

# Inside EPA

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## NARROWED APPELLATE RULES ON 'STANDING' MAY STILL DETER CITIZEN SUITS

As the partisan battle The appellate court that hears direct appeals of EPA regulations has softened a plan to require parties not directly regulated by the rule under review to prove their standing to sue, although the court's final rule may still discourage citizen suits by requiring any party whose standing is not apparent to provide evidence of standing.

One attorney who is an expert on citizen suit cases says the new requirements could deter citizen and environmental groups from filing litigation because "it's just more work," thereby limiting environmental enforcement. The requirements apply to cases filed in the U.S. Court of Appeals for the District of Columbia Circuit and went into effect last month.

But the source acknowledges the rules are "more even-handed" and "less biased" than originally proposed, "so it is hard to object" to them. Relevant documents are available on [InsideEPA.com](http://InsideEPA.com).

The DC Circuit originally proposed adding one sentence to Circuit Rule 28 on standing, which would have said, "In administrative review cases, a petitioner or appellant who is not directly regulated by the agency action under review must present in the opening brief the arguments and evidence establishing its standing." The court said the change was to codify requirements included in a 2002 decision from the court, *Sierra Club v. EPA*.

Groups including Earthjustice, the National Women's Law Center, Trial Lawyers for Public Justice and Friends of the Earth opposed the proposal, arguing it did not accurately reflect applicable DC Circuit precedent, which says standing can be self-evident whether a party is regulated or not.

The proposed rule "requires parties who are not directly regulated by an agency to always present the evidence and arguments showing their standing. . . . Conversely, the rule never requires regulated parties to present such evidence," the groups said in written comments last year.

But the Justice Department (DOJ) supported the court's intent, while acknowledging the proposal departed from the 2002 decision. DOJ, however, recommended that the court change another, Circuit Rule 15, which addresses petition for review filing requirements, by requiring all petitioners and appellants -- even those directly regulated -- to outline their standing claims when they file initial docketing statements (*Inside EPA*, Nov. 25, 2005, p1).

The final rule, which went into effect July 1, says, "When the appellant's or petitioner's standing is not apparent from the administrative record, the brief must include arguments and evidence establishing the claim of standing," The evidence may be presented in a separate addendum if it is lengthy, the rule says.

The court also changed circuit rules 15 and 32. Circuit Rule 15 now requires a petitioner or appellant to provide a brief statement of the basis of standing when filing suit. Circuit Rule 32, which governs the length of briefs, now excludes addenda supporting a claim of standing from length limitations.

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