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APPELLATE STANDING PLAN COULD LIMIT SUITS ON EPA RULES, ACTIVISTS SAY

As the Public interest and environmental groups are objecting to a proposal by the appellate court that hears direct appeals of key EPA regulations to tighten its rules on establishing standing -- or the legal right to sue -- because they say it could limit their ability to file suit by discriminating against outside groups not directly subject to federal regulations.

The groups say the U.S. Court of Appeals for the District of Columbia Circuit is pursuing an overly restrictive definition of standing based on an earlier decision by the court that they believe the proposed rule misinterprets.

The D.C. Circuit's advisory committee on procedures took comments until Nov. 21 on its proposed addition of one sentence to Circuit Rule 28 on standing, which says, "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 proposed amendment was "intended to codify the requirement set forth in the court's opinion" in a 2002 decision in Sierra Club v. EPA establishing standing requirements for the circuit. The decision says standing arguments must be raised by the appellant or petitioner in the opening brief in administrative review cases.

Groups including Earthjustice, the Alliance for Justice, the National Women's Law Center, Trial Lawyers for Public Justice, Friends of the Earth, Sierra Club and the National Environmental Law Center filed joint comments opposing the proposed rule change "on the grounds that it does not accurately reflect applicable D.C. Circuit precedent, does not represent a balanced approach, and does not serve the interests of judicial economy." Relevant documents are available on InsideEPA.com.

The Department of Justice (DOJ) submitted comments in support of the proposed rule, asking that the court consider going even further by modifying a different rule requiring all petitioners and appellants -- even those directly regulated -- to outline their standing claims when they file initial docketing statements.

DOJ notes that the proposal "departs slightly" from the 2002 court decision by requiring parties that are not directly regulated to establish standing, but supports that departure "as it sets forth a clearer standard that will avoid some of the procedural confusion that occasionally occurs when a petitioner mistakenly believes its standing is 'self-evident,'" the comments say.

One source involved in the original case calls DOJ's position "overreaching."

A circuit source says the advisory committee will likely review the

comments and submit a recommendation to the court but notes that the court is not required to respond to the committee or to the comments in making a final decision, which will likely be codified sometime next year.

"[T]he Sierra Club test for determining whether a party must present threshold arguments and evidence on standing is whether that party's standing is 'self-evident' -- not whether the party is 'directly regulated by the agency action under review,'" the coalition's comments say.

A source with Earthjustice says the proposed rule unfairly discriminates against environmentalists and other groups that want to challenge rules but are not directly regulated by them. "That is not the way the court has stated the [standing] test, which is that standing can be self-evident whether you are regulated or not," the source says.

The circuit has ruled that regulated parties do not have self-evident standing. For example, the court refused to accept the standing of regulated parties as self evident in National Mining Association v. U.S. Department of the Interior, a 1995 case, according to the coalition comments.

Conversely, the Earthjustice source says, the court has found that non-regulated parties can have self-evident standing because they are suffering direct effects from a rule, such as a person living next door to a regulated facility that is emitting pollution onto the person's property.

The comments cite a 2005 D.C. Circuit decision in American Library Association v. FCC -- issued three years after Sierra Club -- in which the court further clarified that the test to evaluate whether a petitioner established its basis for standing in its opening brief is whether it has "good reason to know that their standing is not self-evident," the comments say.

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 comments add.

However, environmentalists also objected to the June 18, 2002, decision, saying the new standard would be more difficult for environmental groups to meet. The decision was reached in a case where the plaintiffs, the Sierra Club and the Environmental Technology Council, challenged an EPA rule under the Resource Conservation & Recovery Act.

The 2002 Sierra Club decision has been cited by the circuit and outside groups to establish standing in a number of cases, including Commonwealth of Massachusetts, et al. v. EPA, et al., in which states failed to force EPA to regulate greenhouse gas emissions. In that decision, the circuit cited its earlier decision in determining the states had standing but ultimately ruled against the states on other grounds.

The Federal Communications Commission successfully cited the decision in convincing the court to dismiss a challenge to a rule filed by the Rainbow Push Coalition. On June 10, 2003, the circuit wrote, "We cannot reach the merits of Rainbow's claim, however, because, as the Commission argues, the appellant lacks standing to appeal, wherefore we lack jurisdiction over its case, Sierra Club v. EPA."

And the Supreme Court earlier this month rejected an appeal of a case the circuit had denied because the petitioners failed to immediately establish standing as required by Sierra Club in its challenge of an EPA rule requiring low-sulfur gasoline. The National Alternative Fuel Association in August asked the Supreme Court to force the circuit to hear its case and to set explicit rules for standing, based on the 2002 decision (Inside EPA, Nov. 11, p15).