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Further Developments in the D.C. Circuit's Article III Standing Analysis: Are Environmental Cases Safe From the Court's Deepening Skepticism of Increased-Risk-of-Harm Claims?

by Cassandra Sturkie and Suzanne Logan

Editors' Summary: Following the issuance of two significant decisions in 2006 addressing whether claims of "probabilistic" injury are cognizable for Article III standing purposes, the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit has continued to develop its jurisprudence on this important constitutional question. In this Article, Cassandra Sturkie and Suzanne Logan examine how the D.C. Circuit has analyzed these "increased-risk-of-harm" claims in four cases decided between November 2006 and January 2008. They consider how the court's analysis has varied depending on the nature of the case, focusing on the court's decision to sidestep claims of increased risk in an environmental case. They give special attention to Chief Judge David B. Sentelle's repeated criticisms of such claims before he became Chief Judge in February 2008, and consider what his leadership might mean for this issue. Finally, they offer new lessons for environmental law practitioners, their clients, and governmental litigants.

I. Introduction and Overview of Injury-in-Fact Based on Increased Risk of Harm

This Article builds upon an earlier article published in the April 2007 issue of *News and Analysis*.[1] That article addressed the rigorous approach taken by the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit to the "injury-in-fact" requirement of Article III standing in cases where petitioners allege "probabilistic" injuries based on an increased risk or probability of harm.[2] Questions regarding probabilistic injury as injury-in-fact have led to a conflict among the circuits,[3] with the D.C. Circuit applying a stricter, more exacting approach than most other courts of appeals.[4]

Injury-in-fact is the first of three elements a petitioner must demonstrate to meet the constitutional minimum for standing under Article III, §2 of the U.S. Constitution. A petitioner must show (1) an injury-in-fact (2) caused by the defendant's allegedly unlawful conduct (3) that is likely to be redressed by a decision in the petitioner's favor.[5] To constitute injury-in-fact, the asserted harm must be "actual and imminent" (the temporal component), "concrete" (real, not abstract), and "particularized" ("affect[ing] the plaintiff in a personal and individual way," as opposed to being a "generally available grievance" better suited to legislative action).[6] Consistent with this plaintiff-focused inquiry, even in envi-

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[Editors' Note: Claudia O'Brien, a partner in the Washington, D.C., office of Latham & Watkins LLP, and Ms. Sturkie represented the American Forest and Paper Association in the Wood MACT litigation discussed in this Article. Ms. O'Brien was lead counsel for all industry intervenors and argued the standing claims at oral argument before the D.C. Circuit. She can be reached at claudia.o'brien@lw.com.]

1. 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).
2. The term "petitioner" is used interchangeably with "plaintiff" for purposes of this Article. Petitioners are plaintiffs in cases seeking direct review of agency action by the U.S. courts of appeals. *Id*. at 10288-89. The D.C. Circuit, pursuant to federal statute or petitioners' choice of venue, frequently has jurisdiction over direct-review cases, which typically include challenges to federal environmental rules. *See id*. The 2007 article provides additional background on Article III standing and the injury-in-fact requirement. *See id*.
3. Natural Resources Defense Council (*NRDC II*), 464 F.3d 1, 6, 36 ELR 20181 (D.C. Cir. 2006), *reh'g en banc denied*, 2007 U.S. App. LEXIS 3963 (D.C. Cir. Feb. 21, 2007).
4. Sturkie & Seltzer, *supra* note 1, at 10293.
5. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 22 ELR 20913 (1992); *see also* Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc. (*Laidlaw*), 528 U.S. 167, 180-81, 30 ELR 20246 (2000).
6. *Lujan*, 504 U.S. at 561, 573-74; *see also* Florida Audubon Soc'y v. Bentsen, 94 F.3d 658, 667 n.4, 27 ELR 20098 (D.C. Cir. 1996) ("the plaintiff must show that he is not simply injured as is everyone else, lest the injury be too general for court action, and suited instead for political redress") (internal citation omitted).

ronmental cases the "relevant showing . . . is not injury to the environment but injury to the plaintiff."[7]

Harm to the petitioner that is occurring or has occurred—called "actual harm"—virtually always meets this standard.[8] Future or threatened harm may also meet this standard, but only if the harm is "*certainly* impending"—as opposed to occurring at some indefinite time in the future.[9] Because the U.S. Supreme Court has said that "possible future injury" does not satisfy the requirements of Article III,[10] this showing of "imminence" is necessary for petitioners to establish a genuine threat of harm that warrants judicial review.[11] In evaluating such claims, courts must examine "the *reality* of the threat of . . . injury," not merely accept petitioners' "subjective apprehensions" as to whether or when they might be injured.[12]

Probabilistic injury is another type of harm altogether—one often dangerously close to "possible future injury." Probability, the D.C. Circuit has said, "is . . . an estimate of the likelihood of an event occurring."[13] Probabilistic injury is thus based on the injurious nature of risk itself[14]—the idea that some conduct (typically government action or inaction) will not cause harm outright, but rather will increase the marginal or incremental risk that harm will occur. For example, petitioners in the D.C. Circuit often claim that they face increased health risks from an agency's rule or decision that they argue is not protective enough. In the classic case *Mountain States Legal Foundation v. Glickman* (*Mountain States*),[15] appellants who lived near and/or used a national forest argued that a U.S. Forest Service (Forest Service) decision to curtail logging created an "increased risk of catastrophic wildfire."[16] The court reasoned that "even a small probability" of such drastic harm took that injury "out of the category of the hypothetical" and made it sufficiently threatening to constitute injury-in-fact.[17]

In policing such claims, the D.C. Circuit has established its own evidentiary requirements and legal standard.[18] At the outset of a case seeking direct review of government action, a petitioner must support "'by affidavit or other evidence'" each of the three elements of Article III standing.[19] On the basis of this evidence, a petitioner alleging an increased risk of future harm must show a "substantial probability" that it will be injured by the challenged action or inaction.[20] Or, put differently, the petitioner must establish that "the challenged conduct . . . create[s] a '*demonstrably* increased risk' that 'actually threatens [its] particular interests.'"[21]

Although the D.C. Circuit has held in several cases, including in *Mountain States*, that petitioners or appellants met this legal standard, the court has taken an increasingly negative view of probabilistic injury. The court has voiced concern that claims based on increased risk "do[ ] not fit comfortably with the Supreme Court's description of . . . 'injury-in-fact'" and "may be too expansive."[22] More critically, the court has warned of "hypothesized, non-imminent 'injuries'" being "dressed up as 'increased risk of future injury.'"[23] In addition, the court has strongly suggested that claims of probabilistic injury are viable, if at all, only in the environmental and public health context: "Outside of increased exposure to environmental harms, hypothesized 'increased risk' has *never* been deemed sufficient 'injury.'"[24] These statements were made in an opinion authored by now-Chief Judge David B. Sentelle who, as discussed below, has led the court's jurisprudence on this issue.

The 2007 article discussed the D.C. Circuit's approach in the context of two decisions issued in 2006—the first withdrawn and replaced by the second after reconsideration by a panel comprised of Judges A. Raymond Randolph, Karen LeCraft Henderson, and Harry T. Edwards. In those decisions, captioned *Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency* (*NRDC I* and *II*),[25] the court considered the Natural Resources Defense Council, Inc.'s (NRDC's) claims of probabilistic injury from a U.S. Environmental Protection Agency (EPA) rule. NRDC argued that because (in its view) the rule was not strict enough in regulating "critical uses" of methyl bromide, an ozone-depleting substance, its members' health would be harmed.[26] In evaluating these claims, the court asked two important questions about probabilistic injury. First, does any increase in the risk of future harm itself constitute injury-in-fact, regardless of the likelihood of the harm or the magnitude of its consequences? The panel in *NRDC I* answered no; the increase in

7. *Laidlaw*, 528 U.S. at 704.

8. *See* Whitmore v. Arkansas, 495 U.S. 149, 158-59 (1990); *see also Lujan*, 504 U.S. at 564 n.2.

9. *Lujan*, 504 U.S. at 564 n.2 (quoting *Whitmore*, 495 U.S. at 158) (emphasis added).

10. *Whitmore*, 495 U.S. at 158 ("Each of these cases demonstrates what we have said many times before and reiterate today: Allegations of possible future injury do not satisfy the requirements of Art. III.").

11. *Florida Audubon*, 94 F.3d at 663.

12. City of Los Angeles v. Lyons, 461 U.S. 95, 107 n.8 (1983) (emphasis added).

13. Natural Resources Defense Council v. EPA (*NRDC I*), 440 F.3d 476, 483, 36 ELR 20051 (D.C. Cir. 2006).

14. Friends of the Earth v. Gaston Copper Recycling Corp., 204 F.3d 149, 160, 30 ELR 20369 (4th Cir. 2000).

15. 92 F.3d 1228, 26 ELR 21596 (D.C. Cir. 1996).

16. *Id*. at 1234.

17. *Id*. at 1235 (quoting Village of Elk Grove Village v. Evans, 997 F.2d 328, 329, 23 ELR 20989 (7th Cir. 1983); *see also* Sturkie & Seltzer, *supra* note 1, at 10290.

18. *See* Sierra Club v. EPA, 292 F.3d 895, 899-901, 32 ELR 20760 (D.C. Cir. 2002); *see also* D.C. Circuit Rules 15(c)(2), 28(a)(7) (as amended through Jan. 16, 2007) (requiring appellant or petitioner in cases involving "direct review of administrative actions" to state the basis for its "claim of standing" in its docketing statement and to provide support for that claim in a separate section of its opening brief entitled "Standing").

