

# ELR

## NEWS & ANALYSIS

### Risky Business? *Massachusetts v. EPA*, Risk-Based Harm, and Standing in the D.C. Circuit

*Editors' Summary: On September 19, 2007, the Environmental Law Institute hosted a seminar to examine developments in environmental standing in the U.S. Court of Appeals for the District of Columbia Circuit following the Supreme Court's decision last term in Massachusetts v. EPA. The panelists discussed the concept of a risk-based standard for proving "injury-in-fact" in environmental and public safety cases in light of such recent decisions as NRDC v. EPA I and II and Public Citizen v. NHTSA. The seminar concluded with a question-and-answer period. Below is a transcript of the event.*

*[Transcribed by ACE Transcription Service, Washington, D.C. The transcript has been lightly edited, and citations have been added, for ease of reading.]*

#### Moderator:

**Bruce Myers**, Senior Attorney, Environmental Law Institute (ELI)

#### Panelists:

**Amanda Leiter**, Visiting Professor, Georgetown University Law Center; former attorney, Natural Resources Defense Council (NRDC)

**Chet Thompson**, Partner, Crowell & Moring; former U.S. Environmental Protection Agency (EPA) Deputy General Counsel

**Allison Zieve**, Attorney, Public Citizen Litigation Group

**David B. Weinberg**, Partner, Wiley Rein L.L.P.; counsel for Methyl Bromide Industry Panel of the American Chemistry Council

#### I. Introductions

**Bruce Myers:** The threshold question of who has standing to be heard in federal court is among the most important and commonplace questions of constitutional environmental law. However, it remains among the least understood. Today, we may well be witnessing a shift in the landscape of environmental standing in two of the most important courts that deal with environmental law.

The first, of course, is the U.S. Supreme Court. In its much discussed climate change ruling earlier this year, *Massachusetts v. EPA*,<sup>1</sup> the Supreme Court offered the latest word on standing when it presented two very important but very different views on what the standing doctrine looks like and should look like, in Justice John Paul Stevens' majority opinion and in Chief Justice John G. Roberts Jr.'s dissenting opinion.

At the same time, the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit has been very active on this

topic. There are a series of decisions that have been handed down in recent months or are in the process of being handed down. And within the last year or two, we have had a new rule on standing in the D.C. Circuit, so there is a lot of activity there. This is an area of a great deal of interest to ELI.

Today's seminar is the third in a series of seminars on the topic of environmental standing. Our Endangered Environmental Laws Program has focused a great deal on this question and we have tried to inform the legal and policy debate on this topic as we are doing today, and also to undertake legal research that is premised on the constitutional legitimacy of environmental protections. In addition, I would recommend to you a recent article that appeared in the *Environmental Law Reporter*, one of ELI's flagship publications, called *Developments in the D.C. Circuit's Article III Standing Analysis: When Is an Increased Risk of Future Harm Sufficient to Constitute Injury-in-Fact in Environmental Cases?*<sup>2</sup>

To explore developments in these two courts, we have a terrific lineup of panelists, and hopefully they have some insights into whether we are witnessing some kind of seismic change in the standing doctrine, or just some slight adjustments.

Amanda Leiter is a visiting professor at Georgetown University Law Center. Prior to that, she spent two years as a Clean Air Act (CAA) litigator at the NRDC. She has clerked for judges in the U.S. District Court of Massachusetts, the D.C. Circuit—which is very apropos for today—and for Justice John Paul Stevens of the Supreme Court. She is a graduate of Harvard Law School and holds an M.S. in Oceanography from the University of Washington.

Chet Thompson is a partner in the Washington, D.C., office of Crowell & Moring and is practicing lead counsel in

2. Cassandra Sturkie & Nathan H. Seltzer, *Developments in the D.C. Circuit's Article III Standing Analysis: When Is an Increased Risk of Future Harm Sufficient to Constitute Injury-in-Fact in Environmental Cases?*, 37 ELR 10287 (Apr. 2007).

1. 127 S. Ct. 1438, 37 ELR 20075 (2007).

litigation and regulatory and legislative representation of a wide array of clients under the CAA, Resource Conservation and Recovery Act (RCRA), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Prior to joining the firm, he was Deputy General Counsel of EPA and oversaw, among other things, the Agency's CAA and RCRA legal dockets. He received his J.D. from Catholic University-Columbus School of Law, and obtained his undergraduate degree at Boston College.

Allison Zieve is an attorney at Public Citizen Litigation Group in Washington, D.C. She has litigated numerous cases under the Administrative Procedure Act and currently is working on a case challenging a National Highway Traffic Safety Administration (NHTSA) vehicle safety standard. Allison practices in federal and state courts at all levels. She has published articles on open government and on preemption of state law damages actions, among other topics. She is a graduate of Yale Law School and Brown University.

David Weinberg is a partner and chairman of the Chemical Safety and Environment Group at Wiley Rein L.L.P. in Washington, D.C. He has practiced law since 1973 with time out to work in the Carter Administration and on a couple of campaigns. He has a broad range of environmental and administrative law experience under virtually all of the environmental statutes at all levels. He is a graduate of the University of Pennsylvania and Georgetown University Law Center, where he got an L.L.M., and of Yale University. He has written widely, and he points out that his very first publication after graduating from law school was on the topic of standing.

## II. Background on Standing

**Amanda Leiter:** I have been charged first with providing a background on the cases that we are discussing. I'm going to try to do that in a neutral way, and then I'll give you my take on them at the end. I should disclose that I was actually on the briefs for one of the cases, so I'm not unbiased. My first slide, a picture of people standing on their heads, is a suggestion of what I think of D.C. Circuit standing.

First, I want to provide a short background of what standing is and where it came from. One of the most commonly cited paragraphs from the Supreme Court's *Lujan v. Defenders of Wildlife*<sup>3</sup> decision in 1992 outlines that standing is based on the constitutional requirement of a case or controversy: The irreducible constitutional minimum of standing contains three elements: an injury-in-fact caused by the action that the plaintiff is challenging and redressable by the remedy that the plaintiff seeks from the court.

Recently in these D.C. Circuit cases, the issue of how to implement that requirement has arisen, particularly the injury-in-fact requirement in the context of the so-called increased risk cases, which include cases where the plaintiff is complaining that some action of an agency either increases risk to the plaintiff or fails to decrease a preexisting risk to the plaintiff as much as might be required by federal law.

