Environmental Law & Property Rights

Standing in the Hot Seat: Climate Change Litigation

*By Jonathan H. Adler**

The future of climate change policy may be decided in a federal courtroom rather than on Capitol Hill. In recent years, state attorneys general and environmentalist groups have brought lawsuits seeking to force action on the issue of climate change under a range of statutes and legal theories. One case, *Massachusetts v. EPA*, was argued before the Supreme Court in November 2006. More are on the way.

The plaintiffs in *Massachusetts* charge that the Environmental Protection Agency is obligated to regulate vehicular emissions of greenhouse gases as "pollutants" under the Clean Air Act (CAA). Other lawsuits seek to force the EPA to regulate greenhouse gas emissions from power plants and classify carbon dioxide as a criteria air pollutant subject to a national ambient air quality standard like particulates or ozone smog. Still other lawsuits call for federal agencies to consider the potential effect of agency actions on global climate change under the National Environmental Policy Act or allege that greenhouse gas emissions contribute to the "public nuisance" of global warming under federal common law. How courts resolve these and other pending cases could shape the force of climate change policy for years to come.

Standing's Requirements

A threshold issue in climate change litigation: whether environmental plaintiffs have standing to sue over climate change. This is an important question; if plaintiffs do not have standing, federal courts lack the jurisdiction to hear their claims. Article III of the Constitution confines federal jurisdiction to "cases" and "controversies." This limitation helps ensure that courts decide only matters that are fit for judicial resolution. As such, the standing requirement is an essential component of the separation of powers, helping to safeguard individual liberty, maintain political accountability and protect the democratic legitimacy of federal policy. As Chief Justice John Roberts observed in a 1993 law review article, "[b]y properly contenting itself with the decision of actual cases or controversies at the instance of someone suffering distinct and palpable injury, the judiciary leaves for the political branches the generalized grievances that are their responsibility under the Constitution."[1]

The basic requirements for standing were outlined in the seminal case of *Lujan v. Defenders of Wildlife*.[2] In order to establish standing, a plaintiff must make three showings. First, he must demonstrate that he has suffered an "injury-in-fact" that is "actual or imminent" *and* "concrete and particularized." Second, the plaintiff must demonstrate that the alleged injury is "fairly traceable" to the conduct challenged in the litigation. Third, the plaintiff must show that a favorable decision will redress the alleged injury. As the Supreme Court has made clear time and again, most recently in *DaimlerChrysler v. Cuno*, the burden is on the plaintiff to demonstrate that he has standing.[3] Standing cannot simply be assumed by the court, even if the issue is not raised by the parties.

The very nature of climate change makes standing claims particularly difficult. An injury-in-fact must be both "actual or imminent" *and* "concrete and particularized"—a test climate change plaintiffs may find difficult to meet. As explained below, insofar as litigants assert near-term effects—those that are most likely to be "actual or imminent"—they are more likely to be general, climatic effects that are not concrete and particularized to the particular litigants. The converse is also true. Insofar as a plaintiff asserts specific, localized effects so as to meet the concrete and particularized requirement, the harms alleged will be farther off in the future—resulting from accumulated climate change over years, if not decades—and therefore less likely to meet the actual or imminent requirement. Given the global nature of climate change, redressability is also a concern, as unilateral U.S. regulation, even regulation far in excess of what is sought in current cases, will do little, if anything, to forestall future climate change.