19. *Sierra Club*, 292 F.3d at 899 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 22 ELR 20913 (1992)). The three elements of Article III standing are injury-in-fact, causation, and redressability. *See Lujan*, 504 U.S. at 560-61.

20. *See Sierra Club*, 292 F.3d at 899 (quotation and internal citation omitted); *see also NRDC II*, 464 F.3d at 6.

21. Center for Law & Educ. v. Department of Educ., 396 F.3d 1152, 1161 (D.C. Cir. 2005) (quoting Florida Audubon Soc'y v. Bentsen, 94 F.3d 658, 667, 27 ELR 20098 (D.C. Cir. 1996)) (emphasis added).

22. *NRDC II*, 464 F.3d at 6.

23. *Center for Law & Educ.*, 396 F.3d at 1161.

24. *Id*. (emphasis added).

25. *See NRDC I*, 440 F.3d at 476; *NRDC II*, 464 F.3d at 1. Although the D.C. Circuit withdrew *NRDC I*, it cited it in *NRDC II* as "*NRDC I*." *See NRDC II*, 464 F.3d at 6 (citing *NRDC I*, 440 F.3d at 483). We therefore continue to refer to the decisions as *NRDC I* and *NRDC II*, even though some later cases refer to *NRDC II* only as *NRDC*.

26. *NRDC I*, 440 F.3d at 481 (explaining that the "chain of causation presumably goes something like this: EPA has permitted too much new production and consumption of methyl bromide, which will result in more emissions, which will increase ozone depletion, which ultimately will adversely affect NRDC's members' health").

risk of harm must equate to a "'non-trivial' chance of injury" in order to constitute injury-in-fact.[27] Second, is it appropriate for petitioners to quantify the probability that the alleged harm will occur, e.g., "a 1 in X chance," rather than merely describe it qualitatively, e.g., a high chance of an event occurring?[28] The panel observed that quantifying the probability of harm might not be possible in some cases, but in others it might "affect the assessment."[29]

To support its claims of injury, NRDC had submitted an affidavit estimating the number of deaths, cases of nonfatal skin cancer, and cases of cataracts it expected to result from EPA's rule.[30] On the basis of this and other evidence, the court in *NRDC I* held that a person's 1 in 21 million chance of developing nonfatal skin cancer in his or her lifetime was too "small" of a risk to constitute injury-in-fact.[31] After EPA submitted additional information on rehearing, however, the panel held in *NRDC II* that a much greater likelihood of the same harm—an estimated 1 in 129,000 or 1 in 200,000—was sufficiently probable to constitute injury-in-fact.[32] The panel in *NRDC II* also expressly left undecided the two questions it had raised and answered in *NRDC I*.[33]

By staking out these wide data points—1 in 21 million lifetime cancer risk versus approximately 1 in 200,000—without establishing a clear quantitative threshold for "substantial probability," the D.C. Circuit left significant room for parties to argue about what probability of harm represents a "'non-trivial' chance of injury."[34] As this Article explains, that is precisely what has happened in several cases following *NRDC II*, decided on August 29, 2006. The court, for its part, has approached probabilistic injuries quite differently in the cases that have presented this issue thus far. Part II of this Article reviews the court's disparate treatment of four such cases decided between November 2006 and January 2008. These include a non-environmental case, an environmental case, and two consumer safety cases. Special consideration is given to statements by current Chief Judge Sentelle, made in one decision only a few weeks before he was appointed Chief Judge, in which he warns the court about the repercussions "[i]f we do not soon abandon this idea of probabilistic harm."[35] Finally, Parts III and IV consider the viability of claims based on probabilistic harm amid the court's growing criticisms of such claims in some cases, but not others.

27. *See id*. at 483.

28. *See id.* at 483-84.

29. *See id*. at 483.

30. *See NRDC II*, 464 F.3d at 6.

31. *See NRDC I*, 440 F.3d at 482 n.8.

32. *See NRDC II*, 464 F.3d at 7 (holding that a 1 in 129,000 risk of developing nonfatal skin cancer, as estimated by EPA, or a 1 in 200,000 risk of the same harm, as estimated by industry intervenors, were equally "sufficient to support standing") (discussed in Sturkie & Seltzer, *supra* note 1, at 10293-95).

33. *See NRDC II*, 464 F.3d at 7 (noting that this is a "question . . . we do not have to answer in this case" and "an issue on which we express no opinion," respectively).

34. *NRDC I*, 440 F.3d at 483.

35. Public Citizen v. National Highway Traffic Safety Admin. (*Public Citizen II*), 513 F.3d 234, 242, 38 ELR 20020 (D.C. Cir. 2008). *See* Press Release, United States Court of Appeals for the D.C. Circuit (Jan. 24, 2008), *available at* http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20Courthouse%20-%20New%20Chief%20Judge%20Press%20Release/$FILE/press%20release.pdf (announcing that Judge Sentelle will succeed Judge Douglas H. Ginsburg as Chief Judge on February 11, 2008).

II. The D.C. Circuit's Post-*NRDC* Treatment of Claims Based on Increased Risk of Harm

Since deciding *NRDC II*, the D.C. Circuit has issued four noteworthy decisions evaluating injury-in-fact where the petitioners alleged an increased risk of future harm.[36] The contrast in the court's reasoning and holdings shows the range of approaches the court may take depending on the nature of the case—specifically, depending on whether the alleged "increased risk" involves harm to the petitioners' environmental (as opposed to non-environmental) interests.[37]

The first case, *Virginia State Corp. Commission v. Federal Energy Regulatory Commission* (*Virginia SCC*)[38] involved the Virginia State Corporation Commission's (SCC's) petition for review of orders issued by the Federal Energy Regulatory Commission (FERC). The second case, *Public Citizen, Inc. v. National Highway Traffic Safety Administration* (*Public Citizen I*),[39] involved direct review of a federal motor vehicle standard adopted by the Secretary of

36. In addition, guided by the D.C. Circuit's analysis in *NRDC II*, the U.S. District Court for the District of Columbia Circuit (D.C. District Court) has decided two cases on the basis of quantitative risk assessments, holding in both that the alleged likelihood of harm was sufficiently probable to constitute injury-in-fact.

In Sierra Club v. EPA, 459 F. Supp. 2d 76, 37 ELR 20055 (D.D.C. 2006), the D.C. District Court held that "[o]n a purely quantitative level . . . a risk of fire of 1 in 10,000 . . . would qualify as a 'non-trivial' risk sufficient" to establish injury-in-fact. *Id*. at 93 (quoting *NRDC II*, 464 F.3d at 7). There, the court analyzed the risk of harm to the environment from an alleged increase in wildfires resulting from a decision by the National Park Service (NPS) to allow oil and natural gas drilling operations below a national land preserve. *See id*. at 78-79. Citing NPS' estimate that the incidence of wildfire was "1.15 fires per year, or 1 in 10,000 [oil and gas] wells per year," the court concluded that the increased risk of wildfire was sufficiently actual and imminent to constitute injury-in-fact. *Id*. at 93 (citing *NRDC II*, 464 F.3d at 7) (comparing an increase in an annual risk of fire of 1 in 10,000 to the increased lifetime risk of developing nonfatal skin cancer estimated by industry intervenors at 1 in 200,000 in *NRDC II*). The court also concluded that the "incremental risk" of other "catastrophic events including oil and gas spills and well blowouts" would "also . . . be sufficient to confer standing." *Id*. at 93 n.17. In so holding, the court followed the D.C. Circuit's approach to assessing harm from wildfire in *Mountain States*.

Similarly, in International Ctr. for Tech. Assessment v. Johanns, 473 F. Supp. 2d 9, 37 ELR 20044 (D.D.C. 2007), the D.C. District Court held that risk probabilities ranging "between 0.7 and 8.9 percent [0.7 and 8.9 in 100]" met the injury-in-fact threshold. *Id*. at 20-21. Plaintiffs had alleged an increased risk of genetically engineered grasses becoming established in certain locations due to the U.S. Department of Agriculture's decision not to list them as noxious weeds. *See id*. at 12, 15-16. On the basis of detailed risk assessments submitted by "dueling experts," the court found that at a test plot for one location, the "near-term . . . establishment risk . . . may fall somewhere between 0.7 and 8.9 percent," which the court deemed "certainly nontrivial" and sufficient to "establish standing." *Id*. at 17, 20-21. Thus, for cases brought in the D.C. District Court, these two decisions establish additional data points as to what increase in risk is "substantially probable" to occur.

37. In another case, National Ass'n of Clean Air Agencies v. EPA, 489 F.3d 1221, 37 ELR 20126 (D.C. Cir. 2007), the court analyzed the probability of harm alleged by a national trade association made up of state and local air pollution control agencies. The court's analysis, however, was controlled by precedent unique to states' implementation of the Clean Air Act (CAA). It also respected the Supreme Court's instruction in Massachusetts v. EPA, 127 S. Ct. 1438, 37 ELR 20075 (2007), where the Court stated that states "are 'entitled to special solicitude in . . . standing analysis.'" *Massachusetts*, 127 S. Ct. at 1454-55. The court therefore had "little difficulty" concluding that the trade association had demonstrated a substantial probability of harm to its "state agency members." *National Ass'n of Clean Air Agencies*, 489 F.3d at 1227-28.

38. 468 F.3d 845 (D.C. Cir. 2006).

39. 489 F.3d 1279 (D.C. Cir. 2007).

