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Tips For Establishing Associational Standing

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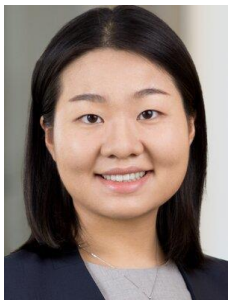

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It is no longer a foregone conclusion that trade associations, nongovernmental organizations and other coalitions can demonstrate standing to challenge agency actions simply by asserting that their members are affected by the action at issue.

Courts are increasingly emphasizing the importance of parties making a bona fide demonstration of standing — routinely refusing to address the merits of the challenger's arguments when an association plaintiff or petitioner fails to meet its burden.

The aim of this article is to provide a primer on associational standing, highlight recent cases of note and give practical tips for lawyers assisting organizations in challenging agency actions.

It is well established that to bring an action in federal court, a party must have Article III standing. That is, a party must show it has suffered an injury that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling," according to the U.S. Supreme Court's 2013 decision in Clapper v. Amnesty Internatonal USA.[1]

As a constitutional requirement, standing poses an issue of federal court jurisdiction — if the party bringing the case lacks standing, the federal court lacks jurisdiction to hear the case.

When a membership organization — as opposed to an individual or corporation — wants to bring a lawsuit on behalf of its members, it can establish standing by meeting three requirements, per the Supreme Court's 1977 ruling in Hunt v. Washington State Apple Advertising Commission: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[2]

The U.S. Court of Appeals for the D.C. Circuit, often the arbiter of challenges to federal agency actions, requires by circuit rule an affirmative demonstration of

standing in the opening brief of a petition for review.[3]

This requirement was crystallized in the D.C. Circuit's 2002 decision in Sierra Club v. U.S. Environmental Protection Agency, in which the court, mindful of its duty to satisfy itself of its own jurisdiction, allowed post-argument affidavits on standing after the EPA challenged the group's standing in its own brief.

Unsatisfied with a process in which supplemental briefing on standing could become the norm, the court stated that, from that point on, "a petitioner whose standing is not [self-evident] should establish its standing by the submission of its arguments and any affidavits or other evidence appurtenant thereto at the first appropriate point in the review proceeding."[4]

The court in Sierra Club anticipated that "[i]n many if not most cases the petitioner's standing to seek review of administrative action is self-evident."[5]

As an example, the appeals court cited its 1994 decision in Horsehead Resource Development Co. v. Browner, in which an EPA rule establishing air emissions requirements for boilers and industrial furnaces burning hazardous waste as fuel was challenged by a number of petitioners, including environmental groups whose members lived in the affected areas.[6]

After some industrial interveners contested the environmental petitioners' standing, the court, without requesting the petitioners to produce evidence of their standing, concluded that their standing was clear because "environmental organizations [whose members live in affected areas] clearly do have standing."[7]

But of late, the court has seemed less and less likely to consider standing to be self-evident.

For example, in January, the D.C. Circuit dismissed a challenge to the EPA's lifetime drinking water advisories for perfluorooctanoic and perfluorooctanesulfonate acid in American Chemical Council v. EPA because the association failed to allege that "the challenged conduct affects all of its members" or that "any specific member … would have standing to pursue this action."[8] Pointing to "alleged harm facing an indirect subsidiary of one of its members" was insufficient.[9]

Indeed, even affidavits by the association of generalized harm to its members are not always enough.

The D.C. Circuit has made clear in a number of recent cases, including in its July ruling in Advocates for Highway & Auto Safety v. Federal Motor Carrier Safety Administration that to establish associational standing, it is "not enough to merely 'aver that unidentified members have been injured.'"[10]

The appeals court emphasized in its 2019 ruling in Twin Rivers Paper Co. v. U.S. Securities and Exchange Commission that if standing is not clear from the administrative record, "an organization must provide 'individual affidavits' from 'members who have suffered the requisite harm.'"[11]

This may come as a shock to trade association members that have long looked to their trade associations to be the face of litigation, specifically so the regulated members can maintain a level of removal from the challenge to their regulators.

In a decision regarding a petition for review of an SEC order, the Twin Rivers court found that petitioner Consumer Action, a consumer advocacy organization, lacked Article III standing because it did not show any concrete injury.[12]

The appeals court was particularly concerned that "Consumer Action failed to submit any member affidavits with its opening brief, and its own affidavit fails to identify any individual members. Moreover, the affidavit barely describes even the general contours of its membership."[13]

Facing the D.C. Circuit's heightened scrutiny on associational standing, additional efforts to explain how an association's members meet the standing requirements can make a difference.

