

C O M M E N T

Charting an Uncertain Legal Climate: Article III Standing in Lawsuits to Combat Climate Change

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Like all plaintiffs in federal court, parties bringing lawsuits to fight climate change must demonstrate standing under Article III of the U.S. Constitution. The U.S. Supreme Court has interpreted Article III's standing requirement to mean that a plaintiff must show: (1) an injury-in-fact that is concrete and particularized as well as actual or imminent; (2) that the injury was caused by and is fairly traceable to the action of the defendant, rather than the result of the independent action of some third party not before the court; and (3) that the injury is likely to be redressed by a favorable court ruling. If a plaintiff cannot establish these three elements of **injury**, **causation**, and **redressability**, a federal court must decline to hear the case.

In 2007, the Supreme Court decided the landmark climate change case *Massachusetts v. EPA*. The Court held that greenhouse gases (GHGs) are air pollutants under the Clean Air Act (CAA) and, therefore, that the U.S. Environmental Protection Agency (EPA) was required to make a determination whether GHGs endanger public health or welfare. Essential to the Court's ruling was the conclusion that Massachusetts had standing to be heard on its legal claims. The Court resolved the standing issue in the particular context of a *state* plaintiff suing the federal government for violation of the state's *procedural* rights under the CAA—two factors that, according to the Court, required that the state be afforded “special solicitude.”







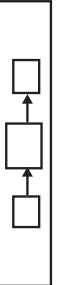


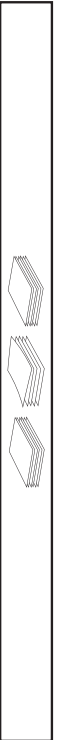



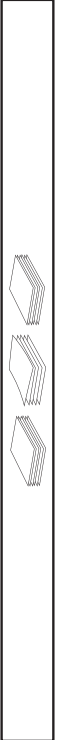



In the wake of *Massachusetts*, lower federal courts have been called upon to apply Article III standing rules in lawsuits featuring a variety of plaintiffs seeking to combat climate change in many different ways. The chart that follows provides a comprehensive snapshot of how these courts have ruled in cases where the standing analysis was documented in a written opinion. The chart is organized by the theory of standing advanced and the type of injury claimed for standing purposes, rather than by legal claim. Plaintiffs' approaches to standing can be loosely grouped into three main categories, plus a fourth minor category:

- Procedural theory of standing (i.e., the defendant violated the plaintiff's procedural right to protect his or her concrete interest, and that interest is adversely affected by the procedural deprivation—the plaintiff's injury may be either climate-based or non-climate-based);
- Informational theory of standing (i.e., the defendant deprived plaintiff of the right to certain information that would have been helpful to the plaintiff);
- Substantive theory of standing (i.e., the defendant is responsible for GHG emissions that contribute to climate change, which in turn causes the plaintiff to suffer a climate-based injury); and
- Increased risk of harm (i.e., the defendant is responsible for an increased risk of harm to the plaintiff's interests).

What do the cases show with respect to the standing of climate plaintiffs? First, standing in federal lawsuits brought to combat climate change is far from a given: federal courts have proven receptive to arguments that a case brought by climate plaintiffs can be dismissed for lack of standing. Second, the procedural theory of climate standing appears to offer promise for climate plaintiffs. Third, informational climate standing has met with some success. Fourth, asserting only a traditional, substantive theory of standing in climate cases has usually failed when tied to climate-based injuries. Fifth, plaintiffs proceeding under a procedural theory of standing tend to fare better when they can articulate an *underlying injury for standing purposes that is not itself climate-based*. Advocates appear to be seizing upon this notion. Finally, the status of climate standing based on an “increased risk of harm” or “probabilistic harm” theory remains uncertain and largely untested.

The endnotes to the chart contain case citations, including information on the legal claims involved in each case and, where appropriate, details on which elements of Article III standing the court found lacking under each theory. Note that multiple rows in the chart may be associated with a single case.

