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ON THIN AIR: STANDING, CLIMATE CHANGE, AND THE NATIONAL ENVIRONMENTAL POLICY ACT

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I. INTRODUCTION

Considerable attention has been given to the growth in litigation relating to the causes and consequences of global climate change.[1] Much of that attention has focused on litigation centering on the authority of the U.S. Environmental Protection Agency ("EPA") to regulate greenhouse gas ("GHG") emissions under the Federal Clean Air Act ("CAA").[2] The most notable of these cases is *Massachusetts v. EPA*,[3] in which the U.S. Supreme Court ruled that the EPA has authority under the CAA to regulate vehicle tailpipe emissions of GHGs.[4] More recently, the focus has shifted to cases in which governmental and private party plaintiffs have brought climate change-related claims based on common law nuisance theories; however, as a general matter, these cases tend to

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1 *See* MARK FULTON ET AL., GROWTH OF U.S. CLIMATE CHANGE LITIGATION: TRENDS & CONSEQUENCES (2010), *available at* http://www.dbcca.com/dbcca/EN/_media/US_CC_Litigation.pdf; *see also* John Schwartz, *Courts as Battlefields in Climate Fights*, N.Y. TIMES, Jan. 26, 2010, at A1 (discussing climate change cases in the federal courts).

2 42 U.S.C. §§ 7401–7626 (2006).

3 549 U.S. 497 (2007).

4 The Court's ruling in *Massachusetts v. EPA* was limited to section 202(a)(1) of the CAA and the EPA's regulation of GHG emissions from mobile sources; however, the decision suggested that the federal government also has the authority to regulate GHG emissions from stationary sources, like coal-fired electrical generation units ("EGUs"). *Id.* at 528–29. In *Coke Oven Environmental Taskforce v. EPA*, ten states, two cities, and three environmental groups challenged EPA's refusal to regulate carbon dioxide emissions from power plants under EPA regulations governing stationary sources. Petition for Review, Coke Oven Envtl. Taskforce v. EPA, No. 06-1149 (D.C. Cir. Apr. 7, 2006). The court subsequently remanded the matter to the EPA for further consideration in light of the Supreme Court's decision in *Massachusetts v. EPA*. New York v. EPA, No. 06-1322 (D.C. Cir. Sept. 24, 2007) (order remanding in light of new case law). In December 2010, the parties entered into a settlement agreement that required the EPA to promulgate GHG standards of performance for new and modified Electric Utility Steam Generating Units ("EGUs") by May 26, 2012. New York v. EPA Settlement Agreement, *available at* http://www.epa.gov/airquality/pdfs/boilerghgsettlement.pdf.

get dismissed on grounds that the claims asserted raise non-justiciable political questions or are preempted by the EPA's regulatory powers.[5]

Less attention has been given to climate change litigation brought under the first and arguably most wide-ranging of modern U.S. environmental laws: the National Environmental Policy Act of 1969 ("NEPA").[6] NEPA is the principal federal statute that reflects the country's priorities for protecting the natural environment from degradation by humans. Congress declared that "it is the continuing policy of the [f]ederal [g]overnment . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."[7] Congress also directed the federal

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[5] *See, e.g.*, Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 883 (N.D. Cal. 2009) (holding that plaintiffs cannot proceed because they have no standing and because of the political question doctrine); California v. Gen. Motors Corp., No. C06–05755MJJ, 2007 WL 2726871, at *16 (N.D. Cal. Sept. 17, 2007) (explaining why the political question doctrine is a bar to these types of suits); Comer v. Murphy Oil USA, Inc., No. 1:05-CV-436-LG-RHW, 2007 WL 6942285, at *1 (S.D. Miss. Aug. 30, 2007), *rev'd*, 585 F.3d 855 (5th Cir. 2009) (granting the defendant's motion to dismiss for lack of standing on political question grounds); Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005), *vacated*, 582 F.3d 309 (2d Cir. 2009) (reversing the trial court's dismissal of the original action brought under the federal common law of nuisance or, in the alternative, state nuisance law, to compel various electric power utilities to cap and then reduce their GHG emissions); *see also* Victor E. Schwartz, Phil Goldberg & Corey Schaecher, *Why Trial Courts Have Been Quick to Cool "Global Warming" Suits*, 77 TENN. L. REV. 803, 813 (2010) (noting that every time such a case has come before a federal judge, the judge has dismissed the case based on the political question doctrine). The U.S. Supreme Court granted certiorari review in *Connecticut v. American Electric Power Co.* and overturned the decision of the appellate court in light of *Massachusetts v. EPA*. Connecticut v. Am. Elec. Power Co., 131 S. Ct. 2527 (2011). The Court found that the authority given to the EPA to regulate GHG emissions under the CAA displaced federal common law claims involving the same subject matter. *Id.*

[6] National Environmental Policy Act of 1969, Pub. L. No. 91-190, § 102, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. § 4321 (2006)). The enactment of NEPA predates by one year the 1970 enactment of the modern CAA. Clean Air Act Extension of 1970, Pub. L. No. 91-604, § 111, 84 Stat. 1676 (1970). NEPA, therefore, should be viewed as an important point of reference for courts seeking to construe Congress' intent concerning the EPA's authority to regulate GHG emissions under the CAA.

