Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Tracking The DC Circ.'s Trend On Article III Standing

Law360, New York (May 13, 2015, 11:17 AM ET) --

Raymond B. Ludwiszewski

On April 24, 2015, the D.C. Circuit in a per curium opinion rejected another industry challenge to recent U.S. Environmental Protection Agency regulations based on standing. The D.C. Circuit's decision in Delta Construction Co. v. EPA[1] was at least the fourth significant EPA rule-making that has escaped judicial review because the court found a technical defect in the industry petitioner's standing.

These cases have shown that, despite the U.S. Supreme Court's statement in Lujan v. Defenders of Wildlife that there is "ordinarily little question" of the standing of a petitioner who is the direct target of the regulation under attack, the D.C. Circuit is taking a hard look at industry standing in all environmental regulatory challenges. Accordingly, practitioners should now take great care to establish every element of an industry petitioner's standing.

In Delta Construction, the D.C. Circuit panel determined that all petitioners lacked standing to seek remand of the EPA's greenhouse gas emission standards for heavy-duty trucks. The GHG regulations were a parallel effort by both the EPA and National Highway Traffic Safety Administration, which promulgated essentially identical, independent programs.

A coalition of California-based companies attacked the EPA's GHG rule because the emission standards would drive up the prices of trucks they purchased for commercial purposes. Additionally, Plant Oil Powered Diesel ("POP Diesel") claimed the rule made its products — after-market modifications to diesel engines enabling them to run on vegetable oil and a fuel derived from vegetable oil — "economically infeasible."

The panel held the California petitioners' standing faltered on both the causation and redressability prongs of the standing test. Because the California petitioners had only challenged the EPA regulations, the panel felt the NHTSA requirements would still stand and, therefore, a successful ruling from the court would not redress the petitioners' purported injury. After concluding POP Diesel did have standing under Article III, the panel went a step further and found the petitioner did not, however, fall within the "zone of interests" intended to be protected by the Clean Air Act. Distinguishing prior D.C. Circuit "competitor standing" precedent, the per curium opinion determined that "the mere fact that POP Diesel's financial interests currently appear to align with the goals of the [CAA] is not sufficient to allow

it to challenge the EPA's emission standards."[2]

The D.C. Circuit's decision in Delta Construction continues a trend of the court viewing industry standing with a skeptical eye. In Coalition for Responsible Regulation v. EPA,[3] industry challenged two elements of the EPA's GHG regulatory program, the Timing and Tailoring Rules.

In the Tailoring Rule, the EPA substantially raised the thresholds triggering permitting obligations under the CAA's Prevention of Significant Deterioration Program. In the Timing Rule, the EPA temporarily limited the universe of emitting sources covered by its GHG program. A three-judge panel of the D.C. Circuit held industry petitioners (along with states and public interest groups that challenged the rules) "failed to establish that the Timing and Tailoring Rules caused them 'injury in fact,' much less injury that could be redressed by the rules' vacatur."[4] To the contrary, the D.C. Circuit determined that the "Timing and Tailoring Rules actually mitigate petitioners' purported injuries" because these rules restricted the scope of EPA's program.[5]

In Grocery Manufacturers Association v. EPA,[6] a very broad variety of trade associations challenged the EPA's decision to certify for sale a gasoline fuel containing a higher level of ethanol. The panel marched through each industry association and determined they all lacked standing. A petroleum trade group alleged their membership would, as a practical matter, be compelled to make the higher ethanol blend and, thus, suffer increased operating costs. The court rejected the claim and concluded the EPA action merely authorized refiners to make the higher ethanol product, but did not itself compel them to do so. A trade group representing grocers and other food interests asserted they would suffer increased raw material costs because corn would be diverted from livestock feed to ethanol production. The D.C. Circuit panel rejected these claims, asserting the so-called food group was not within the zone of interests intended to be protected by the CAA. Finally, a group of automotive and engine manufacturers (the "engine group") asserted their existing fleets were not engineered to run on the enhanced ethanol blends and, thus, they would suffer customer dissatisfaction and increased warranty claims when their products were damaged. Again, a majority of the three-judge panel brushed these injuries aside because the EPA's rule-making had required plans to be submitted by gasoline stations to protect against accidental misfueling and the court refused to presume that those future plans would not be effective.

In Alliance of Automobile Manufacturers v. EPA,[7] a different D.C. Circuit panel concluded industry lacked standing to challenge the very Misfueling Mitigation Rule that had defeated the engine group's standing in the Grocery Manufacturers case. Even though the Mitigation Rule directly regulated the petroleum industry, the court determined that they failed the standing test because the petroleum group advanced "no evidence that any of its members sells or plans to sell"[8] the high ethanol blend. Similarly, the engine manufacturers' standing was rejected because the group failed to sufficiently link the misfueling to actual future damage to their products. This final finding was particularly odd, as the EPA itself had only granted the high ethanol blend a "partial waiver" (for post-model year 2000 vehicles and nonroad engines) precisely because the EPA recognized that the fuel would damage older equipment.

