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Have the Sons Disobeyed Their Fathers? The Massachusetts' Standing Analysis after Biological Diversity. Center for Biological Diversity v. United States Department of Interior

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Have the Sons Disobeyed their Fathers? The *Massachusetts*' Standing Analysis after *Biological Diversity*

Center for Biological Diversity v. United States Department of Interior[1]

I. INTRODUCTION

In his famous dissent in *Sierra Club v. Morton*, Justice Douglas stated that "[c]ontemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation."[2] The spirit of his intention, that citizens had standing to bring suit on behalf of animals, fish, and even the Earth, spurred environmental litigants to bring suit against the federal government when its action would likely result in environmental harm. But from *Morton* until *Massachusetts v. EPA*, a key component to standing requirements, that the particular plaintiff must be injured, and not just the environment, prevented litigants from bringing suits solely to protect environmental objects.[3] With the Supreme Court's decision in *Massachusetts* environmental litigants argued that a new era of standing analysis had arrived.[4] Where previously hostility towards claims of a generalized climate change injury barred litigants from the courtroom door, *Massachusetts* signaled that this proposition was no longer true.[5] However, the D.C. Circuit's decision in *Biological Diversity* casted doubt as to whether a "generally shared" climate change injury could withstand a standing analysis and even what, if anything, *Massachusetts* added to the

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[1] 563 F.3d 466 (D.C. Cir. 2009).

[2] Sierra Club v. Morton, 405 U.S. 727, 741-42 (1972) (Douglas, J., dissenting).

[3] *See id.* at 742-43; Massachusetts v. EPA, 549 U.S. 497 (2007). Notable exceptions to the general prohibition on standing suits that involve general injury are *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973) and *FEC v. Akins*, 524 U.S. 11 (1998).

[4] For a discussion concerning what scholars thought *Massachusetts* meant to standing analysis, see Jonathan K. Adler, *Warming Up to Climate Change Litigation*, 93 VA. L. REV. IN BRIEF 63 *passim* (2007) and Jonathon Z. Cannon, *The Significance of* Massachusetts v. EPA, 93 VA. L. REV. IN BRIEF 53 *passim* (2007).

[5] Adler, *supra* note 4; Cannon, *supra* note 4.

traditional standing analysis.[6]

Due to the importance of the standing analysis, in that courts must resolve jurisdictional questions such as standing before proceeding to the merits of a case, standing is the most important legal principle discussed in *Biological Diversity*.[7] This note will examine the standing analysis in *Massachusetts* and *Biological Diversity* in order to present a discussion of a climate change litigant's standing requirements post *Biological Diversity*. Specifically, two issues will be addressed. First, *Biological Diversity* distinguished itself from *Massachusetts*, which subsequently limited the scope of the *Massachusetts*' standing analysis. This note will discuss whether or not this distinction is legitimate. Second, *Biological Diversity's* discussion of a generally shared injury and an alleged injury determined the court's substantive standing holding. This note will examine how the majority opinion decided these issues and whether or not the analysis was consistent with standing jurisprudence.

II. FACTS AND HOLDING

In August 2005, the United States Department of the Interior (hereinafter "Interior") began the process of expanding its leases on the Outer Continental Shelf region (hereinafter "OCS") off the coast of Alaska from 2007 to 2012.[8] The Leasing Program's particular details included an expansion of previous leases in the Beaufort, Bering, and Chukchi Seas.[9]

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[6] *See Ctr. for Biological Diversity*, 563 F.3d at 475-77. The quotations around generally shared are purposeful to show that this term is pliable at best and untenable at worst. The use of a "generally shared" injury standard has, from time to time, arguably served as a mechanism to bar environmental litigants from the court house door, rather than serve as a legitimate constitutional requirement. In discussing the traditional standing analysis, this note is referring to the modern standing analysis articulated in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

[7] *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 88-93 (1998).

[8] *Ctr. for Biological Diversity*, 563 F.3d at 471. The Leasing Program's purpose is to lease offshore oil and gas developments. *Id.* at 472. Per 43 U.S.C. § 1344, the Leasing Program is created by preparing a five-year schedule of proposed lease sales in the area in question. *Id.* at 473. The general area in the Outer Continental Shelf is the submerged land in the Beaufort, Bering, and Chukchi Seas. *Id.* at 471.

[9] *Id.*

The Program's "Proposed Final Plan" was published in April 2007 for the approval stage, scheduling twenty-one potential lease-sales between July 2007 and June 2012 in eight areas total, four of which are in the seas in question in the OCS.[10]

In seeking review, the Petitioners argued that the Leasing Program violated portions of the Outer Continental Shelf Lands Act (hereinafter "OCSLA"), the National Environmental Policy Act (hereinafter "NEPA"), and the Endangered Species Act (hereinafter "ESA").[11] The Petitioners, three non-profit environmental activist groups and a federally recognized tribal government, the town of New Hope, were seeking to protect the OCS areas.[12] Specifically, the Petitioners advanced four arguments.[13] First, the Petitioners argued that the Leasing Program violates both OCSLA and NEPA because Interior failed to take into consideration the Leasing Program's effects on climate change generally and climate change in the OCS area in particular.[14] Second, the Petitioners contended that the Leasing Program violates OCSLA and NEPA because Interior approved the Program without conducting sufficient biological baseline research for the OCS sea area in question.[15] Also, the Petitioners claimed that the Program did not provide a research plan showing how baseline data would be obtained before the next stage of the Leasing Program.[16] Third, the Petitioners contended Interior violated ESA by failing to first consult with

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[10] *Id.* at 475. The Proposed plan was submitted to Congress and the President of the United States after it was published. *Id.* Thereafter, the Secretary of the Interior approved the plan. *Id.*

[11] *Id.* at 471-72.

