Environmental scholars are very familiar — perhaps *too* familiar — with how the constitutionalization of standing doctrine has restricted the ability of environmental groups to challenge agency actions. I've recently read several books about the financial crisis, and it's occurred to me that Wall Street innovation may have made traditional standing doctrine a dead letter.

My suggestion centers on the so-called "credit default swap," which was a central cause of the market meltdown and is basically a fancy name for purchasing insurance against an investment tanking. Say you've got billions of dollars in mortgage-backed securities, better known as "toxic waste." You then buy several billion dollars in credit default swaps to hedge your investment.

What investors learned was that you don't actually need to *hold* a security to purchase a credit default swap against it. As Michael Lewis tells with relish in *The Big Short,* investors started buying credit default swaps against the subprime market even if they didn't hold the underlying asset. In most state regulations, you can't buy insurance against something unless you have a so-called "insurable interest"; in other words, you can't take out a life insurance policy against a stool pigeon and have him thrown into the river in cement overshoes. But credit default swaps were totally unregulated before the meltdown, and even in the wake of Dodd-Frank, as far as I know there is still no rule against buying a credit default swap against an event occurring (aka betting against something happening) even if you have no underlying interest in it. (This is one reason why the subprime crisis affected the financial system: as Charles Morris explains in *The Trillion Dollar Meltdown*, the interests in the subprime sectors became larger than the sector itself).

So how does this make environmental standing a dead letter? Simple — at least theoretically. Environmental groups can buy a credit default swap against, say, the federal government delisting an endangered species. Then, if the government does delist the species, the environmental group — *simply by virtue of owning the swap* — has standing under the *Lujan* test. Are they injured in fact? Yep: if the government's action is upheld, they lose their investment. Does the government's action cause that injury? Of course. If they government's action is reversed, would it redress the injury? Absolutely. End of story.

There are two obvious problems with this scenario. First, how will there be a market in CDS's for agency actions? It doesn't exist. *Yet.* I have no doubt that the creativity of Wall Street will cause it to flower.

Second, wouldn't the existence of CDS markets essentially make current standing doctrine irrelevant for anything? Uh — yes. I realize that at some level this is all too-clever-by-half

And of course I have little doubt about the ability of Chief Justice Roberts to come up with some doctrine that manages to kick environmental plaintiffs out of court but still protect polluters. But it points to the general incoherence of constitutionalized standing doctrine. Incoherence has never bothered the Scalias and Roberts of the world: the point is to slam the courthouse door. Seeing environmental standing through the lens of credit default swaps, however, demonstrates that no one else should be fooled as to their real agenda.