

## Opaque Trade Groups May Need To Name Names In Court

By **Keith Goldberg**

*Law360 (May 14, 2019, 8:53 PM EDT)* -- A key utility industry advocacy group represented by Hunton Andrews Kurth LLP has disbanded in the face of Congressional scrutiny over the identity of its members, and similar groups that rely on anonymity are getting pressure from some courts about whether they have standing to fight energy and environmental regulatory actions.

The Utility Air Regulatory Group — which for four decades lobbied and litigated on federal air pollution issues on behalf of utility companies who largely kept their names under wraps — disbanded on Friday. It is one of scores of similar ad hoc groups — with opaque membership rolls unlike traditional trade associations — that have played leading roles in challenging federal energy and environmental rules.

But with that opacity comes additional questions over whether such groups have standing to bring those challenges, experts say. And some courts are putting pressure on groups to reveal their membership or face being knocked out of litigation.

“Can you plead sufficient facts to demonstrate the potential harm to your members?” said Josh Margolin, a partner at litigation boutique Selendy & Gay PLLC. “If you’re operating under a cloud of secrecy, it definitely makes it a harder hurdle to get over.”

UARG was forced into the spotlight amid a probe by House Democrats into its activities and ties to former Hunton attorneys now serving as senior air officials in the U.S. Environmental Protection Agency. Democratic leaders of the House Committee on Energy and Commerce are also investigating eight utilities that were unmasked as current and former UARG members about their relationship with the group, while other utilities exposed as members said they’ve ended their membership in UARG.

That kind of Congressional scrutiny of an industry group like UARG is unusual, but the D.C. Circuit has recently turned up the heat on other litigant groups whose membership isn’t clear.

A day before UARG's announcement, the D.C. Circuit said an environmental group lacked standing to challenge a Federal Energy Regulatory Commission pipeline order, noting that Otsego 2000 Inc. acknowledged during oral arguments that it wasn't a membership organization. And two days before that, in oral argument, a D.C. Circuit judge sharply questioned whether an ad hoc coalition of unidentified ethanol and biofuel producers could challenge Renewable Fuel Standard exemptions issued by the EPA.

“The fact that two panels of the D.C. Circuit are raising these questions fuels awareness from other judges on that court,” said John Walke, Clean Air Director of the Natural Resources Defense Council's Climate & Clean Energy Program and a vocal UARG critic. “That court is a repeat player in these matters where these anonymous groups tend to reappear.”

Such groups include the Utility Water Act Group, which lobbies and litigates on water issues affecting utility companies, and the Air Permitting Forum, which deals with Clean Air Act implementation issues affecting manufacturers. Both groups are represented by Hunton.

Others include the Venable LLP-repped Utility Solid Waste Activities Group, which bills itself as “addressing solid and hazardous waste issues on behalf of the utility industry.” USWAG discloses that its members include trade groups Edison Electric Institute, the National Rural Electric Cooperative Association, the American Public Power Association and the American Gas Association, but not the individual members of the group.

Baker Botts LLP represents a host of environmental coalitions, including the The Class of '85 Regulatory Response Group and Texas Industry Project, neither of which publicizes their membership. And Bracewell LLP represents the Electric Reliability Coordinating Council, which says its “members include some of the major electric utilities companies in the country, who all possess the shared belief that coal-based energy should play an important role as our nation moves toward a clean energy future.”

Baker Botts and Bracewell declined to comment on their representation of these groups. A Venable representative referred questions to USWAG executive director James Roewer, who couldn't be immediately reached for comment Tuesday.

“The value of these faceless groups was allowing those corporations to hide behind anonymity,” Walke said.

And whether members are disclosed or not, many companies still prefer having trade groups be the face of their litigation efforts, said Robert Percival, who heads the environmental law program at the University of Maryland's Francis King Carey School of Law.

“Industry groups love allowing trade organizations to handle the controversial litigation so the individual companies don't offend their individual customers by making it clear they're suing,” Percival said.

During May 7 oral arguments in the RFS exemptions case, U.S. Circuit Judge Cornelia T.L. Pillard pressed the standing issue with Jerome Muys, the lawyer for the biofuel coalition known as Producers of Renewables United for Integrity Truth and Transparency. Its acronym spells the last name of Scott Pruitt, the former EPA administrator who signed off on the exemptions.

“Is there any law that you can refer us to that gives it the capacity to sue?” Judge Pillard asked Muys. “I didn't see anything about a working group having the authority to represent its members.”

Muys replied that the group is an “unincorporated association” where parties have come together and “formalized an arrangement” where they have “agreed to proceed jointly for purpose of challenging this particular set of decisions by EPA.”

“Are the members voting members?” Judge Pillard said. “What's the organizational structure?”

Muys said there was a “joint defense agreement,” but couldn't get into specifics. When Judge Pillard asked him if PRUITT's main activity was the lawsuit before the D.C. Circuit, Muys said the group has intervened in similar proceedings raising the same issues and filed comments at the EPA.

“Judge Pillard’s apparent invocation of the kind of tougher Article III standards often promoted by business interests to seek to persuade courts to deny environmentalists Article III standing is, to say the least, ironic,” Harvard Law School environmental law professor Richard Lazarus said. “If Judge Pillard’s suggestion at argument ends up having judicial legs, it may well prompt a healthy reform of the practice of organizations like UARG that for too long have declined to reveal their members.”

U.S. Supreme Court and D.C. Circuit case law holds that organizations have standing to seek injunctive relief from regulatory action if the action concretely impacts them or their members, at least one organization member can show standing and that individual members don’t need to participate in the lawsuit to pursue the claims the groups assert or the relief they seek.

“Typically, you would get an affidavit from a member saying, 'I'm Acme Company and this regulation hurts me because of the following,'" said Sean Donahue of Donahue Goldberg & Weaver LLP, who frequently represents coalitions of environmental and public health groups in litigation over federal regulations. “The organization would have standing to assert the interest of its members but it would have to pony up information about at least one member.”

Another way for organizations unable or unwilling to reveal their membership to avoid having their legal challenges run aground on standing questions is to simply not go it alone, UCLA School of Law environmental law professor Ann Carlson said

“If there's another plaintiff in the group challenging that does have obvious standing, then it doesn't matter as much,” Carlson said. “As long as one party has standing, it doesn't mean that UARG has standing, but it means that the case will go forward. It may mean there's less incentive to challenge their standing, because you do have to then get into a battle over whether they have standing.”

Before it disbanded, UARG frequently joined with other parties in challenging federal air pollution regulations.

In its opening brief in the RFS exemptions challenge, PRUITT told the D.C. Circuit it “previously filed under seal a declaration from an individual member, which further supports standing.” In the corporate disclosure section of its opening brief, the group identified one of its members: biodiesel producer Renewable Energy Group Inc.

Yet Judge Pillard still elected to raise questions about PRUITT's standing last week.

And Donahue notes that the D.C. Circuit is “kind of hawkish on making sure people have standing.”

Congressional probes that seek to lift the veil on groups like UARG may further feed that hawkishness, Percival said. Those groups, and the law firms that represent them, may have to decide how valuable membership anonymity is in furtherance of their litigation goals, he said.

While the standing argument is frequently used to derail environmentalists' challenges of regulations,

standing is a two-way street, Percival said.

“The lesson of this would be you have to be candid about who your members are if you're challenged on standing grounds and you're an organization like UARG,” Percival said.

--Editing by Kelly Duncan and Alanna Weissman.