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Chapter 3

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Standing to Challenge Regulations Under Mining and Environmental Statutes

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Synopsis

§ 3.01. Introduction.

The United States Court of Appeals for the District of Columbia Circuit — where many challenges to federal agency rulemakings are heard — has grown increasingly rigorous about requiring a party seeking judicial review

of agency regulations to prove its standing to sue.[1] Two recent decisions in the wake of the Supreme Court's constriction of third-party standing in *Lujan v. Defenders of Wildlife*[2] illustrate this development in the context of cases filed under statutory provisions allowing rulemaking challenges to be brought within 60 days of the promulgation of the regulation.[3]

In *National Mining Ass'n v. Dep't of Interior* (hereafter *NMA v. Interior*),[4] the D.C. Circuit at oral argument questioned the mining industry's standing *sua sponte* in a challenge to the Surface Mining Control and Reclamation Act (SMCRA) regulations, and requested supplemental briefing, even though no party had raised the issue in summary judgment proceedings in the district court or in their opening appellate briefs. After both the industry trade association *and* the Office of Surface Mining Reclamation and Enforcement (OSM) had argued in favor of standing, the court was satisfied that the industry had standing to challenge a regulation

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1 The D.C. Circuit (or its district court) is specified as the venue for judicial review of rulemaking under numerous federal environmental statutes. *See, e.g.*, Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1276(a)(1); Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-7(a)(1); Noise Control Act of 1972, 42 U.S.C. § 4915(a); Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6976(a)(1); Clean Air Act (CAA), 42 U.S.C. § 7607(b)(1); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9613(a). Still other environmental statutes specify the D.C. Circuit as an alternative forum. *See, e.g.*, Toxic Substances Control Act (TSCA), 15 U.S.C. § 2618(a)(1)(A)(D.C. Circuit or circuit in which petitioner resides or has principal place of business); Mine Safety and Health Act (MSH Act), 30 U.S.C. § 811(d)(same). A few environmental statutes define venue solely with reference to the petitioner. *See, e.g.*, Federal Water Pollution Control Act, commonly known as the Clean Water Act (CWA), 33 U.S.C. § 1369(b)(circuit in which petitioner resides or transacts business); Occupational Safety and Health Act (OSH Act), 29 U.S.C. § 655(f)(circuit in which petitioner resides or has principal place of business). If a rule is challenged in two or more circuits authorized by statute, the cases are consolidated in a single circuit pursuant to 28 U.S.C. § 2112(a)(3).

2 Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

3 D.C. Circuit Judge (former Chief Judge) Wald has acknowledged the tightening of standing by her own court and the Supreme Court. *See* Patricia J. Wald, "Thirty Years of Administrative Law in the D.C. Circuit," 11 *Ad. Law Bull.* No. 13, July 22, 1997, at 1, 7 ("[s]ince the mid-eighties, both our court and the Supreme Court have been tightening up on who can take appeals from agency decisions and when").

4 National Mining Ass'n v. Dep't of Interior (NMA v. Interior), 70 F.3d 1345 (D.C. Cir. 1995).

concerning federal enforcement of state regulatory programs under SMCRA.

By contrast, in *Louisiana Envtl. Action Network v. Browner* (*"LEAN"*),[5] the court ordered supplemental briefing and held that two of the three petitioners — an environmental group, and a coalition of regulated utility companies — lacked standing to challenge EPA's regulations governing federal-state relations under the Clean Air Act (CAA).[6] The court also held that a third petitioner — a coalition of industry trade associations — only "arguably" had standing, and that in any event its challenge was not ripe even though it, like the other petitioners, had sought judicial review within the CAA's seemingly jurisdictional 60-day period for challenging new regulations.[7] The court told these petitioners that they either had not suffered injury by reason of the regulations or that they had to wait until the regulations were actually applied before their challenges would be prudentially ripe for judicial review.[8]

NMA v. Interior and *LEAN* depart from the D.C. Circuit's more receptive view — and more flexible analysis — of standing in earlier rulemaking challenges, such as its 1988 decision in the landmark SMCRA rulemaking case, *National Wildlife Fed'n v. Hodel* (*NWF v. Hodel*).[9] The court held that environmental groups had standing and ripe claims against multiple OSM rulemaking actions, rejecting arguments similar to those it would later rely on to question or deny standing in *NMA v. Interior* and *LEAN*.[10] To further confuse the issue, a 1997 ruling suggests a return to the court's prior flexibility.[11]

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5 Louisiana Envtl. Action Network v. Browner ("LEAN"), 87 F.3d 1379 (D.C. Cir. 1996).

6 *Id*. at 1382. *See* 42 U.S.C. §§ 7401, *et seq.*

7 *Id.*

8 *Id*. at 1384.

9 National Wildlife Fed'n v. Hodel (NWF v. Hodel), 839 F.2d 694 (D.C. Cir. 1988). The case consolidated 36 appeals involving 14 district court actions and produced a 155-page slip opinion, 29 of which dealt with standing.

10 *Id*. at 709.

11 Reyblatt v. Nuclear Regulatory Comm'n, 105 F.3d 715 (D.C. Cir. 1997)(rejecting government's argument, similar to court's holding in *LEAN*, that petitioners' relationship to challenged regulations was too attenuated to provide standing). *Id*. at 721.