[12] *Id.* at 472. The three non-profit activist organizations were the Center for Biological Diversity, the Alaska Wilderness League and the Pacific Environment. *Id.* The organizations work to protect the water and living environments off the coast of Alaska. *Id.* The Native Village of Point Hope, Alaska, is a federally recognized tribal government that uses a sea that is part of the OCS region, the Chukchi Sea, to gather and hunt food. *Id.*

[13] *See id.* at 471-42.

[14] *Id.* at 471 (citing The Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356a (2006) and The National Environmental Policy Act of 1969, 42 U.S.C. §§ 4312-4370f (2006)).

[15] *Id.* at 471-72.

[16] *Id.* at 472.

either the U.S. Fish and Wildlife Service or the National Marine Fisheries Service about potential harm to the endangered species in the OCS area before adopting the Leasing Program.[17] Finally, the Petitioners advanced the argument that "the Leasing Program violate[d] OCSLA because it irrationally relied on an insufficient study by the National Oceanographic and Atmospheric Administration in assessing the environmental sensitivity of the OCS planning areas" in question.[18]

The court held that the Petitioner's NEPA and ESA claims were not ripe for review.[19] Additionally, of the three OCSLA claims, the OCSLA climate change and baseline data challenge claims lacked merit and thus failed.[20] However, the court ruled that the OCSLA claim involving the environmental sensitivity rankings had merit.[21] The court vacated the Leasing Program and remanded the case for reconsideration before the Interior Secretary.[22]

III. LEGAL BACKGROUND

A. *OCSLA Requirements*

OCSLA establishes a procedural framework when Interior leases areas of the OCS in order to explore and develop oil and gas deposits.[23] The framework is a pyramidic, four-step process starting with broad-based planning and subsequently narrowing the focus to actual development once it becomes imminent.[24] The first step involves the creation of the five-year scheduled Leasing Program and the subsequent comment and approval period.[25] Interior is required to ensure the Program considers the

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[17] *Id.* (citing The Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (2006)).
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.* (citing 43 U.S.C. §§ 1334, 1337 (2006)).
[24] *Id.* at 473 (citing California *ex rel.* Brown v. Watt, 668 F.2d 1290, 1297 (D.C. Cir. 1981)).
[25] Sec'y of the Interior v. California, 464 U.S. 312, 337 (1984).

economic, environmental, and social values of renewable and nonrenewable resources.[26] The Leasing Program is examined to determine the potential impact that oil and gas exploration has on the OCS, along with marine, coastal, and human environments.[27] Interior must consider additional factors such as a region's existing geographical, geological, and ecological characteristics.[28] Additionally, Interior must consider an analysis of the developmental benefits and environmental risks, the environmental sensitivity and marine productivity of the OCS, and the environmental and predictive information for different areas of the OCS.[29] Finally, Interior must ensure that the lease obtains a balance between the potential for environmental damage and the potential for discovery of oil and gas.[30]

Second, bids are solicited and subsequent leases are issued.[31] During the second step, the lease purchasers who were issued a lease only have the right to conduct preliminary activities and cannot penetrate the seabed by more than 300 feet.[32] The preliminary activities and seabed penetration cannot result in any significant environmental impacts.[33] During the third step, Interior reviews the plan. The plan can proceed to the fourth step only if it "will not be unduly harmful to aquatic life in the area, result in pollution, create hazardous or unsafe conditions, unreasonably interfere with other uses of the area, or disturb any site, structure, or object of historical or archeological significance."[34] The fourth step is the development and production phase. It involves an

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[26] *See Ctr. for Biological Diversity*, 563 F.3d at 473.

[27] *Id.* (citing 43 U.S.C. § 1344(a)). Section 20 of the OCSLA provides that when the first lease is given in an area, the Secretary conducts studies to establish the environmental information necessary to provide time-series and data trend information. 43 U.S.C. § 1346(b).

[28] *Id.*

[29] *Id.* (citing 43 U.S.C. § 1344(a)(2)).

[30] *Id.* at 474 (citing 43 U.S.C. § 1344(a)(3)).

[31] *Id.* at 473 (citing 43 U.S.C. § 1337(a)).

[32] Sec'y of the Interior v. California, 464 U.S. 312, 338-39 (1984) (citing 30 C.F.R. § 250.34-1 (1982)).

[33] *Id.* at 339.

[34] *Ctr. for Biological Diversity*, 563 F.3d at 473 (internal quotation marks omitted) (quoting 43 U.S.C. § 1340 (g)(3)).

additional review of the detailed plan. Interior determines whether or not the plan would be likely to cause serious harm or damage to the marine, coastal, or human environment.[35] The structure of moving from the broad to the narrow prevents premature litigation, as adverse environmental effects occur during the later stages of the process.[36]

B. *NEPA Requirements*

NEPA's requirements are procedural in nature to ensure consideration of environmental impacts in order to work toward the goal of environmental protection and an informed decision.[37] Therefore, the statute requires an agency to do two things. First, an agency must assess the environmental consequences of major federal actions, such as leasing the OCS space, by following certain procedures during the decision making process.[38] Second, an agency must prepare a detailed environmental impact statement before approving a particular project.[39] When a pyramid program is at issue, an agency allows a tiered approach.[40] This occurs when an environmental impact statement is prepared that starts broader and subsequently becomes more detailed as the program advances through the steps.[41]

C. *ESA Requirements*

Under ESA, a federal agency is required to ensure that a government action, such as a Leasing Program, is not likely to jeopardize an endangered species and is not likely to cause damage to the critical

