In a previous post I questioned whether anyone would have standing to challenge EPA's new plant regulations for coal plants, considering that coal plants are current uneconomical anyway due to low natural gas prices. I was pleased that *Inside EPA* wrote a story about my argument, and even more pleased that the story reported on a couple of theories about how to avoid the problem. These theories are interesting, and I hope that industry tries them so we can find out what the courts say. But they basically amount to gaming the standing rules, and I don't think this would be successful.

The first theory involves a kind of pro forma permit denial. Nathan Richardson of Resources For the Future noted in a Nov. 7 tweet, "But what stops any prospective plaintiff from applying for a coal permit, having it refused, then suing? Costs seem relatively low." I think he's underestimating the costs of applying for the permit — I'd guess that assembling a complete permit application for a new plant costing hundreds of millions of dollars would not be a trivial undertaking. But let's put that aside. Would filing for a permit be enough, even without plans to ever build the plant in question?

If the permit has no prospect of ever resulting in construction, the answer has to be no. Anyone in America can download a form, write something or other in the blank spaces, and then submit it. That surely can't be enough to create standing — otherwise, anyone can buy standing for the cost of the permit application fee. Like a procedural right, a permit is a means to an end, and without some prospect of obtaining the end goal the permit itself is meaningless. So at the very least, it has to be a permit that is otherwise valid (apart from the challenged regulation) and for someone who would be willing and able to build a coal plant if market conditions changed. Or in other words, it has to be a good faith permit application.

The more interesting question is whether a good faith permit application is enough, even if there is no present prospect that the plant will be built because the market isn't right and may never in fact become right. The existence of the permit doesn't seem to distinguish prior cases where the Court has denied standing. For instance, in the *Lujan* case, where the Court brusquely denied standing to people who wanted to go see an endangered species in another country as soon as conditions allowed them to travel there. Suppose they had purchased a fully refundable ticket with no change fee, which would give them the option of going there as soon as conditions changed. That seems to be just like a permit to be exercised if a project ever becomes feasible. It's very hard to believe that either one would provide a basis for standing — if so, *Lujan* would be a very easy case to evade.

Brian Potts suggested another theory of standing, by which "coal companies to have their property appraised to show that the value of their coal reserves has gone down because of

the rule." It's not clear to me that they're going to be able to do that, because the effect of a rule that has only a speculative impact on future demand growth might not have a measurable effect on appraised value. Similar event studies for stocks are difficult even when the stock is part of a large, liquid market, which I would guess is not true of coal beds. And the regulation has been a clear possibility at least since Obama's reelection, so he market probably has already factored it into prices. So I wouldn't be completely sure about the ability of industry to come up with convincing market evidence.

But it's interesting to think about whether a change in market value *would* work as a basis for standing. A court might still not view the change in value as imminent harm unless the company has plans to sell, but let's also put aside that issue. The bigger question is this: when a court relies a future risk as too speculative or distant to give rise to standing, should the result change because the market is capitalizing that risk into current asset prices?

The argument for a yes answer is that the market provides an objective check on whether the risk should be taken seriously. But there are counter-arguments. Changes in market value may partly reflect the industry's own beliefs about the impact of the regulation, rather than realities. And it seems odd for courts to outsource standing determinations to real estate appraisers.

In principle, this kind of evidence seems similar to the standing claim made by the plaintiffs in *Clapper*. They argued that an increased risk of surveillance by the NSA imposed present costs on them simply by its existence, regardless of whether the surveillance itself ever took place. They were forced to make expenditures to maintain confidentiality with foreign groups and clients. The majority of the Court rejected this standing argument, demanding evidence that that the surveillance was actually "imminent."

The main difference is that the coal companies would be able to monetize the current effects of possible future permit rejection whereas the *Clapper* plaintiffs made no attempt to do so. But I have real doubts about whether monetizing would be enough to change the result. Suppose, for instance, that a law firm could show that it had lost foreign clients because those clients were concerned by the increased risk of NSA surveillance. It's hard for me to believe that this would have changed the result in *Clapper*, or that standing law should draw such a distinction between for-profit and non-profit activities.

But as Justice Brennan used to say, five Justices can do whatever it is they want. . . .