Standing is not the only jurisdictional hurdle for plaintiffs in climate change cases. There are prudential reasons for courts to stay their hands as well. As a general matter, federal courts are reluctant to intervene on major policy questions with international implications. The last several presidential administrations have been actively involved in international discussions over what, if anything, to do about climate change. The United States has signed various agreements, including the Kyoto Protocol, but no treaty with binding limitations has been submitted to the Senate for ratification. Nonetheless, the U.S. continues to talk with other nations about alternative approaches to climate change, and has agreed with several nations to pursue the development and proliferation of low-emission technologies. Whether these approaches constitute a wise or sufficient response to climate change, the existence of international agreements and ongoing negotiations could further discourage courts from entering the fray. Indeed, as of this writing, at least one federal court has found climate-based nuisance claims to constitute "political questions" unfit for judicial resolution.[4]

Climate Standing in Court

Courts have already divided on whether climate change plaintiffs have standing to bring their claims in federal court. In *Massachusetts v. EPA* a three judge panel of the U.S. Court of Appeals for the District of Columbia Circuit split three ways on the standing question in rejecting the petition for review.[5] Judge Sentelle concluded the plaintiffs lacked standing, finding the asserted injuries too diffuse and generalized to

* *Jonathan H. Adler is Professor of Law and Director of the Center for Business Law and Regulation at the Case Western Reserve University School of Law. He contributed to an amicus curiae brief filed by the Cato Institute in* Massachusetts v. EPA*, upon which portions of this article are based.*

meet the requirement that the asserted injury be "concrete and particularized." Judge Randolph failed to resolve the standing question, finding it bound up in the merits of the case, and seized upon an alternative basis to reject the petition for review. Judge Tatel, in dissent, thought the standing hurdle was easily met, given Massachusetts' detailed allegations of the particular harms that could befall the state plaintiffs. This, Tatel believed, was sufficiently "concrete and particularized" to satisfy the standing test.

This was not the first time the D.C. Circuit was called upon to answer the standing question. In 1990, in *City of Los Angeles v. NHTSA*,[6] the court held that plaintiffs had standing to challenge the National Highway Transportation Safety Administration's failure to consider the potential effect of automotive fuel economy standards on greenhouse gas emissions and climate change under the National Environmental Policy Act (NEPA). Judge Douglas Ginsburg dissented, arguing the panel decision effectively "eliminated" the standing requirement in NEPA cases "for anyone with the wit to shout 'global warming' in a crowded courthouse."[7] Before additional climate change cases could make their way to the D.C. Circuit, however, *City of Los Angeles* was effectively overruled in a subsequent case.[8]

While the threat of climate change may not have been enough to demonstrate standing in the D.C. Circuit, NEPA plaintiffs have fared better in federal district courts in other circuits. In *Friends of Earth, Inc. v. Watson*, the federal district court for the Northern District of California found that environmental plaintiffs had standing to challenge the failure of the Export-Import Bank and the Overseas Private Investment Corporation to conduct environmental impact statements that considered the potential effect of funded projects on greenhouse gas emissions.[9] In June 2006, another federal district court found that environmental plaintiffs had standing to raise claims under the Clean Air Act linked to climate change.[10]

Does Climate Change Cause an "Injury-in-Fact"?

While global warming is a valid environmental concern, federal courts should be reluctant to find that environmentalist plaintiffs have standing to raise climate change claims in federal courts. Allegations that greenhouse gases will cause injuries due to effects on the climate, almost by definition, are the sort of generalized grievance unfit for judicial resolution. Insofar as petitioners seek to identify specific harms that could result from the failure to control greenhouse gas emissions, it is difficult to show legally cognizable injuries that are *both* actual or imminent *and* concrete and particularized. Indeed, as environmentalist petitioners strain to demonstrate their alleged harms to satisfy one prong of the injury requirement, they undermine their ability to satisfy the other requisite half of the test. There is also reason to doubt whether climate claims are judicially redressable in any meaningful sense, particularly in cases where they seek to force federal regulation, and not just the generation of additional information or analyses (as in NEPA cases).

That climate change may be an urgent concern provides no argument for discarding the traditional requirements of standing. As the Supreme Court noted in *United States v. Richardson*:

> It can be argued that if [petitioners are] not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately the political process.[11]

That an issue cannot be litigated does not mean it will not be addressed. Whether they, or any other potential plaintiffs, have standing, environmentalist groups and state governments retain their ability to seek redress of their grievances through the political process. Indeed, the regularity with which climate change emerges in Congressional debate, the increased relevance of environmental concerns in national political campaigns, and the rapid speed at which states have adopted various climate-related measures, amply demonstrate that the political process is fully capable of adopting climate policies if and when the public demands such action. A Republican Congress may have been reluctant to regulate greenhouse gases, but a Senate Environment and Public Works Committee chaired by Senator Barbara Boxer (D-CA) is unlikely to be so reticent.