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[35] *Id.* (quoting 43 U.S.C. § 1351(h)(1)(D)(i)).
[36] *Id.* (citing *Sec'y of the Interior*, 464 U.S. at 341).
[37] *Id.* at 474 (citing N. Slope Borough v. Andrus, 642 F.2d 589, 598 (D.C. Cir. 1980)).
[38] *Id.* (quoting Nevada v. Dep't of Energy, 457 F.3d 78, 87 (D.C. Cir. 2006)).
[39] *Id.* The environmental impact statement discusses any adverse environmental effects that cannot be avoided and alternatives to the proposed action. *Id.* (quoting 42 U.S.C. § 4332(2)(C)(i)-(iii) (2006)).
[40] *Id.* (citing 40 C.F.R. § 1508.28 (2008)).
[41] *Id.*

habitat of the endangered species.[42] After the analysis, if an agency determines that the action may affect the species or habitat, the agency is required to consult the National Marine Fisheries Service or the U.S. Fish and Wildlife Services.[43] But, if the agency determines that the action will not result in any adverse impact to the species or habitat, the agency does not have to consult with the NMFS or the U.S. Fish and Wildlife Services.[44]

D. *The Substantive Theory of Standing*

Lujan v. Defenders of Wildlife[45] sets out the Supreme Court's modern standing test.[46] For a petitioner to establish standing, that petitioner must demonstrate: (1) a particularized injury occurred; (2) the injury was caused by and is fairly traceable to the act challenged; and (3) that the injury can be redressed by the court.[47] Injury is established when a party demonstrates that it has suffered an injury that affects it in an individual way.[48] Additionally, an alleged injury must be actual or imminent and not hypothetical.[49] Finally, although injuries must be particular and not generally suffered, the Supreme Court clarified in *FEC v. Akins* that standing can be established if a generalized harmed occurred so long as the injury was concrete, not abstract.[50] This distinction is relevant in environmental injury cases, as a plaintiff does not have standing when a general environmental harm occurs but will have standing if the plaintiff can show injury due to that general environmental harm.[51]

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[42] 16 U.S.C. § 1536(a)(2) (2006).
[43] 50 C.F.R. §§ 402.13-.14 (2009).
[44] Sw. Ctr. for Biological Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1447-48 (9th Cir. 1996) (citing Pac. Rivers Council v. Thomas, 30 F.3d 1050, 1054 n.8 (9th Cir. 1994)).
[45] 504 U.S. 555 (1992).
[46] *See id.* at 560-61.
[47] *Id.*
[48] *Id.* at 560 (citing Allen v. Wright, 468 U.S. 737, 756 (1984)).
[49] *Id.* (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).
[50] FEC v. Akins, 524 U.S. 11, 24 (1998).
[51] Fla. Aubudon Soc'y v. Bentsen, 94 F.3d 658, 665 (D.C. Cir. 1996).

Traceability and causation rests on whether an injury can be fairly traceable to the challenged action.[52] In applying this test to an agency, the plaintiff must show that the challenged acts of the agency will cause a particularized injury to the plaintiff.[53] Additionally, the more attenuated the chain of causation, the less likely the link of injury will be established between the agency and the plaintiff.[54] Finally, when the plaintiff is not the object of the government action, standing is more difficult to establish.[55] In establishing causation, the plaintiff bears the burden of showing that a government action will lead a third party to act in a manner that will cause injury.[56]

E. *The Procedural Theory of Standing*

Lujan also articulated procedural standing requirements when litigants are challenging an agency decision.[57] A plaintiff has procedural standing if they can show that an agency failed to abide by a procedural requirement designed to protect a threatened, concrete interest.[58] This is accomplished by showing that not only did a defendant omit a procedural requirement, but also that it was substantially probable that the procedural requirement omitted will cause the essential injury to the plaintiff required to assert standing.[59] Justice Scalia noted in *Lujan* that the procedural theory of standing is perhaps easier to meet.[60]

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[52] *Id.* (citing *Allen*, 468 U.S. at 753 n.19 and Cal. Ass'n of the Physically Handicapped, Inc. v. FCC, 778 F.2d 823, 825 n.7 (D.C. Cir. 1985)).
[53] Ctr. for Biological Diversity v. U.S. Dept. of Interior, 563 F.3d 466, 477 (D.C. Cir. 2009) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) and *Fla. Aubudon Soc'y*, 94 F.3d at 663).
[54] *Id.* at 478 (citing *Allen,* 468 U.S. at 757-58).
[55] *Id.* at 477 (quoting *Lujan*, 504 U.S. at 562).
[56] *Id.* (quoting *Lujan*, 504 U.S. at 562).
[57] *See Lujan*, 504 U.S. at 573 n.8.
[58] *Id.*
[59] *Ctr. for Biological Diversity*, 563 F.3d at 479 (citing *Fla. Audubon Soc'y*, 94 F.3d at 664-65, 667). Essential injury is the plaintiff's requirement to show that the injury was not equally suffered.
[60] *See Lujan*, 504 U.S. at 571-78.

