

Constitutional Law Committee Newsletter

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MESSAGE FROM THE CHAIR

Robin Kundis Craig

As 2007 draws to a close, one can't help but think that the relations between states and the federal government will continue to be an important source of legal tension in environmental law. This year, of course, saw two major decisions that each, in different ways, raised questions about the role of states in environmental enforcement and policymaking. In *Massachusetts v. EPA*, 127 S. Ct. 1438 (Apr. 2, 2007), the Supreme Court majority arguably altered federal standing doctrine to find that Massachusetts had standing to challenge the Environmental Protection Agency's (EPA's) decision not to regulate greenhouse gases pursuant to the Clean Air Act. One of the lingering ambiguities of that decision is whether standing law has changed for *everyone*, or just for states. Moreover, if (as I suspect) the latter interpretation turns out to be the correct one, the rationale for treating states differently remains imprecisely drawn, suggesting that further requests for special treatment for states lie in the future.

Less than a month later, the Court weakened one of the defining limits on state regulatory authority, the dormant Commerce Clause, in *United Haulers Association v. Oneida-Herkimer Waste Management Authority*, 127 S. Ct. 1786 (Apr. 30, 2007). Bucking the unbroken line of cases that have determined that "flow control" laws for solid waste and differential treatment of in-state and out-of-state waste violate the dormant Commerce Clause, the *United*

Haulers Court determined that government ownership of trash facilities matters to the dormant Commerce Clause analysis. Justice Thomas even called for the abolition of the dormant Commerce Clause entirely.

Of course, these two cases were both environmental cases, and tensions in the relationship between levels of government—federalism—has been a recurring issue in environmental and natural resources law for decades. Indeed, in many pollution control statutes, Congress exploited a new form of statutory federalism, dubbed *cooperative federalism*, to both acknowledge and, at least in theory, smooth out, those tensions. The Supreme Court early on helped these federal efforts by distinguishing environmental law from land use law and by supporting Congress' use of its spending power to bribe (or coerce, depending on your perspective) states into pursuing federal policies.

However, as is old news, the Rehnquist and Roberts Courts' New Federalism perspective has heightened the tension between state and federal regulatory authority in all areas of law, not just environmental and natural resources law. The Court's questioning and limiting of Congress' Commerce Clause authority in a series of non-environmental decisions led to unprecedented numbers of challenges against the Endangered Species Act and the Clean Water Act, culminating for the latter in the constitutional avoidance rationale in *Solid Waste Agency* and the jurisdictional mess left after *Rapanos*. Surely, if this progression signals anything, it signals that environmental and natural resources lawyers must pay attention to non-environmental developments in constitutional law.

Supreme Court also agreed to hear *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85 (2d Cir. 2006), cert. granted 128 S. Ct. 31 (Sept. 25, 2007). In this case, a claim for damages arising from use of the diabetes drug Rezulin, the Second Circuit held that the federal Food, Drug, and Cosmetic Act did not preempt a Michigan law excepting drug manufacturers from immunity to products liability claims if the manufacturer had misrepresented or withheld material information from the federal Food and Drug Administration during the drug approval process. Writing for the Second Circuit, Judge Calabresi also emphasized the states' traditional and inherent police power to protect public health and safety.

The Court's decisions in all of these cases could affect environmental and natural resources law, whether by further limiting the scope of the dormant Commerce Clause, refining statutory interpretation methodologies, or more precisely defining the parameters of when federal law can preempt state law.

Of course, no message amounting to a Supreme Court preview for this committee would be complete without mentioning that on Nov. 6, the Supreme Court heard argument in a Fifth Amendment takings case arising out of federal agency site remediation. *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345 (Fed. Cir. 2006), cert. granted, 127 S. Ct. 2877 (May 29, 2007), centers on the EPA's interference with John R. Sand and Gravel's 50-year lease to mine on a 158-acre property that abutted a landfill. In the 1980s and 1990s, the federal EPA supervised a clean-up and remediation of the landfill pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). As part of this cleanup, EPA fenced off large portions of John R. Sand & Gravel Company's leased site. The company sued, seeking compensation for a physical taking of the property. The Court of Federal Claims found for the United States, and the Federal Circuit affirmed, holding that the company's taking claim was time-barred by the applicable six-year statute of limitations.

Enjoy the end of 2007, and we look forward to your continued participation in the committee into the new year!