[7] National Environmental Policy Act § 101(b). Congress also declared that:

> In order to carry out the policy set forth in this Act, it is the continuing responsibility of the [f]ederal [g]overnment to use all practicable means, consist [sic] with other essential considerations of national policy, to improve and coordinate [f]ederal plans, functions, programs, and resources to the end that the [n]ation may—
>
> (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
>
> (2) assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;

government to promote that policy through a detailed analysis of the environmental impacts of "proposals for legislation and other major [f]ederal actions significantly affecting the quality of the human environment."[8]

The notion that climate change is an environmental impact that warrants consideration under NEPA is a relatively recent development.[9] The issue was raised in only a few cases brought by environmental groups and government entities in the late 1980s and early 1990s, and none of those cases provided a basis for directing further federal agency

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> (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
>
> (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;
>
> (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
>
> (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

Id.

[8] *Id.* § 102(C). Specifically, with respect to all such legislative proposals and "major" federal actions, agencies must provide:

> a detailed statement . . . on—
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> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id.

[9] Concern over climate change was mentioned only in passing during the congressional hearings leading to NEPA's enactment in 1969. *See* H.R. REP. NO. 91-378, at 5–6 (1969). The report cited testimony by Dr. David M. Gates, director of the Missouri Botanical Gardens and Chairman of the Board of Advisors to the Ad Hoc Committee on the Environment, that:

> [t]he complexity of the earth's ecosystem . . . makes understanding it and the management of it a massive challenge . . . [*i*]s *the climate changing in an unnatural manner* . . . [h]ow much production of inorganic products can we produce [sic] without fouling the global system . . . [t]oday we are manipulating an extremely complex system: The ecosystems of the earth, the units of the landscape, and we do not know the consequences of our actions until it is too late.

Id. (emphasis added).

action.[10] The idea began to receive serious attention in the late 1990s, however, when the Council on Environmental Quality ("CEQ") issued draft guidance encouraging federal government agencies to consider climate change as part of their routine analysis of the environmental impacts of federal programs and actions.[11] The draft guidance reviewed what was then the current scientific understanding of climate change and the evolving concern that human activities involving the emission of GHGs—particularly carbon dioxide—were the principal cause of the phenomenon. The draft guidance stated that, while "very few federal agencies to date have focused on global climatic change in their NEPA documents, federal agencies should be aware of how their proposals may contribute to or be affected by climatic changes," and that "[e]ach [federal] agency must exercise its own independent judgment and discretion . . . to determine the extent to which it should assess global climate change in its NEPA documents."[12]

In the nearly fifteen years since CEQ issued its initial draft guidance, there has been a dramatic growth in litigation asserting climate change claims under both NEPA and various corollary state law statutes, including the California Environmental Quality Act ("CEQA").[13] At the same time, however, some attempts to use NEPA as a means of responding to the challenges of global climate change may have gone beyond what Congress likely intended when the statute was enacted. This Article will provide an overview of NEPA and some of the issues raised in litigation to address climate change in that context, focusing on whether plaintiffs are sufficiently injured by potential climate change to have standing to challenge federal agency decision-making.[14] The Article will also address the potential implications of *Massachusetts v.*

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[10] *See, e.g.*, Found. on Econ. Trends v. Watkins, 794 F. Supp. 395 (D.D.C. 1992) (challenging forty-two actions and programs by the U.S. Departments of Energy, Agriculture, and the Interior for failure to evaluate their implications for the "greenhouse effect" under NEPA); City of Los Angeles v. Nat'l Highway Traffic Safety Admin., 912 F.2d 478 (D.C. Cir. 1990) (challenging federal fuel economy standards based on a failure to consider global warming as part of a NEPA review).

[11] *See* Memorandum from Dinah Bear, CEQ Gen. Counsel, to all Federal Agency NEPA Liaisons, Re: Draft Guidance Regarding Consideration of Global Climatic Change in Environmental Documents Prepared Pursuant to the National Environmental Policy Act (Oct. 8, 1997) (on file with author), *available at* http://www.boemre.gov/eppd/compliance/reports/ceqmemo.pdf. The CEQ was established within the Executive Office of the President and oversees federal agency implementation of, and compliance with, NEPA pursuant to the statute. *See* 42 U.S.C. §§ 4342, 4344 (2006).