F. *Procedural and Substantive Standing after* Massachusetts

Prior to *Massachusetts v. EPA*,[61] standing jurisprudence traditionally did not allow litigants to bring suit, seeking relief due to a defendant's action, which has, or more importantly might, cause climate change consequences.[62] After *Massachusetts*, it appeared that climate change litigants had precedent that allowed the possibility of citizen suits to seek relief for climate change suits.[63]

In *Massachusetts*, a particularized injury to the State of Massachusetts was alleged to result in the rising of global sea levels leading to the diminishment of the state's shoreline.[64] This case represented a significant benchmark in environmental standing for two reasons. First, states do not normally have standing to sue the federal government on behalf of its citizens.[65] Additionally, as stated above, standing is more difficult to establish when the plaintiff, here the State of Massachusetts, is not the object of the government action.[66] However, *Massachusetts* articulated what has been interpreted as a "sovereign exception," stating that a sovereign has standing to sue when the state is suing for its individual interests because its individual interests are harmed.[67]

Second, although previous standing requirements articulated in case law have not allowed climate change injury, primarily due to the generalized nature of "injury" and the lack of causation, the *Massachusetts* court found that all elements of standing were met.[68] In addressing the scientific and ecological evidence presented, the *Massachusetts* court found a chain of causation that resulted in an injury that could be redressed; that greenhouse gas emissions can lead to the greenhouse effect, which can lead to a rise in global temperatures, leading to a rise in

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[61] 549 U.S. 497 (2007).
[62] See *supra* Part III.D for a discussion of *Lujan's* standing requirements.
[63] *See Massachusetts*, 549 U.S. 497.
[64] *Id.* at 522.
[65] Massachusetts v. Mellon, 262 U.S. 447, 485-86 (1923).
[66] Lujan v. Defenders of Wildlife, 504 U.S. 555, 561-62 (1992).
[67] *See Massachusetts*, 549 U.S at 497.
[68] *Id.* at 526.

ocean levels and loss of state shoreline.[69] The standing interpretation of *Massachusetts* has not been conclusively settled, as the *Massachusetts*' dissent presented an alternate interpretation.

The dissenting opinion in *Massachusetts* articulated a traditional theory of standing and did not "expand" the injury and causation scope.[70] First, the dissenting opinion stated that climate change is a harm to all of humanity and therefore the plaintiff's injury is no different than any other individual.[71] Second, in discussing the majority's decision, the dissenting opinion questioned whether injury had even occurred.[72] As compared to the majority opinion, the dissenting opinion felt that the loss in coastline could not be conclusively and solely shown to be caused by climate change.[73]

G. *Whether a Claim is Ripe for Review*

Abbott Laboratories v. Gardner[74] is the instructive case in addressing whether a claim is ripe for review.[75] It gave the courts the guiding principle that a court should determine if the issues are fit for judicial-decision making and the hardship that could occur to parties if the court withheld consideration.[76] Applying that principle, in the context of a NEPA-based claim, a multiple-stage Leasing Program requires the court to look at which stage of the Program a suit was brought.[77] If a suit is brought in a stage where a critical decision will occur which will lead to an irreversible and irretrievable commitment of resources to an action that

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[69] *Id.* at 504-05, 521.
[70] *See id.* at 535-60 (Roberts, C.J., Scalia, J., dissenting). The quotations around expand are purposeful, as the claim that the *Massachusetts* majority opinion expanded the injury and causation scope will be explored in the comment. *See infra* Part V.C.
[71] *Id.* at 541.
[72] *Id.* at 541-42.
[73] *Id.*
[74] 387 U.S. 136 (1967).
[75] *See id.*
[76] *See id.* at 148-49.
[77] Wyo. Outdoor Council v. U.S. Forest Serv., 165 F.3d 43, 49-50 (D.C. Cir. 1999).

will affect the environment, then the suit is mature and ripe.[78] Therefore, ripeness of a suit in multiple-stage Leasing Programs matures only when the Program is at the stage where leases are issued.[79]

H. *Standard of Review*

The D.C. Circuit utilizes a "hybrid" standard of review when analyzing whether a Leasing Program complies with OCSLA.[80] The hybrid standard of review is a balancing of the substantial evidence and the arbitrary and capricious tests.[81] First, findings of ascertainable fact are examined under a substantial evidence test, which states that a determination must be made with more than a scintilla but less than a preponderance of evidence.[82] Second, Interior's OCSLA interpretation decisions are given deference so long as the decision is based off of a permissible construction of the statute and therefore is not arbitrary and capricious.[83] However, an agency action will fail in court if the action does not effectuate Congress' intent, if the court determines that the agency did not consider the relevant factors or if the court determines that there was a clear error in judgment.[84]

IV. INSTANT DECISION

In *Biological Diversity*, Chief Judge Sentelle of the United States Court of Appeals for the District of Columbia Circuit delivered an opinion dismissing a portion of the Petitioners' claims while remanding the case on the merits of other claims.[85] The opinion followed a three-step analysis

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[78] *Id.* at 49 (quoting Mobil Oil Corp. v. FTC, 562 F.2d 170, 173 (2d Cir. 1977)).
[79] *Id.*
[80] Ctr. for Biological Diversity v. U.S. Dept. of Interior, 563 F.3d 466, 484 (D.C. Cir. 2009) (citing California *ex rel.* Brown v. Watt, 668 F.2d 1290, 1300 (D.C. Cir. 1981)).
[81] *Watt*, 668 F.2d at 1300.
[82] *Ctr. for Biological Diversity*, 563 F.3d at 484 (citing FPL Energy Me. Hydro, L.L.C. v. FERC, 287 F.3d 1151, 1160 (D.C. Cir. 2002)).
[83] *Id.* (citing *Watt,* 668 F.2d at 1302-03).
[84] *Id.* (citing *Watt,* 668 F.2d at 1302-03).
[85] *Id.* at 472.

in determining the Petitioners' standing, ripeness, and merits of their claims.[86]