Transportation, through the National Highway Transportation Safety Administration (NHTSA). The third case, *Public Citizen, Inc. v. National Highway Traffic Safety Administration* (*Public Citizen II*),[40] was decided most recently and considers questions about injury-in-fact that the court ordered the parties to address in *Public Citizen I*. And the fourth case, *Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency* (*Wood MACT*),[41] involved direct review of two final rules promulgated by EPA under the Clean Air Act (CAA).[42]

A. Virginia SCC

In *Virginia SCC*, the SCC challenged two orders in which FERC declined to address whether a Virginia-based electric company, Virginia Dominion Power (Dominion) could recover certain startup costs through a rate proceeding, such that Dominion could categorize the costs as "regulatory assets" for FERC accounting purposes.[43] FERC stated that it could not determine the proper treatment of those costs, and on that basis ordered Dominion to "assess all available evidence" and answer the question for itself.[44] The SCC argued that FERC's "failure to reject Dominion's request for regulatory asset treatment was arbitrary and capricious."[45] The D.C. Circuit never reached the merits of these arguments, however, because it held that the SCC's "lack of standing" barred consideration.[46]

In a unanimous decision issued on November 21, 2006, by Judges Sentelle, Edwards, and Stephen F. Williams, the court found that "petitioners [could not] point to the requisite injury-in-fact . . . and [had] not been aggrieved by the orders."[47] In so holding, the court rejected two independent types of harm alleged by the SCC. First, the SCC had claimed that FERC's lack of accounting guidance, as reflected in the orders, adversely impacted the rates paid by Dominion's retail customers. The D.C. Circuit rejected that alleged harm, finding that "accounting practices are not controlling for ratemaking purposes" and thus may not be the basis for a rate-related injury.[48]

The second basis for injury involved what the court recognized as a "probabilistic injury"—that FERC's lack of accounting guidance denied the public a clear picture of Dominion's asset base, thus "increas[ing] the probability [that] investors [would] inaccurately evaluate Dominion's financial position."[49] Applying the "substantial probability" of injury standard, the court held that this alleged future harm to investors was not an injury-in-fact sufficient to establish the SCC's standing.[50] Citing its precedent and a decision from the U.S. Court of Appeals for the Seventh Circuit addressing the probability of harm, the court found that the SCC had "made no showing that FERC's order[s] could generate a non-trivial increase in the likelihood" of harm to investors.[51] The court explained that even if investors faced some "incremental uncertainty" from FERC's orders, that uncertainty "[fell] far short of substantially increasing the risk that investors will inaccurately appraise Dominion's overall financial standing."[52] The court thus held that the SCC's claims of increased harm were insufficient to establish Article III standing and dismissed the SCC's petitions for review.[53]

Perhaps most instructive, the court in dicta continued to advance its skepticism of probabilistic injury as a basis for standing, particularly outside of the environmental context. The court restated its position in *NRDC II* (a case in which Judge Edwards also participated) and remarked on questions it had left open in that case. The court stated, for example, that "[t]he word 'substantial'" in the "substantial probability" standard "poses questions of degree . . . far from fully resolved."[54] The court also observed that, in *NRDC II*, it had "left open . . . the question whether, in the realm of environmental risk, 'any scientifically demonstrable increase in the threat of death or serious illness . . . is sufficient for standing,'" and "noted a conflict among the circuits on that point."[55] Finally, the court again distinguished its treatment of injury-in-fact depending on the nature of the case, stating that "[o]utside the realm of environmental disputes . . . we have suggested that a claim of increased risk or probability cannot suffice."[56]

B. Public Citizen I

In *Public Citizen I*, the D.C. Circuit seized upon one petitioner's claims of injury as an opportunity to provide a forceful, expansive presentation of its view of "increased-risk-of-harm" claims, in a manner not seen even in *NRDC I*. Tire manufacturers and retailers (collectively, tire industry petitioners) and the nongovernmental organization Public Citizen, Inc., separately petitioned for review of a new federal motor vehicle standard pertaining to tire safety.[57] The NHTSA adopted the standard (Standard 138)

40. 513 F.3d 234, 38 ELR 20020 (D.C. Cir. 2008).
41. 489 F.3d 1364, 37 ELR 20146 (D.C. Cir. 2007). Because this case involved EPA rules regulating the plywood and composite wood products (PCWP) industry, it is commonly referred to as the "PCWP case."
42. *See id.* at 1367.
43. *See Virginia SCC*, 468 F.3d at 846.
44. *See id*. FERC stated, in relevant part:

> "At this time, we cannot determine with certainty that all of the costs . . . are, in fact, unrecoverable in Dominion's current retail and wholesale rates or whether all such costs, if deferred, will ultimately be found . . . to be recoverable in future rates . . . . Dominion must assess all available evidence bearing on the likelihood of rate recovery [and if] Dominion determines that it is probable that these costs will be recovered in rates in future periods, it should record a regulatory asset for such amounts."

Id. (quoting FERC order).
45. *Id*. at 847.
46. *Id*.
47. *Id*.
48. *Id*. (internal quotation and alteration omitted).
49. *Id*. at 848 (internal quotation and alteration omitted).
50. *Id*.
51. *Virginia SCC*, 468 F.3d at 849 (citing Sierra Club v. EPA, 292 F.3d 895, 898, 32 ELR 20760 (D.C. Cir. 2002) and 520 S. Mich. Ave. Assocs. Ltd. v. Devine, 433 F.3d 961, 962 (7th Cir. 2006)).
52. *Id*. at 49 (comparing Mountain States Legal Found. v. Glickman (*Mountain States*), 92 F.3d 1228, 26 ELR 21596 (D.C. Cir. 1996), with *Sierra Club*, 292 F.3d at 898).
53. *Id*. at 849.
54. *Id*. at 848.
55. *Id*. (quoting *NRDC II*, 464 F.3d at 6 (internal quotation omitted)).
56. *Id*. (comparing Center for Law & Educ. v. Department of Educ., 396 F.3d 1152, 1161 (D.C. Cir. 2005), with 396 F.3d at 1166-68 (Edwards, J., concurring)).
57. *See Public Citizen I*, 489 F.3d at 1284.

as required under the Transportation Recall Enhancement, Accountability, and Documentation Act (TREAD Act).[58] Standard 138 required automakers to manufacture cars with a tire pressure monitoring system that turns on a warning light when a tire is significantly underinflated.[59] The tire industry petitioners and Public Citizen argued that the standard would not improve tire safety to the extent required by the TREAD Act.[60] An association of automakers—the industry that is the "'object' of the regulation"—did not challenge the standard but intervened in the litigation and challenged the petitioners' standing.[61]

The panel was comprised of Judges Randolph (who had authored *NRDC I* and *II*), Brett M. Kavanaugh, and Sentelle—the latter who concurred in part and dissented in part in the decision, and who had ruled against the SCC in *Virginia SCC*. In a decision issued on June 15, 2007, the court began its analysis by observing that "[c]laims that a safety regulation is good—but not good enough—can pose difficult issues of standing."[62] Likewise, the court cautioned that Public Citizen's standing is "'substantially more difficult to establish'" because its "'asserted injury [arose] from the government's allegedly unlawful regulation . . . of *someone else*'"—the automakers who must implement the new tire standard.[63]

Limiting its holdings to the "key initial question" of the petitioners' Article III standing, the court first held that the tire industry petitioners failed to establish standing because their theory of causation was based on a causal chain that was too "attenuated" and "speculative."[64] Next, and most relevant here, the court held that it could not determine whether Public Citizen had standing without additional quantitative evidence and supplemental briefing.[65] As explained below, the court postponed review of Public Citizen's claims and ordered the parties to submit supplemental affidavits and briefs addressing whether Public Citizen's "asserted increased-risk-of-harm qualifies as an injury in fact."[66]

Public Citizen sought to establish standing "based on an alleged increased risk of harm to its members who drive or ride in cars."[67] The D.C. Circuit determined that the affidavit submitted by Public Citizen's president was insufficient to establish standing on this basis. Public Citizen had asserted that the NHTSA's Standard 138 "would affect Public Citizen's 130,000 members—who drive or ride in cars—by creating 'a higher risk of injury' than if NHTSA had adopted" a more stringent tire pressure standard.[68] It argued that its members faced "an increased risk of death, physical injury, or property damage from *future car accidents*" that the tire standard would allegedly fail to prevent.[69] To establish injury-in-fact, Public Citizen thus had to demonstrate that this increased risk was substantially probable, i.e., non-trivial.

On this question, the D.C. Circuit acknowledged that "[i]njuries from car accidents . . . are plainly concrete harms."[70] But the court was unwilling to find that the new tire standard increased the risk of any harm that was "certainly impending and immediate—not remote, speculative, conjectural, or hypothetical."[71] The court explained that this "'imminence' problem arises" because "[f]or any particular individual, the odds of such an accident occurring are extremely remote and speculative, and the time (if ever) when any such accident would occur is entirely uncertain."[72] Because of these uncertainties, "there is a powerful argument that 'increased-risk-of-harm' claims—such as Public Citizen's claim here—fail to meet the constitutional requirement that a plaintiff demonstrate harm that is 'actual or imminent, not conjectural or hypothetical.'"[73] Indeed, the court remarked (without deciding) that "Public Citizen's injury-in-fact theory flouts these settled principles."[74]

The court also cited Public Citizen's evidentiary shortcomings and the incomplete record.[75] Neither the Public Citizen affidavit nor the administrative record contained estimates of the number of car accidents or injuries that Public Citizen's preferred tire standard would allegedly prevent, as compared to Standard 138 adopted by the NHTSA.[76] The court therefore ordered Public Citizen to address (1) whether the standard "creates a substantial increase in the risk of death, physical injury, or property loss over the interpretation of the TREAD Act that [it] has advanced," and (2) "whether the ultimate risk of harm to which Public Citizen's members are exposed, including the increase allegedly due to NHTSA's actions, is 'substantial' and sufficient 'to take a suit out of the category of the hypothetical.'"[77]

Spurred by what it apparently viewed as weaknesses in Public Citizen's claims, the court devoted several pages of its opinion to the legal defects inherent in "increased-risk-of-harm" claims and the need for utmost judicial scrutiny of such claims. The court first described the "consequences" of allowing standing in increased-risk cases: "Under Public Citizen's theory of probabilistic injury, after any agency takes virtually *any* action, virtually *any* citizen—because of a fractional chance of benefit from alternative action—would have standing to obtain judicial review of the

58. *See id*. at 1283.

