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Katherine L. Huddleston
University of Kentucky

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ENVIRONMENTAL GROUPS CHALLENGING OFFSHORE DRILLING AS EXPLAINED IN CENTER FOR BIOLOGICAL DIVERSITY V. UNITED STATES DEPARTMENT OF THE INTERIOR

KATHERINE L. HUDDLESTON*

I. INTRODUCTION

The now infamous chant "Drill, baby, drill" that filled town halls and auditoriums across the country during the 2008 United States presidential election has come to represent the deep political divide in the United States over the prospect of drilling for oil. After the BP oil spill in the summer of 2010, this divide has grown even larger, particularly concerning offshore drilling. However, offshore drilling is hardly a new phenomenon.

The United States Congress originally passed the Outer Continental Shelf Leasing Act (hereinafter "OCSLA") in 1953.1 This legislation provided a framework for leasing outer continental shelf areas to private organizations for the purpose of searching for oil.2 However, two major developments in the late 1960s and early 1970s led to large overhauls of the '53 Act and the OCSLA guidelines.3 These two events were: 1) the massive oil spill caused by an outer continental shelf "drilling project in the Santa Barbara Channel on January 28, 1969;"4 and 2) the 1973 Arab oil embargo, which clearly demonstrated the U.S.'s dependence on foreign oil.5 The combination of these two incidents highlighted both the serious environmental dangers of offshore drilling and the pressing need for U.S. energy independence. Consequentially, Congress passed the 1978 Amendments to OCSLA, which are still in effect today.6

Balancing this delicate dichotomy has been both a goal and a challenge for the Department of the Interior (hereinafter "Interior"), environmental protection groups and U.S. courts over the past 35 years. Traditionally, this balance tilted towards energy independence and away from environmental protection. However, the April 17, 2009 decision of

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2 Id.

3 Watt I, 668 F.2d at 1295.

4 Id.

5 Id.

6 Id. at 1296.
the District of Columbia Circuit Court of Appeals in *Center for Biological Diversity v. United States Department of the Interior* (hereinafter “*Center for Biological Diversity*”)\(^7\) gives renewed hope to environmental groups seeking to challenge offshore drilling programs.

This Comment will discuss the *Center for Biological Diversity* opinion, its analysis and holding. Section II specifically relates to the legal and factual background surrounding the case. Section III provides an overview of the analysis of the D.C. Circuit Court while Section IV identifies certain implications that are likely to result from this important decision.

II. BACKGROUND

A. Legal Background

The plaintiffs in *Center for Biological Diversity* brought several claims under OCSLA, the National Environmental Policy Act of 1973 (hereinafter “NEPA”) and the Endangered Species Act of 1973 (hereinafter “ESA”).\(^8\) Of these, the court only reached the merits of the claims under OCSLA.\(^9\)

OCSLA sets up a four-tiered system by which the Secretary of the Interior is required to evaluate and process outer continental shelf leasing agreements.\(^10\) The tiers are as follows: 1) the “preparation stage;” 2) the “lease-sale stage;” 3) the “exploration stage;” and 4) the “development and production stage.” Each tier is subject to a different level of review.\(^11\)

The requirements under OCSLA are binding on leasing agreements evaluated by the Department of the Interior. However, even if the Interior satisfies the above-mentioned requirements of OCSLA, other federal statutes may bear on the agency’s action. For example, NEPA requires that any governmental agency “assess the environmental consequences of major [federal actions] by following certain procedures during the decision-making process.”\(^12\) To demonstrate compliance with this NEPA requirement, an agency must prepare and submit an Environmental Impact Statement (hereinafter “EIS”), detailing “the environmental impact of the proposed [agency] action.”\(^13\)

\(^7\) Ctr. for Biological Diversity v. U.S. Dep’t of the Interior, 563 F.3d 466 (D.C. Cir. 2009).
\(^8\) Id. at 471-72.
\(^9\) Id. at 472.
\(^10\) Id. at 473.
\(^11\) Id.
\(^14\) Ctr. for Biological Diversity, 565 F.3d at 474 (quoting 42 U.S.C. § 4332(2)(C)(i)-(iii) (2010)).
Additionally, the ESA requires an agency to consider any threat that a proposed action may pose to an endangered species before proceeding with that action. If the agency determines that an endangered species may be affected, the agency must then "pursue either formal or informal consultation with the [National Marine Fisheries Service] or Fish and Wildlife" before proceeding.