A. *Claims Examined Under a Standing Test*

In examining each claim, the court first assessed whether the Petitioners had standing.[87] First, the court held that the Petitioners lacked standing on their substantive climate change theory.[88] Relying on its interpretations of *Massachusetts* and *Lujan*, the court held that the Petitioners failed the substantive test of standing because they did not establish either the injury or causation element of standing.[89] The court held that the Petitioners' argument that the environment suffered an injury does not meet the standing requirements but rather the party itself must have suffered an injury.[90] The court reasoned that the Petitioners did not allege any particular injury and only stated that the Leasing Program "may" affect climate change and the environment.[91] Additionally, the Petitioners could not prove that their particular interest was any different than the interests of the rest of the population.[92] Therefore, in examining these elements, the court held that the Petitioners did not allege an injury that would pass a standing analysis and that any alleged injury asserted would be too generalized to establish standing.[93]

Turning to the causation element, the court held that even if the Petitioners would have been able to meet the injury prong, they still would not have had standing because the Petitioners could not establish a causal link between Interior's action, the Leasing Program approval, and the Petitioners' injury.[94] In citing *Allen v. Wright* and *Florida Audubon*

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[86] *Id.* at 475.
[87] *Id.* at 475-76.
[88] *Id.* at 475.
[89] *Id.* at 477-78 (construing Massachusetts v. EPA, 549 U.S. 497 (2009) and Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)).
[90] *Id.* at 478 (citing *Lujan*, 504 U.S. at 560).
[91] *Id.*
[92] *Id.*
[93] *Id.* at 475-78.
[94] *Id.* at 478.

Society v. Bentsen, the court held that the petitioners' claim of causation was too indirect to establish a link.[95] The court reasoned this by showing the nature of the indirect link; that the Leasing Program will bring about drilling, which will yield oil, which will then lead to an increase in oil consumption, which will then cause carbon dioxide dispersement in the air, and therefore cause climate change.[96]

Once the court established that the Petitioner did not have a substantive claim of standing, the court then turned to the procedural theory of standing the Petitioners asserted.[97] In determining that the Petitioners were able to show both that Interior omitted a procedural requirement and that the procedural breach was substantially likely to cause injury to the Petitioner, the court held that the Petitioners had standing under a procedural theory to bring their OCSLA and NEPA-based claims.[98]

B. *Claims Examined Under a Ripeness Test*

Next, the court turned to whether the NEPA-based claim was ripe for review.[99] In holding that the NEPA claim was not ripe for review, the court turned to the nature of the Leasing Program's multiple stage timing.[100] In addressing the timing of the Petitioners' suit and focusing on the fact that Interior had only approved of the Leasing Program, the court held that the Leasing Program had not reached a critical stage where an irreversible commitment of resources that will effect the environment had occurred.[101] Therefore, the court held that the Petitioners' NEPA-based claim was not yet ripe.[102]

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[95] *Id.* (citing Allen v. Wright, 468 U.S. 737, 751 (1984) and Fla. Audubon Soc'y v. Bentsen, 94 F.3d 658, 663 (D.C. Cir. 1996)).
[96] *Id.* at 478-79.
[97] *Id.* at 479.
[98] *Id.*
[99] *Id.* at 480.
[100] *Id.*
[101] *Id.* The court used the *Wyoming Outdoor Council* test articulated in *Wyoming Outdoor Council v. United States Forest Service*, 165 F.3d 43 (D.C. Cir. 1999). *Id.*
[102] *Id.*

Additionally, the court refuted the Petitioner's two chief arguments against the conclusion that the NEPA claim was not yet ripe. First, the Petitioners asserted that their harm in having to wait to bring a claim until the actual leasing stage began would outweigh the harm to Interior.[103] The court reasoned that Interior, along with other agencies, actually suffered a larger share of the harm by bringing the claim at the lease approval stage because agencies safeguarding against this type of suit during a pre-leasing time would essentially be required to create an additional procedural requirement for segmented programs.[104]

Second, the court refuted the Petitioners' argument, taken from portions of *Ohio Forestry Ass'n v. Sierra Club*, that the NEPA claim could not get any riper because NEPA claims may be complained of as soon as a failure occurs.[105] The court held that the portion of *Ohio Forestry* the Petitioners took their argument from was dicta.[106] Moreover, the court felt the Petitioners reached for too much in the *Ohio Forestry* court's holding, as the holding only stated that a claim cannot get any riper than when a violation occurred and does not address what constitutes the point when a violation occurs.[107] Therefore, because *Ohio Forestry* does not dictate a decision the court needs to abide by and *Wyoming Outdoor Council* states that a NEPA obligation occurs only when the leasing stage commences, the Petitioners' second argument also fails.

Third, the court looked to whether the ESA claim was ripe for review. Here, the ESA ripeness claim focused on whether Interior's approval of the Leasing Program may affect a list species or critical habitat. In articulating the holding of *North Slope Borough v. Andrus*, the court found that it should consider the ESA requirement in light of the nature of the Leasing Program and therefore consider the requirement in each particular leasing stage.[108] Therefore, the court held that the ESA

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[103] *Id.*
[104] *Id.*
[105] *Id.* at 481 (construing Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726 (1998)).
[106] *Id.*
[107] *Id.*
[108] *Id.* at 483 (construing N. Slope Borough v. Andrus, 642 F.2d 589 (D.C. Cir. 1980)).

claim was not ripe for review, as the first leasing stage caused no harm to a list species or critical habitat, and no subsequent stages have occurred.[109]

Finally, the court determined whether the OCSLA claims were ripe for review.[110] The court held that the claims were ripe for review, as they concerned requirements that are implicated at the initial stage of the Leasing Program.[111]