The injury-in-fact requirement of Article III is a particular problem for environmentalist plaintiffs in climate change cases. As noted above, in order to have standing, petitioners must allege an injury in fact that is *both* "actual or imminent" *and* "concrete and particularized." The injury must also be concrete "in both a qualitative and temporal sense."[12] Yet this is a difficult showing for climate plaintiffs to make. As characterized by the Supreme Court in various cases, to be "actual or imminent," an alleged injury must be "palpable," "certainly impending"or "real and immediate," and not "hypothetical." Allegations of a far-off injury at a much later date are too speculative to suffice. As the Court explained in *Lujan*:

> Although 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending.[13]

Insofar as litigants assert near-term effects—such as the minor perturbations in the climate that may have been detected, they are general, climatic effects that are not concrete and particularized to the petitioners. Insofar as petitioners allege current harm from changes in the global climate, they are merely alleging the sort of generalized grievance that should not be sufficient to establish standing. Current changes in the global climate are felt by all U.S. citizens—indeed by all citizens of the world. They are not particular to any specific set of environmentalist plaintiffs, nor can they be.

The strength of the scientific evidence supporting estimates of the anthropogenic contribution to climate change does not alter the analysis. Courts need not question environmentalist plaintiffs' presentation of contemporary climate science to conclude that they lack standing. As the Court concluded in *Friends of the Earth v. Laidlaw Environmental Services*, "The relevant showing for purposes of Article III standing… is not injury to the environment, but injury *to the plaintiff*."[14] Claims about current or projected climatic changes are not, by themselves sufficient to confer standing absent a demonstration of harm to the plaintiffs themselves in

a concrete and personal way. Accepting that human activities are contributing to a gradual rise in global mean temperatures does not, by itself, resolve the standing inquiry.

For instance, insofar as the plaintiffs in *Massachusetts v. EPA* have sought to allege harms particular to them—specific, localized effects such as the fear in the Commonwealth of Massachusetts an eventual rise in sea levels over the next century will lead to property loss—the harms alleged are too remote to satisfy the actual or imminent requirement. Even the best predictions of what may transpire in the earth's climate in the year 2050 or 2100 are too speculative and distant to fulfill the requirement that alleged injuries are "actual or imminent" Unlike claims of an immediate environmental impact, these allegations rely upon many variables, including but not limited to estimates of future greenhouse gas emissions, climatic feedback mechanisms, and other exogenous variables, that may change dramatically in the years to come. This makes the claims too speculative to satisfy the injury requirement.

The potential seriousness of climate change does not obviate petitioners' obligation to demonstrate that they meet the requirements of Article III standing, or alter the analysis of injury. Even where the injury alleged is "one of the most serious injuries recognized in our legal system," this Court has recognized its obligation to ensure that the plaintiffs completely satisfy the requirements of Article III, as "the federal judiciary may not redress [any injury] unless standing requirements are met."[15] If "environmental concerns provide no reason to disregard limits in the statutory text," as Justice Kennedy argued in *Rapanos v. United States*, such concerns clearly provide no reason to disregard the jurisdictional limitations imposed by Article III.[16]

Unredressable Injuries

It is not enough to establish standing, that a petitioner demonstrate "injury-in-fact." Plaintiffs must also demonstrate that the injury alleged is fairly traceable to the federal action challenged and is likely to be redressed by the relief sought in federal court. This is also a difficult showing for environmental plaintiffs to meet.