As *Center for Biological Diversity* and other relevant cases demonstrate, these environmental acts may work separately or in tandem to affect a proposal for outer continental shelf leasing.

### A. Case Background

*Center for Biological Diversity* arose as a result of an order by the Interior approving an expansion of leasing areas under OCSLA off the coast of Alaska. Three environmental groups, the Center for Biological Diversity, the Pacific Environment, and the Alaska Wilderness League, filed separate petitions opposing this action. The cases of those Petitioners were combined and joined by the Native Village of Point Hope, Alaska, a tribal government.

The groups filed four claims against the Interior. First, the petitioners claimed that the Interior’s actions violated OCSLA and NEPA because the “Interior failed to take into consideration both the effects of climate change on OCS [outer continental shelf] areas and the Leasing Program’s effects on climate change.” Second, the Petitioners argued that the Interior violated OCSLA and NEPA by failing to conduct “sufficient biological baseline research” for the affected areas. Third, Petitioners alleged the Interior violated ESA because the Interior failed to consult with either the National Marine Fisheries Service or the U.S. Fish and Wildlife Service regarding the possible effect of the program on endangered species. Finally, Petitioners asserted the Interior violated OCSLA because it “irrationally relied on an insufficient study” conducted by the National Oceanographic and Atmospheric Administration (hereinafter “NOAA”) as its sole authority in evaluating the “environmental sensitivity” of the OCS areas included in the program.

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15 *Ctr. for Biological Diversity*, 563 F.3d at 474 (quoting 16 U.S.C. § 1536(a)(2)).
16 *Ctr. for Biological Diversity*, 563 F.3d at 474-75; (citing 50 C.F.R. § 402.13, 402.14 (2009)).
17 *Center for Biological Diversity*, 563 F.3d at 471-72.
18 *Id. at 472.
19 *Id.*
20 *Id. at 471.
21 *Id. at 471.
22 *Id. at 471-72.
23 *Center for Biological Diversity*, 563 F.3d at 472.
24 *Id.*
As previously discussed, approval of OCS leasing occurs in four stages. At which stage the action is brought will determine the level of review given by the courts. In this case, the Interior had only completed stage one, the preparation stage, when this action commenced.\textsuperscript{25} The preparation stage is governed by Section 18 of OSLA and requires the Secretary of the Interior to “prepare, periodically revise, and maintain” a program that is “conducted in a manner which considers economic, social, and environmental values” of the OCS resources and “the potential impact of ... exploration on ... the marine, coastal, and human environments.”\textsuperscript{26} During this stage, the Secretary is also required to “consider additional factors with respect to the timing and location of exploration, development, and production of oil and gas in particular OCS areas.”\textsuperscript{27} These additional factors include:

a region’s “existing information concerning the geographical, geological, and ecological characteristics; an equitable sharing of developmental benefits and environmental risks among the various regions”; [sic] “the interest of potential oil and gas producers in the development of oil and gas resources”; [sic] “the relative environmental sensitivity and marine productivity of different areas of the [OCS]”; [sic] and “relevant environmental and predictive information for different areas of the OCS.”\textsuperscript{28}

The final requirement during the preparation stage holds the Interior responsible for striking a delicate balance between the benefits of searching for oil and gas and the negative effects the search may have on the surrounding environment.\textsuperscript{29}

Therefore, the court examined the Petitioners’ claims in relation to these first tier requirements.