C. *Remaining Claims Examined Under the Merits*

Three claims, the OCSLA Climate Change claim, the OCSLA Baseline Information claim, and the OCSLA National Oceanic and Atmospheric Administration claim, survived the standing and ripeness requirements and the court subsequently looked to the merits.[112] First, the court held that the Climate Change OCSLA claim fails because OCSLA does not require Interior to consider the effects of consumption of oil and gas due to the Leasing Program.[113] The court found that because the text of OCSLA states Interior must consider the potential impact of oil and gas exploration and production and not oil and gas consumption, the Petitioners' argument is without merit.[114]

Second, the court held that the Petitioners' OCSLA Baseline claim failed because the Petitioners' interpretation of the OCSLA requirement that baseline research be established, updated, and monitored was erroneous.[115] In reaching this conclusion, the court again referenced the text of OCSLA to state that such baseline research is required subsequent to leasing and development, not during the approval stage.[116]

Finally, the court found that the Petitioner's OCSLA NOAA claim had merit and Interior's decision to solely rely upon the NOAA study was

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[109] *Id.*
[110] *Id.* at 484.
[111] *Id.*
[112] *Id.* at 472, 483.
[113] *Id.* at 484.
[114] *Id.*
[115] *Id.* at 486.
[116] *Id.*

improper.[117] The court found that OCSLA mandates that Interior assess the environmental sensitivity of different areas of the OCS, not just the effect an oil spill will have on shorelines.[118] Therefore, because Interior erroneously limited the scope of its assessment, Interior failed to comply with OCSLA balancing requirements, and on remand Interior is required to conduct a more complete analysis, consistent with OCSLA standards.[119]

V. COMMENT

The most important implication of Chief Judge Sentelle's opinion in *Biological Diversity* is what effect the case's standing analysis will have on future climate change claims. *Biological Diversity* distinguished itself from *Massachusetts* by discussing the inapplicability of the sovereign exception used in *Massachusetts*. Additionally, *Biological Diversity* defined the scope of *Massachusetts*. However, although this distinction was warranted, subsequent cases should exercise caution in interpreting *Biological Diversity's* discussion of *Massachusetts*. Specifically, two discussions in *Biological Diversity* should be examined. First, although the Petitioners did not appear to actually allege injury in *Biological Diversity*, the opinion's analysis risks subsequent misinterpretation by dismissing any prospective injury as being a generalized, and therefore not actionable, injury. This is highlighted by a mysteriously worded passage discussing harm within the opinion and its subsequent analysis. The passage and subsequent analysis casts doubt as to whether *Biological Diversity* would have followed generalized harm precedent set by *Akins* and followed in the *Massachusetts*' majority. Second, *Biological Diversity's* discussion of causation appears to not follow the *Massachusetts*' majority and instead adheres to the arguments laid out in the *Massachusetts*' lower court and Supreme Court dissent.

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[117] *Id.* at 489.
[118] *Id.* at 488.
[119] *Id.* at 489.

A. Massachusetts' *Lower Court Dissent*

Written by Judge Sentelle, the author of the *Biological Diversity* opinion, the *Massachusetts*' lower court's dissent would have held that the State of Massachusetts did not have standing.[120] Judge Sentelle first addressed the injury prong in his analysis. Quoting *Lujan*, Judge Sentelle asserted that when an individual's relief to a generalized harm no more directly benefits the individual than society at large, the harm is not considered an injury under a standing analysis.[121] Applying this legal principle to the facts, Judge Sentelle found that the emission of gases that may cause climate change is harmful to humanity at large.[122] Therefore, the nature of the harm, regardless of whether injury occurred, foreclosed the possibility of standing.

B. Massachusetts' *Dissenting Opinion*

In the Supreme Court, the *Massachusetts*' majority overturned the lower court's decision and held that the State of Massachusetts had standing to bring suit against the EPA.[123] The dissenting opinion, written by Chief Justice Roberts, again attacked the assertion that the State of Massachusetts would have standing to bring suit.[124] First, in addressing the sovereign exception, Chief Justice Roberts countered the majority's determination and stated that the majority gave the state special solitude.[125] Therefore, Chief Justice Roberts concluded that the state was

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[120] Massachusetts v. EPA, 415 F.3d 50, 59 (D.C. Cir. 2005) (Sentelle, J., dissenting in part and concurring in judgment), *rev'd* 549 U.S. 497 (2007). Judge Sentelle's opinion was a concurrence in judgment and dissent in part. *Id.* This is relevant because Judge Sentelle not only agreed with the lower court's majority opinion that the EPA exercised proper rulemaking discretion, he went further to state that the majority's opinion was inevitably correct because the State of Massachusetts did not have standing anyway. *See id.*

[121] *Id.*

[122] *Id.* at 60.

[123] *Massachusetts*, 549 U.S. at 498.

[124] *Id.* at 535.

[125] *Id.* at 536.

given a relaxed standing requirement.[126] Second, Chief Justice Roberts praised the lower court's dissent, written by Judge Sentelle, in discussing the type of harm that occurred.[127] Using Judge Sentelle's language, Chief Justice Roberts argued that a danger to humanity at large was not a particularized injury.[128] The only redress for the plaintiffs in a climate change situation, Justice Roberts held, was literally to change the atmosphere.[129] Since the harm was general and the potential remedy is the same for all of society, Justice Roberts reasoned that the injury is not particularized and therefore not a standing injury.[130]

Additionally, the dissent expanded upon Judge Sentelle's criticism to argue that the evidence brought forth did not prove any actual or imminent loss of shoreline.[131] In questioning the state's assertions, the dissent argued that the state only hypothetically showed a claimed ten to twenty centimeters of shoreline had disappeared.[132] Therefore, the dissent argued that no actual injury had occurred. In shifting from an actual injury inquiry to whether the injury may be imminent, Justice Roberts reasoned that the injury asserted was also not imminent, as the rise in shoreline was predicted to be seventy centimeters in the next ninety years.[133] Justice Roberts focused on the timeframe of ninety years as a barrier for the harm to be imminent.[134]