Injury Asserted						
Procedural Theory of Standing						
<div>□ → □ → □</div> <div>Failure to account for climate change in approving total maximum daily load (TMDL)</div>	+	<div> (Climate-Based)</div> <div>Harm to use and enjoyment of affected waters for sailing, swimming, fishing, and other purposes</div>				
<div>□ → □ → □</div> <div>Deficient environmental impact analysis, including failure to adequately consider greenhouse gas (GHG) emissions</div>	+	<div> (Climate-Based)</div> <div>Harm to ability to use and enjoy lands near lease sites</div>				
<div>□ → □ → □</div> <div>Denial of procedural opportunities that would attach if area was designated as a coal production region and leasing was conducted pursuant to a regional leasing process</div>	+	<div> (Climate-Based)</div> <div>Harm to wildlife and recreational and aesthetic interests</div>				
<div>□ → □ → □</div> <div>Failure to meaningfully address climate change in approving oil and gas leases</div>	+	<div> (Climate-Based) \$ (Climate-Based)</div> <div>Harm to ability to use and enjoy Bureau of Land Management (BLM) land and ability to make a living</div>				
<div>□ → □ → □</div> <div>Failure to consider both the economic costs of GHG emissions associated with leasing program and the effects of climate change on lease areas</div>	+	<div> (Climate-Based)</div> <div>Substantial increase in risk to enjoyment of observing animals affected by offshore drilling</div>				
<div>□ → □ → □</div> <div>Lack of opportunity for public participation and comment on climate change-related research plan and scientific assessment</div>	+	<div> (Climate-Based)</div> <div>Interference with ability to research and observe species</div>				
<div>□ → □ → □</div> <div>Inadequate procedures followed, including with respect to GHG emissions, in connection with fuel purchase contracts</div>						
Type of Plaintiff	Type of Defendant	Conduct Challenged	Remedy Sought	Art. III Standing?		
NGO		Approving state TMDL documents	Injunction vacating EPA approval of TMDLs and requiring EPA to account for impacts of climate change	NO ¹		
NGO		Approving execution and sale of leases for oil and gas development	Injunction halting lease approval pending full NEPA compliance	NO ²		
NGO		Failing to recertify area as a coal production region	Order vacating agency decision and remanding for further consideration	NO ³		
NGO		Approving oil and gas leases	Order setting aside approval of leases	NO ⁴		
NGO		Approving offshore oil and gas leasing program	Order setting aside and remanding leasing program	YES ⁵		
NGO		Failing to issue climate change-related research plan and scientific assessment	Injunction compelling government to issue research plan and scientific assessment	YES ⁶		
NGO		Entering into purchasing contracts for fuel derived from oil sands	Injunction prohibiting Department of Defense (DoD) from entering into contracts for fuel derived from oil sands	NO ⁷		

Injury Asserted		Type of Plaintiff	Type of Defendant	Conduct Challenged	Remedy Sought	Art. III Standing?
	 (Non-Climate-Based)	NGO		Authorizing mining exploration activities in roadless area	Order invalidating agency decisions and halting mining exploration activities in roadless area	YES ⁸
	 (Non-Climate-Based)	NGO		Approving leases for coal mining operations	Order setting aside environmental impact analysis	YES ⁹
	 (Non-Climate-Based)	NGO		Approving oil and gas leases	Order setting aside approval of leases	NO ⁴
Informational Theory of Standing						
		NGO		Failing to recertify area as a coal production region	Order vacating agency decision and remanding for further consideration	NO ³
		NGO		Failing to issue climate change-related research plan	Injunction compelling government to issue research plan	YES ⁶
		NGO		Failing to issue climate change-related scientific assessment	Injunction compelling government to issue scientific assessment	NO ⁶
		NGO		Entering into purchasing contracts for fuel derived from oil sands	Injunction prohibiting DoD from entering into contracts for fuel derived from oil sands	NO ⁷