[12] Memorandum from Dinah Bear to all Federal Agency NEPA Liaisons, *supra* note 11, at 5.

[13] California Environmental Quality Act, CAL. PUB. RES. CODE § 21000 (West 2010).

[14] *See infra* Parts II–III (discussing the NEPA and recent Supreme Court cases applying the NEPA to standing issues).

EPA, *Summers v. Earth Island Institute*, and *Monsanto v. Geertson Seed Farms*, three recent Supreme Court decisions addressing standing and available remedies in NEPA cases.[15] The Article then examines constitutional standing for global climate change cases brought under the NEPA.[16]

II. OVERVIEW OF THE NEPA PROCESS

As noted, the NEPA review process is triggered whenever a federal agency proposes "legislation [or] other major [f]ederal actions significantly affecting the quality of the human environment."[17] The statute does not define what constitutes a "[m]ajor [f]ederal action," and CEQ's implementing regulations on this subject are vague and somewhat circular.[18] Determining whether a federal action is a "major" federal action depends fundamentally on whether its environmental impacts are "significant[]."[19] The impacts' significance depends on their context and intensity.[20] Moreover, actions may cause environmental

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15 *See infra* Part IV (discussing *Massachusetts*, *Summers*, and *Monsanto*).

16 *See infra* Part VI (examining recent cases such as *Border Power Plant Working Group v. DOE*, *Friends of the Earth, Inc. v. Watson*, and *Center for Biological Diversity v. U.S. Department of the Interior*).

17 National Environmental Policy Act of 1969, Pub. L. 91-190, § 102, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. § 4321 (2006)).

18 *See* 40 C.F.R. § 1508.18 (2010) (defining "[m]ajor [f]ederal action" as "actions with effects that may be major and which are potentially subject to [f]ederal control and responsibility"). The regulations do provide that major federal actions generally fall within one or more listed categories, including:

> (1) Adoption of official policy such as rules, regulations, and [formally adopted administrative] interpretations . . . treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.
>
> (2) Adoption of formal plans . . . which guide or prescribe alternative uses of [f]ederal resources . . . .
>
> (3) Adoption of programs . . . [or] systematic and connected agency decisions allocating agency resources . . . .
>
> (4) Approval of specific projects, such as construction or management activities located in a defined geographic area.

Id. § 1508.18(b)(1)–(4).

19 *See id.* § 1508.18 ("Major reinforces but does not have a meaning independent of significantly.").

20 *Id.* § 1508.27(a)–(b). "[T]he significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. [It can also] var[y] with the setting of the proposed action." *Id.* § 1508.27(a). "Intensity . . . refers to the severity of impact." *Id.* § 1508.27(b) (emphasis omitted). It takes the following considerations into account:

> (1) Impacts . . . may be both beneficial and adverse. . . .

effects that may not be significant in their own right, but could contribute to a cumulative impact that is significant.[21]

Once an agency decides that a proposed action is a major federal action triggering NEPA, it must then determine whether to prepare an environmental impact statement ("EIS").[22] The agency normally will prepare an EIS if the proposal is of a type that typically requires one.[23] If the proposal is, instead, covered by a categorical exemption for projects not typically expected to have significant environmental consequences, no further environmental review is required under NEPA.[24] In any other

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> (2) The degree to which the proposed action affects public health or safety.
>
> (3) Unique characteristics of the [affected] geographic area . . . .
>
> (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
>
> . . . .
>
> (6) The degree to which the action may establish a precedent for future actions with significant effects . . . .
>
> (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. . . .
>
> (8) The degree to which the action may adversely affect . . . [or] cause loss or destruction of significant scientific, cultural, or historical resources.
>
> (9) The degree to which the action may adversely affect an endangered or threatened species or its habitat . . . .
>
> (10) Whether the action threatens a violation of [f]ederal, [s]tate, or local law or requirements imposed for the protection of the environment.

Id. § 1508.27(b)(1)–(10).

[21] "Cumulative impact" is defined in the CEQ's regulations as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions . . . ." *Id.* § 1508.7 (emphasis omitted); *cf.* Kleppe v. Sierra Club, 427 U.S. 390, 413–14 (1976) (explaining the importance of administrative agencies in defining cumulative effects).

[22] 40 C.F.R. § 1501.4; Nat'l Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 730 (9th Cir. 2001).

[23] 40 C.F.R. § 1501.4(a)(1).