C. *Analyzing the* Massachusetts' *Dissenting Opinions*

Justice Roberts created a susceptible framework that the dissent used to analyze the sovereign exception. By asserting that special solicitude was given to the state, the dissent attempted to show that the

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[126] *Id.*
[127] *See id.* at 541.
[128] *Id.* (citing Massachusetts v. EPA, 415 F.3d 50, 60 (D.C. Cir. 2005) (Sentelle, J., dissenting in part and concurring in judgment), *rev'd* 549 U.S. 497 (2007)).
[129] *Id.*
[130] *Id.*
[131] *Id.* at 541-42.
[132] *Id.*
[133] *Id.* at 542.
[134] *Id.*

majority weakened the standing analysis to allow the state standing.[135] However, in two different places in the dissent, one of which is one sentence after an assertion that the standing analysis for the majority was weakened, Justice Roberts discussed the traditional three-step standing analysis the majority used.[136] Therefore, Justice Roberts' claim is not that the standing analysis was weakened specifically due to the unique nature of the State of Massachusetts, but that the subsequent standing analysis for the majority was inadequate to find standing and therefore the majority must have allowed a sovereign exception.[137] This is simply inconsistent with the sovereign exception defined by the majority and found in previous case law.[138] The sovereign exception was granted as a procedural right to the State of Massachusetts to protect its own interests, not the interests of its citizens from the operation of federal statutes.[139] Protecting the latter right is prohibited but protecting the former is not.[140] Therefore, the sovereign exception, as the majority refers to and the dissent mischaracterizes, is not an exception to the standing analysis but a protection of the state's procedural right.

Second, the *Massachusetts*' dissenting opinions correctly asserted that some sort of injury must occur in order to have standing. However, the analysis of what type of injury is required either ignored or attempted to distinguish previous case law.[141] Specifically, *Akins* stands for the proposition that when a right is conferred to someone, even if everyone subsequently is harmed due to an action, that generalized harm can still

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[135] *Id.* at 540.
[136] *Id.*
[137] *See id.*
[138] *See id.* at 518-19. The Court cited *Alden v. Maine*, 527 U.S. 706 (1999), *Alfred S. Snapp & Son, Inc. v. P.R. ex rel. Barez*, 458 U.S. 607 (1982), and *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907) to articulate the parameters of the sovereign exception. *Massachusetts*, 549 U.S. at 518-19.
[139] *Massachusetts*, 549 U.S. at 519 (distinguishing Massachusetts v. Mellon, 262 U.S. 447 (1923)).
[140] *Id.*
[141] *See, e.g.*, FEC v. Akins, 524 U.S. 11 (1998). Additionally, although widely a discredited case, *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), provides precedent for generalized harm suits.

confer standing *so long as* the harm is concrete and not abstract.[142] The majority opinion recognized the precedent *Akins* set in order to reach its holding.[143] However, the dissenting opinions of both the lower courts and the Supreme Court chose to not even discuss *Akins*.[144] The dissenting opinions provided no discussion of the possibility that a generalized harm could still be an injury for standing purposes and instead asserted that generalized harms preclude standing.[145]

Finally, the *Massachusetts*' Supreme Court majority and dissenting opinion disagreed on whether the causation element could be met.[146] While both opinions generally agreed on the chain of causation, that vehicle emissions can lead to global warming which can cause the sea levels to rise due to the polar caps melting, both opinions simply disagreed on whether or not the chain was too attenuated.[147]

D. *Applying the* Massachusetts' *Opinions' Analysis to* Biological Diversity

Biological Diversity correctly finds that no actual injury was found because the Petitioners never actually alleged injury.[148] But, *Biological Diversity* analyzes whether injury would have been found anyway and concludes that the harm was generalized and therefore would preclude injury standing.[149] This analysis follows the *Massachusetts*' dissenting opinions but appears to ignore the *Massachusetts*' majority and *Akins*. The following passage in *Biological Diversity* raises this question.

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[142] *Akins*, 524 U.S. at 24.
[143] *See Massachusetts*, 549 U.S. at 522.
[144] *See id.* at 535-60; Massachusetts v. EPA, 415 F.3d 50, 59-82 (D.C. Cir. 2005), *rev'd* 549 U.S. 497 (2007).
[145] *See Massachusetts*, 549 U.S. at 535-60; *Massachusetts*, 415 F.3d at 59-82.
[146] *Massachusetts*, 549 U.S. at 523, 542.
[147] *Id.*
[148] *See* Ctr. for Biological Diversity v. U.S. Dept. of Interior, 563 F.3d 466, 477 (D.C. Cir. 2009).
[149] *Id.* at 477.

> Moreover, to the extent that Petitioners allege that the Leasing Program caused any *actual* harm to any territory, this harm is limited to areas of the OCS-areas that are owned by the federal government, not by a state or Native American tribe. Aside from these allegations of generalized harm brought about by climate change, Petitioners have not demonstrated that climate change would directly cause any diminution of Point Hope's territory any more than anywhere else. Accordingly, without this necessary element being present, we find that *Massachusetts's* limited holding does not extend to the standing analysis in this case.[150]

Asserting that the Petitioners did not allege harm, the passage goes further to state that even if there was harm found, the harm occurred in areas that the Petitioners did not own.[151] But in looking to precedent, it is readily shown that simply owning an area is not a prerequisite to showing that injury occurred. Numerous cases have held that injury occurs when the plaintiffs are deprived from access to various entities due to the defendant's action.[152] The important test is whether actual injury occurred, not whether actual injury occurred to an entity that the plaintiff must own.