TRENDS NOW AVAILABLE ONLINE!

Section members are now able to view the newsletter *Trends* in .pdf format in the Section Members Only portion of the Section Web site at www.abanet.org. Issues dating back to September/October 2006 are archived.

As a Section member you have access to view *Trends* after logging onto the Web site with your ABA Member ID number and password.

Section members may also view *The Year in Review* and *Natural Resources & Environment*.

The online versions of the publications contains all the articles found in the paper copies, created in .pdf format.

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OPPORTUNITIES FOR PUBLIC SERVICE THROUGH TEACHING

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As the Constitutional Law Committee's Public Service vice chair, I encourage you to get involved in an exciting opportunity to provide public service to your community. Each year members of the Section of Environment, Energy, and Resources from around the country offer lessons to students in grade schools and high schools about various environmental issues. The Section has many pre-packaged lesson plans from which we can choose, and most can be implemented in one or two sessions at your local school. For the list of lesson plans, see http://www.abanet.org/environ/publicservice/educational_instruction.shtml. Of course, you can also develop your own lesson if you'd like!

Our goal is to have at least 10 members of this committee volunteer to teach a lesson on or before Earth Day in April (a sizable number since we are such a small group). It's great fun and a great service to our communities, as we help students explore the science and policy questions involved in environmental law. So come join us and help us meet our goal! To get more information about the teaching opportunities or to sign up, please contact me at mccubbin@law.siu.edu or (618) 453-8759. I look forward to working with you!

THIRD ANNUAL STUDENT WRITING COMPETITION ON "ENDANGERED ENVIRONMENTAL LAWS"

The third annual student writing competition on "Endangered Environmental Laws" is in progress. This year, the competition is being co-sponsored by the Environmental Law Institute (ELI), the ABA Section of Environment, Energy, and Resources' Constitutional Law Committee, and the National Association of Environmental Law Societies (NAELs). A wide range of environmental law issues fits within the competition's

notion of "endangerment," including standing to bring citizen suits, Commerce Clause challenges to environmental protection statutes, dormant commerce clause issues arising out of local environmental or resource protection laws, federalism, and other constitutional doctrines that, in one manifestation or another, impede the legal protection of the environment. The competition is open to law students enrolled in any U.S. law school or a law school abroad. Co-authored works are eligible as long as all authors are students who will not have graduated prior to spring of 2008. Any relevant article, case comment, note, or essay is eligible as long as it has not been published or slated for publication. The winning entry will receive a \$2,000 cash prize and an offer of publication in ELI's Environmental Law Reporter. Entries must conform to the latest edition of The Bluebook and must be received no later than 5 p.m. on April 4, 2008, at hoang@eli.org. For more information, visit http://www.endangeredlaws.org/pdf/ELI-ABA-NAELS_Writing_Competition_2007-08.pdf.

EDITOR'S NOTE: STANDING AND PROBABILISTIC INJURY: HAS THE D.C. CIRCUIT TIGHTENED THE STANDARDS FOR PUBLIC INTEREST GROUPS?

Professor McCubbin's article focuses on a cutting-edge issue for environmental practitioners: What is the exact requirement for challenging a government regulation that does not cause a palpable "harm" to a member of the association today, but threatens to cause such harm to one or more members in the future? As Professor McCubbin notes, this type of harm, commonly termed an "increased threat of harm", is actually a case where the public interest group claims that the government regulation could have gone further and lessened the risk of potential harm to its members to an even greater extent.

This article and the cases discussed in it raise a number of questions: Did the D.C. Circuit panel adequately address the Supreme Court's decision in April of this year in *Massachusetts v. EPA*, which directly analyzed

standing in the context of a failure by the Environmental Protection Agency to regulate greenhouse gas emissions? Did the D.C. Circuit mean what it said in the *Public Citizen* case, or do other cases suggest that a different form of pleading will easily avoid the standing dilemma that was posed in that case? Does the Ninth Circuit's recent decision in *Center for Biological Diversity v. National Highway Traffic Safety Administration*, ___ F. 3d ___, 2007 WESTLAW 3378240 (Nov. 15, 2007), issued just as this article was being written, suggest that the D.C. Circuit's standing restrictions can easily be avoided when a public interest group sues by challenging an agency's discretionary action pursuant to NEPA?