\textsuperscript{25} Id. at 473.
\textsuperscript{26} Ctr. for Biological Diversity, 563 F.3d at 473 (quoting 43 U.S.C. § 1344(a)(1)).
\textsuperscript{27} Id. at 473.
\textsuperscript{28} Id. (quoting 43 U.S.C. § 1344(a)(2)(A), (B), (E), (G), (H) (1978)).
\textsuperscript{29} Id. at 474 (quoting 43 U.S.C. § 1344 (a)(3)).
III. ANALYSIS

A. Standing

The first major hurdle for the Petitioners in Center for Biological Diversity was to establish standing for their claims against the Interior. What may seem like a small obstacle can actually be extremely difficult for plaintiffs alleging an ideological opposition to governmental action. This difficulty results from Article III, Section 2 of the United States Constitution, which mandates that the role of the federal judiciary must be limited to handling actual "cases" and "controversies." The Supreme Court has interpreted this limitation to mean that courts must "protect agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." The second part of this interpretation, requiring that plaintiffs feel the effects of an administrative decision "in a concrete way" before bringing an action, is the basis for the standing doctrine.

The court then discussed two types of standing, substantive and procedural, in its analysis of this case. For substantive standing, the court used the standard and analysis set forth in Lujan v. Defenders of Wildlife: "a petitioner must demonstrate that it has suffered a concrete and particularized injury that is caused by, or fairly traceable to, the act challenged in the litigation and redressable by the court." Applying this standard to the facts of this case, the court found that the Petitioners lacked substantive standing because they had yet to suffer "an injury that affects [them] in a 'personal and individual' way." Furthermore, the Petitioners could not establish a causal link between such an injury and the actions of the Interior.

Under the injury requirement of the substantive theory of standing, the court declared that "standing analysis does not examine whether the environment in general has suffered an injury." Therefore, Petitioners' standing claim of "climate change ...shared by humanity at large," failed to establish substantive standing because the alleged injury was too "conjectural or hypothetical." However, the court went on to say that even if the injury were sufficient to establish substantive standing, the Petitioners could not demonstrate a causal link between such injury and the

30 U.S. Const. art. III, § 2, cl. 1.
32 Ctr. for Biological Diversity, 563 F.3d at 477.
34 Ctr. for Biological Diversity, 563 F.3d at 478 (quoting Lujan, 504 U.S. at 560 n.1).
35 Ctr. for Biological Diversity, 563 F.3d at 478.
36 Id. (citing Florida Audubon Soc'y v. Bentsen, 94 F.3d 658 at 665).
37 Ctr. for Biological Diversity, 563 F.3d at 478; See Defenders of Wildlife, 504 U.S. at 560.
actions of the Interior, especially this early in the leasing process when no actual exploration had yet taken place.\(^{38}\)

Under this analysis, it seems that an environmental protection group might never be able to establish standing to make a claim against the Interior regarding an outer continental shelf leasing program. However, the court continued to evaluate Petitioners’ claims under a theory of procedural standing.

Procedural standing was defined by an earlier decision of the District of Columbia Court of Appeals in *Florida Audubon Society v. Bentsen.*\(^{39}\) That case declared that, “a plaintiff must show not only that the defendant’s acts omitted some procedural requirement, but also that there is a substantial probability that the procedural breach will cause the essential injury to the plaintiff’s own interest”\(^{40}\) In *Center for Biological Diversity,* the “threatened concrete interest” asserted by the Petitioners is the desire to “observe an animal species.”\(^{41}\) This interest has been recognized by the Supreme Court as a valid basis for standing if plaintiffs show proof of “concrete plans” to visit and observe the species in the near future, providing “definitive dates” not just hopes or desires.\(^{42}\) The Petitioners provided this information, and, therefore, the court found that they established grounds for standing under the procedural theory.

**B. Ripeness for Review**

After establishing standing for their claims, Petitioners had to prove that the issues they raised were ripe for review.\(^{43}\) Ripeness of an issue for review is also mandated by the “case or controversy” requirement of the Constitution for federal court jurisdiction to exist.\(^{44}\) Ripeness considerations go to the first half of the Supreme Court standard for “case or controversy” cited earlier, stating that agencies could not be subject to “judicial interference until an administrative decision has been formalized.”\(^{45}\) This requirement presented serious problems for the Petitioners’ ESA and NEPA-based claims.