59. *See id*.

60. *See id*. at 1289.

61. *Id*. at 1290.

62. *Id*. at 1289.

63. *Id*. at 1291 (quoting *Lujan*, 504 U.S. at 562).

64. The tire industry petitioners had claimed that the NHTSA's alleged underregulation of the *automakers*—vis-à-vis the tire pressure standard—would leave the *tire industry* more exposed to both liability arising from accidents and claims for warranty-related refunds attributable to tire failure. *Public Citizen I*, 489 F.3d at 1290. Finding an "obvious causal disconnect . . . between the regulation of automakers and private claims against tire industry petitioners," the court held that these petitioners could not satisfy the causation element of Article III standing. *Id*. at 1290, 1291. In addition, they had failed to demonstrate a "substantial probability" that the NHTSA's actions would cause the asserted harm. *Id*. at 1291 (citation omitted).

65. *Id*. at 1284, 1296-97.

66. *Id*. at 1297. As discussed below, then-Judge Sentelle stated in a separate opinion that Public Citizen "ha[d] not demonstrated standing" and that its claim should be dismissed. *Id*. at 1298-99.

67. *Id*. at 1284.

68. *Id*. at 1291 (citing Claybrook Aff. ¶ 2).

69. *Id*. at 1293.

70. *Public Citizen I*, 489 F.3d at 1292.

71. *Id*. at 1293 (citations omitted).

72. *Id*. at 1293-94 (also rejecting the idea that Public Citizen can "aggregate a series of remote and speculative claims" to make them actual and imminent).

73. *Id*. at 1294 (quoting *Lujan*, 504 U.S. at 560).

74. *Id*.

75. *Id.* at 1296.

76. *Id*.

77. *Id*. at 1297 (quoting *NRDC II*, 464 F.3d at 6; *Mountain States*, 92 F.3d at 1235).

agency's choice."[78] This would lead, in the court's view, to a crush of new cases that "drain the 'actual or imminent' requirement of meaning [and] expand the . . . constitutional role of the Judicial Branch beyond deciding actual cases or controversies."[79]

Second, the court explicitly rejected the notion (left unresolved in *NRDC II*) that any scientifically demonstrable increase in risk "is *itself* concrete, particularized, and *actual* injury for standing purposes."[80] The court observed that (1) "the mere increased risk of some event occurring is utterly abstract," (2) "increased risk falls on a population in an undifferentiated and generalized manner," and (3) treating "increased risk of future harm as an actual harm," in and of itself, would tear asunder "well-established" Supreme Court principles on injury-in-fact.[81]

Third, the court announced a new formulation of the "substantial probability" standard and how to apply it. The court advised that "the proper way to analyze an increased-risk-of-harm claim is to consider the ultimate alleged harm . . . and then . . . determine whether the increased risk of such harm makes injury to an individual citizen sufficiently 'imminent' for standing purposes."[82] In turn, to show "imminent" harm, the petitioner must demonstrate "at least *both* (i) a *substantially* increased risk of harm and (ii) a *substantial* probability of harm with that increase taken into account."[83]

Fourth, the court noted that *Mountain States* did not set forth "any hard-and-fast numerical rules" as to what constitutes a "non-trivial" chance of injury under this legal standard.[84] But it also stated that "the constitutional requirement of imminence . . . compels a *very strict understanding* of what increases in risk and overall risk levels . . . count as 'substantial'"[85]—thus suggesting a need for quantitative risk analysis in appropriate cases.

Finally, in his separate opinion, now-Chief Judge Sentelle stated that he "fully agree[d] with most of the court's opinion" but dissented from "the majority's decision to allow Public Citizen a further attempt to establish standing."[86] In his view, "Public Citizen [had] not demonstrated standing" and did not warrant a "second bite at the standing apple" in light of its "'ample opportunity'" to demonstrate standing on the existing record.[87] More generally, Judge Sentelle "retain[ed] misgivings as to whether an organizational plaintiff can establish probabilistic standing based on increased risk where the increase in risk is not different from the increase suffered by the public at large."[88] He expressed concern that "such an increased risk falls within the category of oversight reserved for legislative branch."[89]

78. *Public Citizen I*, 489 F.3d at 1295 (emphasis added).
79. *Id*. at 1295.
80. *Id*. at 1297 (citation omitted) (emphasis added).
81. *Id*. at 1297-98 (rejecting this "conception" of injury-in-fact).
82. *Id*. at 1298.
83. *Public Citizen I*, 489 F.3d at 1295 (emphasis added).
84. *Id.* at 1296.
85. *Id*. (emphasis added).
86. *Id*. at 1299.
87. *Id.* (quoting American Library Ass'n v. Federal Communications Comm'n, 401 F.3d 489, 497 (D.C. Cir. 2005) (Sentelle, J., dissenting)).
88. *Id*.
89. *Id*.

C. Public Citizen II

On January 22, 2008, seven months after the D.C. Circuit ordered supplemental briefing in *Public Citizen I*, the court dismissed Public Citizen's petition for review due to its failure to establish Article III standing.[90] In a per curiam opinion issued by the *Public Citizen I* panel, with Judge Sentelle concurring in the judgment, the court held that "[u]nder this Circuit's precedents, Public Citizen has not met its burden to demonstrate injury in fact."[91] As discussed below, the court was probing and critical in rejecting Public Citizen's claims of increased risk, not unlike its sharp tone in *NRDC I* before that decision was withdrawn and replaced with the softer *NRDC II*. The court also reiterated its view that standing is "'substantially more difficult to establish'" where, as with Public Citizen, the alleged increased risk of harm results from an agency's allegedly unlawful regulation of a third party, not the petitioner itself.[92]

As explained above, Public Citizen argued that its members would suffer more car accidents with Standard 138 enacted, as compared to the more stringent tire safety standard that it had proposed. To support this claim, Public Citizen submitted a declaration of a statistician that sought to estimate the death, injury, and property damage associated with the NHTSA's decision not to adopt Public Citizen's proposed version of Standard 138.[93] In rebuttal, the NHTSA submitted a statistical analysis in a declaration from the NHTSA's division chief who had been developing federal tire safety standards for two decades.[94] The intervenor automakers also provided their own statistical analysis and heavily criticized Public Citizen's risk estimates.[95] Taking these risk analyses into account, the court considered Public Citizen's allegations of harm under its three different challenges to Standard 138.

1. No Injury Related to Replacement Tire Compatibility

Public Citizen first argued that Standard 138 violated the TREAD Act because it allows the warning system for tire pressure monitors to be compatible with only 90 to 99% of replacement tires, instead of all replacement tires as Public Citizen wanted.[96] In Public Citizen's view, this creates a greater potential for a car accident arising from an underinflated tire. Public Citizen's expert therefore estimated the difference in risk of harm between Standard 138 and a standard requiring that pressure monitors be compatible with all replacement tires.[97]

The flaw in this argument, however, was that Public Citizen had previously supported an alternative to its "all replacement tire" position. In both the administrative and earlier judicial proceedings, Public Citizen had argued that Standard 138 should require either that pressure monitors be compatible with all replacement tires (its position here) or that automakers publish a list of compatible tires in each car

90. *Public Citizen II*, 513 F.3d at 235-36.
91. *Id*. at 241.
92. *See id*. at 237.
93. *See id*. at 238.
94. *See id*; *see also Public Citizen I*, 489 F.3d at 1291.
95. *See Public Citizen II*, 513 F.3d at 238.
96. *See id*.
97. *See id*.

owner's manual.[98] Yet, in the supplemental briefing, Public Citizen failed to demonstrate the difference in risk between Standard 138 and its proposal that automakers publish a list of compatible tires.[99] It also had not demonstrated that a list of compatible tires in the owner's manual would substantially reduce the risk of death, injury, or economic loss to its members, as compared to Standard 138.[100] For these reasons, the court found that Public Citizen failed to meet its evidentiary burden: "Public Citizen obviously is not injured . . . if Standard 138 poses no greater risk of injury than one of [its] proposed alternatives."[101]

2. No Injury Related to Time Before Notification

Standard 138 allows a lag time of up to 20 minutes before the pressure monitor activates a dashboard light warning the driver that a tire is underinflated.[102] Public Citizen argued that the lag time should be much shorter—activating the warning light within one minute of tire underinflation—under the theory that some drivers only drive their cars on trips that last less than 20 minutes, and thus may never be alerted that they have an underinflated tire.[103]

In attempting to demonstrate injury-in-fact, Public Citizen acknowledged that "any increased risk of injury from the 20-minute lag time as compared to a one-minute lag time is 'more difficult to quantify' than the risk related to its other claims."[104] The court, however, showed no sympathy for this evidentiary shortcoming and instead rejected Public Citizen's risk calculation as "fundamentally flawed," "convoluted," and "simplistic and unreliable."[105]