Throughout *Biological Diversity,* the opinion sought separation between the case's facts and decision and that of *Massachusetts.* In attempting to distinguish *Massachusetts* in order to show that the *Biological Diversity* facts do not afford it *Massachusetts*' standing, the court explicitly stated that *Massachusetts* stands only for the limited proposition that when a harm is widely shared, a sovereign has standing to sue when that sovereign's interests, separate from the citizens it represents, are harmed.[153] But a fair reading of *Massachusetts* shows that the case does not stand only for that limited proposition.

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[150] *Id.*
[151] *Id.*
[152] *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727 (1972).
[153] *Ctr. for Biological Diversity*, 563 F.3d at 476-77.

Biological Diversity's standing analysis is an application of the *Massachusetts*' dissents, not the majority opinion. Like the dissenting opinions, one of which was written by Judge Sentelle, *Biological Diversity* characterizes *Massachusetts* as an illustrative case of both a sovereign exception and an easing of the standing analysis to allow the otherwise inactionable generalized harm. As the *Massachusetts*' majority and *Akins* have shown, a generalized harm does not preclude standing so long as that harm is concrete.

Additionally, using the *Massachusetts*' Supreme Court dissent, *Biological Diversity* also attacks the Petitioners' causation argument and concludes that they have not established an injury fairly traceable to the challenged action.[154] In stating that the Petitioners cannot show that Interior's acts will cause an actual injury, the court does not follow the precedent that the *Massachusetts*' majority set in allowing climate change harm that does not have direct causation. Specifically, *Biological Diversity* asserts that too many attenuated steps have occurred and therefore a link cannot be established.[155] The court describes numerous steps to attempt to show that the claim is attenuated, such as stating that the Leasing Program will bring about drilling, which will bring about more oil, which will then be consumed.[156] However, as the *Massachusetts*' majority opinion has shown, the presence of multiple steps to an injury does not preclude a showing of causation. The *Biological Diversity* opinion appears to replace the words "fairly traceable" in its analysis with "really easily traceable."

E. *Why* Biological Diversity's *Interpretation of* Massachusetts *Matters*

Even if the Petitioners had an alleged injury in *Biological Diversity*, it is not clear that the majority's analysis would have conferred standing. *Biological Diversity's* interpretation of *Massachusetts* matters because it generally provides an example of how courts will analyze future

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[154] *Id.* at 478.

[155] *Id.* (noting that the less indirect the claim, the less likely the plaintiff will be able to establish a link (citing Allen v. Wright, 468 U.S. 737, 757-58 (1984))).

[156] *Id.*

standing claims that involve a harm caused by climate change. Specifically, the interpretation matters for three reasons.

First, jurisdiction to review agency decisions is usually vested in the D.C. Circuit.[157] Therefore, *Biological Diversity's* interpretation of the *Massachusetts*' standing analysis creates precedent for other D.C. Circuit cases to follow. Second, *Biological Diversity's* attempt to define and frame the scope of the *Massachusetts*' holding risks creating precedent that actually follows the *Massachusetts*' dissenting opinions' interpretation rather than the Supreme Court *Massachusetts*' majority. Future litigation cases could be decided using *Biological Diversity's* determination that a petitioner needs land in order to claim harm, a chain of causation can be too attenuated if there are more than a few steps between the action and the harm, and a sovereign entity exception alters the normal injury standing analysis. All of these interpretations are either erroneous or do not recognize previous precedent. Third, and most important, *Biological Diversity's* analysis points to a standing jurisprudence that does not recognize generalized harms as being able to survive a standing analysis. An interpretation against allowing standing for generalized harm claims is in direct contradiction to the injury analysis articulated in *Massachusetts* and *Akins*. Subsequently, if the new precedent *Biological Diversity* created holds, concrete, widely shared harms will no longer allow standing and the analysis will depart from Supreme Court precedent.

VI. CONCLUSION

At its most ambitious interpretation, *Biological Diversity* limits the scope of *Massachusetts* by showing that *Massachusetts* is an exception, not the new rule. However, this note has articulated a "middle ground" argument. Although *Biological Diversity's* discussion of a generalized injury is susceptible on the grounds that it seems to choose to follow the *Massachusetts*' dissent rather than Supreme Court precedent, *Biological Diversity* correctly decided that the Petitioner's inability to show actual

[157] John G. Roberts Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 389 (2006).

injury forecloses standing. The standing analysis is the most important legacy *Biological Diversity* leaves because the ability of individuals to challenge government programs that may allow global warming lies in whether or not standing jurisprudence will move toward a more expansive or intrusive interpretation. If standing analysis moves towards a liberal interpretation of *Massachusetts*, standing considerations will no longer bar global warming litigants from the courthouse door; anyone seeking to bring suit on behalf of the environment will be able to withstand a standing challenge, and a claim of injury will no longer be a prerequisite to surviving a standing analysis. However, if a standing analysis moves away from the liberal interpretation of *Massachusetts* to the standards and spirit articulated in *Biological Diversity*, *Biological Diversity* will continue to serve as precedent to show that in order for a petitioner to bring climate change claims that *Massachusetts* now appears to allow, actual, fairly easily traceable, non-generalized injury needs to be alleged.[158]

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[158] For example, see *Comer v. Murphy USA*, 585 F.3d 855 (5th Cir. 2009) and *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009) for cases that used *Biological Diversity* to articulate that not showing an alleged injury precludes standing.