This litany of standing defeats in the D.C. Circuit suggests a much tougher approach to industry petitions challenging EPA rule-makings. As was seen in Coalition for Responsible Regulation, Grocery Manufacturers and Alliance of Automobile Manufacturers, the D.C. Circuit appears to be shifting away from the long-standing presumption that when an industry is the subject of the regulations challenged "standing to seek review of administrative action is self-evident."[9]

Delta Construction continues this trend of limiting industry standing (although the industry petitioners in

that case were not the direct objects of the challenged regulation but rather suffered an indirect economic harm from the regulations). In this new regime of strict scrutiny of industry standing, practitioners should carefully establish the basis for the standing of their clients. Close attention should paid to the "brief statement of the basis for the … petitioner's claim of standing" that must be included in the docketing statement with reference to materials in "the administrative record supporting the claim of standing."[10] Similarly, arguments and evidence must be included in a special section of the brief, with resort to a separate addendum to the brief, if the evidence is lengthy and not reflected in the administrative record.[11]

In positioning a client's standing, it is advisable to evaluate the redressability and causation prongs of standing in particular. The D.C. Circuit now appears to seek a simple, clear linkage between the specific relief sought and the end of the client's alleged injuries. This can be particularly difficult in complex, multistage rule-makings the EPA has preferred lately. As the Grocery Manufacturers and Alliance of Automobile Manufacturers cases reflect, the EPA can divide a regulatory action — in those cases a partial fuels waiver dependent upon future misfueling mitigation plans — in a manner that greatly complicates a petitioner's ability to draw a clean linkage between a challenged regulation and a resolution of a petitioner's injury in fact. Similarly, in Coalition for Responsible Regulation, the EPA utilized a string of interrelated regulations — the Tailoring Rule, Timing Rule, Endangerment Finding and a separate rule limiting GHG emissions from light-duty vehicles — to formulate its response to GHG emissions. By structuring some of those rules (i.e.,the Tailoring and Timing Rules) as relaxing some aspects of the full regulatory scheme, the EPA defeated the regulated community's access to judicial review, while establishing the agency's fundamental authority to regulate GHG emissions under the CAA.

There is some prospect that the D.C. Circuit's stringent approach to industry petitioner standing in challenges to environmental regulations may not be a permanent doctrinal shift. In Delta Construction, POP Diesel was tossed from court even after Article III standing was established because it flunked the prudential standing test concerning the zone of interests protected by the CAA. Just last year, however, the Supreme Court in Lexmark International Inc. v. Static Control Components Inc.[12] disavowed that test as at tension with "a federal court's obligation to hear and decide" cases within its jurisdiction, once Article III standing had been confirmed.

Similarly, in Utility Air Regulatory Group v. EPA, the Supreme Court's approach last year to the industry petitioners' challenge to the Tailoring Rule appeared to undercut — without directly overruling — the D.C. Circuit's findings in Coalition for Responsible Regulation. Despite the adverse standing determination below, the court proceeded to the merits and struck down the Tailoring Rule. The Supreme Court was unwilling to segment the closely linked EPA GHG rule-makings — as the D.C. Circuit had done — to stretch to terminate industry standing. These Supreme Court decisions may indicate a concern at the highest court that standing precedent is evolving in the lower courts in a direction that bars the very targets of agency regulatory actions from resort to the courthouse.

—By Raymond B. Ludwiszewski and Charles H. Haake, Gibson Dunn & Crutcher LLP

Raymond Ludwiszewski is a partner in Gibson Dunn & Crutcher's Washington, D.C., office. Ludwiszewski served as general counsel and assistant administrator for enforcement at the U.S. Environmental Protection Agency. He was also was special counsel to the assistant attorney general for the U.S. Department of Justice's Environment and Natural Resources Division. Subsequently, Ludwiszewski was associate deputy attorney general.

Charles Haake is counsel in Gibson Dunn & Crutcher's Washington, D.C., office.

[1] — F.3d — (D.C. Cir. April 24, 2015).

[2] Delta Construction at *7.

[3] 684 F.3d 102 (D.C. Cir. 2012) (per curiam), rev'd in part sub nom. Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427 (2014).

[4] Coal. for Responsible Regulation v. EPA, 684 F.3d 102 at 146.

[5] Id. In Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427 (2014), the Supreme Court vacated the Tailoring Rule to the extent that it sought to rewrite the clear statutory thresholds for PSD permitting. In doing so, however, the court did not expressly address the D.C. Circuit's standing decision.

[6] 693 F.3d 169 (D.C. Cir. 2012).

[7] No. 11-1334 (D.C. Cir. Oct. 21, 2014) (per curiam).

[8] Id. at *3.

[9] Sierra Club v. EPA, 292 F.3d 895, 899-90 (D.C. Cir. 2002).

[10] D.C. Cir. R. 15(c)(2).

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

[12] 134 S. Ct. 1377, 1387 (2014).
