Industry's Touting Of Citizen Suit Standing Hurdles Appears 'Optimistic'

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Some industry attorneys are touting what they see as new legal barriers to environmentalists demonstrating standing to bring citizen suits under environmental laws, particularly under a Supreme Court with a new conservative majority, but other industry lawyers and environmentalists say that is an "optimistic" view of recent rulings.

Brent Rosser and Kate Perkins, lawyers at Hunton Andrews Kurth, wrote in a **Sept. 7 blog post** that standing -- the ability to bring suit under Article III of the Constitution by demonstrating an injury that is traceable to the action and is redressable by the courts -- is "proving to be a formidable defense to environmental citizen suits."

They cite an **Aug. 30 decision** by the U.S. District Court for the Middle District of North Carolina in *Center for Biological Diversity (CBD) v. University of North Carolina at Chapel Hill* that CBD lacked standing in seven of nine allegations regarding the failure to maintain records, inspect equipment and report permit deviations under the school's Title V Clean Air Act permit.

The court found the plaintiffs had not shown their members had suffered a concrete injury due to the missing reports.

The Hunton lawyers say this holding is the most recent in a series of federal court opinions dismissing citizen suit environmental claims on standing grounds. Another includes a **June holding** in *Prairie Rivers Network v. Dynegy Midwest* by the U.S. Court of Appeals for the 7th Circuit calling the plaintiff's standing allegations "akin to impermissible speculation."

These decisions have come down following the high court's 2016 holding in *Spokeo v. Robins* that requires an injury to be "concrete and particularized," they say.

Also, the Center for Regulatory Effectiveness (CRE) sought input in a **July 28 blog**, "The Birth of a Legal Doctrine," on whether standing and other common law doctrines should be subject to review by an impartial government body.

While CRE acknowledges that some have questioned its expertise "regarding the venting of legal doctrines," the center cites a July ***E&E News*** **article**, "Inside a Legal Doctrine that Could Silence Enviros In Court," saying it "highlights the issues presented herein with an emphasis on climate change." The article in part parses Justice Amy Coney Barrett's limited record on standing to suggest she views it narrowly.

“You see a broad coalition of justices suggesting they are skeptical of new innovative ways to establish standing,” Case Western Reserve University law professor Jonathan Adler told the publication.

Also, attorney Creighton Magid pointed to a **Sept. 20 decision** in *Greenpeace v. Walmart* by a federal district judge in California who dismissed Greenpeace;s claims that Walmart’s product recycling labels were deceptive for lack of standing. “The dismissal order throws a bucket of cold water on lawsuits brought by environmental organizations under state consumer deception statutes,” Magid said. “It’s not enough to argue that claims of recyclability are misleading to bring a lawsuit under such a statute, the organization has to show it was misled.”

But others are not swayed and say the recent decisions cited show no significant movement on standing.

Informational Injury

Robert Ukeiley, a CBD lawyer familiar with the North Carolina district court decision, says the high court’s most significant standing holding last term was ***TransUnionLLC v. Ramirez***. The 5-4 decision said only the 1,853 from a class of more than 8,000 people had standing to sue TransUnion for allegedly violating the Fair Credit Reporting Act because those were the only plaintiffs whose credit report was disseminated and had a “personal stake.” *TransUnion* “does not impact standing in environmental pollution cases where the plaintiff alleges a polluter violated a permit limit,” Ukeiley says.

In the North Carolina case, the judge “found that we did have standing for the claims where we were saying they put out more pollution than their permit allowed. . . . So I think the only place that *TransUnion* can change things . . . is in claims where the polluter didn’t do a test or didn’t report testing or monitoring.” There, the judge found the plaintiffs lacked standing for those claims, “but she did not evaluate whether we had informational injury,” he says. That is an issue CBD may appeal to the 4th Circuit. Ukeiley says the plaintiffs have until Sept. 30 to do so.