Among other things, the court found that Public Citizen's risk calculation failed to quantify how many, if any, additional accidents were likely to occur with the 20-minute lag time, as opposed to a one-minute lag time.[106] Public Citizen also failed to account for what the court deemed "the rather obvious fact" that drivers with shorter-than-20-minute trips also operate their vehicles on longer-than-20-minute trips, and thus would be alerted under Standard 138 if they had an underinflated tire.[107] As with the replacement tire claim, the court held that Public Citizen had not established an injury-in-fact sufficient to pursue this claim.[108]

3. No Injury From Tire Pressure Measure Used to Trigger Warning

Finally, Public Citizen argued that Standard 138 violated the TREAD Act by using one measure of "minimum tire pressure" to activate the warning light for underinflation (called the 25-percent-below-placard-pressure measure), as opposed to a lower level of tire pressure set by the Tire and Rim Association.[109]

Introducing quantitative risk estimates, Public Citizen asserted that "the increase in annual risk of fatalities to its members" from the tire pressure used by Standard 138, instead of the lower Tire and Rim Association standard, "is between .21 and 1.2 in 1,000,000."[110] Further, "[t]he alleged increase in lifetime risk of fatalities is between 1.2 and 8.3 in 100,000."[111] Public Citizen argued that "these estimates exceed[ed] the risk estimates that supported standing in [*NRDC II*]"—which were a 1 in 129,000 or 1 in 200,000 lifetime risk of developing nonfatal skin cancer[112]—and that "it therefore ha[d] standing to advocate for the [Tire and Rim Association] pressure trigger."[113]

Again, the D.C. Circuit rejected Public Citizen's claim of injury because of "at least two significant statistical flaws" in its risk analyses—both brought to the court's attention in the NHTSA's and automakers' rebuttal declarations.[114] As a result of these errors, "Public Citizen estimated all of the supposed benefits of the [Tire and Rim Association] standard but none of the costs, resulting in calculations that dramatically overstate[d] the risk to Public Citizen's members under Standard 138."[115] In light of Public Citizen's "unreliable" risk calculations, the court held that Public Citizen failed to meet its burden to demonstrate standing on this claim, as well.[116]

In explaining its holding, the court stated that its decisions in *Mountain States* and *NRDC II* "'ha[d] not closed the door to all increased-risk-of-harm cases.'"[117] But it cautioned that "[i]n an appropriate case, the en banc Court may have to consider whether or how the *Mountain States* principle should apply to general consumer challenges to safety regulations."[118] The court also made clear that it would continue to demand of itself and the parties "'a very strict understanding of what increases in risk and overall risk levels'" would support injury-in-fact for purposes of Article III standing.[119]

In his concurrence, Judge Sentelle "agree[d] this case must be dismissed" but reiterated that it should have been dismissed in *Public Citizen I*.[120] More generally, he expressed deep concern about what he called "the probabilistic approach to standing . . . in increased-risk cases."[121] In his view, such cases require the federal judiciary to engage in "expand[ed]" decisionmaking that goes beyond adjudicating rights in a "case or controversy," and instead "'entail[s] the Judiciary exercising some part of the Executive's re-

98. *See id*.
99. *See id*. at 239.
100. *See id*.
101. *Id*.
102. *See id*.
103. *See id*.
104. *Id*. (quoting Public Citizen Supp. Brief at 16).
105. *Id*.
106. *See id*. at 240.
107. *Id*. at 239-40.
108. *See id*. at 240.
109. *See id*. (explaining that the "Tire & Rim Association pressure [is] the minimum tire pressure required to safely carry a car operating at its maximum load").
110. *Id*.
111. *Id*.
112. *See NRDC II*, 464 F.3d at 7.
113. *Public Citizen II*, 513 F.3d at 240.
114. *Id*. at 240.
115. *Id*. at 241.
116. *Id*.
117. *Id*. (quoting *Public Citizen I*, 489 F.3d at 1295).
118. *Id*.
119. *Id*. at 242 (quoting *Public Citizen I*, 489 F.3d at 1296).
120. *Id*. (citing *Public Citizen I*, 489 F.3d at 1298) (Sentelle, J., dissenting).
121. *Id*.

sponsibility.'"[122] Quoting *Public Citizen I*, Judge Sentelle cautioned that "'disputes about future events where the possibility of harm to any given individual is remote and speculative are properly left to the policymaking Branches, not the Article III courts.'"[123] This case, in particular, he felt illustrated "the ill fit between judicial power and that sort of future event and possible harm." He further explained, "[t]he wide-ranging, near-merits discussion at the standing threshold is the sort of thing that congressional committees and executive agencies exist to explore."[124] He concluded in the strongest language yet from a member of the court: "If we do not soon abandon this idea of probabilistic harm, we will find ourselves looking more and more like legislatures rather than courts."[125]

D. Wood MACT

1. Briefing and Oral Argument

In this environmental case decided on June 19, 2007, a central issue was the sufficiency of claims asserted by NRDC and the Sierra Club (collectively, environmental petitioners) based on an alleged increased risk of harm from two EPA rules. Indeed, this issue dominated questioning at oral argument. In contrast to the three cases discussed above, however, the D.C. Circuit curiously omitted any discussion of that issue from its decision. Instead, the court held that the environmental petitioners established an injury-in-fact under a separate analysis set forth in the Supreme Court's decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.* (*Laidlaw*)[126]—thus indicating a willingness to sidestep concerns about probabilistic injury when an alternative theory of injury is available.

The environmental petitioners challenged final rules promulgated by EPA in 2004 and 2006 under §112 of the CAA (the 2004 Rule and 2006 Rule, respectively).[127] These rules regulate emissions of hazardous air pollutants (HAPs) from facilities that manufacture plywood and composite wood products (PCWP).[128] Over the last decade, EPA has established standards imposing "the maximum degree of reduction in [HAP] emissions" for various categories or subcategories of major sources identified by Congress. EPA must also require sources to use the maximum achievable control technology (MACT), which sets the "MACT floor," or minimum degree of emissions reductions that sources must achieve.[129] Because this case involved EPA's MACT standards for the plywood and composite wood products industry, it is commonly referred to as *Wood MACT* or *PCWP MACT*.

In CAA §112(d), Congress directed EPA how to establish the MACT floor for new and existing facilities. Congress also recognized, however, that "there would be circumstances where a 'source category' could appropriately be exempted ('delisted') from MACT emission standards."[130] Accordingly, in the 2004 Rule, EPA amended the list of HAP source categories by delisting, pursuant to its authority under CAA §112(c)(9), a subcategory of PCWP sources that EPA determined presented a "low risk" to human health and the environment.[131] This delisting action was challenged by environmental petitioners and also became the basis of the PCWP industry intervenors' challenge to environmental petitioners' standing.

The delisting provision states, in relevant part:

> (B) The Administrator may delete any source category from the list [of regulated source categories] whenever the Administrator makes the following determination . . . :
>
> (i) In the case of hazardous air pollutants emitted by sources in the category that may result in cancer in humans, a determination that no source in the category . . . emits such hazardous air pollutants in quantities which *may cause a lifetime risk of cancer greater than one in a million* to the individual in the population who is most exposed to emissions from the source. . . .
>
> (ii) In the case of hazardous air pollutants that may result in adverse health effects in humans other than cancer or adverse environmental effects, a determination that emissions from no source in the category or subcategory . . . exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any source . . . .[132]

Thus, for the MACT regulatory scheme, Congress specified by statute the level of risk below which there was no harm to human health or the environment and thus no need for EPA to regulate.

Using site-specific data and conservative, health-based models, EPA determined that the sources (or facilities) in the low-risk subcategory did not emit carcinogens in excess of the 1-in-1-million "statutory ceiling"; that they "did not emit non-carcinogens in amounts exceeding a level adequate to protect public health with an ample margin of safety"; and that no source emitted HAPs "in amounts resulting in an adverse environmental effect," as defined by statute.[133] EPA initially determined that eight facilities met the low-risk eligibility criteria—an action not challenged by the environmental petitioners—and contemplated that other facilities would meet the criteria and therefore be relieved of their emission reduction requirements.[134] The environmental petitioners argued, in relevant part, that it was unlawful for EPA to delist the low-risk subcategory from regulation under the MACT emission standards.[135]

As required under the D.C. Circuit's rules and precedent, the environmental petitioners addressed standing in their opening brief. They also submitted declarations from organizational members who "live, work, and recreate in com-

122. *Id*. (quoting *Public Citizen I*, 489 F.3d at 1295; alteration in original).

123. *Id*. (quoting *Public Citizen I*, 489 F.3d at 1295).

124. *Id*.

125. *Id*.

126. 528 U.S. 167, 30 ELR 20246 (2000).

127. *Wood MACT*, 489 F.3d at 1367.

128. *Id*. (explaining that CAA §122(b)(2), 42 U.S.C. §7412(b)(2), defines hazardous air pollutants as "'pollutants which present, or may present . . . a threat of adverse human health effects . . . or adverse environmental effects'").

129. *See id*. at 1368-69 (quoting 42 U.S.C. §7412(d)(3)).

130. *Id*. at 1369 (quoting 42 U.S.C. §7412(c)(9)(B)(i)).

131. *See id*. at 1369-70 (citing 69 Fed. Reg. 45944, 45955 (July 30, 2004)).

132. 42 U.S.C. §7412(c)(9)(B) (emphasis added).

133. *Wood MACT*, 489 F.3d at 1369.

134. *See id*. at 1370.