[24] *Id.* § 1501.4(a)(2). A "categorical exclusion [may be available for] actions which do not individually or cumulatively have a significant effect on the human environment" (i.e., actions that do not really meet the definition of a major federal action in the first place) or which an agency has found, pursuant to its implementing regulations, are of a type that would have "no such effect." *Id.* § 1508.4 (emphasis omitted). Categorical exclusions typically are available for routine, general administrative, or operational activities. *See, e.g.*, 10 C.F.R. § 1021(d) (2010) (listing these exclusions). Appendix A contains Department of Energy ("DOE") categorical exclusions for general agency activities such as "[r]outine administrative/financial/personnel actions[,] . . . [c]ontract interpretations/amendments/modifications, clarifying or administrative[,] . . . [t]ransfer of property, use unchanged[, and the] [a]ward of contracts for technical support/management and operation/personal services." *Id.* at app. A. Appendix B contains DOE categorical exclusions for specific agency actions such as minor rate increases, training exercises and simulations, and routine

circumstance, an agency will normally prepare an initial environmental assessment ("EA") of the project's potential environmental impacts.[25] EAs are intended to be concise, public documents that contain "sufficient evidence and analysis [to allow] for [a] determin[ation] [of] whether to prepare [either] an [EIS] or a finding of no significant impact" ("FONSI").[26] A FONSI is a finding that the project will not have significant environmental impacts or that those impacts will be effectively mitigated through project modifications.[27] If no categorical exclusion applies, and issuance of a FONSI cannot be justified, the agency ordinarily must prepare an EIS. An EIS is typically prepared using a standard format that includes, among other things: (1) a description of the purpose of, and need for, the proposed action; (2) a discussion of alternatives to the proposed action, including the proposed action itself; (3) a description of the affected environment; and (4) an analysis of the proposal's environmental consequences.[28]

The preparation of an EIS is a public process, and interested individuals and agencies are afforded opportunities to submit comments on a draft version of the document.[29] The agency preparing the EIS must consider comments received and must respond in one or more of the following ways by: "(1) [m]odify[ing] alternatives including the proposed action[;] (2) [d]evelop[ing] and evaluat[ing] alternatives not previously given serious consideration by the agency[;] (3) [s]upplement[ing], improv[ing], or modify[ing] its analyses[;] (4) [m]ak[ing] factual corrections[; and/or] (5) [e]xplain[ing] why the comments do not warrant further agency response . . . ."[30] Changes made as a result of these responses must be reflected in the final EIR, which can then be used as the basis for final agency action with respect to the proposal described in the document.

NEPA itself does not provide any mechanism for challenging the adequacy of an EIS, or the way in which the EIS was prepared, under the law. Unlike many other federal environmental laws, NEPA does not include a so-called "citizen suit" provision that allows private parties to

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maintenance/custodial services for buildings, structures, infrastructures, and equipment. *Id*. at app. B.

25 Silverton Snowmobile Club v. U.S. Forest Serv., 433 F.3d 772, 780 (10th Cir. 2006); 40 C.F.R. § 1501.4(c).

26 40 C.F.R. § 1508.9.

27 Ocean Advocates v. U.S. Army Corps of Eng'rs, 402 F.3d 846, 864 (9th Cir. 2005); Spiller v. White, 352 F.3d 235, 237 (5th Cir. 2003); 40 C.F.R. §§ 1508.9, 1508.13.

28 40 C.F.R. § 1502.10.

29 *Id*. § 1503.1.

30 *Id*. § 1503.4(a).

initiate civil actions to enjoin compliance with the statute.[31] Instead, actions to prosecute claims for alleged NEPA violations must be brought under the Administrative Procedure Act ("APA"),[32] on grounds that a U.S. governmental agency has failed to comply with applicable procedural requirements in approving the proposed action.[33] Under the APA, any person "aggrieved" by a federal agency action may bring a lawsuit to challenge the action as procedurally deficient or otherwise inconsistent with applicable law; this includes the provisions of NEPA.[34] The Court, on several occasions, has defined the essential requirements for aggrieved parties to bring suit against a federal agency under the NEPA.

III. THE ESSENTIAL REQUIREMENTS FOR STANDING IN ENVIRONMENTAL CASES: *LUJAN V. DEFENDERS OF WILDLIFE* AND *FRIENDS OF THE EARTH V. LAIDLAW*

The 1992 U.S. Supreme Court decision, *Lujan v. Defenders of Wildlife*,[35] is the seminal case defining the contemporary requirements for standing in environmental cases. *Lujan* was not a NEPA case; rather, it specifically concerned the authority of the Department of the Interior to adopt regulations implementing the Federal Endangered Species Act ("ESA").[36] Nevertheless, it has been cited widely as the case that delineated the principal criteria for standing that must be met by

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[31] *See* Cetacean Cmty. v. Bush, 386 F.3d 1169, 1179 (9th Cir. 2004) (citing Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882 (1990)) ("[N]o provision of NEPA explicitly grants any person or entity standing to enforce the statute."). An example of a citizen suit provision that has been widely used over the years is section 505 of the Clean Water Act ("CWA"). 33 U.S.C. § 1365 (2006). Section 505 provides, subject to certain limitations, that:

> [A]ny citizen may commence a civil action on his own behalf—
>
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency . . . who is alleged to be in violation of [the Act] . . . or
>
> (2) against the Administrator [of the United States EPA] to perform any act or duty under this chapter which is not discretionary with the Administrator.

