

Client Alert

Citizen Suit Watch: Ninth Circuit Rejects Suit Demanding Greenhouse Gas Regulations Based on Lack of Standing (But Rehearing May Be Next)

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A recent Ninth Circuit decision highlights the difficulties in demonstrating Article III standing in Clean Air Act (CAA) citizen suits involving greenhouse gas emissions. The case, *Washington Environmental Council v. Bellon*, --- F.3d ---, 2013 WL 5646060 (9th Cir. 2013), involved two environmental groups' challenge to the State of Washington's alleged failure to issue emission standards for the state's five oil refineries, pursuant to its approved State Implementation Plan (SIP). In its October 13, 2013 decision, the court dismissed plaintiffs' claims, holding that they lacked Article III standing for failure to satisfy threshold causation and redressability requirements.

On October 31, however, the court announced that a single judge has called for a vote on rehearing en banc and ordered briefs filed by November 21 on whether the case should be reheard.

BACKGROUND

Plaintiffs Washington Environmental Council and the Washington State Chapter of the Sierra Club filed suit in March 2011 to challenge alleged inaction by the Washington State Department of Ecology and several regional environmental agencies in regulating greenhouse gas emissions. Plaintiffs brought their claims pursuant to the CAA's citizen-suit provision, 42 U.S.C. § 7604(a)(1), specifically alleging violation of Washington's approved SIP for implementation and enforcement of the CAA in the state.

The complaint alleged two counts: first, that the defendant agencies had failed to promulgate "reasonably available control technology" (RACT) standards for greenhouse gas emissions from the state's oil refineries¹; and second, that by taking no action to regulate the refineries' greenhouse gas emissions, the defendant agencies had allowed the emission of air contaminants "detrimental to the health, safety, or welfare of any person."²

Plaintiffs sought both declaratory and injunctive relief, including an order requiring the defendant agencies to promulgate specific RACT standards so as to limit the refineries' greenhouse gas emissions. The Western States Petroleum Association (WSPA) successfully sought to intervene as defendant on behalf of its members, including the five oil refineries whose emissions were at issue.

The U.S. District Court for the Western District of Washington considered cross-motions for summary judgment from the plaintiff environmental groups and intervenor-defendant WSPA, as well as the agencies' motion to dismiss. The district court issued a mixed decision on the merits, finding for plaintiffs on the first count (failure to promulgate RACT standards for the refineries' greenhouse gas emissions) but dismissing plaintiffs' second claim as "overly broad and aspirational."³ Intervenor-defendant WSPA first raised the issue of standing on appeal, arguing that that plaintiffs had failed to demonstrate they had Article III standing to pursue their CAA claims.

DECISION

In a decision authored by Circuit Judge Milan D. Smith, Jr., the Ninth Circuit held that plaintiffs lacked Article III standing and ordered that the case be dismissed for want of jurisdiction.⁴

The court first considered whether plaintiffs had satisfied the first requirement for Article III standing: a "concrete, particularized, and actual or imminent" injury-in-fact.⁵ The court spoke at length about various declarations submitted by individual members of each of the plaintiff groups, addressing recreational, aesthetic, health, and economic injuries claimed to have resulted from greenhouse gas emissions and global climate change impacts. The court disposed of this initial question by "assum[ing] without deciding" that the plaintiff environmental groups had satisfied Article III's injury-in-fact requirement.⁶

However, the court went on to hold that plaintiffs' claims failed on both the second and third elements of Article III standing: causation and redressability.⁷

The court reached its conclusion irrespective of the claimed effect of greenhouse gas emissions on climate change generally, "assum[ing] without deciding that man-made sources of [greenhouse gas] emissions are causally linked to global warming and detrimental climate change."⁸ The court's standing inquiry was instead considerably more focused, with an emphasis on emissions from and impacts of the state's five oil refineries. In the end, the court held that the causal link between plaintiffs' injuries and the specific failure alleged—the state's failure to properly regulate the refineries' greenhouse gas emissions—was "too attenuated" for constitutional standing purposes.⁹

Critical to the court's decision on the causation issue was the absence of scientific or other evidence capable of demonstrating that the refineries' uncontrolled emissions specifically contributed in any discernible way to plaintiffs' injuries. "While Plaintiffs need not connect each molecule to their injuries, simply saying that the Agencies have failed to curb emission of greenhouse gases, which contribute (in some undefined way and to some undefined degree) to their injuries, relies on an attenuated chain of conjecture insufficient to support standing."¹⁰

Relying on a declaration from WSPA's expert, the court reasoned that scientists have not yet developed any meaningful capacity in "assessing, detecting, or measuring the relationship between a certain [greenhouse gas] emission source and localized climate change impacts in a given region."¹¹ As a consequence, the refineries' specific emissions could not be said to have been the cause of any specific impact or injury.