135. *See id*. at 1371-72.

munities where PCWP facilities are located."[136] The environmental petitioners asserted that the declarants "are exposed to the HAPs that these facilities emit and to the resulting risk of adverse health effects."[137] They argued that "the challenged rules prolong and increase [their] members' exposure to toxic pollution and to the resulting threat of adverse health effects," and that if the delisting provision were struck from the 2004 Rule, their "exposure and risk would be reduced"—presumably because the low-risk facilities then would be subject to the MACT emission standards.[138]

The industry intervenors argued that the environmental petitioners lacked Article III standing and, in particular, failed to establish injury-in-fact from EPA's rules. They argued that the declarants' allegations of probabilistic injury were not based on evidence, but on vague, unsubstantiated fears that EPA's rules would increase the risk of possible future harm.[139] Industry intervenors also asserted that the environmental petitioners could not demonstrate a "substantial probability" of harm where emissions from facilities subject to the low-risk subcategory pose less than a 1-in-1-million lifetime risk of cancer, no significant non-carcinogenic effects, and no adverse environmental effects—findings made by EPA and never challenged.[140]

On reply, the environmental petitioners argued that their members were "exposed right now to HAPs from sources that should be controlled by the challenged rules" and that the low-risk subcategory "increase[s] PCWP pollution and thus increase[s] and prolong[s] the exposure of Petitioners' members."[141] In the last line of their reply brief, they claimed that "the uncontested harm to [their members'] recreational and aesthetic interests also confers standing," citing *Laidlaw*.[142] This was the first time they had mentioned *Laidlaw* or "recreational and aesthetic interests."

At oral argument before a panel comprised of then-Chief Judge Douglas H. Ginsburg, and Judges Judith W. Rogers and Thomas B. Griffith, the industry intervenors argued that CAA §112 "specifies the level of risk below which EPA need not consider regulating" and thus "express[es] the congressional intent as to what constitutes an injury-in-fact under Section 112."[143] They also argued that by failing to challenge EPA's factual findings about the facilities in the low-risk subcategory, "[p]etitioners . . . concede that the risk threshold is not met."[144] Thereafter, Chief Judge Ginsburg exhaustively questioned the environmental petitioners' counsel on this issue. For example, he observed that the court must "bear[ ] in mind that the exposure is at . . . less than one in a million level," and questioned how "[i]f there's no injury to health . . . what is the recreational injury?," particularly when "the HAP [risk] component [of a visible plume from a facility] is less than one in a million."[145] He also explicitly questioned the environmental petitioners' standing by referencing the injury-in-fact analysis applied in *NRDC II* and *Virginia SCC*:

> Chief Judge Ginsburg: [In those cases] we have the court saying that we generally require the petitioners demonstrate a, quote, substantial probability, close quote that they will be injured. Relevant variations and risk must be non-trivial.
> * * *
> Chief Judge Ginsburg: [Here] the Congress has said certain risks are trivial. Let's assume that, therefore, that's dispositive of that risk. Are you really in a position to . . . say, well, that's okay because if those risks were abated, doing so would also give us some comfort in recreation?
> * * *
> Chief Judge Ginsburg: They [Congress] said [these risks] are not worth regulating essentially, right?
> * * *
> Chief Judge Ginsburg: If it were one in a billion, would you be in the same position?
> * * *
> Chief Judge Ginsburg: But these are injuries that are nonetheless treated [under the CAA] as trivial for purposes of standing, right?
> * * *
> Chief Judge Ginsburg: [I've] looked at all the cases. There's not a one where anyone has said, wait a minute, the right risk here is less than one in a million. The closest we have is the [*NRDC II*] case [pre-*Public Citizen II*] in which they said it's about one in 200,000, and we said, well, that's enough.
> * * *
> Chief Judge Ginsburg: Leaving open that question of what about one in . . . a million, which is where we are now.
> * * *
> Chief Judge Ginsburg: [In past cases w]e have left open . . . the question of whether in the realm of environmental risk . . . any scientifically demonstrable increase in the threat of death or serious illness is sufficient for standing . . . . You keep saying there's injury, but that's not the issue. The question is whether it's of a substantial nature sufficient to confer standing.
> * * *
> Chief Judge Ginsburg: [An] exposure is not a harm, it's an increase in the probability of harm, and the increase may be substantial or it may be insubstantial.
> * * *
> Chief Judge Ginsburg: We just don't have any cases in which that has been—except the one where it was 200,000—in which this [risk] has been quantified; the 200,000 [i.e., 1 in 200,000 lifetime cancer risk in *NRDC II*] went your way.
> * * *

136. Final Opening Brief of Environmental Petitioners (*Final Opening Brief*) at 16, *Wood MACT*, 489 F.3d at 1364 (No. 04-1323) (and consolidated cases) and Supplemental Addendum of Standing Declarations.

137. *Final Opening Brief*, *supra* note 136, at 16 (emphasis added).

138. *Id*. After briefing but prior to oral argument, EPA obtained a voluntary remand of the 2004 Rule "to the extent it failed to establish emission standards for listed HAPs." *Wood MACT*, 489 F.3d at 1371. That left for the court's consideration, in relevant part, the environmental petitioners' challenge to EPA's delisting of the low-risk subcategory. Under Supreme Court law, "a plaintiff must demonstrate standing separately for each form of relief sought." *Laidlaw*, 528 U.S. at 185, *quoted in* DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854, 1867 (2006). Therefore, the environmental petitioners had the burden of establishing that they were injured by the delisting of EPA's low-risk subcategory.

139. *Final Opening Brief*, *supra* note 136, at 16 (emphasis added).

140. Final Brief of Industry Intervenors at 6-7, *Wood MACT*, 489 F.3d 1364 (No. 04-1323) (and consolidated cases).

141. Final Reply Brief of Environmental Petitioners at 16, *Wood MACT*, 489 F.3d at 1364 (No. 04-1323) (and consolidated cases).

142. *Id*.

143. Transcript of Proceedings at 6, *Wood MACT*, 489 F.3d at 1364 (No. 04-1323) (and consolidated cases) [hereinafter *Wood MACT* Transcript].

144. *Id*.; *see also id*. at 11 (counsel for environmental petitioners conceding that they challenged EPA's legal authority but not the low-risk factual determinations).

145. *Id*. at 11-13.

> Chief Judge Ginsburg: I understand the plaintiffs view it as an injury . . . but the plaintiffs haven't disputed . . . what the 'it' is.
> * * *
> Chief Judge Ginsburg: [T]here's nothing in the declarations to challenge [EPA's characterization of the risk as 1-in-1-million]. You didn't have a scientist come in and say . . . that's [harmful]. In that case, I don't think there's any question you'd have to standing to contest that.
> * * *
> Chief Judge Ginsburg: So you [environmental petitioners] would be the same at one in a billion then, right? It wouldn't matter how trivial it is.
> * * *
> Chief Judge Ginsburg: I think you [environmental petitioners' counsel] could address it [the one-in-a-billion hypothetical], but we'll move on . . . if you like.[146]

Accepting Chief Judge Ginsburg's invitation to "move on" beyond this line of questioning, counsel for the environmental petitioners argued that "we fall easily within this Court's decision in *Laidlaw*" because "our enjoyment of . . . every day activities like going outside and breathing, gardening, biking, and so forth, is diminished [by the implementation of EPA's rules]."[147]

2. Court's Holding on Standing

The D.C. Circuit had little difficulty holding that the environmental petitioners had demonstrated Article III standing. Yet, despite the focus on their claims of increased risk in the briefs and at oral argument, the court's decision was completely silent on this line of argument.[148] Indeed, without knowing the background of the case, someone reading the decision would never know that the industry intervenors had challenged the environmental petitioners' standing on the basis of their explicit claims of probabilistic injury. The decision did not mention this challenge or, more specifically, the relevance of the "1-in-1-million" risk level in the statute for purposes of analyzing the environmental petitioners' alleged injury.[149] The court instead described the industry intervenors' challenge to the environmental petitioners' standing only in general terms: that the environmental petitioners "failed to allege a sufficiently 'concrete and particularized' or 'actual and imminent' injury."[150]

The court held that environmental petitioners demonstrated standing under a different line of argument: the *Laidlaw* "aesthetic and recreational value" argument raised by the environmental petitioners in their reply brief, and thus never addressed by industry intervenors in their brief.[151] Interestingly, the court itself made the case for the environmental petitioners' standing under *Laidlaw*. As noted above, the environmental petitioners had cited that case in only a single conclusory sentence of their reply brief. They had made only the barest attempt to demonstrate, either in their reply brief or at oral argument, that they met their burden under a *Laidlaw*-type analysis. At oral argument, counsel for environmental petitioners summarily stated that "we are squarely within that authority [*Laidlaw*] when we say that our enjoyment of the most every day activities like going outside and breathing, gardening, biking, and so forth, is diminished."[152]

Obliged, however, to assure itself that the environmental petitioners had Article III standing,[153] the court provided the additional detail that the environmental petitioners had not included. First, the court observed that "[i]n *Laidlaw*, the affidavits referred to observations of pollution and alterations of behavior as a result of the risk of pollution in an affected area."[154] It then examined environmental petitioners' declarations and discussed two at length—both from "members [who] live near PCWP facilities that are exempt as low-risk facilities from all HAP controls."[155] For example, the court noted how one declarant had "cut back on her outdoor activities, including her gardening, and . . . does not drive her car."[156] But the court did not explain—presumably because the environmental petitioners did not explain—how these alleged harms related to EPA's rules and the HAPs from the PCWP facilities (as opposed to other pollutants). Nor did the court acknowledge that EPA's "low-risk" finding for those facilities was undisputed. Similarly, the court stated that "emissions from a nearby low-risk PCWP facility" diminished another declarant's "'enjoyment . . . from outdoor recreational activities, including gardening, walking, . . . and sitting on the back porch.'"[157] Based on this reasoning, the court concluded that "[t]hese are the kinds of harm that the Supreme Court in *Laidlaw* determined were sufficient to show injury-in-fact."[158] It found that the "member-affiants use or live in areas affected by the PCWP sources," and thus are "persons 'for whom the aesthetic and recreational values of the area [are] lessened by the challenged activity.'"[159] On that basis, the court held that the environmental petitioners "meet the *Lujan* test for standing."[160]