Id.

[32] 5 U.S.C. § 702 (2006).

[33] *Cetacean Cmty.*, 386 F.3d at 1176–77.

[34] 5 U.S.C. § 702(a).

[35] 504 U.S. 555 (1992).

[36] 16 U.S.C. § 1531 (2006). The regulations at issue in the case were ones intended "to render [the statute] applicable only to actions within the United States or on the high seas." *Lujan*, 504 U.S. at 558.

plaintiffs challenging governmental action under NEPA, as well as other federal environmental statutes.[37]

The majority opinion in *Lujan*, delivered by Justice Scalia, provides a succinct summary of federal judicial standing requirements. According to Justice Scalia:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."[38]

The *Lujan* Court found that the plaintiffs failed to meet the first of these criteria, "injury in fact," because they were unable to show how the government's implementing regulation resulted in imminent injury to their personal interests.[39] According to the Court, "'the "injury in fact" test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.'"[40] The Court also found the plaintiffs failed to meet the third criterion—

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[37] *See, e.g.*, Summers v. Earth Island Inst., 555 U.S. 488 (2009) (denying standing to environmental groups challenging regulations governing procedures for decisions implementing land and resource development plans under the Forest and Rangeland Renewable Resources Planning Act of 1974); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167 (2000) (allowing standing to an environmental group seeking imposition of injunctive relief in a citizen suit under the CWA); Salmon Spawning & Recovery Alliance v. Gutierrez, 545 F.3d 1220 (9th Cir. 2008) (denying standing to an environmental group seeking to pursue claims against the National Marine Fisheries Service, the Department of Commerce, and the State Department). Furthermore, it was alleged that United States' entry and participation in the Pacific Salmon Treaty ("Treaty") violated the Endangered Species Act ("ESA") and the APA. *Id.*; Pye v. United States, 269 F.3d 459 (4th Cir. 2001) (allowing standing to a neighboring landowner challenging a U.S. Army Corps of Engineers' decision to issue a permit to construct a road crossing within the waters of the United States).

[38] *Lujan,* 504 U.S. at 560–61 (alterations in original) (footnote omitted) (citations omitted).

[39] *Id.* at 563 (internal quotation marks omitted).

[40] *See id.* (quoting Sierra Club v. Morton, 405 U.S. 727, 734–35 (1972)).

"redressability"—because they had chosen to challenge a generalized level of government action, ESA implementing regulations, rather than attack separate decisions involving particular projects that might allegedly have caused them harm.[41] According to Justice Scalia, "'suits challenging, not specifically identifiable [g]overnment violations of law, but the particular programs agencies establish to carry out their legal obligations . . . [are], even when premised on allegations of several instances of violations of law, . . . rarely if ever appropriate for federal-court adjudication.'"[42]

Finally, the Court addressed the claim that respondents had standing because they had suffered a "procedural injury." The Court based its determination on the ESA's "citizen suit" provision, which states that, "'any person may commence a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of'" the statute.[43] The appellate court held that this "provision create[d] a procedural righ[t] . . . in all 'persons,'—so that anyone could file a suit" challenging the government's "failure to follow [ESA procedures], notwithstanding [the absence of] any discrete injury flowing from that failure."[44] The Supreme Court rejected that position, largely on the grounds that plaintiffs' ESA challenge was no more unique to the plaintiffs than to members of the public at large, and therefore, it did not state a justiciable case or controversy under Article III of the United States Constitution.[45]

The majority opinion in *Lujan* did not hold that a plaintiff could never establish injury based solely on a "procedural injury;" indeed, Justice Scalia specifically distinguished the case from one:

> where plaintiffs [were] seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs (e.g., the procedural requirement for a hearing prior to denial of their license application, or the procedural requirement for an

41 *Id.* at 568.

42 *Id.* (alteration in original) (quoting Allen v. Wright, 468 U.S. 737, 759–60 (1984)).

43 *Id.* at 571–72 (alteration in original); *see* 16 U.S.C. § 1540(g) (2006) (setting forth the ESA's citizen suit provision).

44 *See Lujan*, 504 U.S. at 572 (alteration in original) (quoting the court of appeals' decision at 911 F.2d 117, 121–22 (8th Cir. 1990)) (internal quotation marks omitted).

45 *Id.* at 573–74.