The first cases in which I was involved that raised these issues were *NRDC v. EPA I*<sup>4</sup> and *II*,<sup>5</sup> in which we challenged

an EPA rule regulating the pesticide methyl bromide, which depletes the ozone layer. We were alleging that the EPA rules did not adequately decrease use of methyl bromide nationwide. We included in our submissions to the court affidavits from members who said they spend a lot of time outside. They were concerned that because EPA was not sufficiently reducing use of methyl bromide, the ozone layer would be depleted and the plaintiffs or members of the NRDC would be subjected to greater risk from ozone exposure and skin cancer.

In the first decision, the court went through a very complicated quantitative analysis of the risks to our members and said that in these increased risk cases, the plaintiff has to establish that the increase in risk and the subsequent increased risk are both substantial and clear some sort of substantiality bar. The court did not identify numerically where that bar was, but said in its first decision that we had not cleared it.

We then had Seth Waxman put together a reconsideration petition for us. The court granted reconsideration on the issue that Seth briefed for us and then ruled against us on the merits. Nevertheless, the standing decision was erased from the books. But the court expressly said it was not reconsidering its requirement that you establish that the risk that you are facing is substantial. It just said: "We are redoing our calculations, and in fact, the NRDC has shown that its risk is substantial."

The court then reiterated that the plaintiff is required to show that the risk clears some sort of substantiality bar in the case that Allison is going to tell you about, *Public Citizen v. NHTSA*.<sup>6</sup> This case is a challenge to NHTSA tire pressure safety rules in which Public Citizen tried to establish standing based on the increased risk of tire-related injuries on the ground that NHTSA's rule was insufficiently protective. The court in essence said: "We are not yet sure whether Public Citizen has shown that it is increased in risk and the resulting increased risk are both sufficiently substantial to establish standing."

The bottom line of these two cases is that the court has now said quite clearly, in a couple of different panels, that to establish standing in the D.C. Circuit in these increased risk cases, you have to clear the substantiality threshold.

There is another *NRDC* case that came out just four days after the *Public Citizen* decision, with a completely different result under a different panel. It is a challenge to control pollution from plywood manufacturing facilities.<sup>7</sup> In this case, the NRDC introduced affidavits showing that people who spend a lot of time outdoors felt that they were changing their use of their neighboring environment. They were not spending as much time outdoors because they were worried about pollution. And the court there said that the plaintiffs' change in their primary conduct or behavior was sufficient to establish standing.

So they did not really look at an allegation of increased risk and therefore did not have the opportunity to impose the substantiality threshold. That said, in either of these cases, standing could have been pled in either way. You can always make an argument that because of an increased risk to you, you are changing your use of the resource.

It is not clear that these are really distinguishable cases, but they come out completely differently. Judge Judith W.

3. 504 U.S. 555, 22 ELR 20913 (1992).

4. 440 F.3d 476, 36 ELR 20051 (D.C. Cir. 2006).

5. 464 F.3d 1, 36 ELR 20181 (D.C. Cir. 2006).

6. 489 F.3d 1279 (D.C. Cir. 2007).

7. *Natural Resources Defense Council v. EPA*, 489 F.3d 1364, 37 ELR 20146 (D.C. Cir. 2007).

Rogers here says: “No problem.” The NRDC was apparently grilled on standing at oral argument. But the opinion actually deals with it very quickly and says clearly standing is established.

As far as *Massachusetts v. EPA*, what is interesting to me was its conspicuous absence from most of these D.C. Circuit cases. It is cited in *Public Citizen*, but very briefly. I think that what this says is that *Massachusetts v. EPA* may not have a huge role to play in D.C. Circuit increased risk cases. That is partly because of the presence of a state plaintiff in *Massachusetts v. EPA* and, of course, the Court in that case says: “Massachusetts is losing its coastline; Massachusetts has a sovereign, a special interest. We are particularly concerned about paying attention to Massachusetts’ sovereign interest.” They also say in a very short phrase that I think may have been very important to getting Justice Anthony Kennedy on board: “Massachusetts has already lost coastline.”

There was not, in this case, a question of solely increased risk of future injury. There was a clear allusion to a present injury to Massachusetts. And it also was not an injury to Massachusetts in its public trust over the health and welfare of its citizens, it was an injury to Massachusetts’ territory. Unfortunately, it is not clear to me that *Massachusetts v. EPA* really signals such a sort of sea change vis-à-vis plaintiffs in these increased risk cases.

The last thing I’ll leave you with is my view of the substantial risk threshold. I think it is quite wrongheaded for a couple of reasons. The first is that it acts as a sort of de minimis threshold. You have to show that your increase in risk clears some bar, presumably a quantitative bar, although the court has not identified numerically what that is. If you look at other areas of standing law, there is generally not a de minimis threshold. And in fact, if you look at class actions, we have put together a procedure designed to give plaintiffs who have suffered very small injuries access to courts. As a practical matter, this is the only area in which the court has tried to impose this threshold. The D.C. Circuit is unique in this regard. A couple of other circuits have addressed this issue and have said an increase in risk is an injury for standing purposes and have not tried to impose a threshold.

Even if you think there is a need to weed out some of these increased risk cases, using a threshold is a bad way to do it because it is not a great proxy for the importance of the legal issue or the importance of having judicial review, because it looks only at the risk to the plaintiff. It ignores the magnitude of the harm. Well, does it not matter whether it is a risk of death or a risk of some much more minor form of health-related injury or whatever? And then should not the size of the affected population matter?

The threshold skews agency incentives because if you are trying to evade review now, you can just subdivide your action into smaller and smaller pieces so that the risk of any one action is small. The court’s imposing a cutoff usurps the legislative authority because the U.S. Congress has included citizen supervisions in these statutes for a reason.

### III. NRDC I & II

**Chet Thompson:** I was at EPA as the Deputy General Counsel at the time of both the *Massachusetts* case and the *NRDC I & II* cases. During my tenure there, we took standing very seriously and always ensured first and foremost

that we could raise standing arguments to the defenses of our actions.