There is much room to disagree with this conclusion, although we respect the court's holding and do not do so here. It bears noting, however, that the posture and facts of *Laidlaw* were quite different from *Wood MACT*. *Laidlaw* did not involve a national rulemaking in which, as in *Wood MACT*, the environmental petitioners challenged EPA's regulation of third parties (the PCWP facilities). To the contrary, *Laidlaw* involved an enforcement action brought under the Clean Water Act by citizens seeking to stop Laidlaw Environmental Services (TOC), Inc.'s "consistent[ ]" and "repeated[ ]" discharges of mercury into a nearby river for nearly eight years.[161] The Supreme Court in *Laidlaw* determined that the plaintiffs had demonstrated an injury-in-fact only *after* concluding that their fears of harm were reasonable, owing to the documented "continuous and pervasive illegal discharges of pollutants into [the] river."[162] Here, as noted above, the declarants had not challenged EPA's find-

146. *Id*. at 15-23.

147. *Id*. at 23.

148. *See Wood MACT*, 489 F.3d at 1370.

149. *See id*. at 1370-71.

150. *See id*. (no citation in original).

151. *See* Final Reply Br. of Environmental Petitioners at 16.

152. *See Wood MACT* Transcript at 23.

153. *See Laidlaw*, 528 U.S. at 704 (discussing this obligation).

154. *Wood MACT*, 489 F.3d at 1370.

155. *See id*. at 1370.

156. *Id*. at 1370-71.

157. *Id*. at 1371 (quoting Declaration of Karen Kirkwood).

158. *Id*.

159. *Id*. at 1371 (quoting *Laidlaw*, 528 U.S. at 183).

160. *Id*.

161. *Laidlaw*, 528 U.S. at 176.

162. *Id*. at 184.

ing that the nearby PCWP facilities were "low risk," as defined by statute. In addition, the *Laidlaw* plaintiffs' specific, detailed fears of mercury toxicity are not exactly the same as a declarant's vague, generalized statement that she "does not drive her car" on "particularly polluted days" or no longer finds the same enjoyment in "going outside and breathing" or "sitting on the back porch." The court in *Wood MACT* also did not scrutinize whether the declarants had a credible basis for making such allegations in relation to the PCWP facilities and HAPs at issue, despite the industry intervenors' argument that the allegations "are not based on evidence" and merely suggest that any exposure to HAPs may result in an increased probability of harm.[163]

Although the standing inquiry is not a determination on the merits, it is possible that the D.C. Circuit did not engage in a more probing analysis of these issues because it had substantial questions about EPA's authority with respect to the low-risk subcategory, and because the declarants' claims were facially adequate to establish standing, e.g., "these are the kinds of harms" that are adequate under *Laidlaw*.[164] Indeed, on the merits, the court ruled in favor of the environmental petitioners. The court held, in relevant part, that EPA lacked authority under the CAA to create and delist a low-risk subcategory.[165] The court therefore vacated and remanded the challenged provisions of EPA's rules.[166]

III. New Lessons From the D.C. Circuit on Litigating Increased-Risk-of-Harm Claims

The cases decided after *NRDC II* add to the lessons set forth in the 2007 Article for environmental law practitioners and their clients.[167] They offer five immediate observations.

First, the writing is on the wall for petitioners alleging increased-risk-of-harm claims in non-environmental cases. The D.C. Circuit is often dubious of such claims even when, at best, they involve probabilistic environmental and health injuries. In 2005, for example, the court expressed a greater tolerance for cases involving "increased exposure to environmental harms," at the same time it warned of petitioners in non-environmental cases "dressing up" "hypothesized, non-imminent 'injuries'" as increased-risk claims.[168] But in the wake of *Virginia SCC* and the *Public Citizen* cases, petitioners alleging increased-risk claims in non-environmental cases have the odds stacked even higher against them.

In *Virginia SCC*, the D.C. Circuit soundly rejected the SCC's claims of probabilistic financial harm and once again suggested that only such claims in "the realm of environmental disputes" would "suffice."[169] Less than one year later, the court took that sentiment to an unprecedented new level in *Public Citizen I*, in which it explained its position on probabilistic harm in a multi-part criticism of Public Citizen's challenges to the NHTSA's safety regulations. That type of case might be expected to fare better given that it involved alleged public health injuries, but in *Public Citizen I* the risk of harm was too "public." The court expressed doubt that such a case could be "actual or imminent" when the alleged increased risk of harm (a higher number of car accidents) was remote, "utterly abstract," and borne by the public at large—in other words, "extremely unlikely to occur" for "any given individual."[170] The court also rejected (albeit in dicta) any "fractional" right to standing in cases challenging agency rulemakings, in which virtually any agency action may give rise to Article III standing because of a "fractional chance of benefit" from an alternative not taken by the agency.[171]

Writing separately in both *Public Citizen* cases, now-Chief Judge Sentelle effectively put a bull's-eye on claims of probabilistic harm. He urged other members of the court to "soon abandon this idea of probabilistic harm," citing the "ill fit between judicial power and [future] possible harm" that often requires analyses more akin to policymaking.[172] He, along with Judges Randolph and Kavanaugh, also suggested that the en banc court may want to select an "appropriate case" to establish "whether or how" the *Mountain States* standard should apply to increased-risk-of-harm claims in cases challenging consumer safety regulations.[173]

These are not only the strongest statements on this subject from a judge on the D.C. Circuit to date, but it is significant that they were made (or joined) by the incoming Chief Judge as if to create a roadmap for the court's future direction on this issue. The *Public Citizen* decisions already reinforce the D.C. Circuit's existing conflict with several other courts of appeals in this area of the law, particularly with respect to its view that an increased risk of harm is not itself an actual injury.[174] The more the court continues to limit claims based on increased risk of future harm—a direction Chief Judge Sentelle and Judges Randolph, Ginsburg, Edwards, and Kavanaugh (at a minimum) appear more than willing to take—the more likely it is that the D.C. Circuit's strict approach to injury-in-fact will be challenged and the Supreme Court will be called upon to decide this issue.

Second, the D.C. Circuit has previously commented that "environmental and health injuries often are purely probabilistic" and that "this category of injury may be too expansive."[175] Increasingly, however, it appears that the threshold required to establish injury-in-fact based on probabilistic harm may be lower for petitioners in environmental cases than in non-environmental disputes. This was evident in *Wood MACT*, in which the question of probabilistic harm

163. Final Brief of Industry Intervenors at 6.

164. *Wood MACT*, 489 F.3d at 1371 (quoting *Laidlaw*, 528 U.S. at 183).

165. *See id*. at 1371-74.

166. *See id*. at 1375.

167. *See* Sturkie & Seltzer, *supra* note 1, at 10295-96.

168. *Center for Law & Educ.*, 396 F.3d at 1161 (Judges Edwards, Sentelle, and Randolph). The court's tolerance for probabilistic injuries in the environmental context is tenuous, however. In the now-withdrawn language in *NRDC I*, the court expressed great concern about "purely probabilistic injuries" involving environmental and public health. *NRDC I*, 440 F.3d at 483. The court stated that such injuries have "complex etiologies that involve the interaction of many discrete risk factors," which in turn reduces the likelihood that the injuries are "actual" or "imminent in the sense of temporal proximity." *Id*. (internal quotation omitted). These observations did not survive the court's revision of the decision in *NRDC II*, but are still very telling.

169. *Virginia SCC*, 468 F.3d at 848.

170. *Public Citizen I*, 489 F.3d at 1297-98.

171. *Id*. at 1295.

172. *Public Citizen II*, 513 at 242.

173. *Id*. at 241.

174. *See Public Citizen I*, 489 F.3d at 1297; *see also Virginia SCC*, 468 F.3d at 848; Sturkie & Seltzer, *supra* note 1, at 10293, 10295 (discussing the D.C. Circuit's discussion of its minority position vis-à-vis other courts of appeals in *NRDC I*, subsequently withdrawn).

175. *NRDC II*, 464 F.3d at 6.

dominated oral argument yet appeared nowhere in the court's standing analysis.[176]

As that case showed, the court may avoid examining potentially more complicated claims of increased risk if there is an alternate basis for injury-in-fact. This is particularly true if the petitioners (or their members) can establish a geographic nexus between the agency's action and an area where they live or use recreationally. When such a nexus is present, as it was in *Mountain States*, the court may feel assured that it is deciding a case that presents a sufficiently "actual or imminent" injury, so long as the incremental risk of harm is shown to be "non-trivial."[177] Alternately, depending on how the petitioners argue the case, the court may pursue a *Laidlaw* analysis where it evaluates standing based solely on alleged impacts to "recreational and aesthetic values." Thus, even if organizational petitioners allege a probabilistic injury as their principal basis of harm, they likely will have a strong basis for demonstrating standing if they can make the geographic connection and provide detailed facts about their aesthetic and recreational enjoyment relative to the action they are challenging.