STANDING IN ENVIRONMENTAL "INCREASED RISK" CASES IN THE D.C. CIRCUIT: A SUBSTANTIVE SHIFT IN CASE LAW OR MERELY A PLEADING DIFFERENCE?

Trish McCubbin

In challenges to pollution control regulations adopted by the U.S. Environmental Protection Agency (EPA) and other federal agencies, petitioners will often assert that the rules pose greater threats to human health than appropriate. Such cases raise the thorny question of whether the challengers can demonstrate the legally cognizable "injury-in-fact" required by the standing doctrine since typically the cancers or other illnesses that may result from the pollutants have not yet manifested and only the chance of developing them has increased. While the U.S. Court of Appeals for the District of Columbia Circuit has previously recognized that such threatened harm can be an injury-in-fact if it has a "substantial probability" of occurring, now in what some see as a dramatic shift, the D.C. Circuit is beginning to demand very specific demonstrations of the increased probability of the future harms posed by environmental, health, and safety regulations. In a decision from June 2007, one panel of that court required the petitioners not only to show that the increased risk itself is substantial but that the overall risk (taking that increase into account) is also

substantial. Moreover, in an earlier opinion the D.C. Circuit for the first time relied on detailed, quantitative estimates of the risk posed by a regulation in order to judge the probability of harm. At the same time, however, other environmental challengers in that circuit have faced little difficulty demonstrating the necessary injury simply by focusing not on the future health hazards but on the alteration of their current activities in order to avoid those harms. This article discusses these recent developments, the implications for litigation strategies, and the questions left open by the cases.

***Public Citizen*: A New, Two-Pronged Inquiry into Increased Risks**

The issue of standing in increased risk cases has most recently surfaced at the D.C. Circuit in a case called *Public Citizen v. NHTSA*, 489 F.3d 1279 (D.C. Cir. 2007), which although not a pollution control case is nevertheless relevant to environmental practitioners because of its holding in the context of another health and safety regime—this one involving automobile accidents on the nation's roadways. The advocacy group Public Citizen, on behalf of consumers and drivers, challenged a regulation adopted by the National Highway Transportation Safety Administration (NHTSA) requiring automakers to install tire pressure monitors in cars. The petitioner believed NHTSA should have adopted more protective measures and accordingly claimed that its members will suffer "a higher risk of injury than if NHTSA adopted the alternative regulation that Public Citizen advanced." 489 F.3d at 1291. (Notice that these are often called "increased risk" cases but here—and commonly—the claim is really one of "insufficiently decrease[d]" risk, *id.* at 1295, since the rule does reduce the risks as compared to an unrestricted baseline, just not as much as the challenger would want.)

While such a threat of future harm can serve as the necessary injury, the threat must be, according to the U.S. Supreme Court, "imminent" and not merely "conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). Similarly, the D.C. Circuit requires a threatened harm to have a "substantial probability" of resulting from the defendant's actions. *See American Petroleum Inst. v.*

EPA, 216 F.3d 50, 63-64, 67 (D.C. Cir. 2000); *Louisiana Env'tl. Action Network v. EPA*, 172 F.3d 65, 68 (D.C. Cir. 1999). In *Public Citizen*, the intervenor auto manufacturers argued that the possibility of future car accidents as a result of the challenged regulation was too speculative to support the petitioner's standing.

In response, a two-member majority of a panel of the D.C. Circuit (Judges Randolph and Kavanaugh) gave new meaning to the notion of a "substantial probability" when it established a two-pronged test to demonstrate the required injury in these types of cases. The court required the petitioners to show that, first, the "increased risk of harm" to individual members of the complaining organization is itself substantial and, second, the "probability of harm with that increase taken into account" or, in other words, the "ultimate risk" or "overall risk" is also substantial. 489 F.3d at 1295-96. Although the *Public Citizen* court claimed that its holding was based on two prior cases (discussed below), the D.C. Circuit certainly had not previously required both demonstrations in any one case. To apply this new test, the court ordered supplemental briefing and set oral argument for October 2007. At the time of this writing no further opinion had been issued.

In his partial dissent, Judge David B. Sentelle would have gone further than the majority on standing and ruled that the *Public Citizen* petitioner lacked standing because the increased risk of automobile accidents is shared by the public at large, *id.* at 1299, and thus is not "concrete and particularized" as required by the Supreme Court. That might be true if the court were analyzing the increase itself—rather than the car accidents—as the harm, since that increased risk is indeed borne by all citizens generally. The majority, however, rejected that approach, holding instead that the future car accidents are the potential injury and then asking how likely they are to happen. *Id.* at 1297-98. With that analysis it was easier to find the injury could be "concrete and particularized" because the car accidents will eventually only happen to certain individuals. *Id.* at 1292-93.