The ESA requires that an agency examine any impact a proposed action may have on an endangered species.\(^{46}\) If the agency determines that

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\(^{38}\) *Id.* at 479.

\(^{39}\) *Fla. Audubon Soc’y,* 94 F.3d 658.

\(^{40}\) *Ctr. for Biological Diversity,* 563 F.3d at 479 (quoting *Fla. Audubon Soc’y,* 94 F.3d at 664).

\(^{41}\) *Id.*

\(^{42}\) *Id.* (quoting *Lujan,* 504 U.S. at 564).

\(^{43}\) *Center for Biological Diversity,* 563 F.3d at 479.

\(^{44}\) *Id.* at 480-84.

\(^{45}\) *Id.* at 475.

\(^{46}\) *Id.* (quoting *Abbott Labs,* 387 U.S. at 148-49).

\(^{47}\) *Ctr. for Biological Diversity,* 563 F.3d at 474.
a species may be at risk, the agency is then required to consult with either
the National Marine Fisheries Service (hereinafter “NMFS”) or Fish and
Wildlife. Based on this requirement, Petitioners brought their third claim
alleging that the lease approval was invalid because of Interior’s failure to
consult with these agencies. However, the court found that this claim
generated the negative implication of the ESA, namely that consultation with
the NMFS or Fish and Wildlife was not required if an agency determined
that no endangered species would be impacted by the proposed action.

Although Petitioners claimed that the Interior’s determination was
incorrect, the court held that the tiered structure of the leasing system must
be taken into consideration. Upholding and citing a previous ruling, North
Slope Borough v. Andrus, the court stated “we must consider any
environmental effects of a leasing program on a stage-by-stage basis, and
correspondingly evaluate ESA’s obligations with respect to each particular
stage of the program.” Therefore, as the program under review had only
completed the first tier of the leasing process and “by design”... “the
welfare of animals” had yet to be implicated, the court found the claim
made by Petitioners based on an alleged violation of ESA requirements to
be premature.

The NEPA claim faced similar challenges. The court cited its
previous decision in Wyoming Outdoor Council v. United States Forest
Service for the proposition that the obligations placed on an agency by
NEPA only mature when the agency reaches a “critical stage of decision
which will result in ‘irreversible and irretrievable commitments of
resources’ to an action that will affect the environment.” Therefore, in the
NEPA analysis, the tiered system of OCSLA was, once again, a
determinative factor. The court concluded that under that tiered system,
the “critical stage of decision” was not reached until the leases were
actually issued. Thus, any claim before that time would be considered
premature and not ripe for review.

Despite petitioners’ success in establishing procedural standing,
their claims under NEPA and ESA ultimately failed because the issues
presented were not ripe for review. Therefore, the only claims left for the
court to address were the OCSLA-based claims.

48 Id. at 474-75.
49 Id. at 472.
50 Id. at 475 (citing Sw. Ctr. for Biological Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1447 (9th Cir. 1996)).
51 North Slope Borough, 642 F.2d 589 (D.C. Cir. 1980).
52 Ctr. for Biological Diversity, 563 F.3d at 483.
53 Id.
54 Id. at 480 (quoting Wyo. Outdoor Council v. U.S. Forest Serv., 165 F.3d 42, 49 (D.C. Cir.
1999)).
55 Ctr. for Biological Diversity, 563 F.3d at 480.
C. Justiciable OCSLA Claims

When reviewing the approval of a leasing program under OCSLA, courts use a two-tier system of review. The first tier involves "findings of ascertainable fact," which courts evaluate based on a "substantial evidence test" where the basis for such findings must be "more than a scintilla," but "may be less than a preponderance of the evidence." The second tier looks at the policy judgments of an agency, which are reviewed to determine if the decision was "based on a consideration of the relevant factors and whether there [was] a clear error of judgment." Petitioners' first claim under OCSLA alleged the failure of the Secretary of the Interior to properly take into account the environmental costs associated with consumption of oil and gas derived from the lease and the climate change that would be caused by the consumption of these fuels. While OCSLA requires the Interior to evaluate any adverse environmental effect that could be caused by the lease, the court found Petitioners' extension of this duty to include a duty to examine any potential adverse effects of the consumption of the oil and gas, rather than just the recovery of such oil and gas, as much too tenuous, stating that "the Secretary ... need only consider the 'potential for environmental damage' on a localized basis." Therefore, the court found that the Interior has no duty to consider potential future effects of consumption when evaluating leasing programs.