My job at EPA was to get our final decisions upheld. We also felt we had an obligation to the courts to raise standing because there have been suggestions that in the last few years EPA has not raised standing with zeal. But I do think that EPA has an obligation to raise it in all situations where it is legitimately in play.

I plan on talking about *NRDC I & II* and providing a little bit of background, because for those who read that decision cold, it is probably a bit confusing as to why we are here, what was granted, what the confusion was, and why *NRDC I* had that mathematical equation that is difficult to follow. Then I’ll touch on *Public Citizen* and on a few comments that Amanda just raised.

I do not think that this is the end of environmental citizen suits by any stretch of the imagination. Some of this has been overplayed. *NRDC I & II* have a little bit of something for everybody. For those who argue that standing should be found in *NRDC I & II*, notwithstanding the fact that the substantial probability test was set forth again, standing was ultimately found, which is a good thing if you are in that camp.

The court affirmed that a risk in the neighborhood of 1 in 129,000 is not trivial. For those who live in the substance of EPA matters like I do, that risk is not considered outlandish. In some respects, you will be able to assert that type of risk threat; and if *NRDC II* is followed, that would be enough to set a hurdle.

There is also something there for those in the other camp as well. The case reaffirms the substantial probability test. In *NRDC I*, Judge A. Raymond Randolph noted that the mere assertion of increased risk was not enough, but in *NRDC II* they kicked the can a little bit. They noted that other circuits disagree and then they note that they do not have to decide that issue, and just decided it on the actual risk, which was a bit odd. Nevertheless, for those who believe that standing should be reeled in a little bit, then there is enough there for you to argue your cases as well.

By way of background, the methyl bromide rule was established by EPA under the Montreal Protocol<sup>8</sup> and allowed for critical use exemptions to the phaseout of methyl bromide and established this critical use level from 2005 forward. Some thought that EPA should be more aggressive in its critical use allowances, and so they brought the challenge. EPA at that time did not raise standing in the first instance. We were prepared to concede the point. David [Weinberg] and others raised standing. And so when the initial decision came out, EPA was in the odd position of having a rule upheld on standing grounds that we did not raise.

EPA wanted this decision to be upheld. We believed that the court misinterpreted the mathematics at play and we felt we had a legal responsibility to raise this to the D.C. Circuit.

The Agency ran a model to justify the risk of these rules and they came out with the numbers of 10 deaths, 2,000 nonfatal skin cancer cases, and 700 cases of cataracts. The court accepted these numbers and that the risk would be spread out over 145 years and, therefore, they came up with a rather astronomical number. The court ruled that a risk of 1 in 42 billion of dying or getting cancer was trivial and that, therefore, there was no standing. This model showed that it

8. Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY DOC. NO. 100-10, 1522 U.N.T.S. 29.

already took a lot of those things into consideration and that the real risk was what EPA put forward, 1 in 129,000.

EPA was prepared to point out that the number most likely was sufficient from the Agency perspective to show a risk. We suggested to the D.C. Circuit that maybe they miscalculated, and that is why there was a complete reversal of the numbers between *NRDC I & II*.

*NRDC I* is critical because it indicated the long-standing position of the D.C. Circuit that there has to be a substantial probability and the risk has to be nontrivial, and that an increased risk by itself is not sufficient.

Oddly, when you get to *NRDC II*, where Judge Randolph had the opportunity to tee this issue up again and hit it out of the park, he noted that the court need not answer it, which one could initially view as backtracking on his original position. That said, since the *Public Citizen* case came out, I no longer believe that is a backtrack; I think it was a sidestep and then a giant step forward. We are now in the world of the CAA of residual risk rules where the statute has built-in probabilities that we have to take into consideration, 1 in 10 and 1 in 6 and a hazard index of 1. From EPA's perspective, this is not the end of the world. If, under one of these rulemakings, you cannot assert an increased risk of injury of greater than 1 in 129,000, then with all due respect to the rule, standing probably does not exist. So this is not bad as some believe it may be.

The other thing I'll comment on is *Public Citizen*. I believe that this does slam the door on the issue that we raised. Allison may disagree, but unless and until they change their mind that it definitely does away with this notion that an increased risk by itself should be sufficient or can be sufficient, that three-nothing decision is not currently up for grabs. What is up for grabs is the issue of whether numerically there is a substantial risk.

Another interesting aspect of *Public Citizen* is the fact that Judge Brett M. Kavanaugh laid out an untraditional point: that the increase has to be substantial but the underlying risk itself also has to be substantial, which makes sense, notwithstanding what is on the board. If the original risk is not sufficient to have standing because it is trivial, why would a slight increase in that risk be enough to grant standing? I think Judge Randolph in *NRDC I* was correct when he points out that in some situations, a significant increase still is trivial. I cannot comment on why we raised standing and whether I think the decision was right.

One last thing that I'll point out is the notion that Amanda raised about an agency incentive to subdivide the risk. I can assure you that in my time at EPA there were no thought processes like that. The Office of General Counsel works with the program. The program is implementing their statutory mission to the best that they can and there were never attempts to carve up an action to improve a standing argument in the D.C. Circuit. I respectfully submit that that is not a real risk.

#### IV. *Public Citizen v. NHTSA*

**Allison Zieve:** I'm going to talk in a little more detail about the D.C. Circuit case, *Public Citizen v. NHTSA*. It is not an environmental case and I'm not an environmental lawyer, so I'm a bit of an outlier here. It was brought against NHTSA to challenge a rule that requires tire-pressure monitoring systems in cars to tell you when you have a tire that is signifi-

cantly under-inflated. Before I get to standing, I will provide a bit of the context in which the standing issue arose.

In 2000, Congress ordered NHTSA to issue a rule on this topic. When NHTSA did so, it violated the statute. We challenged the rule in the U.S. Court of Appeals for the Second Circuit and won. The Alliance of Automobile Manufacturers intervened in that case, and neither they nor NHTSA suggested that we did not have standing. But because the *Sierra Club* case<sup>9</sup> had just come out in the D.C. Circuit shortly before our brief was due, we submitted standing declarations with a short notice of filing that explained that there was this new decision in the D.C. Circuit and we were just trying to be careful. The court never mentioned that we had done that and the decision did not mention standing. There was no question about it.