> environmental impact statement before a federal facility is constructed next door to them).[46]

Moreover, the Court made clear that "[n]othing in this [opinion] contradicts the principle that '[t]he . . . injury required by [Article] III may exist solely by virtue of "statutes creating legal rights, the invasion of which creates standing."'"[47]

Despite these qualifications, Justice Blackmun, with whom Justice O'Connor joined, wrote a strong dissent arguing that the majority had sought "to impose fresh limitations on the constitutional authority of Congress to allow citizen suits in the federal courts for injuries deemed 'procedural' in nature," and "conclud[ed] that any 'procedural injury' suffered by respondents is insufficient to confer standing."[48] The dissent rejected this conclusion, and pointed out that the Court in fact had found standing in prior cases involving "procedurally oriented statutes," including NEPA.[49] Justice Blackmun then expressed the "hope[] that over time the Court will acknowledge that some classes of procedural duties are so enmeshed with the prevention of a substantive, concrete harm that an individual plaintiff may be able to demonstrate a sufficient likelihood of injury just through the breach of that procedural duty."[50]

The notion that the majority opinion in *Lujan* imposed fresh limitations on the authority of Congress to allow citizen suits in the federal courts was undermined to some degree by the Court's decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc*.[51] Like

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46 *Id*. at 572.

47 *Id*. at 578 (alteration in original) (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975)) (internal quotation marks omitted). Justice Scalia went on to clarify, however, that:

> As we said in *Sierra Club*, "[Statutory] broadening [of] the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." Whether or not the principle set forth in *Warth* can be extended beyond that distinction, . . . in suits against the [g]overnment, at least, the concrete injury requirement must remain.

Id. (alteration in original) (citation omitted).

48 *Id*. at 589–90, 601 (Blackmun, J., dissenting).

49 *Id*. at 603 (citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 348 (1989)). The "Court considered injury from violation of the 'action-forcing' procedures of [NEPA], in particular the requirements for issuance of [EIS]." *Id*.

50 *Id*. at 605. Expressing his hopes for future expansion of standing to incorporate strictly procedural injuries, Justice Blackmun observed that he could not join the majority opining in what he thought "amount[ed] to a slash-and-burn expedition through the law of environmental standing. In my view, '[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.'" *Id*. at 606 (alteration in original) (quoting Marbury v. Madison, 5 U.S. 137 (1803)).

51 528 U.S. 167 (2000).

Lujan, *Laidlaw* focused on the issue of standing to sue under a direct citizen suit provision of a federal environmental statute—in this case, the Federal Clean Water Act ("CWA").[52] Several environmental groups brought the case, seeking injunctive relief and the imposition of civil penalties, for alleged violations of a state-issued permit authorizing the discharge of treated industrial wastewater into the North Tyger River in South Carolina.[53] The government moved for summary judgment on, inter alia, the grounds that the plaintiffs had failed to present evidence demonstrating injury in fact, as required under *Lujan*, and that the plaintiffs therefore lacked Article III standing to bring the lawsuit.[54] The Court, however, rejected the defendant's argument on this point.

Relying on its decision in *Lujan,* the Court found that factual averments in affidavits submitted by the plaintiffs adequately documented the existence of an injury in fact.[55] The Court pointed out that it had previously "held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity."[56] That these averments were conditional in nature—claiming that the plaintiffs' members would use the North Tyger River for recreation if it were not being polluted—was not material in this context. According to the Court, they still could not be equated with the speculative "'"some day" intentions' to visit endangered species halfway around the world," which the Court found insufficient to show injury in fact in *Lujan*.[57]

The *Laidlaw* case did not deal with NEPA per se. Nevertheless, the Court's discussion of the standing issue bears directly on the capacity of private citizens to pursue challenges under NEPA—including actions with potential global climate change consequences. The Court stated

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52 33 U.S.C. § 1251 (2006). Section 505(a) of the CWA authorizes any "person or persons having an interest which is or may be adversely affected" by an alleged violation of the statute to bring an action to compel future compliance with the Act, through the imposition of injunctive relief or civil penalties. 33 U.S.C. § 1365(a), (g).

53 The permit was issued by the South Carolina Department of Health and Environmental Control ("DHEC"), acting pursuant to authority delegated to it under the CWA. *See* 33 U.S.C. § 1342(a)(1) (delegating authority under the CWA).

54 *Friends of the Earth, Inc.*, 528 U.S. at 177.

55 *Id.* at 180–82. The factual averments stated, for example, that the plaintiffs' members lived near the permitted discharge point, occasionally drove over the river, which looked and smelled polluted, and would like to fish, camp, swim, and picnic in and near the river but would not do so because of concerns that the river was polluted. *Id.*

56 *Id.* at 183 (quoting Sierra Club v. Morton, 405 U.S. 727, 735 (1972)). The Court stated, "'[o]f course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing.'" *Id.* (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 562–63 (1992)).