Instead, the court held that the Interior's decision to focus its environmental effect analysis on the effects of the actual production activities that would occur under the lease was proper. In making this analysis, the Interior evaluated the potential "greenhouse gas emissions that would result from leasing, exploration, and development in the OCS, and examined the cumulative impact of these emissions on the global environment." The court found that these efforts satisfied the requirements of OCSLA.

The court then turned to Petitioners' final claim that the Interior's sole reliance on a study conducted by the NOAA for its compliance with OCSLA's requirement to consider "the relative environmental sensitivity of

56 Id. at 484.
57 Id. at 484 (quoting FPL Energy Me. Hydro LLC. V. FERC, 287 F.3d 1151, 1160 (D.C. Cir. 2002)).
58 Ctr. for Biological Diversity, 563 F.3d at 484 (quoting Watt I, 668 F.2d at 1302).
59 Ctr. for Biological Diversity at 485.
60 Id.
61 See Id. (the "Interior simply lacks the discretion to consider any global effects that oil and gas consumption may bring about").
62 Id. at 485.
63 Id. at 485.
64 Id. at 485.
... different areas of the outer Continental Shelf was insufficient. Previous cases had held that "all that is required for compliance with Section 18(a)(2)(G) is "that the Secretary make a good faith determination of the relative environmental sensitivity" and that the Secretary was "free to use any methodology 'so long as it is not irrational.'" While the court upheld this loose standard, it also went on to declare that Interior's actions in this case violated it.

The NOAA study relied on by the Interior examined environmental sensitivity of the Alaskan coastline but did not evaluate any offshore areas. Therefore, by relying on this study, the Interior failed the OCSLA requirement that it consider the sensitivity of "different areas of the outer Continental Shelf." The court went on to explain that Interior's duties under OCSLA for the first stage of the leasing process require a balancing of the "potential for environmental damage, potential for the discovery of oil and gas, and the potential for adverse impact on the coastal zone." Such a balance is impossible when the Interior fails to properly consider one of these factors, as it did in this case.

Based on this analysis, the court in *Center for Biological Diversity* found in the Petitioners' favor and vacated the Interior's approval or the leasing program, remanding it to the Interior for further consideration consistent with the court's opinion. According to the court, such further consideration must begin with a "more complete comparative analysis" of the outer continental shelf areas potentially affected by the program.

### IV. IMPLICATIONS

With constant worries looming over the ever increasing prices of oil worldwide and the amount of greenhouse gases trapped in the atmosphere, future battles between environmental groups and the government over OCSLA will likely be more common and more contentious than ever before. Courts will be asked to decide what should come first, garnering the fossil fuels our country needs or guarding an already fragile environment that protects life on this planet? There is no perfect answer, and as this debate continues the delicate balance mandated by OCSLA and upheld by the court in this case will be challenged from both sides.

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66 *Ctr. for Biological Diversity*, 563 F.3d at 487.
67 *Id.* at 488 (quoting California v. Watt (*Watt I*), 712 F.2d 584, 596 (D.C. Cir. 1983) (affirming the holding in *Watt I*, 668 F.2d at 1313)).
68 *Ctr. for Biological Diversity*, 563 F.3d at 488.
70 *Ctr. for Biological Diversity*, 563 F.3d at 488 (quoting 43 U.S.C. § 1344(a)(3)).
71 *Ctr. for Biological Diversity*, 563 F.3d at 489.
72 *Id.* at 488.
The ruling in *Center for Biological Diversity* has important implications for both sides of this debate. For environmental groups, the court clearly states the standards for establishing standing for these claims. Establishing standing can be a serious challenge for groups opposing government action on ideological grounds, as the Supreme Court has consistently held that injuries must be particularized. Therefore, claims of injury to the global environment affecting all residents are generally insufficient. Establishing standing requires not only a showing of a particularized injury, but also the establishment of a causal link between the governmental action and the injury. Proving this element becomes even more difficult when dealing with the kind of tiered system present under OCSLA wherein actual damage to the environment does not occur until leases have been obtained and drilling begins. Therefore, preemptive environmental protective action appears almost impossible under the standing rules.