The federal regulation plaintiffs in *Massachusetts* hope will result from their litigation, by itself, will not likely have any meaningful, even measurable, effect on the alleged injuries. The environmentalist plaintiffs' ultimate claim is that the EPA is required to regulate tailpipe emissions of greenhouse gases from new motor vehicles under Section 202 of the CAA. U.S. motor vehicles as a whole constitute approximately six percent of global emissions, yet those vehicles potentially subject to EPA regulation—new vehicles—are only a small fraction of this percentage, and the rate of emission reduction is a function of gradual fleet turnover. As greenhouse gas emissions from other parts of the world likely will continue to climb, the effect of such regulation in the U.S. would be truly negligible.

Even if one assumes that EPA regulation could eliminate *all* vehicular emissions of greenhouse gases tomorrow, it is arguable whether any meaningful effect would result. Dr. T.M.L. Wigley of the National Center for Atmospheric Research demonstrated that, were all developed nations to fully comply with the greenhouse gas emission reduction targets established by the Kyoto Protocol, and maintain such controls through 2100, this would only change the predicted future warming by 0.15ºC by 2100; projections in sea-level rise would be modified by only 2.5 centimeters.[17] Yet the reductions modeled in Wigley's study are several times greater than the complete elimination of all greenhouse gas emissions from the U.S. transportation sector, let alone any realistic estimate of emission reductions to be achieved from the imposition of regulatory controls over time. Add in the lead time, that petitioners acknowledge is necessary for emission reductions to be implemented economically, and the amount of tangible redress plaintiffs can hope for approaches zero.

The plaintiffs in *Massachusetts* argue that regulations in the U.S. would spur technological change and encourage other nations to follow suit—which may be so, but is not a legally sufficient basis on which to find redressabiltiy for the purposes of standing. Claims about the future actions of various third parties are not subject to federal jurisdiction. Whereas in *Lujan* the redressability of the plaintiffs' claims depended upon the compliance of another agency within the federal government, the claim of redressability in *Massachusetts* is contingent upon the future actions of foreign governments, private firms, and the market for automotive technologies. Whether other countries would come to mandate technology developed in response to U.S. regulation, as some environmentalist groups claim, the unconstrained, voluntary actions of third parties at some indefinite point in the future cannot serve to satisfy the redressability requirement of standing. Such claims are simply too conjectural to satisfy standing under Article III.

States Seek Standing as States

Some state attorneys general have claimed that states should have standing because judicial resolution of specific claims, such as whether the EPA has authority to regulate greenhouse gases under the Clean Air Act, will affect the ability of states to adopt greenhouse gas regulations of their own. For instance, some state amici in *Massachusetts* argue for standing because the EPA's *failure* to regulate greenhouse gas emissions from motor vehicles "could be and indeed have been challenged as preempted based on the EPA's decision." Their claim is that some states "are harmed by the EPA's decision because it intrudes on their sovereignty by subjecting them to claims that they are prevented from regulating motor vehicle emissions as the CAA permits."

Whether states are subject to claims of federal preemption is, however, a sufficiently independent question from whether the EPA the authority to regulate greenhouse gas emissions under the Clean Air Act that states cannot ground their claim of standing on EPA's refusal to regulate. While some may argue that the EPA's lack of authority under Section 202 is a basis for preempting states from adopting emission standards of their own, a contrary decision by EPA would stop opponents of state regulation from forwarding other plausible claims of preemption. Moreover, state amici cannot demonstrate that the EPA's lack of authority to regulate vehicle emissions of greenhouse gases will lead to the preemption of state efforts to adopt such controls, as there are many alternative bases upon which courts could conclude that state regulation of greenhouse

gases is preempted. Not only may courts conclude that state efforts to regulate greenhouse gases are preempted by Section 202(a), irrespective of EPA's authority under the CAA, but other provisions of federal law, such as the Energy Policy Conservation Act, may be sufficient to preempt state efforts.

