Ninth Circuit Denies Rehearing of Clean Air Act Suit and War of Words Ensues

02.07.2014 | By Benjamin Z. Rubin, Paul S. Weiland

On February 3, 2014, the United States Court of Appeals for the Ninth Circuit declined to rehear en banc a decision handed down last October by a three-judge panel, thereby leaving in place a decision that could significantly curtail future environmental lawsuits aimed at reducing global warming.[1] In *Washington Environmental Council v. Bellon*, 732 F.3d 1131 (9th Cir. 2013), the Washington Environmental Council and the Sierra Club brought a citizens' suit against state agencies responsible for implementing the Clean Air Act, seeking to compel the agencies to regulate greenhouse gas emissions from Washington state's five oil refineries. The groups alleged that the state agencies had failed to enforce the state's Clean Air Act implementation plan, which requires the agencies to define reasonably available control technologies ("RACT") for greenhouse gases and to apply RACT standards to oil refineries. The district court held, and the Ninth Circuit affirmed, that the groups did not have standing to compel the state agencies to issue oil refinery regulations. In a strikingly contentious opinion, a majority of Ninth Circuit judges refused to reconsider the panel's decision regarding the plaintiffs' standing, while a vocal minority dissented. *Wash. Envtl. Council v. Bellon*, No. 35323, 2014 U.S. App. LEXIS 2065 (9th Cir. Feb. 3, 2014).

Standing is a constitutional prerequisite to seeking judicial relief for an alleged injury in federal court. In order to have standing, a plaintiff must show that he or she has suffered an injury, that the injury is caused by the defendant's actions, and that the injury will likely be redressed if the court grants the requested relief.

Agreeing with the majority, Judge Milan D. Smith - the author of the original panel decision - penned a concurrence essentially stating that the Ninth Circuit had merely followed *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), a U.S. Supreme Court case discussing the standard for standing when private groups seek to compel state agencies to regulate third-parties such as oil companies. Specifically, Judge Smith stated that, under *Lujan*, the plaintiff groups were required to show that injunctive relief will cause the state agencies to promulgate new regulations in the groups' favor, and that the new regulations will cause the oil companies to change their conduct in a manner that will redress the environmental injuries suffered by the

groups as a result of oil-related greenhouse gas emissions. Judge Smith also stated that the plaintiff groups had failed to provide any evidence that would support either necessary finding.

Notably, Judge Smith's concurrence distinguished the facts from those in *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007), in which the Supreme Court, after applying a more lenient standing standard, held that the state of Massachusetts had standing to sue the Environmental Protection Agency ("EPA") to compel the EPA to promulgate Clean Air Act regulations of greenhouse gas emissions from motor vehicles. Specifically, Judge Smith stressed two reasons why use of a more stringent standing standard than that used in *Massachusetts v. Environmental Protection Agency* was appropriate. First, Massachusetts had brought a *procedural* claim seeking the EPA's reconsideration of a rulemaking petition under the Clean Air Act, whereas the Washington Environmental Council and the Sierra Club had brought a *substantive* claim for an injunction seeking to compel the promulgation of regulations. A litigant bringing a procedural claim, unlike one bringing a substantive claim, need not show that receiving the requested procedure will necessarily change any substantive result. Second, Massachusetts is a sovereign state that has a special interest in the condition of its environmental resources, while the environmental groups in this case were private individuals.

In a passionate dissent joined by two other judges, Judge Ronald M. Gould wrote that, in holding that the plaintiffs lacked standing, the panel had misapplied *Massachusetts v. Environmental Protection Agency* to "essentially read private citizens out of the equation when it comes to using courts to address global warming." In doing so, he argued, the decision prevents citizens from urging their states to take corrective action against global warming and "relegates judges – and the general public – to the sidelines as climate change progresses."

The decision arguably ratchets up the standard that applies to plaintiffs seeking to compel public agency regulation of third parties under the Clean Air Act and other environmental laws. In future suits raising a substantive challenge, environmental groups will likely have to overcome the significant burden associated with proving (1) that an agency's failure to regulate a third party has caused climate change, (2) that, if the agency does regulate the third party, the third party will follow the law, and (3) that the third party's following of the law will actually mitigate climate change.

[1] Generally, cases in front of the federal courts of appeals (or Circuit courts) are heard by three-judge panels. The Circuit courts sometimes grant rehearing en banc, in which all judges of the court reconsider a decision of a panel, in cases involving a matter of exceptional public importance or in cases in which a panel decision arguably conflicts with a prior decision of the court.