57 *Id.* at 169 (citing *Lujan*, 504 U.S. at 564).

that its ruling on standing in *Laidlaw* was entirely consistent with its earlier decision in *Lujan*, which involved both NEPA and the APA.[58] In *Lujan*, the Court held that the plaintiff could not establish standing to sue "merely by offering 'averments which state only that one of [the organization's] members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action.'"[59] In contrast, the *Laidlaw* Court found that the "reasonable concerns" expressed by the plaintiffs and their members about the effects of pollutant discharges to the North Tyger River "directly affected" their "recreational, aesthetic, and economic interests," and they "present[ed] dispositively more than the mere 'general averments' and 'conclusory allegations' found inadequate in *Lujan* . . . ."[60]

IV. RECENT SUPREME COURT DECISIONS ON STANDING IN ENVIRONMENTAL CASES

Since its decision in *Laidlaw*, the Supreme Court has decided several cases addressing standing in environmental cases. The first of these, *Massachusetts v. EPA*, considered the issue in the context of global climate change.[61] Two years after the Court decided *Massachusetts v. EPA*, it elaborated on the standing issue in *Summers v. Earth Island Institute*.[62] Finally, in *Monsanto Co. v. Geertson Seed Farms*,[63] the Court dealt with standing explicitly in the context of NEPA.[64] Each of these cases reflect a commitment by the Court to stand by the strict requirements for standing articulated in *Lujan*. Furthermore, these cases suggest that the relatively cavalier approach taken in cases such as *Border Power* and *Watson* would not and should not be sustained.[65] This Part addresses each of these cases in turn, beginning with *Massachusetts v. EPA*.

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58 Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990). The plaintiff in *Lujan v. National Wildlife Federation* alleged that the Director of the Federal Bureau of Land Management ("BLM") and other federal parties had violated the Federal Land Policy and Management Act of 1976 ("FLPMA") and NEPA in the course of administering the BLM's land withdrawal appraisal program, pursuant to which they make various decisions affecting the status of public lands and their availability for private uses, including mining. *Id.* The plaintiff contended that the program should be set aside because it was arbitrary, variable, an abuse of discretion, and not in accordance with law. *Id.*

59 *Friends of the Earth, Inc.*, 528 U.S. at 169 (quoting *Lujan*, 497 U.S. at 889).

60 *Id.* at 169.

61 *See infra* Part IV.A (discussing *Massachusetts v. EPA*).

62 *See infra* Part IV.B (discussing *Summers v. Earth Island Institute*).

63 130 S. Ct. 2743 (2010).

64 *See infra* Part IV.C (discussing *Monsanto Co. v. Geertson Seed Farms*).

65 *See infra* Part V (applying the principles in *Lujan*, *Massachusetts*, *Summers*, and *Monsanto* to district court cases).

A. Massachusetts v. EPA

In 2007, the Supreme Court issued its landmark decision in *Massachusetts v. EPA*.[66] The case addressed the EPA's authority to regulate GHG emissions under the CAA.[67] The plaintiffs, which included twelve states, four local government entities, and a variety of environmental and public interest groups, specifically challenged the EPA's rejection of rulemaking petitions regarding the regulation of tailpipe emissions from cars and trucks under Section 202(a)(1) of the CAA.[68] Of the various governmental and private party plaintiffs, however, only the Commonwealth of Massachusetts was found to have standing.[69]

The Court in *Massachusetts v. EPA* framed its standing analysis squarely within the requirements described in *Lujan*, noting that:

> To ensure the proper adversarial presentation, *Lujan* holds that a litigant must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury.[70]

Moreover, "a litigant to whom Congress has 'accorded a procedural right to protect his concrete interests' . . . 'can assert that right without meeting all the normal standards for redressability and immediacy.'"[71] Finding that only Massachusetts had standing within this framework, the Court stated that it was "of considerable relevance that the party seeking review . . . is a sovereign [s]tate and not, as it was in *Lujan*, a private individual."[72] The Court noted that Congress had granted a procedural right under the APA to challenge the rejection of Massachusetts' rulemaking petition. It also found that, given this right and "Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in [the] standing analysis."[73]

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66 549 U.S. 497 (2007).
67 42 U.S.C. § 7521(a)(1) (2006).
68 *See Massachusetts*, 549 U.S. at 497.
69 *Id.* at 498.
70 *Id.* at 517.
71 *Id.* at 517–18.
72 *Id.* at 518.
73 *Id.* at 520.