As the Supreme Court has noted in another context, it is just not possible for a litigant to prove in advance that the judicial system will lead to any particular result in his case,[18] so the states' effort to ground their standing claim on what legal claims will or will not be advanced as a result of EPA's decision must fail. Even if the Supreme Court were to conclude that EPA had the authority to regulate greenhouse gas emissions under the CAA, and EPA to adopt such emission standards, there is no guarantee that states would be free to adopt their own regulations on vehicular emissions. Among other things, state efforts to regulate vehicular emissions would still be contingent upon the issuance of a waiver from the EPA under CAA Section 209, as well as a determination that the ability of states other than California to adopt vehicle emission controls under CAA Section 177 extends to emissions that are not subject to regulation under the CAA's non-attainment provisions. Thus, states' ability to regulate automotive emissions would remain wholly speculative.

Some states argue that "because the EPA has refused to regulate emissions of pollutants associated with climate change from motor vehicles, California's standards are the only ones available to the States that desire to regulate such emissions." Yet this would be equally true were the EPA to regulate greenhouse gas emissions from motor vehicles. Under the CAA, the only option states ever have with regard to the regulation of motor vehicle tailpipe emissions is to accept existing federal standards or to adopt relevant standards adopted by the state of California. This remains so irrespective of whether EPA has or exercises the authority to regulate tailpipe emissions of greenhouse gases. So, even assuming that the states suffer the injury they allege, they would still lack standing because their alleged injury is neither fairly traceable to the EPA's alleged failure to regulate greenhouse gas emissions, nor can it satisfy the requirement of redressability.

Cooling Courts to Climate Claims

In filing lawsuits over climate change, environmental plaintiffs have sought to drag federal courts into a complex and contentious policy question at the intersection of economics, environmental protection, international diplomacy, and distributive justice. This is an invitation courts should not accept. How and when the United States should address the threat of global warming is a decision that should be made in the halls of Congress, and perhaps in international treaty negotiations—not in federal courts. If environmentalist groups and others believe the political branches' voluntary initiatives and agreements with other nations to encourage low-emission technologies are insufficient they can make their case in the public square and through the established democratic political process, push for change.

Climate change is doubtless a serious public policy issue. Global warming may in fact be the greatest environmental concern of the twenty-first century. But this does not mean that courts should abandon traditional limitations on their jurisdiction. Current claims of injury from global warming are quintessential generalized grievances that Article III courts are not competent to address. However serious or urgent the threat of climate change may be, such concerns are best resolved through the political process, and not federal litigation.

Endnotes

1 John G. Roberts, Jr., *Article II Limits on Standing*, 42 Duke L.J. 1219, 1229 (1993).

2 504 U.S. 555, 560-61 (1992).

3 126 S.Ct. 1854 (2006).

4 Connecticut v. AEP, _____ (D. Conn __).

5 __ F.3d. ___ (D.C. Cir. 2005).

6 912 F.2d 478 (D.C. Cir. 1990).

7 *Id.* at 484 (D.H. Ginsburg, dissenting).

8 *See* Florida Audubon Soc. v. Bentsen, 94 F.3d 658 (D.C.Cir. Aug 20, 1996)

9 2005 WL 2035596 (N.D.Cal.,2005).

10 Northwest Environmental Defense Center v. Owens Corning Corp., 434 F.Supp.2d 957 (D.Or.,June 8, 2006).

11 418 U.S. 166, 179 (1974).

12 Whitmore v. Arkansas, 459 U.S. 149, 155 (1990)

13 *Lujan*, 504 U.S. at 564 n.2 (quotations omitted).

14 Friends of the Earth v. Laidlaw Environmental Services, 528 U.S. 167, 181 (2000) (emphasis added).

15 Allen v. Wright, 468 U.S. 737, 756-57 (1984).

16 126 S.Ct. 2208, 2247 (2006) (Kennedy, J. concurring in the judgment).

17 T.M. L. Wigley, *The Kyoto Protocol: CO2, CH4 and Climate Implications*, 25 Geophysical Research Letters 2285 (1998).

18 *Supra* note 12, 159-160.