NHTSA then issued a new rule. The tire manufacturers were quite unhappy with the new NHTSA rule, and we joined them in their suit in the D.C. Circuit. We again submitted the *Sierra Club* declarations about standing. And this time, the Alliance of Automobile Manufacturers argued that none of the petitioners had standing for various reasons. EPA did not address standing in its briefs. We addressed it fairly briefly. Oral argument focused heavily on standing, and the recent decision only addressed standing. The court first held that the tire manufacturers did not have standing for reasons that are not germane here.

Judge Kavanaugh then turned to *Public Citizen* and discussed our standing at some length. The decision is particularly distressing to us because we have brought these types of cases for 30-some years, but let's see what happens in the future. For the most part, he did not rely on the arguments that were made in the Alliance of Automobile Manufacturers' brief. He agreed that the injury that we had asserted, which was the increased risk that our members would be injured in car accidents, satisfies the concrete injury and the particularized injury prongs of the standing analysis.

But when he got to the next prong, whether the injury is actual or imminent, we ran into problems beyond what we experienced before, and that came directly from the EPA line of cases. The court held that to establish imminence and injury-in-fact, an organizational plaintiff suing on behalf of its members must show both the substantially increased risk of harm to individual members and that the ultimate risk is substantial, as Chet indicated. The Court cited *Mountain States*<sup>10</sup> for this point without noting that *Mountain States* said "nontrivial."

It is unclear for me whether the terms "substantial" and "nontrivial" are meant to denote the same thing or whether the court is moving away from "nontrivial" toward a more demanding "substantial" requirement. Either way, it has certainly moved beyond the "identifiable trifle" language that was used in some of the older cases that have never actually been overruled; they have just been forgotten.

In addition, the auto makers argued that our members' injury would be self-inflicted because drivers could always check their tires manually, so they do not need a warning light. The court rejected that argument, in part because although you could manually check your own tires, you could not be sure that your neighbor was going to manually check his or her tires to ensure they were not under-inflated, and

9. *Sierra Club v. EPA*, 292 F.3d 895, 32 ELR 20738 (D.C. Cir. 2002).

10. *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1234-35, 26 ELR 21596 (D.C. Cir. 1996).

accidents could be caused by someone with under-inflated tires skidding into you.

Then the court said that because the injury alleged was based on the government's regulation of others, not regulation of Public Citizen members, we had to show that causation did not depend on choices made by the auto makers. We were instructed to show that auto makers will not voluntarily exceed the safety standard that NHTSA adapted; that drivers would not seek to prevent injury to themselves or to other people by manually checking their tires and then inflating them properly; and to show that drivers will pay attention to the warning light that will be installed in cars.

The two latter topics were addressed specifically in the *Federal Register* notices that accompanied issuance of both rules. We did not expect to have to independently show that installation of a warning light was going to have an effect. But I cannot say at this point whether relying on what the agency states in the administrative record, using its own facts and methodology and conclusions, is enough or whether the D.C. Circuit is looking for something more.

As discouraged as we were by this decision, it did not end the case. I mention this because first, Judge Kavanaugh writing for the majority says that if he were relying just on Supreme Court cases, we would be out. We would have been out when he issued the decision in June. But he says that it is prudent in light of *Mountain States* and *NRDC* to ask for further submissions. Judge David B. Sentelle dissented in part to say that in his view we should not be given a further chance to demonstrate standing. He said that he had misgivings about whether an organizational plaintiff can ever establish probabilistic standing based on increased risk, where the increase in risk is no different from the increase suffered by the public at large. He said that he thought that such risks fell in the realm of the legislative branch, not the judicial branch, presumably even if the agency's rule is in direct violation of the legislative directive.

I'll digress from my case for just a second to say that, first, I think *Massachusetts v. EPA* rejects the proposition that an individual harmed by government action cannot sue if the harm is also suffered by the public generally. And second, in our view, Congress has already addressed the matter that is the subject of our suit and the agency failed to do what Congress asked it to do. The courts are an appropriate and proper place to hold the executive branch accountable for failure to abide by the law. And it is simply not practicable or desirable to expect Congress to revisit an issue and say to the agency each time the agency does not live up to the legislative mandate: "No, agency, when we said to do X, we meant to do X, not to do Y." Congress, through the APA and statutes that authorize judicial review of agency actions, has confirmed that courts can and should entertain such suits. That does not mean that a plaintiff or a petitioner does not need to have stake in the case, because, after all, the case or controversy requirement comes from the U.S. Constitution, not from Congress. But once Congress has spoken and the agency has acted, the courts have an important role to play.

With respect to many rules, standing can only be based on increased risk because you can never show that the injury, whether cancer or an auto accident, is definitely going to happen to any specific person. Even after it happens, the person would not have standing to challenge the rule any more than before because he or she would not be able to show that he would be in an accident again. So the person might have a

tort claim, as Judge Kavanaugh suggests, which in our opinion is fine, but that should not affect standing to challenge the rule. But when we know with certainty that people will be injured, the courts have a role and a duty to consider the agency's rule and not simply to throw it back and let Congress decide whether to pick it up again.

In any event, we submitted a supplemental reply in early July as instructed by the court. The court has said injury-in-fact is qualitative, not quantitative, which is supported by *Massachusetts v. EPA*. But *NRDC v. EPA* shows that in the D.C. Circuit you have to quantify the risk, and we did that. We submitted a declaration from a statistician with expertise in the area. The Alliance of Automobile Manufacturers and NHTSA submitted declarations challenging his methodology and his conclusions, and it is now something of a battle among experts. Is it lifetime risk, is it annual risk, what should the numerator be, and what should the denominator be? I think Judge Randolph will love it, but I'm not really quite sure what to make of it.

The court also asked us to address a few specific issues that bear on causation. For example, the court said that if the NHTSA rule could cause injury but the automobile industry might exceed the minimum standard, we must demonstrate a substantial probability that the industry would not voluntarily exceed the standard, which we could never show. We submitted information about what the industry has done in the past—which the industry belittled—but that aspect of the decision is troubling because the court recognizes that a company has self-evident standing to challenge a rule aimed at it without proof that it might not comply with the regulations anyway. Although that possibility could theoretically negate their injury in the same way that voluntary compliance supposedly could negate ours, why should members of the public facing increased risk of injury have to face the impossible burden of proving what the industry might do?