For example, 2012's Grocery Manufacturers Association v. EPA and 2021's American Fuel & Petrochemical Manufacturers v. EPA, deal with two similar — though not identical — situations in which trade associations petitioned for review of EPA final actions regarding Clean Air Act waivers for E15, fuel blends containing gasoline and up to 15% ethanol.[14]

The D.C. Circuit found no associational standing in Grocery Manufacturers,[15] where the court was not persuaded that any of the trade association petitioners' members were injured by the entry of E15 into the market, despite arguments — not in declarations — that, for example, use of the fuel could incur liability for engine manufacturers if used in their products.[16]

By contrast, in AFPM,[17] the D.C. Circuit relied heavily on AFPM member declarations as demonstrating that increased use of E15 presented a direct competitive injury where those members sold petroleum products.[18]

The general takeaway from the last several years is that associations cannot take standing for granted and that practitioners would be wise to develop a complaint — or petition — and supporting papers in a way that meets the more robust associational standing requirements expected by the D.C. Circuit.

Thus, although one of the historical purposes of trade associations has been to shield members from having to participate individually in litigation challenges to agency authority, maintaining member-level anonymity at all costs poses litigation risk.

If it is not clear from an administrative record that the association's members stand to be aggrieved by the agency action, member affidavits or declarations attesting to injury from the agency action seem necessary.

And, at a minimum, whether litigating in the D.C. Circuit or elsewhere, association challengers to agency action are well advised to articulate the elements of standing in their opening briefs or complaints.

Because standing poses a question of jurisdiction in the federal courts, associations challenging agency action need to be mindful from the outset of building the narrative of how specifically their members are injured by that action.

This is certainly true in the D.C. Circuit, and given that its precedent on questions arising in administrative law contexts is frequently relied upon by courts in other jurisdictions, it is a sound practice to apply regardless of venue.

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[1] Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013) (internal quotation marks and citations omitted).

[2] Hunt v. Washington State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977). Alternatively, an organization can demonstrate standing through "the same inquiry as in the case of an individual." Havens Realty Corp. v. Coleman, 455 U.S. 363, 378 (1982). Organizational standing is a separate topic beyond the scope of this article.

[3] D.C. Cir. R. 28(a)(7).

[4] 292 F.3d 895, 900 (D.C. Cir. 2002).

[5] Id.

[6] 16 F.3d 1246 (D.C. Cir. 1994).

[7] Id. at 1259.

[8] Am. Chem. Couns. v. EPA, No. 22-1177 (D.C. Cir Jan. 23, 2023).

[9] Id.

[10] Id.; Twin Rivers Paper Co. LLC v. SEC, 934 F.3d 607, 613 (D.C. Cir. 2019); see also Cowtown Found., Inc. v. U.S. Dep't of Agric., 2022 WL 16571189, at *7 (D.D.C. Nov. 1, 2022); Nw. Immigrant Rights Project v. United States Citizenship & Immigration Servs., 496 F. Supp. 3d 31, 51 (D.D.C. 2020) (cleaned up). To be noted, the D.C. Circuit does not speculate whether "one individual will meet all of the standing criteria," Advocs. for Hwy. & Auto Safety v. Fed. Motor Carrier Safety Admin., 41 F.4th 586, 594 (D.C. Cir. 2022) (cleaned up). Nor does the Court require an organization to "identify injured members when all the members of the organization are affected by the challenged activity." Alon Ref. Krotz Springs, Inc. v. Env't Prot. Agency, 936 F.3d 628, 665 (D.C. Cir. 2019) (cleaned up).

[11] Twin Rivers Paper Co. LLC, 934 F.3d at 613-14.

[12] Id.

[13] Id. at 613.

[14] AFPM v. EPA, 3 F.4th 373 (D.C. Cir. 2021); Grocery Mfrs. Ass'n v. EPA, 693 F.3d 169 (D.C. Cir. 2012). American Fuel & Petrochemical Manufacturers in AFPM v. EPA was represented by Elizabeth B. Dawson, Thomas A. Lorenzen, and Robert J. Meyers of Crowell & Moring LLP. Crowell & Moring also represented one of the petitioners in Grocery Manufacturers.

[15] 693 F.3d at 175-78.

[16] 693 F.3d at 175-78.

[17] 3 F.4th at 379.

[18] Id. at 379-80.