor Farber did a similar search on Westlaw and produced similar results. See Farber, supra note 16, at 1539.

246 See id. (quoting Patricia Wald, Environmental Postcards From the Edge: The Year That Was and the Year That Might Be, 26 ENVTL. L. REP. 10182 (1996)).


248 Morton, supra note 44, at 744-45.


250 This paper uses “human-centered” rather than the customary word, “anthrocentric,” to avoid the gender-exclusive meaning of “anthro.”
nature-centered approach that some analysts have called for.\footnote{251}{See Cassuto, supra note 89.} At the same time, the concept is not much different from the current rule, as Douglas envisions that a plaintiff would need some nexus to the place, or as he puts it, an “intimate relation with the inanimate object about to be injured, polluted, or otherwise despoiled.”\footnote{252}{Morton, supra note 44, at 745.}

Nonetheless, Douglas’s proposal poses problems. To use Douglas’s guardian ad litem analogy, it is not difficult to foresee custody battles over the ward. That is, it is easy to imagine a case in which the Forest Service, an environmental organization, and an ersatz, “astro-turf” environmental group each argued that only it knew what was best for the forest. Resolving such disputes possibly could pose new problems for courts to sort out as a prelude to more substantive litigation. As one animal rights attorney has said of the Douglas-Stone idea, “The lesson is that this kind of change in the test for access to federal courts is somewhat impractical at this phase.”\footnote{253}{Confronting Barriers, supra note 246, at 79 (transcript quoting Jonathan Lovvorn, Vice President and Director of Animal Protection at the Humane Society of the United States).}

2. Professor Farber’s Place-based Standing Test

Recognizing the problems associated with environmental standing in particular, Professor Farber has devised a streamlined, three-part test that is a sort of simplified procedural standing test.\footnote{254}{See Farber, supra note 16, at 1550.} Farber acknowledges that the approach maintains elements of the standing doctrine as it is now.\footnote{255}{Id. at 1508.} But he asserts that the place-based approach would simplify matters.

The test contains three elements: (1) the violation element means there must be a violation of an environmental defendant, or at least a colorable claim;\footnote{256}{Id. at 1550.} (2) the area element means the violation must involve a specific area, meaning plaintiffs in HTA (and possibly Life of the Land v. LUC) probably would not have had standing while plaintiffs in Superferry would have; and (3) the connection element means the plaintiff must be personally connected to the area, either by residence, recreational use, or some other purpose.\footnote{257}{Id. at 1550.}

The benefit of this test is that it would simplify standing disputes by providing courts a simpler test. Plus, the test incorporates many of the
principles that courts now use to determine standing. It keeps the door open, but not too wide.

One problem with the test for Hawaii is that it ignores the special relationship between the land and the Native Hawaiian people. Hawaii law provides broad standing rights to Native Hawaiians, particularly in cases involving the environment and traditional practices. Article XII, section 7 of the Hawaii Constitution of 1978 states, “The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.”

In the landmark 1982 case *Kalipi v. Hawaiian Trust Co.*, Chief Justice William S. Richardson defined the basic rights protected by article XII, section 7 as allowing occupants of an ahupua'a to enter undeveloped lands within the ahupua'a to practice native Hawaiian customs and traditions. A decade later, in the 1992 case *Pele Defense Fund v. Paty*, the Hawaii Supreme Court expanded these rights to allow a Native Hawaiian person to engage in traditional cultural practice outside of the ahupua'a in which the person resides if it can be shown that the area in question was a place where traditional practices were conducted. Under this principle, a Native Hawaiian person might have a special interest in preserving the summit of Mauna Kea, for instance, even if the person did not have the same sort of nexus that Farber would require. Thus, I would propose adapting Farber’s Land-based Theory into a “Land-based Plus Theory,” which would carve out an exception granting standing to Native Hawaiians, even if they lacked “the connection” as Farber describes it.

3. Article XI standing: standing under the Hawaii Constitution

The Hawaii Constitution also offers a foundation for a simplified standing theory that would grant standing to any person wishing to enforce a Hawaii environmental law. As discussed above, the state courts of Hawaii do not face the same jurisdictional limits as federal courts.

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258 HAW. CONST. art. XII, § 7
260 *Id.* at 5.
261 *Pele Def. Fund v. Paty*, *supra* note 114, at 621.
262 As discussed above, the Hawaii Supreme Court recently applied article XII, section 7 to grant a private right of action to enforce Hawaii’s land-use law. But the Court also made clear that a private right of action and standing were separate doctrines; thus, Ala Loop does not expand Hawaii’s environmental standing doctrine. *See Cnty. of Haw. v. Ala Loop Homeowners*, *supra* note 15 at 32 n.20.
263 *See supra*, text accompanying note 101.
courts, by contrast, are courts of general jurisdiction. Thus, a Hawaii “circuit court has jurisdiction over all civil causes of action unless precluded by the State Constitution or statute.” The Hawaii Constitution and Hawaii statutes hardly preclude broad standing in environmental suits. To the contrary, the Hawaii Constitution of 1978 articulates a broad standing policy.

The Hawaii Constitution states,

Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.

According to the historical records of the Constitutional Convention of 1978, article XI, section 9 “provides that individuals may directly sue public and private violators of statutes, ordinances, and administrative rules related to environmental quality.” Also, Hawaii attorneys general have stated unequivocally that article XI, section 9 grants a broad standing right in environmental cases. During the 1993 Regular Legislative Session, when lawmakers were considering a resolution calling for a study on environmental standing in Hawaii, Attorney General Robert A. Marks and Deputy Attorney General Laurence Lau opposed the resolution because the “legal issue of standing to sue is simple and does not need extensive study.”