NRDC II: A New Reliance on Quantified Estimates of Increased Risks

One of the two cases on which the *Public Citizen* panel relied, *NRDC v. EPA (NRDC II)*, 464 F.3d 1 (D.C. Cir. 2007), is noteworthy in its own right because for the first time the D.C. Circuit looked to *quantified* estimates of the increased risks, as opposed to merely qualitative indicators, in order to judge whether there was a "substantial probability" of future harm. *NRDC II*, which was decided only a few months before *Public Citizen*, involved challenges to EPA's regulation exempting methyl bromide from otherwise applicable restrictions under the Montreal Protocol and the Clean Air Act. The court found the Natural Resources Defense Council (NRDC) had standing only after the parties submitted detailed affidavits from experts, including EPA personnel, with precise mathematical calculations of the risks posed by the regulation. In particular, the court held that an individual's lifetime risk as low as 1 in 200,000 for developing non-fatal skin cancer was substantial enough to satisfy the injury-in-fact element of the standing inquiry. *Id.* at 7.

Never before had the D.C. Circuit looked to such quantified risk estimates. Indeed, the other case that *NRDC II* and *Public Citizen* both relied on had merely asked qualitatively whether the increased risks were "non-trivial." *Mountain States Legal Foundation v. Glickman*, 92 F.3d 1228, 1234-35 (D.C. Cir. 1996). While the *NRDC II* panel left open the possibility of a qualitative inquiry, its reliance on quantitative data to find the "substantial probability" of future harm strongly suggests that litigants should follow that same course.

Notice that *NRDC II* involved an individual's chances of developing cancer over a *lifetime*. Until the Supreme Court's recent decision in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), one might have wondered whether such decades-away harms satisfy the requirement of an "imminent" threat. Now, however, that a majority of the Supreme Court in *Massachusetts* has suggested that the risk over the next century of the state losing lands to rising seas caused by global warming is a cognizable injury, there

may be less doubt that the cancers manifesting in the next ten, twenty, or even fifty years can also be deemed “imminent.”

Implications of *Public Citizen* and *NRDC II*

Petitioners in the D.C. Circuit seeking to demonstrate their standing by pointing to the increased risks posed by environmental, health and safety regulations will face a number of challenges. First, given that the court will likely seek to rely on quantitative estimates of the risks, that leaves the question of precisely what constitutes a “substantial probability” since neither the *Public Citizen* or *NRDC II* decisions set any numeric cutoff. Indeed, the majority in *Public Citizen* expressly disclaimed setting any “hard-and-fast” numerical principle and instead proffered only a “general principle” of standing. 489 F.3d at 1295-96.

Second, although for some rules EPA itself will provide quantified risk estimates (for example, in the Residual Risk rules under the Clean Air Act), in many other rulemakings the litigants themselves will have to generate that type of data by hiring statisticians, risk analysts, or other experts to comb the administrative record, answer the complex questions about how to quantify the risks, and present affidavits to the court. In doing so petitioners should keep the information as clear and simple as possible because otherwise the judges, who lack expertise in the subtleties of risk analysis, may simply become confused. Indeed, in *NRDC*’s suit against the methyl bromide exemption, the panel initially tried to create its own calculations of the risks, going so far as to present its mathematical formulas in its opinion, only to have to withdraw that decision on rehearing after EPA pointed out that the court’s calculations were significantly in error. *NRDC v. EPA (NRDC I)*, 440 F.3d 476 (D.C. Cir. 2006).

Third and most challenging, the *Public Citizen* and *NRDC II* opinions did not agree on *what* has to be quantified. While *Public Citizen* demanded that both the increase in risk to individual members of the public interest association and the overall level of risk after that increase be substantial, *NRDC II* only looked at the increase in risk. Whether parties will often be able to satisfy one test but not the other remains to be seen.