## V. D.C. Circuit Considerations

**David B. Weinberg:** The standing debate, as evidenced in these cases, reflects a confluence of three factors in the D.C. Circuit.

The first is the general shift in the environmental arena from concern about pollution to concern about risk. If you take a long-term perspective on what the environmental laws have dealt with since the late 1960s, we have moved dramatically from dealing with obvious pollution problems—air where you could not see your hand in front of your face, or water that was discolored, or situations where somebody was not going to be able to enjoy a vista—to what is, to the layman, a rather esoteric effort to characterize and respond to risk. People active in the environmental policy community have tended to move along with the times without noticing it was happening. But judges tend to not work on this vineyard all the time. As a result, they tend to be a little bit more skeptical about some of the assumptions in risk assessments. In essence, if you do not deal with risk day in and day out and you read one of these risk analyses, you can quickly become skeptical because there is a great degree of arbitrariness buried into them.

Second, we are seeing the fundamental conservatism or caution on the role of the courts reflected in the current makeup of the circuit bench. You can characterize this as politically driven, as a difference between the judges that were

appointed in the last eight years over judges who were appointed earlier. Whatever the reason, we now have judges who are much more cautious about the role of the courts in government policy than Judge David L. Bazelon or Judge Harold Leventhal or Justice William O. Douglas, who were setting the basic doctrine when the standing issue first came up in administrative law.

Third, there is the fact—often ignored in academic analyses—that tactical choices of lawyers matter. That partly explains what happened in *NRDC I & II*. After the intervenors filed a clearly written affidavit designed to be comprehensible by a judge, that challenged quite squarely the level of risk that was asserted in the appellant's standing papers, an opinion was issued (*NRDC I*) that recognized doubt on the level of risk. Importantly, however, counsel for the NRDC had not addressed those issues either in any supplemental papers or in oral argument, even when given the opportunity.

That probably led the court to see our side of the issue more clearly than it saw the other side's. It may even have led the court to reach some conclusion about the NRDC's view of the strength of its standing position. It certainly played a role in the outcome of the case, because that first opinion really does not state any new legal principles. You may not like judges trying to do mathematics—and I understand that problem—but there was no earth-shattering view of the law stated in the first opinion.

By the time the second decision came around, the plaintiffs and EPA had joined the issue, and the court had in front of it tightly focused expert analyses that gave it some second thoughts about the risk issue. But I'm not sure how much more you can take out of it. All we now know is that 1 in 4.2 billion is a trivial risk, and 1 in 200,000 or 1 in 126,000 is a nontrivial risk. I suspect that in between those extremes, in cases where one can make reference either to existing policies of EPA—or any other agency for that matter—or to statutes which recognize risk levels, plaintiffs are going to get traction with judges. They are going to find that they have to do their homework.

It is going to be incumbent on the parties to put very clearly in front of the judge what the science holds. It is not a matter of what Congress has said, and the policy arguments on the panel here are not particularly influential, because the courts have now characterized this as a constitutional question.

From my perspective, *Massachusetts* does not give us much further insight into the future on this standing issue, but for a different reason. If you think about the tripod of concerns that go into standing—that is, the three prongs that *Lujan* talks about: injury, causation, and redressability—*NRDC* addresses the first, the probability of there being some injury; but does not get past that.

In the Supreme Court case, however, the fact of injury was assumed by the majority. They took it that the papers established that the state of Massachusetts had lost property. That was a very traditional kind of injury, and so the traditional standing analysis in *Massachusetts* addresses the causation and the redressability point—which, of course, gets buried in the causation even though we say there are three prongs—and do not really focus or give guidance on probability of injury elements.

Also, albeit parenthetically, as a practical matter, after *Massachusetts* I expect almost every case will have either a

state or attorney general as a plaintiff, so that we will see less and less litigation over standing. Certainly, if I were bringing those cases, I would consider using that tactic.

In any event, the governmental standing aspect of *Massachusetts* looks to me like something that was dropped in after the other analyses already had been done. One of the panelists here made reference to the fact that particular wording may have been necessary to get Justice Kennedy on board. I do not claim to know what it takes to get any individual Justice on board, but it certainly does look to me like something that was added to get someone on board who was not quite comfortable with the traditional analysis and wanted to have some other basis on which to join the majority.

Ultimately, the practical lesson is that the affidavits now required by rule in D.C. and de facto in other circuits are very important and have to be written and considered from the standpoint of the jurists who are looking at them, not from the standpoint of people who are experts in risk analysis and are used to its language, concepts, and assumptions. Judges, because they are unfamiliar with risk analyses, are going to be more skeptical.

## VI. Panelist Responses

**Bruce Myers:** Thank you to the panelists. Before we go into the question-and-answer period, which I know will be very interesting, I would like to allow each panelist one to two minutes to respond to any issues that came up.

**Amanda Leiter:** I would like to comment on the shift from concern about pollution to concern about risk, which is at least in part an artifact of the shift in standing doctrine, and the extent to which it was an allusion to there being fewer environmental harms to complain about because we can now see vistas and see our hand in front of our face and there are no rivers burning.

I disagree with that. We still face many environmental problems, including some perhaps much more serious than the sort of immediate environs contamination that was the issue in the lot of early environmental cases. I'm not at all suggesting that the achievements that we made in the last 30 years are not important, but it would be wrong to think that the battle has been won and that all that is happening now is skirmishes around the edges. There are quite a few environmental challenges that still face us, including climate change, biodiversity loss, and open space loss, and the court battles that come out of those challenges are important and I would not characterize them as esoteric at all.

The other thing that I want to take issue with is the view that *NRDC I* did not change D.C. Circuit standing law. One reason why we did not respond to the intervenors' standing affidavit was that we were quite sure we had standing. Under preexisting D.C. Circuit law, we did have standing because the case cited in *NRDC I* for the proposition that you have to clear some sort of risk threshold to establish your standing is *Mountain States*, which is about a forest fire and damage to a forest. In that case, the court clearly finds standing, does not have much trouble finding standing, and says: "This is not the sort of circumstance in which there is a trivial risk." And so, that sort of shoves that to the side. *NRDC I* latches on to that language, which was peripheral and unimportant in the *Mountain States* decision, and makes it a new standard in the circuit. It was an important shift in

D.C. Circuit standing law and, for some other reasons that Allison alluded to, it is a problem, not least because of the litigation burden that it imposes on nonprofits as in *NRDC* and *Public Citizen*.