However, the court in this case outlined very specific parameters by which environmental groups can establish standing for these challenges. Plaintiffs may establish a particularized injury in these cases by showing that, by omitting some procedural requirements under OCSLA, the governmental agency has threatened some concrete interest. Since an actual injury need not have occurred to permit a claim, preemptive action may be taken. However, groups must demonstrate a "concrete interest," and, in these cases, the simplest way to establish such an interest is to provide affidavits from members of the plaintiff groups confirming both an interest in and desire to "observe an animal species," for any purpose, and "concrete plans" for making such observations including "definitive" travel dates. While these are highly specific requirements and might be difficultly to meet, because of this opinion and *Lujan* before it, groups have the court's explicit approval of such a course of action to satisfy the standing requirements.

However, once groups establish standing, they must still defend their claims on the merits. These groups typically assert claims that the governmental action fails on review because the agency did not "abide by a procedural requirement" that was designed to protect an established interest of a plaintiff. However, the *Center for Biological Diversity* court

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73 *Id.* at 477-89 (citing *Lujan*, 504 U.S. at 560 and *Fla. Audubon Soc’y*, 94 F.3d at 665 to generally discuss the law of standing).
74 *Id.* at 478.
75 *Id.* at 477-78 (citing *Lujan*, 504 U.S. at 560-61 and holding that Petitioners’ could not establish either element of standing for their substantive climate change claims).
76 *Ct. for Biological Diversity*, 563 F.3d at 479 (citing *Lujan*, 504 U.S. at 573 n.8).
77 *Ct. for Biological Diversity*, 563 F.3d at 479.
78 *Lujan*, 504 U.S. at 562-63.
79 *Ct. for Biological Diversity*, 563 F.3d at 479 (citing *Lujan*, 504 U.S. at 573).
provided some encouragement for groups making these claims through its evaluation of the Interior’s duties under OCSLA. When evaluating the Petitioners’ OCSLA environmental sensitivity claim, the court upheld the previously stated standard requiring that the Interior act in “good faith” and refrain from “irrational” methodology in making sensitivity determinations, but seemed to move away from that extreme deference stating that previous precedent “did not give Interior carte blanche to wholly disregard a statutory requirement out of convenience.” Instead, the court implied that Interior’s discretion in making the necessary environmental determinations under OCSLA is not absolute and its actions must accord with the strict requirements of the text.

Therefore, the court’s opinion in this case should give a great deal of hope to environmental groups seeking to oppose programs authorized under OCSLA and provides an excellent guide for how they can effectively do so. However, the court also provides protection for the Interior in exercising its rights and duties under OCSLA. Despite the court’s order to vacate the Interior’s approval of the leasing program in this case, the court made it clear that outer continental shelf leasing programs will be upheld as long as the Interior takes care to strictly comply with the requirements of OCSLA.

V. CONCLUSION

While this case provides a useful guide to environmental groups seeking to challenge leasing programs under OCSLA, it also dictates how the Interior can successfully stave off such challenges. When the Interior fails to meet the requirements of OCSLA, environmental groups can establish standing and oppose the program at issue. However, by strict compliance with the requirements of OCSLA, the Interior can protect itself from such challenges and go forward with approvals of leasing programs.

Thus, “to drill or not to drill” has a definitive answer, at least for the time being. When done in strict compliance with the law, off-shore drilling is permissible under existing statutes and any prohibition of such drilling would require further legislative action. However, while outer continental shelf drilling is a part of American life, this case demonstrates that the courts can be a useful tool in ensuring that such programs only occur with proper consideration and protection of the surrounding environment.

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80 Id. at 487-88. See Watt I, 668 F.2d 1290; Watt II, 712 F.2d 584.
81 Id. at 488.