Increased Risk of Harm

\$ Economic



Recreational/Aesthetic



Informational



Risk of Harm



Procedural Deprivation



















Energy Companies



State Agency



Federal Agency/Entity

Injury Asserted	Type of Plaintiff	Type of Defendant	Conduct Challenged	Remedy Sought	Art. III Standing?
\$ (Climate-Based) Property damage and other economic harms due to hurricane strengthened by climate change	Private landowners		Emitting GHGs	Money damages	NO ¹⁰
\$ (Climate-Based) Flooding of coastal village	Native tribal sovereign, municipality		Emitting GHGs	Money damages	NO ¹¹
\$ (Climate-Based) Property damage (flooding, reduced water availability, and wildfires) and negative effects on health	NGO		Failing to regulate GHG emissions from oil refineries	Injunction requiring agencies to regulate GHG emissions from oil refineries	NO ¹²
\$ (Climate-Based) Various harms to property, ecology, and public health	States, municipality		Emitting GHGs	Injunction capping and reducing defendants' GHG emissions	YES ¹³
 (Climate-Based) Diminished opportunity to observe birds due to their climate change-related displacement	NGO		Failing to set secondary standard for carbon monoxide emissions	Injunction requiring EPA to set secondary standard for carbon monoxide emissions	NO ¹⁴
 (Climate-Based) Diminished enjoyment of outdoors	NGO		Failing to regulate GHG emissions from oil refineries	Injunction requiring agencies to regulate GHG emissions from oil refineries	NO ¹²
 (Climate-Based) Harm to wildlife and recreational and aesthetic interests	NGO		Failing to recertify region as a "coal production region"	Order vacating agency decision and remanding for further consideration	NO ³
 (Climate-Based) Harms to ecological and aesthetic value of trust properties	Private land trusts		Emitting GHGs	Injunction capping and reducing defendants' GHG emissions	YES ¹³
 (Climate-Based) Decreased enjoyment of observing animals and their habitat	NGO		Approving offshore oil and gas leasing program	Order setting aside and remanding leasing program	NO ⁵
 (Climate-Based) Decreased enjoyment of observing animals and their habitat	Native tribal sovereign		Approving offshore oil and gas leasing program	Order setting aside and remanding leasing program	NO ⁵