**Chet Thompson:** I agree with what David said about *Massachusetts* on the standing and focusing not on the injury. There have been two recent decisions, including a tort case in Mississippi on the theory that climate change led to [Hurricane] Katrina, which led to damage. The case was dismissed on standing grounds. That case was put on hold pending *Massachusetts*, so that decision was rendered notwithstanding.

**Allison Zieve:** At the end of ELI's seminar last spring about *Massachusetts v. EPA* on standing, one of the speakers said that he thought that the case would cause the D.C. Circuit to take a step back from requiring what he called a common-law type or toaster oven injury and relax a bit. The decision in *Public Citizen* shows that that is just wrong. At least three members of the court have read *Massachusetts v. EPA* differently. They just dismissed it by saying that the plaintiff in that case was a state.

In contrast, in the other decision that Amanda mentioned that came out three days after ours, Judge Rogers said very briefly that there is standing and moved on. She relies on the 2000 *Laidlaw*<sup>11</sup> decision. The difference there is partially attributable to the panels, but also shows that if you can characterize the injury in present terms, somehow the injury of not liking to garden as much when it is smoggy is going to get you past the standing hurdle, when fear of actually dying from skin cancer just does not get you there.

Also, in addition to *Massachusetts v. EPA*, standing was mentioned briefly by Chief Justice Roberts in another case at the end of last term, the school race-conscious assignment plan case, *Parents Involved in Community Schools v. Seattle School District*.<sup>12</sup> There Chief Justice Roberts said something that is just staggering for a former D.C. Circuit judge to say these days, which is that parents who had a kid who already was at the school that the parents wanted him to be at could challenge the plan because there was a risk that when he went to the middle school, he would not get the school that he wanted. He would be assigned, because of the plan, to some other school. That is in extremely stark contrast to the kind of showing that is being required in D.C. these days.

The last thing I just wanted to mention is that *Public Citizen* is not over. Oral argument is on October 11, at 2:00 PM. That is a victory; it is still going.

**David B. Weinberg:** Well, we can argue about whether *Mountain States* means one thing or another, and that is the case cited in *NRDC*, but the reason I say there was not a whole lot of change in D.C. law is that we had a CERCLA case in 2002 and an EPA case in 2000 that had gone our way on the issue of substantial risk. Maybe the law moved a little bit, but it was not a dramatic change.

**Bruce Myers:** Two questions from me before we move to the audience. First, how does this tie to the Constitution? I think I heard the word Constitution maybe two or three

times. I will pretend to be Justice Antonin Scalia for a moment and say: "I have read Article III. I do not see anything about redressability and causation and injury-in-fact or increased risks or substantial probability. What is all this about?" And just to narrow it a bit, you often hear that standing, like the political question doctrines that have come up in some of the climate change cases, is all about separation of powers. Is that right, and should we just accept that? Is it something less, something more, something different? What is going on underneath these standing doctrines? Does anyone have a reaction to that?

**Allison Zieve:** It should be about the proper role of the courts, but it has become about hostility to regulation.

**Amanda Leiter:** If you look at the history of the standing doctrine, it is clear. The court first mentioned standing in the early 1900s, and the number of mentions per case, per year increases with the growth of the administrative state. That does not necessarily mean that it is inappropriate, but there is this growth of a government sector that did not previously exist, and the question that everyone is trying to address in each of these historical stages is how much of a role does the judiciary have in reining in the executive? The first sort of introduction of, and emphasis on, standing comes at a time when the regulatory state is growing and private citizens or private plaintiffs are challenging regulation of their business interests.

Two Justices on the Court were sympathetic to the growth of the administrative state and sympathetic to the New Deal agencies, and wanted to put in place greater hurdles for private plaintiffs challenging the increase in regulation. As the Court and the agencies shift, it is now being used to argue that the president controls how the executive implements the laws, and that it is inappropriate for the judiciary to play a role in reining that in. It is not separation of power at bottom.

**David B. Weinberg:** I agree. The court's degree of activism probably peaked around the late 1960s, early 1970s, and with *SCRAP*<sup>13</sup> in 1973. At that time, we did have judges who were more prepared to be activists, who did not think that the legislators were addressing a whole series of issues that they were concerned about. I seem to remember that there was actually one decision in which Justice Douglas said something about rocks having standing.

The current focus on constitutional grounding reflects a great sophistication in trying to take the issue out of the public policy arena. If standing is purely a policy issue as to who can get to court, then the fact that Congress has said there should be citizen suits should end the whole subject. It should not be a further issue. And certainly there are plenty of environmental statutes that show congressional intent by including citizen suit provisions.

But the characterization of the question as constitutional makes that policy at least intellectually irrelevant, if not politically irrelevant. You quickly get into discussions of original meaning and the like. When you go back to *Lujan*, which is the case in which this doctrine is grounded, and these three tests, you see the focus on interpretation of the "case or controversy" requirement in the Constitution. That is a brilliant

11. *Friends of the Earth v. Laidlaw Env'tl. Servs.* (TOC), 528 U.S. 167, 30 ELR 20246 (2000).

12. 127 S. Ct. 2738 (2007).

13. *United States v. SCRAP*, 412 U.S. 669, 3 ELR 20536 (1973).

tactical way to shape the issue if you have the goals which Professor Leiter says some people have. It is a way to try to limit the regulatory state.

**Amanda Leiter:** There is a section of *Lujan* that people mostly do not cite, that goes into whether Congress has the constitutional authority to grant citizens standing. *Lujan* is always cited for this articulation of the standing requirement, but one of the things that Justice Scalia is trying to do with that opinion, and he succeeds for a period and then there are some subsequent decisions that chip at that, is to say that Congress does not have this authority under the Constitution.

**Bruce Myers:** Thank you for those reactions. Let's very briefly take it from the Ivory Tower down to street level. What other consequences exist for public interest organizations or even for clients who have to pay to go through these standing debates, in terms of resources, cost, or time?

**David B. Weinberg:** Public interest organizations have the money these days—

**Bruce Myers:** Well, that is a separate issue. We will throw that out during question-and-answer as well. But what, if any, are the practical consequences for litigation of having to address these issues?