Perhaps the distinction can be attributed to the slightly different postures of the two cases: in *NRDC II* EPA had affirmatively authorized an increase in the amount of methyl bromide emissions above the level currently allowed, whereas *Public Citizen* involved the more typical situation in which EPA is requiring a reduction in current pollutant levels, just not to the extent that the environmental challengers sought. Given, however, that in both situations the challengers are claiming the regulations increase their health risks, then it is more likely that the different approach taken in the more recent *Public Citizen* opinion simply reflects the D.C. Circuit’s growing interest in exploring the nature of the risks in greater detail.

***NRDC III*: Just a Pleading Difference?**

Perhaps these vexing issues can be avoided altogether by a different pleading strategy. After all, in a decision by a separate panel of the D.C. Circuit issued just four days after the *Public Citizen* decision, the court easily found standing in an environmental challenge without having to assess the increased risks posed to the citizenry. *NRDC v. EPA (NRDC III)*, 489 F.3d 1364 (D.C. Cir. 2007). In this case, the environmental petitioners claimed that EPA’s rule restricting hazardous air pollutants emissions from plywood manufacturing facilities was too lax. Even though *NRDC* probably could have identified the future cancers and other illnesses caused by the contaminants as the injury, instead *NRDC* pointed to the altered behavior of two of its members, one of whom “cut[] back on her outdoor activities, including her gardening,” because of the pollutants in the air, and another who, for the same reason, derived less “enjoyment . . . from outside recreational activities, including gardening, walking, working with animals and sitting on the back porch.” *Id.* at 1371. Because such curtailed actions and disruptions to “aesthetic and recreational values” have been recognized by the Supreme Court as a basis for standing, this D.C. Circuit panel did not hesitate to conclude that the citizens challenging the plywood rule suffered the legally required injury. *Id.* (citing *Friends of the Earth v. Laidlaw*, 528 U.S. 167 (2000)). That result suggests that if the citizens in *NRDC II* challenging the methyl bromide exemption had filed similar affidavits or the challengers in *Public Citizen*

had shown that they drove less often in order to reduce the risk of automobile accidents caused by improperly inflated tires, they too perhaps could have bypassed the difficult questions about the likelihood of those future harms.

But perhaps this pleading distinction will not last. After all, the Supreme Court has held that a plaintiff's need to alter her behavior will only serve as the necessary injury-in-fact if it is in response to a "realistic" threat of harm, not merely based on an unreasonable subjective fear. *Laidlaw*, 528 U.S. at 184 (citing *Los Angeles v. Lyons*, 461 U.S. 95 (1983)). Thus, under the guise of inquiring whether a challenger's decision, say, to change her driving or outdoor activities was reasonable, the courts might very well have to delve right back into questions about whether the harm in fact was likely to occur or, in other words, has a "substantial probability" of occurring—the very test that, at least in the D.C. Circuit, is now leading to complicated risk assessment questions.

Indeed, we see this merger of issues in a recent case from the U.S. Court of Appeals for the First Circuit, *Maine People's Alliance v. Mallinckrodt, Inc.*, 471 F.3d 277 (1st Cir. 2006), in which the industry defendant asserted that the supposedly insignificant increase in health risks posed by its release of mercury into the waterways made the citizens' avoidance of those waters "unreasonable" and hence not a cognizable injury. The appellate court disagreed, relying on the testimony of the plaintiff's expert to find that the defendant had created a "substantial probability" of increased harm that made the plaintiff's behavior in avoiding the mercury-contaminated waters reasonable, and hence confirmed standing for the citizens' group. *Id.* at 285.

In sum, in a D.C. Circuit challenge to environmental, health or safety regulations, a petitioner who identifies a potential future harm as her injury may very well have to quantify the increased probability of suffering that harm and demonstrate not merely that the increase itself is substantial but that the overall risk (taking that increase into account) is also substantial. If, on the other hand, a challenger focuses on the current change in her activities in order to avoid the future harm then

perhaps she will have an easier time demonstrating an injury, but it remains to be seen whether the D.C. Circuit will merge the two lines of inquiry, making both more difficult.

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ABA SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

Calendar of Section Events

26th Annual Water Law Conference

Feb. 21-22, 2008

San Diego, California

37th Annual Conference on Environmental Law

March 13-16, 2008

Keystone, Colorado

Eastern Water Resources

May 1-2, 2008

Charlotte, North Carolina

ABA Annual Meeting

Aug. 7-12, 2008

New York, New York

16th Section Fall Meeting

Sept. 17-20, 2008

Phoenix, Arizona

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