Third, while making clear that it is not "'clos[ing] the door to all increased-risk-of-harm claims,'"[178] the court has placed an even greater priority on the quality and scope of petitioners' evidence in support of their claim of standing. This focus arises in part from the court's more specific formulation of the "substantial probability" analysis. As announced in *Public Citizen I* and applied in *Public Citizen II*, the court examines (1) whether the challenged regulation or action "creates a substantial increase" in the risk of injury, and (2) "whether the ultimate risk of harm" with that alleged increase taken into account "is 'substantial' and sufficient 'to take a suit out of the category of the hypothetical.'"[179] Furthermore, the court has twice indicated that it expects to have "a very strict understanding of what increases in risk and overall risk levels . . . count as 'substantial'" for purposes of establishing injury-in-fact under this standard.[180] If petitioners are unable to met this burden, they have to failed to meet "the constitutional requirement of imminence as articulated by the Supreme Court."[181]

In the past, petitioners have taken a routine, almost perfunctory approach to demonstrating standing—by, for example, including a few general paragraphs on standing in their opening brief and attaching supporting declarations. This is the approach used by the *Wood MACT* petitioners, and in that case, it proved sufficient. But in light of the court's increasing skepticism of probabilistic harm and its rigorous analysis of the risk estimates in *Public Citizen II*, environmental law practitioners should take a more careful, proactive approach.

Specifically, petitioners will want to evaluate *Public Citizen I* to consider the gaps in evidence that made Public Citizen's record "incomplete," particularly since they likely will not get a "second bite at the standing apple."[182] In addition, they will want to study *Public Citizen II* to understand the different types of risk estimates the court may expect to see in analyzing each claim involving incremental risk. At bottom, petitioners in non-environmental cases must have compelling risk assessments if they have any chance of establishing standing. They will need to work with statisticians or other experts and, if possible, submit quantitative risk assessments covering all grounds (and alternatives) on which they assert an increased risk of harm. They would also be wise to devote a meaningful portion of their brief to Article III standing, in which they discuss and analyze their risk estimates and the declarants' statements, rather than merely citing those supporting documents. Together, these actions are probably the only way for petitioners to persuade a skeptical court that they are the "truly afflicted," rather than the "abstractly distressed."[183]

Respondents also must be prepared to submit expert declarations exposing flaws in the petitioners' risk estimates. The court's actions in *NRDC I* and *II*, as well as *Public Citizen II*, illustrate the importance of these rebuttal estimates in influencing the court's analysis.[184]

Fourth, although the court has made abundantly clear that it expects to see quantitative risk assessments in appropriate cases, it has left significant room for parties to argue about what probability of harm is a non-trivial, non-hypothetical risk sufficient to constitute injury-in-fact. As noted above, the court declined to address the "1-in-1-million" risk of lifetime cancer in *Wood MACT*. That would have been an important data point, establishing whether a "1-in-1-million" cancer risk represents a "substantial probability of harm" sufficient to establish Article III standing.[185] For now, the risk estimates in *NRDC I* and *II* are the guideposts, with a lifetime skin cancer risk of 1 in 21 million being too "small" to constitute in injury-in-fact in *NRDC I* (albeit subsequently withdrawn), and a 1 in 129,000 or 1 in 200,00 chance of the same risk deemed sufficient to establish standing in *NRDC II*.[186]

Since the D.C. Circuit decided *NRDC II*, the U.S. District Court for the District of Columbia has had more opportunities than the D.C. Circuit to flesh out additional data points—holding in one case that a 1 in 10,000 risk of wildfire constituted injury-in-fact, and in another that an 8.9 in 100 (or roughly 1 in 11) risk of a lesser harm was sufficient.[187] But neither of these holdings are surprising given their higher risk probabilities, both of which are far higher than even 1 in 129,000. The D.C. Circuit itself will need to rule on a risk estimate that is far less probable than the 1 in 200,000 lifetime cancer risk in *NRDC II*. The court apparently felt that *Wood MACT* was not the right case to establish

176. *See supra* at 10469.

177. *See, e.g.*, *Mountain States*, 92 F.3d at 1235; *see also* Florida Audubon Soc'y v. Bentson, 94 F.3d 658, 667-68, 27 ELR 20098 (D.C. Cir. 1996), *cited in* Sturkie & Seltzer, *supra* note 1, at 10289-90 (stating that the court will apply "even more exacting scrutiny" to the claims of injury challenging a "broad [national] rulemaking," as compared to localized government action having a "geographic nexus" to the petitioners).

178. *Public Citizen II*, 513 F.3d at 237 (quoting *Public Citizen I*, 489 F.3d at 1295).

179. *Public Citizen I*, 489 F.3d at 1297 (quoting *NRDC*, 464 F.3d at 6; *Mountain States*, 92 F.3d at 1235); s*ee also supra* at 10465; *Public Citizen II*, 513 F.3d at 237.

180. *Public Citizen II*, 513 F.3d at 241 (quoting *Public Citizen I*, 489 F.3d at 1296).

181. *Id*. at 241.

182. *Public Citizen I*, 489 F.3d at 1296, 1299.

183. Friends of the Earth v. Gaston Copper, 204 F.3d 149, 30 ELR 20369 (4th Cir. 2000).

184. *See* Sturkie & Seltzer, *supra* note 1, at 10294.

185. *Public Citizen I*, 489 F.3d at 1295.

186. *See supra* at 10462.

187. *See supra* at 10462 n.36.

such a data point but, as noted in the 2007 Article, it is only a matter of time before the court finds the right case to establish this important precedent.[188]

Finally, these post-*NRDC* cases suggest that government respondents should engage earlier in the standing discussion, as soon as it is apparent that petitioners are alleging claims of increased risk of future harm from government action. As seen in *NRDC I* and *II* and *Wood MACT*, federal agencies (and their counsel, the U.S. Department of Justice) typically let the industry intervenors slog out their standing dispute with the petitioners. They often concede standing early in a case and/or do not weigh in unless ordered to do so by the court.[189] But as *NRDC II* and *Public Citizen II* demonstrate, the agencies are often in the best position to address—and quantify—the risks of injury presented under their chosen action and other alternatives.[190] For example, it was only after EPA weighed in on the risk calculations at the rehearing stage in *NRDC II* that the court revamped its quantitative analysis and changed its holding.[191] Similarly, in *Public Citizen II*, the NHTSA's declaration and risk assessment had the imprimatur of the agency's chief tire safety expert, and thus were both valuable and highly influential.[192] In sum, if agencies wish to conserve taxpayer resources and most effectively defend their actions, they should consider submitting a declaration as soon as increased-risk claims arise, not sit on the sidelines until the court is already grappling with these issues.

IV. Conclusion

Twelve years ago, in *Florida Audubon Society v. Bentson*,[193] the en banc D.C. Circuit defended its holding that a petitioner failed to demonstrate injury-in-fact and thus lacked standing by noting that "[t]he federal judiciary is not a back-seat Congress nor some sort of super-agency."[194] The court explained that it was important for the federal judiciary to uphold "the strictures of [its] own constitutional role—the hearing of only actual cases between proper litigants"—even if that meant dismissing cases based on remote, speculative claims of increased risk of harm.[195]

The author of the *Florida Audubon* decision was then-Judge Sentelle. More recently, in *Public Citizen I* and *II*, now-Chief Judge Sentelle continued to reiterate the same concern that "the probabilistic approach to standing" in increased-risk cases does not respect the constitutional separation of powers.[196] At least several other judges on the D.C. Circuit share this concern. Together, they are strengthening the court's injury-in-fact analysis to ensure that the court is adjudicating only "actual or imminent" controversies. As the U.S. Court of Appeals for the Fourth Circuit put it more colorfully, the court "[may] not question the sincerity of plaintiffs' pleas" yet still may "decline to launch the standing doctrine into outer space."[197]

If anything is clear in the post-*NRDC II* climate, it is that these issues are not going away. Chief Judge Sentelle, for one, is prepared to "abandon this idea of probabilistic harm."[198] But for now, the court likely will continue to chip away at the viability of increased-risk claims, reinforcing its existing conflict with other courts of appeals. We have already seen that happen in three cases decided after *NRDC II—Virginia SCC* and the *Public Citizen* cases. Based on the court's discussion and holdings in these cases, the court appears to be hearkening back to the more rigorous, assertive, and quantitative injury-in-fact analysis it applied in *NRDC I*, before that decision was withdrawn.

By contrast, the court intentionally avoided a probabilistic harm analysis in the *Wood MACT* decision—the only environmental case among the four. It remains to be seen whether environmental cases are generally safe from the court's deepening skepticism of increased-risk-of-harm claims, or whether *Wood MACT* simply presented a convenient opportunity for the court to find standing under *Laidlaw* based on the petitioners' geographic nexus and their aesthetic and recreational values. More predictable is that, because these issues remain in flux, we can expect to see environmental law practitioners adapting their clients' claims around the principles newly articulated or reaffirmed in this growing line of case law.

188. *See* Sturkie & Seltzer, *supra* note 1, at 10296.

189. *See, e.g.*, *NRDC II*, 489 F.3d at 6.

190. *See id.* at 7.

191. *See id*.

192. *See Public Citizen II*, 513 F.3d at 238, 240.

193. 94 F.3d 658, 27 ELR 20098 (D.C. Cir. 1996).

194. *Id*. at 672.

195. *Id*.

196. *Public Citizen II*, 513 F.3d at 242.

197. Friends for Ferrell Parkway v. Stasko, 282 F.3d 315, 325 (4th Cir. 2002) (remarking that the court's "acceptance of plaintiffs' contention that the mere threatened loss of a remote opportunity is sufficient to confer standing would quickly lead to absurd consequences").

198. *Public Citizen II*, 513 F.3d at 242.