Substantive Theory of Standing

ENDNOTES

1. Conservation Law Found. v. U.S. Environmental Protection Agency, 964 F. Supp. 2d 175 (D. Mass. 2013) (Clean Water Act (CWA) and Administrative Procedure Act (APA)). District court granted motion for summary judgment seeking dismissal for lack of Art. III standing due to **failure to establish injury-in-fact** and **redressability**.
2. Montana Env'tl. Info. Ctr. v. U.S. Bureau of Land Mgmt., No. CV-11-15, 43 ELR 20131 (D. Mont. June 14, 2013) (National Environmental Policy Act (NEPA) and APA). District court granted motion for summary judgment seeking dismissal for lack of Art. III standing due to **failure to establish injury-in-fact** and **causation**.
3. WildEarth Guardians v. Salazar, 859 F. Supp. 2d 83 (D.D.C. 2012) (Mineral Leasing Act (MLA) and APA). District court granted motion for summary judgment seeking dismissal for lack of Art. III standing due to **failure to properly frame either a procedural injury or an informational injury** (as to procedural and informational standing) and **failure to establish redressability** (as to substantive standing).
4. Amigos Bravos v. U.S. Bureau of Land Mgmt., 816 F. Supp. 2d 1118 (D.N.M. 2011) (NEPA, Federal Land Policy and Management Act, MLA, and APA). District court granted motion to dismiss for lack of Art. III standing due to **failure to establish injury-in-fact** and **causation**.
5. Center for Biological Diversity v. U.S. Dep't of Interior, 563 F.3d 466 (D.C. Cir. 2009) (Outer Continental Shelf Lands Act and NEPA). D.C. Circuit held that petitioners had Art. III standing to pursue a procedural theory of standing, but that all petitioners lacked Art. III standing based on direct (as opposed to procedural) climate harms due to **failure to establish injury-in-fact** and **causation**. Petitioner Native Village of Point Hope was not entitled to "special solicitude" afforded under *Massachusetts v. EPA*.
6. Center for Biological Diversity v. Brennan, 571 F. Supp. 2d 1105 (N.D. Cal. 2007) (Global Change Research Act and APA). District court found Art. III standing based on both procedural injury (research plan and scientific assessment) and informational injury (research plan), but declined to find Art. III standing for the alleged informational injury with respect to the scientific assessment (where duty to disclose was based on unenforceable guidelines) due to **failure to establish injury-in-fact**.
7. Sierra Club v. U.S. Def. Energy Support Ctr., No. 01:11-cv-41, 2011 WL 3321296 (E.D. Va. July 29, 2011) (Energy Independence and Security Act, NEPA, and APA). District court granted motion to dismiss for lack of Art. III standing on both a procedural theory of standing and an "increased risk of harm" theory of standing, due to **failure to establish injury-in-fact, causation, and redressability**. The status of Art. III standing based on a showing of "increased risk of harm," or a "probabilistic harm," remains an open question following the Supreme Court's 2013 decision in *Clapper v. Amnesty International*, 133 S. Ct. 1138 (2013), a non-environmental case.
8. High Country Conservation Advocates v. U.S. Forest Serv., No. 13-cv-01723, 2014 WL 2922751 (D. Colo. June 27, 2014) (NEPA and APA).
9. WildEarth Guardians v. Jewell, 738 F.3d 298 (D.C. Cir. 2013) (NEPA and APA). D.C. Circuit found standing based on an underlying, non-climate-based injury and noted in dicta that the appellants could not have established standing based strictly upon their climate-based injuries. *See also* WildEarth Guardians v. U.S. Bureau of Land Mgmt., 8 F. Supp. 3d 17 (D.D.C. 2014) (citing *WildEarth Guardians v. Jewell* as controlling on similar facts).
10. Comer v. Murphy Oil USA, 839 F. Supp. 2d 849 (S.D. Miss. 2012) (federal and state nuisance, trespass, and negligence). District court granted motion to dismiss for lack of Art. III standing due to **failure to establish causation**.
11. Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009) (federal and state nuisance), *aff'd on other grounds*, 696 F.3d 849 (9th Cir. 2012). District court granted motion to dismiss for lack of Art. III standing due to **failure to establish causation**. Plaintiff Native Village of Kivalina was not entitled to "special solicitude" afforded under *Massachusetts v. EPA*.
12. Washington Env'tl Council v. Bellon, 732 F.3d 1131 (9th Cir. 2013) (Clean Air Act (CAA)); *reh'g en banc denied*, 741 F.3d 1075 (9th Cir. 2014). Ninth Circuit remanded case to district court to dismiss for lack of Art. III standing, due to **failure to establish causation** and **redressability**. Later, in a dissent from the Ninth Circuit's order denying rehearing en banc, three judges argued that the panel's decision had "essentially read private citizens out of the equation when it comes to using courts to address global warming." 741 F.3d at 1079.
13. Connecticut v. Am. Elec. Power, 582 F.3d 309 (2d Cir. 2009) (federal and state nuisance), *rev'd on other grounds, standing aff'd by an equally divided ct.*, 131 S. Ct. 2527 (2011). This Second Circuit ruling, though important for its holding that private parties can establish Art. III standing based on direct (as opposed to procedural) climate harms, has limited value: the Supreme Court both reversed on other grounds and split 4-4 on the standing issue, with one Justice recused.
14. Communities for a Better Env't v. EPA, 748 F.3d 333 (D.C. Cir. 2014) (CAA). D.C. Circuit dismissed petition for review for lack of Art. III standing due to **failure to establish causation**.