

In 2007, the U.S. Supreme Court's famously ruled in [\*Massachusetts v. USEPA\*](#) that petitioners in that case had standing to sue the Environmental Protection Agency in federal court to challenge EPA's failure to regulate greenhouse gas emissions under the Clean Air Act. Observers then could have been forgiven for thinking that this ruling flung open prospectively the federal courthouse door to climate change litigation.

Subsequent events would have proven that view sadly mistaken. Six years after *Massachusetts v. USEPA*, that case has been distinguished and ignored by lower federal courts to the point of rendering *Massachusetts'* standing rules a nullity. While subsequent federal court rulings have split on the issue of citizen suit standing in climate change cases, the clear trend is to bar such lawsuits from the federal courthouse on standing grounds.

The latest example of this unfortunate trend is a new decision from the Ninth Circuit Court of Appeals, finding that environmental plaintiffs lack standing to bring a new climate change-related case under the Clean Air Act. That decision, [\*Washington Environmental Council v. Bellon\*](#), bodes ill for future climate change litigation, both within the Ninth Circuit and nationwide.

In *Washington Environmental Council*, environmental groups sued Washington state environmental regulators in federal district court, seeking to compel them to regulate greenhouse gas emissions from oil refineries in that state, under authority delegated to Washington State under the Clean Air Act by the EPA. The oil companies that owned and operated the Washington refineries successfully intervened in the case as defendants, arguing that the environmentalists lacked legal standing to bring the lawsuit.

A brief description of applicable federal standing rules is required at this point. (Experienced environmental litigators should feel free to skip the rest of this paragraph.) Article III of the U.S. Constitution limits the authority of federal courts to actual "cases and controversies." Over the years the Supreme Court has interpreted this to mean that plaintiffs must show they have a genuine interest and stake in a case by demonstrating that they possess "standing to sue." Countless Supreme Court opinions have in turn articulated Article III standing in the form of a three-part test: a federal court plaintiff must show: 1) "an injury in fact" that is concrete and particularized, as well as actual or imminent; 2) that the injury is "fairly traceable to the challenged action of the defendant(s) [the so-called "causation" test]; and 3) it is likely, as opposed to merely speculative, that the plaintiff's claimed injury can be redressed by a favorable court decision.

The Supreme Court's three-part standing rule is far easier to state than to apply in particular cases—especially when it comes to climate change controversies. In

*Massachusetts*, Justice John Paul Stevens ruled on behalf of a bare 5-4 majority of the Court that at least the state plaintiffs in that case satisfied all three elements of the Article III standing test. Chief Justice Roberts and three other conservative justices vehemently disagreed, and the intellectual debate over standing in climate change cases was fully joined.

In the new *Washington Environmental Council* case, a conservative three-judge panel of the Court of Appeals held that the environmental groups failed to meet Article III standing requirements.

A number of other, recent climate change lawsuits attacked on lack-of-standing grounds have foundered on the first part of the test: the injury-in-fact requirement. The Ninth Circuit in *Washington Environmental Council* brushed past that particular test, assuming but not deciding that the environmental groups had suffered the requisite injury as a result of Washington State's failure to regulate greenhouse gas emissions from the companies' refineries.

The groundbreaking portion of the *Washington Environmental Council* decision is instead that which analyzes the other two Article III standing tests: causation and redressability. The Ninth Circuit found the environmentalists' arguments on both points without merit.

Focusing first on causation, the panel noted that "there are numerous independent sources of GHG emissions, both within and outside the United States, that contribute to the greenhouse effect." Quoting with approval from the oil industry's expert witness, the court then noted that "it is not possible to quantify a causal link, in any generally accepted scientific way, between GHG emissions from any single oil refinery in Washington, or the collective emission of all five oil refineries located in Washington, and direct, indirect or cumulative effects on global climate change in Washington or anywhere else."

Turning to the redressability prong of Article III standing, the Ninth Circuit first concluded that the relative contribution of Washington-based oil refineries to ambient global GHG emission levels was *de minimis*. "Because the effect of collective emissions from the Oil Refineries on global climate change is 'scientifically indiscernible,'...Plaintiffs' injuries are likely to continue unabated even if [the court were to grant the relief sought by the suing environmental groups]."

In its decision, the Ninth Circuit panel expressly declined to follow *Massachusetts v. USEPA*, concluding that inasmuch as the Supreme Court case had involved states rather than private environmental groups as plaintiffs, the Supreme Court's grant of standing in

*Massachusetts* had no applicability to the facts in *Washington Environmental Council*. But that distinction actually was not especially relevant to the Supreme Court's expansive interpretation and application of the causation and redressability standing rules in *Massachusetts*.

Even more disturbing, the panel in *Washington Environmental Council* failed to distinguish—or even cite—the Ninth Circuit's own, 2004 decision [[Covington v. Jefferson County](#)] in which the Court of Appeals had found standing in an early climate change case based on facts roughly analogous to those in *Washington Environmental Council*, and using an expansive standing analysis that closely presaged that adopted in *Massachusetts*.

Assuming the Ninth Circuit's decision in *Washington Environmental Council* remains undisturbed, it is likely to have profound, adverse effects on climate change litigation advanced by citizen suit plaintiffs in the future. Indeed, it is difficult to imagine *any* private citizen or environmental group that could satisfy the formidable causation and redressability standards recently fashioned by the Ninth Circuit. And given the Ninth Circuit's nationwide influence when it comes to environmental and natural resources law, one can expect that *Washington Environmental Council* will be cited and followed in other federal courts around the nation.

When it comes to Article III standing rules in climate change litigation, the precedential effect of *Massachusetts v. USEPA* has, in a relatively short period of time, become marginalized to an extreme degree. How unfortunate.