In reaching its decision, the court rejected several arguments by the plaintiffs. Plaintiffs argued that the court should infer the existence of a sufficient causal link in cases seeking "to enforce a specific regulatory obligation."¹² The court held, however, that while some generalized environmental injury might be inferred, this is insufficient as a showing that plaintiffs themselves had suffered some particularized injury as a result of the defendant agencies' inaction.

Plaintiffs also argued that the court should apply the more "relaxed" Article III standard adopted in *Massachusetts v. EPA*, 549 U.S. 497 (2007). The court rejected this argument as well, distinguishing the case as

having involved both (1) procedural rights, and (2) the "special position and interest" of the state as a "quasi-sovereign"—features providing Massachusetts with "special solicitude" not to be granted to plaintiffs in the case at bar.¹³ The court also emphasized the scale of emissions involved in *Massachusetts v. EPA*: motor-vehicle emissions accounting for 6% of worldwide carbon dioxide emissions. According to the court, such a "meaningful contribution" to global climate change stood in contrast to the emissions from the Washington oil refineries, which—while a significant portion of state emissions¹⁴—were not necessarily meaningful on a broader national or global scale.¹⁵

The court's specific holding on the question of redressability relied on much of the same analysis that governed its holding on the causation issue. Lacking sufficient evidence of a causal link between the state's failure to control the refineries' greenhouse gas emissions and plaintiffs' specific injuries, the court found no evidence that an order compelling the state to issue RACT standards would measurably reduce global climate change and its localized effects on plaintiffs and their members.¹⁶ Accordingly, the court concluded that plaintiffs had not met Article III's standing requirements and therefore did not have jurisdiction to pursue their claims.

IMPLICATIONS

As the court itself recognized, Article III's requirement for an adequately supported and identifiable link between an injury and the claims alleged imposes a "particularly challenging" hurdle for prospective plaintiffs where climate change impacts are concerned.¹⁷ In litigating future suits similarly implicating state or federal greenhouse gas regulation, parties will surely want to give significant consideration to Article III's standing requirements and whether they are capable of being met, per the Ninth Circuit's analysis.

Even so, the Ninth Circuit decision leaves a number of key questions outstanding that could affect the outcome of future decisions. Such questions include precisely what level of emissions may be considered to constitute a "meaningful contribution" to climate change impacts generally, and when – if ever – a "meaningful contributor" to climate change impacts generally can be said to generate specific, localized injuries capable of redress. Prospective litigants will also want to pay close attention to the developing science surrounding these issues and its potential to affect the governing analysis and outcome in future cases.

And of course all of this analysis could change dramatically if the Ninth Circuit agrees to rehear the case en banc, so all readers of Citizen Suit Watch should stay tuned.

¹ See Wash. Admin. Code § 173-400-040(1); Wash. Rev. Code § 7094-154.

² See Wash. Admin. Code § 173-400-040(6).

³ *Wash. Envtl. Council*, 2013 WL 564060, at *6; see also *Wash. Envtl. Council v. Sturdevant*, 834 F. Supp. 2d 1209, 1213-14, 1215 (W.D. Wash. 2011) (decision of court below).

⁴ The Ninth Circuit also vacated the district court's decision on the merits, including its order that the state act pursuant to its SIP to limit the refineries' greenhouse gas emissions. Whether and what action the state may be required to take pursuant to governing CAA and SIP provisions remains unresolved.

⁵ *Wash. Env'tl. Council*, 2013 WL 564060, at *8

⁶ *Id.* at *9.

⁷ As discussed in the court's decision, a plaintiff is required to show not only a concrete and particularized injury-in-fact, but also that its injury is "fairly traceable" to the challenged action (or inaction), and that the injury is "likely to be redressed" by a decision in the plaintiff's favor. *See id.* at *8 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)).

⁸ *Id.* at *10.

⁹ *Id.* at *10, *11.

¹⁰ *Id.* at *11 (internal quotation marks omitted).

¹¹ *Id.* at *12.

¹² *Id.*

¹³ *Id.* at *13.

¹⁴ The court acknowledged that aggregate emissions from the five oil refineries totaled 5.9% of all greenhouse gas emissions from the State of Washington. *Id.* at *14.

¹⁵ *Id.*

¹⁶ *Id.* at *15-16. The court also found that plaintiffs had failed to adduce evidence that RACT standards would even meaningfully reduce the refineries' emission, given controverting evidence that "many sources are likely already meeting or exceeding RACT." *Id.* at *15.

¹⁷ *Id.* at *11.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Kirsten L. Nathanson

Partner – Washington, D.C.

Phone: +1.202.624.2887

Email: knathanson@crowell.com