“Hawaii citizens already have a right to enforce existing environmental laws directly against violators, Haw. Const. Art. XI, § 9,

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264 *Sherman v. Sawyer*, 63 Haw. 55, 58 (1980).

265 *Id.*

266 I wish to acknowledge the following people for their guidance and insight on this section: Denise Antolini, Professor of Law, William S. Richardson School of Law; David Kimo Frankel, Staff Attorney, Native Hawaiian Legal Corp; William Tam, Of Counsel, Alston, Hunt, Floyd & Ing; and Jon Van Dyke, Professor of Law, William S. Richardson School of Law. *See generally Amicus Curiae Native Hawaiian Legal Corporation’s Brief in Support of Writ of Certiorari, Cnty. of Haw. v. Ala Loop Homeowners v. Wai’ola Waters of Life Charter Sch., Civ. No. 97-0383(2). [hereinafter Frankel Amicus Brief]*

267 *HAW. CONST. art. XI § 9,* (1978).


and no legislation is needed to enable citizens to exercise that right,” the Attorney General continued. “The constitutional history makes it clear that this right was intended to eliminate standing to sue barriers.”

The testimony echoes a 1990 letter from Deputy Attorney General Sonia Faust to Dr. John C. Lewin, Director of the Hawaii Department of Health. Faust wrote that article XI, section 9 is intended to allow citizens “to directly sue violators of statutes, ordinances, and administrative rules relating to environmental quality.” The provision, Faust wrote, turns citizens into “civil enforcers” of environmental statutes, including statutes in effect when the state adopted the 1978 Constitution, as well as subsequent amendments. Although an absence of cases defining the contours of the provision made it “difficult to be positive about how [the provision] would work,” Faust wrote that the provision “appears . . . intended to give private persons standing to sue civilly any violators of any of the State’s host of environmental laws.”

The Hawaii Legislature also has interpreted article XI, section 9 to grant broad standing rights to citizens in environmental cases. Haw. Rev. Stat. § 607-25 allows the court to award attorneys fees to the prevailing party in litigation in which a private party sues for injunctive relief against another private party who failed to obtain the necessary permits and approvals for a development. The statute applies to several Hawaii statutes, including HEPA and Hawaii’s land-use law, Haw. Rev. Stat. § 205 et seq. The Hawaii Supreme Court has interpreted Haw. Rev. Stat. § 607-25 to mean that the “Legislature intended that individuals and organizations would help the state’s enforcement of laws and ordinances controlling development by acting as private attorneys general and suing developers who did not comply with the proper development laws” at the very least in context of Hawaii’s land-use statute. The legislative history of Haw. Rev. Stat. § 607-25 indicates that lawmakers had an expansive view of the legislation. The Legislature stated, “the bill will give fuller effect to Article XI, Section 9 of the Constitution of the State of Hawaii, which gives Hawaii’s people the right to bring lawsuits enforcing environmental laws.”

270 Id.
271 Letter from Deputy Attorney General Sonia Faust to Dr. John C. Lewin (August 15, 1990) (pp. 6-9 only) (on file with Professor Denise Antolini).
272 Id.
273 Id.
All of this creates a legal argument supporting a broad, simplified standing doctrine for environmental cases in Hawaii – what may be called “Article XI standing.” Although Hawaii courts repeatedly have cited article XI, section 9 to support the state’s generally open environmental standing policy, the Hawaii Supreme Court also has at times embraced the standing principles established by the federal courts. Although some commentators, such as Kevin Hallstrom, have argued that the federal doctrine offers a predictable standard to which Hawaii should strictly adhere, this paper illustrates that the federal doctrine is far from clear and predictable as the U.S. Supreme Court applies it. Article XI standing would create a more simplified, predictable standard.

Article XI standing is far from perfect. It is not clear, for example, precisely how courts would apply the doctrine. What burden of proof, for instance, would a plaintiff face to show that a defendant had violated a Hawaii environmental law in order to establish Article XI standing? Would courts require an initial mini-trial on the merits to establish article XI standing? These questions are beyond the scope of this paper. Still, these questions are no more complex than the questions Hawaii courts now face while trying to apply the federal doctrine to Hawaii cases, as the HTA and Superferry cases demonstrate.

III. CONCLUSION

Whether Hawaii will ever have an interisland ferry is unclear. What is clear, however, is that because of the Superferry project and the surrounding litigation, Hawaii has a well-articulated procedural standing doctrine -- a doctrine that is defined in federal case law and grounded in Article III. It also is apparent from the tale outlined above that implementing federal standing doctrine is a complex and time-consuming analytical and procedural task for judges and lawyers. Hawaii, therefore, should consider replacing the doctrine with one that is easier to implement in environmental matters. Although critics might fear that Article XI standing would spawn a flood of litigation, the policy actually would promote judicial economy by removing a time-consuming threshold task and allowing the parties to move more quickly to the merits of a case. The threshold question under Article XI standing would be whether there is sufficient evidence to show that a defendant in fact violated an environmental law. Furthermore, Article XI standing is grounded in the plain language of the Hawaii Constitution. If the Superferry case prompted Hawaii to adopt Article XI standing, the Superferry decision would have yet another legacy. In a world of Article XI standing, Hawaii judges and lawyers might well look back at the Superferry Court’s tortured analysis of standing and view it as just another excess of the saga.

\[Frankel Amicus Brief, supra n. 266, at 7.\]

\[278 See, e.g., Superferry, supra note 6, at 320.\]