**Allison Zieve:** This development is huge for us. The dueling experts thing that is going on in *Public Citizen* is not something that we could afford very often at all. It will definitely be a consideration in our decisions over whether we bring future cases and where. Some of our cases are easier to describe in the terms of “we do not enjoy gardening today” as opposed to “we might get skin cancer tomorrow.” Those cases seem to present less of a problem for the plaintiff. But where it is a case about substantial increase in risk and the risk itself being substantial, you really need to hire an expert who knows this stuff and the industry, and EPA is always going to have a lot of qualified, impressive experts at their disposal. It is not something we will be able to match regularly.

Part of the problem of standing being a constitutional law development is that some judges and justices thought that it was too wide open at one point and the backlash is to close it up, but when it goes so far in the other direction, toward making it harder to show standing, and that is based on constitutional law, it is harder to ever come back to a happy medium. At least outside the environmental realm, things were better for us before *Lujan* than after, but we were still basically okay, until recently.

**Chet Thompson:** Well, from observation it is undeniably more difficult on the other groups than on industry. I mean, industry still has to deal with it and weigh in on the standing. But because they do not carry the initial burden, I think David would agree that it is more of a burden on public interest groups. That said, if you look at the D.C. Circuit's docket, there is no shortage of active cases to get past standing. Remember, all these have to be grounded and if there is any direct injury, you are over the hump easily. Most of EPA's active docket, like the boiler max and like the plywood max that are raised, these are not difficult issues.

The cases that we are talking about are these rather limited increased risk cases.

**Bruce Myers:** Well, in the *NHTSA* case you have industry on both sides, right? So it is not always just a binary public interest versus industry issue.

**David B. Weinberg:** There is not much doubt that people think there is going to be a change in the next presidential election. There will be a change in the political direction, there will be a change in some judges, and people will take different views. But the issue is not going to go away as long as you have this constitutional framework that you have to deal with. And, that is not just an “industry” versus “public interest group” issue. I think that you will see things change. You will see some more conservative public policy groups finding their interests challenged in cases down the road. We have had situations in which we have had industry clients that are plaintiffs or appellants on matters that are a bit removed from their daily operations, and I have no doubt that we are someday going to see standing objections.

**Allison Zieve:** In a recently decided case over the number of hours truck drivers can drive in a day or a week, which was not an increased risk case, the lawyer for the intervenor industry was wondering whether standing would come up, though it ultimately did not because we were petitioning along with a group of drivers. They had a different kind of injury, but it was hard to say they did not have a real stake in the case. So in the future, we will also have to give some extra thought to whether there is another group or person who has a different kind of injury that we can bring in. We can try to get to the heart of it while sidestepping all the statistics.

## VII. Questions and Answers

**Audience Member:** That same core group of Justices would probably be all too happy to advance this Scalia argument that climate change is such a massive diffused injury that no single plaintiff will ever have standing to bring it into federal court. And Amanda may be right that we dodge the ball at this time on that front when you think about having another seat in place or even Kennedy wavering in the other direction on the next case. I see a pretty strong—

**David B. Weinberg:** It is certainly true that Chief Justice Roberts' dissent is much closer to the “there is not enough risk” argument. And when I say I do not think the case is all that important on this standing issue, I guess I'm thinking about it from a practicing standpoint. It is not a case in which the majority opinion changes very much. For somebody who is looking at the trends, however, and wants a reason to be concerned about the next appointment to the Supreme Court, you have one.

**Audience Member:** Substantial imminent risk.

**David B. Weinberg:** Some people care about some issues, other people care about others. If that is your issue, your decision issue, you are right in pointing that out.

**Chet Thompson:** I was going to bite my cheeks on this, but to suggest that a lot of these decisions are not politically mo-

tivated is just denying reality. And to the defense of the four in the minority, their point is well taken and Congress is now getting engaged in the climate issue and the issue of why it is inappropriate for the judiciary to say on issues like this: "Let the Congress take the lead." There are ways to solve problems without leaving it to the judiciary to do.

To suggest that a lot of these decisions and challenges were not politically motivated is simply not true. Some of this is a backlash of saying the executive branch is the one that controls the agencies right now. If you disagree with them, there are other routes to get there than being able to challenge everything even if it is a 1 in 4.2 billion risk.

**Audience Member:** Even if Congress already spoke to it in 1970, which is the merits argument in *Massachusetts*?

**Chet Thompson:** Well, that is my point. You won the merits argument. The merits argument has been decided. The issue you raised was standing and all I'm suggesting there is that all they said is that Congress should get involved and Congress is involved and what is wrong with—?

**David B. Weinberg:** You know, the opinion that Bob Fabrikant produced is intellectually no less defensible than the opinions Gary Guzy and his predecessors produced. You look at the same facts, you look at what Congress has chosen to do, and you make a judgment. The Court has now ruled which way the Court sees it, but neither of those General Counsels was nonpolitical. Of course, their political views influenced their judgments, but both of them had substantial bases for the conclusions that they asserted.

**Audience Member:** I work at the NRDC presently and I'll be doing a lot of litigation over the agency's residual risk rules. For example, if we assume that the second methyl bromide case means that 1 in 129,000 is the threshold. Let's say that is a number that the D.C. Circuit decides upon.

But Congress clearly said in the residual risk provision for the CAA that a risk above one in one million triggers rulemaking responsibility on the agency. If the circuit decides upon a risk threshold somehow tied to the Constitution, that it is different than, say, for example, this risk threshold that Congress has decided upon, you could theoretically have a situation where the agency disregards a risk above one in one million but less than 1 in 129,000, but nobody could challenge this despite the fact that Congress is on the books with an opinion. Is that a tenable position? Is that something that perhaps suggests that a numerical threshold that is devised by the circuit is ill-advised?

**Chet Thompson:** I have a couple of reactions. Because the case in controversy is a constitutional issue, Congress cannot just overcome that through legislation. We deal with that in all the other arenas so that is not surprising. But I do not necessarily buy into your premise. The D.C. Circuit would be hard-pressed in that arena of risk around the one in one million range, for which there is a regulatory statute obligation for EPA to regulate, to find that not to be a substantial risk. That is all. There is nothing that suggests that they would not find that. And if I were in your shoes, I would like to brief that issue.

