Standing Rises Up Again In DC Circuit

Judges are not necessarily very good at statistics. Even very smart D.C. Circuit judges. Or at least that is what is suggested by a petition for rehearing or rehearing en banc recently filed by the Natural Resources Defense Council.

On March 7, in NRDC v. EPA, the D.C. Circuit dismissed for lack of standing NRDC’s petition for review of EPA’s rule implementing “critical use” exemptions from prohibitions otherwise placed on methyl bromide pursuant to the Montreal Protocol on Substances that Deplete the Ozone Layer. Methyl bromide reduces the thickness of the ozone layer, increasing ultraviolet radiation. NRDC claims that EPA’s exemption rule violates both the Clean Air Act and the Montreal Protocol by permitting excessive amounts of methyl bromide, which is used as a pesticide. The court’s dismissal for lack of standing is particularly surprising because EPA had not contested NRDC’s standing, which was instead challenged only by industry intervenors, and because the three judge panel hearing the case asked the parties to submit post-argument briefs on legal issues related to the merits and not to Article III jurisdiction.

The opinion written by Judge Raymond Randolph, and joined by Judges Karen Henderson and Harry Edwards, held that NRDC’s petition must fail because “the law of this circuit is that an increase in the likelihood of harm may constitute injury in fact only if the increase is sufficient to ‘take a suit out of the category of the hypothetical,’” quoting from a prior court ruling. The panel rejected NRDC’s contention “that an increase in probability itself constitutes an ‘actual or imminent’ injury,” while acknowledging that “several other courts of appeals have suggested” just that.

Most striking about the court’s ruling is the detailed statistical calculations offered in support of its conclusion that the adverse human health risks alleged by NRDC’s experts are “minuscule.” One footnote includes a series of equations and calculations that seek to demonstrate that at most “the probability of fatality from EPA’s rule comes to 1 in 42 billion per person per year.” A second, even lengthier footnote dominated by yet another dizzying series of equations and calculations contends that even if all of the existing 490,000 members of NRDC were otherwise immortal, it would be approximately 12,565,0657 years before the first death of one of those members would occur. There is accordingly “nothing to NRDC’s assertion that its members must now add to the precautions they already take against sunlight exposure. . . . [A]ny extra precautions would be irrational.”

NRDC’s response, politely put, a suggestion that the panel should be wary of entering into any math tournaments. According to NRDC, the court has misstated the average risk of harm to Americans by about 40,000 fold, which makes the risk approximately 1 in 100,000 — well within the normal range for regulatory action — rather than 1 in 4.2 billion. The organization contends that the court wrongly ignored serious, nonfatal illnesses that are relevant to “injury in fact” by focusing only on the risk of death and that the court wholly miscalculated the time frame of the risks created by positing that they occurred over 145 years. NRDC further argues that the risks presented to its members are even greater than 1 in 100,000 because six of the eight members who supplied affidavits in support of NRDC’s standing have skin conditions that make them especially sensitive to ultraviolet rays, further increasing their individual risks up to 10 times.

Looming behind the statistical squabble, however, is a much further reaching question about Article III standing. The D.C. Circuit’s ruling suggests the possibility that the court is now moving to a formal requirement that those who challenge environmental protection regulations satisfy “injury in fact” standing requirements by demonstrating that the risks created by the allegedly unlawful agency action cross some mathematically quantifiable numeric threshold. If fully realized, such a ruling would significantly limit the availability of judicial review.

In the aftermath of the Supreme Court’s opinion six years ago upholding environmental citizen groups standing in Friends of the Earth, Laidlaw Environmental Services, environmentalists have fared much better in meeting standing requirements. Before Laidlaw, environmental groups had faced increasing difficulty in the 1990s, because several courts of appeals had held that environmental plaintiffs must prove for standing that the agency action they challenge would actually cause an adverse environmental or health effect.

Because of the substantial scientific uncertainty surrounding much environmental protection, such showings are often very difficult, if not impossible, to make. Indeed, for that very reason Congress generally declined in the underlying statutes themselves to require agencies to make such a showing prior to promulgating environmental protection requirements. Laidlaw effectively rejected these lower court standing decisions by ruling that standing lower court standing decisions by ruling that standing by rule could not be applied to actual harm, but only that the plaintiff’s environmental concerns were reasonable.

But now by seeming to make the reasonableness of a citizen concern dependent upon a mathematical showing of a specific numeric increase in risk, the D.C. Circuit’s opinion in NRDC v. EPA portends a possible resurrection of barriers to citizen standing that Laidlaw had diminished. Perhaps the panel would respond to NRDC’s rehearing petition and conclude that it indeed made a mathematical stumble. Otherwise, we are likely to see renewed attention to standing in the D.C. Circuit and other courts of appeals as parties explore the full implications of the former ruling.

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