The case goes on in the district court regardless, on the two excess pollution claims the court found does grant the plaintiffs standing.

However, informational standing was analyzed in **a Sept. 20 decision** in *Inland Empire Waterkeeper, et al., v. Corona Clay Co.,* from the 9th Circuit, which found the plaintiffs did have informational injury when the county failed to report required groundwater pollution discharge data.

“And I think that is consistent with *TransUnion*,” Ukeiley says. “If disseminating incorrect information is grounds, then I think it’s closely analogous that not providing information that you are required to is also an injury sufficient for standing.”

He adds that he doesn’t think “things are really shifting. Because it is like a double-edged sword. If the Supreme Court got too restrictive on standing, that might also hurt the polluters when they want to challenge new regulations.”

Jeff Porter, who chairs the environmental law practice at the law firm Mintz, tells *Inside EPA* that he also does not see any major legal standing shifts and that saying otherwise is "wishful thinking."

The 9th Circuit decision is "a pretty good example of the standing inquiry the courts typically do" and it came down on the side of the plaintiffs, granting them informational injury, which, Porter notes, is not recognized in every circuit.
Of the two cases cited in the Hunton blog, Porter points out that CBD did win standing on two of its issues, and "in a citizen suit, whether you [win standing on] one or multiple claims, it's pretty much equally bad, so because some were dismissed, to me, is not a victory."

Supreme Court

In *Prairie Rivers*, the 7th Circuit remanded the case back to the district court to address standing since the issue did not arise there and only came up on appeal, following a **related high court ruling** issued April 23, 2020, in *County of Maui, HI v. Hawaii Wildlife Fund* that created a new "functional equivalent" test for determining when pollutants traveling through groundwater to surface water may need a Clean Water Act discharge permit.
Porter says the 7th Circuit "dodged the ability" to be one of the first courts to apply *Maui* directly, and instead focused on the fact that Dynegy challenged *Prairie Rivers'* standing for the first time on appeal. It told Prairie River to amend its complaint at the lower court to include standing.
"I'm confident when it goes back down to the district court, they will meet the standing requirements," he says. "I don't think what is necessary to show standing under Article III is going to change substantially."

Porter does find the 9th Circuit's *Inland Empire* decision upholding informational injury noteworthy and says it is an "interesting question" whether the Supreme Court would view the claims like it did in *TransUnion* or not. "It is not out of the question that [the six conservative justices] would say" informational injury "is not a sufficient adverse effect."

He notes that the 9th Circuit holding, which was split 2-1, does not refer to the *TransUnion* holding.

"My conclusion is it is unclear how the six justices in the majority in *TransUnion* would view what this panel concluded about the informational injury suffered in Corona Clay."

Also, Mark Ryan, a Clean Water Act attorney who worked at EPA for 24 years, says claims of standing hurdles "might be right" but "overly optimistic." While the new conservative justices are likely to take a harder look at standing, the court would have to reach back to its 1999 holding in *Friends of the Earth v. Laidlaw* if it wanted to change its precedent, and *Laidlaw "*sets a pretty low bar. I don't think you can take one to two cases and jump to conclusions."

He wrote a **2017 peer-reviewed paper** looking at 10 years of standing decisions in water act cases and found that courts allowed cases to go forward at about a 5-1 ratio.

Finally, Jeremy Nichols of the group WildEarth Guardians, which often files citizen suits under environmental laws, does not think “standing is going to get any more difficult than it already is. Courts have already been very clear that it’s a high bar for environmental litigants.” He adds that some judges, such as the North Carolina one, are “more skeptical of procedural violation-related harms, and others, such as the District of Colorado, where we’ve successfully pursued failure to monitor claims, less skeptical.”

Nichols notes that it is “clear we need to be more vigilant than ever, and groups like ours probably need to bring forward the most kitchen-sinky type standing arguments possible.” -- *Dawn Reeves* (**dreeves@iwpnews.com**)
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