So my point is, that is a different case. That is not one in four billion. The reason Judge Randolph found 1 in 129,000

was simply because that was what was in front of him or the panel. In a residual risk case, if EPA chooses not to regulate under residual risk, you probably have a pretty good case.

**Amanda Leiter:** Your question points out that the standing threshold is a problem no matter what. But your question really points out the absurdity of putting a numerical value on that threshold. It is one thing to say it can be trivial and sort of wave your hands about it. But if you are actually saying it has to be greater than 1 in 129,000 or whatever the number is, that borders on the silly because it is so dependent on whatever the assumptions were. You said that the risk assessment is arbitrary because there are all sorts of assumptions built in. And then the parameters of what the agency has chosen to do are arbitrary.

I take your point that EPA is not sitting there crafting rules that are subdivided so as to minimize the risk. Nevertheless, it is arbitrary. For example, in the methyl bromide case, they chose to regulate a single pesticide. They could have regulated several at the same time and they chose to regulate it annually. They could have regulated it multiple years at a time. I'm not suggesting any sort of nefarious intent on the part of EPA. I'm just suggesting arbitrariness. If EPA is moving in steps and the size of the steps is somewhat arbitrary, it is absurd to think that the Constitution says something about standing based on the size of the steps that the Agency is taking in any numerical sense.

**Allison Zieve:** Actually, even if they had regulated several pesticides in one rule, it might not have affected anything because in the *NHTSA* case, for example, they said we had to make our showing with respect to each aspect of the rule we challenged.

**Chet Thompson:** Incidentally, the EPA rule on methyl bromide was made because they were implementing the methyl bromide critical use exemption for 2005. Every year they created a new definition of a critical use. EPA was doing exactly what it was supposed to do.

**Amanda Leiter:** I do not mean to suggest it is anything nefarious. I only mean that it is an arbitrary decision as to the size of the steps that the agency takes in any particular time, and to suggest that it has a constitutional dimension seems to me silly.

**Chet Thompson:** But first of all, we are coming up with this 129,000. The 129,000 was only what was found nontrivial in that case. The court has said, in all these cases, that they are not going to put a number to it. Every tort case in America has a standard of reasonability. This is what the judges are to do, to decide what is significant and what is not. So my only point is that against the backdrop of a statutory obligation to act against certain probabilities, there would be a different type of case.

**David B. Weinberg:** I hope this is not an admission against interest, because I do not know which cases you are going to be briefing, but I would urge you to go back and look at the particular affidavits that were in front of the particular judges at the time they made decisions, because I believe that has a considerable impact on this. And, look at those affidavits from the standpoint of a judge. If you have a Mas-

ter's degree in Environmental Science and have studied risk analysis and are a member of the Society of Toxicology, you are going to have a very different view of a risk analysis than a generalist will.

Twenty years ago, when people wrote affidavits to support standing, and before these recent sets of cases, my sense is that many of those affidavits were written without serious attention. "We have a thousand members in the world and a lot of them like to go canoeing" was perceived to be enough. Now, however, the judges are saying: "That is not enough. You are going to have to explain to me more in terms that I understand." And when we get into this area of risk, it is inherently so vague that there is a higher burden in crafting the affidavits.

**Allison Zieve:** I agree that our declarations will be different in the future. In our case, not even the industry or the government had suggested the test for the environmental cases. No one cited those cases and our declarations were not quite six people go canoeing, but they were along these lines. Since our declarations come first, they will look a lot different in the future, and I hope that they will deter standing arguments from the other side. Seeing them first, not being called for later—it makes some difference.

**Audience Member:** One of the things we have not addressed today is if any increase risk is enough for standing, when is there any environmental case for which standing would not be found? Because if so, then we are disregarding a constitutional requirement and I will be curious to know where you think the line should be drawn.

**Amanda Leiter:** It is not a problem at all to say that an increase in risk is an adequate injury for standing. There are all sorts of limits on the number of those cases that is likely to be brought, including whether Congress has decided to include the citizen suit provision. And perhaps if standing were liberalized, Congress would react to that by narrowing the scope of the cause of action, for example. And I would have much less of an issue with Congress affirmatively narrowing the scope of the cause of action than with the court trying to sort of graft something onto the back end.

All jokes aside, the resources of the nonprofit groups and things are truly limiting. Nonprofit groups are not going to bring trivial cases. I do not think the issue in that case was just how much methyl bromide should be used in 2005. This was a whole new action that EPA is taking into the future with respect to regulation under the Montreal Protocol, and if we do not challenge this one, then potentially David's cli-

ents will come back next time and say: "You should have challenged it last time."

When it is so clear that a directly regulated industry has standing, it should be equally clear that the affected public has standing to argue that the Agency is not complying with the congressional mandate.

**Audience Member:** I have been curious to know if the NRDC agrees with what Allison said that this development in standing is going to hinder the ability to bring cases because they are going to be so expensive.

**Allison Zieve:** Standing is definitely something that we are very nervous about. And if every case boils down to having to hire an expert to run a risk analysis, to challenge EPA's risk analysis, or to validate that the risk that you are facing is substantial, that will definitely affect our ability to bring cases.

**Audience Member:** With regards to your point about the numerical standard, I agree with Chet. You certainly have to look at that in the context of the case that was brought. There was a huge legal issue on the merits over how courts enforced nonbinding environmental treaty obligations and U.S. law, and particularly how you interpreted the treaty with the CAA.

Part of what went on here and was an avoidance of the merits. The hook was provided on the standing issue and there was this land case leading up from *Mountain States* and on. It was pretty clear that Judge Randolph had issues with the whole legal question to begin with. Now they eventually had to get to the merits and they decided that the decisions at the international level were nonbinding, but at all costs they wanted to avoid get into that.

**Bruce Myers:** That is a great point. Courts want to clear their dockets.

**Allison Zieve:** I think in *Public Citizen* they actually just wanted to talk about standing. I suspect they are not dying to get to the merits either because the way it was briefed is complicated. But I can certainly see that happening in some cases. I think part of the reason Chief Justice Roberts finds that a kid who already is at his preferred school has standing in *Parents Involved in Community Schools* is because he wants to get to the merits. So you get a few sentences on standing in a situation where it is a little awkward to say they have it.