Despite this entitlement to "special solicitude," the majority opinion in *Massachusetts v. EPA* made it clear that Massachusetts' right to challenge the EPA's actions met the fundamental requirements of standing enunciated in *Lujan*. According to the Court, "petitioners' submissions as they pertain to Massachusetts have satisfied the most demanding standards of the adversarial process. [The] EPA's steadfast refusal to regulate [GHG] emissions presents a risk of harm to Massachusetts that is both 'actual' and 'imminent'" and therefore sufficient to show injury in fact to Massachusetts' concrete interests.[74] Justice Stevens, writing for the majority, was persuaded to grant Massachusetts standing based, in part, on Massachusetts' argument that it was jeopardized imminently by rising sea levels, which had already begun to engulf the state's coastal land.[75] Moreover, those changes had, and would continue to have, a direct and particularized impact on Massachusetts, which owns a substantial portion of the state's coastal property and operates or maintains a wide variety of coastal-related public resources and infrastructure.[76]

In a vigorous dissent, Chief Justice Roberts criticized Justice Stevens' willingness to give Massachusetts a special status for standing purposes and Stevens' conclusion that the Commonwealth had suffered injury in fact under *Lujan*. On the latter point, Justice Roberts specifically disagreed with the suggestion that Massachusetts' global warming-related injuries could legitimately be considered actual, not conjectural, although by and large these criticisms really centered on the weight given by Justice Stevens to the facts offered by Massachusetts as evidence of its purported coastal injuries.[77] Of perhaps greater note is Justice Roberts' observation regarding the connection between injury in fact and the two other elements of any standing analysis under *Lujan*: causation and redressability. According to Justice Roberts:

> Petitioners' reliance on Massachusetts'[] loss of coastal land as their injury in fact for standing purposes creates insurmountable problems for them with respect to causation and redressability. To establish standing,

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74 *Id*. at 521.

75 *Id*. at 522.

76 *Id*. at 541 n.19.

77 *See id*. at 542–43 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992)). As described by Justice Roberts, the Court observes that "global sea levels rose somewhere between [ten] and [twenty] centimeters over the [twentieth] century as a result of global warming" and that "[t]hese rising seas have already begun to swallow Massachusetts' coastal land." *Id*. at 522 (citation omitted). But none of petitioners' declarations supports that connection. *Id*. at 541.

> petitioners must show a causal connection between that specific injury and the lack of new motor vehicle [GHG] emission standards, and that the promulgation of such standards would likely redress that injury. As is often the case, the questions of causation and redressability overlap. And importantly, when a party is challenging the [g]overnment's allegedly unlawful regulation, or lack of regulation, of a third party, satisfying the causation and redressability requirements becomes "substantially more difficult."[78]

Justice Roberts emphasized that causation and redressability are significant considerations in the analysis of standing in most cases. What Justice Roberts did not acknowledge, however, is that, even under *Lujan*, these factors, particularly redressability, are less significant in cases where the injury in fact is a procedural one.[79] Fundamental to the majority's analysis of Massachusetts' standing, as previously noted, was the fact that Congress had given Massachusetts a procedural right under the APA to challenge the EPA's decision not to regulate GHG emissions; this was part of Justice Stevens justification, giving Massachusetts "special solicitude in our standing analysis."[80] Thus, to the extent that the injury in fact suffered by Massachusetts had a procedural

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[78] *Id.* at 542–43 (citation omitted) (citing *Lujan*, 504 U.S. at 562). As to the issue of causation, Justice Roberts observed:

> Petitioners are never able to trace their alleged injuries back through this complex web to the fractional amount of global emissions that might have been limited with EPA standards. In light of the bit-part domestic new motor vehicle [GHG] emissions have played in what petitioners describe as a 150-year global phenomenon, and the myriad additional factors bearing on petitioners' alleged injury—the loss of Massachusetts coastal land—the connection is far too speculative to establish causation.

Id. As to redressability, Justice Roberts rejected the majority's contention that:

> [R]egulating domestic motor vehicle emissions will reduce carbon dioxide in the atmosphere, *and therefore* redress Massachusetts's injury. But even if regulation *does* reduce emissions—to some indeterminate degree, given events elsewhere in the world—the Court never explains why that makes it *likely* that the injury in fact—the loss of land—will be redressed. Schoolchildren know that a kingdom might be lost "all for the want of a horseshoe nail," but "likely" redressability is a different matter.

Id. at 546.

[79] *Id.* at 517–18 (ruling that the person who has been "'accorded a procedural right to protect his concrete interests' . . . 'can assert that right without meeting all the normal standards for redressability and immediacy'").

[80] *Id.* at 520.

component, the hurdles presented by causation and redressability presumably are diminished under the traditional standing analysis, with a more rigorous assessment of those factors arguably becoming unnecessary.

The implications of an injury in fact being procedural in nature are particularly important in NEPA cases, as that is the essence of the injury that occurs whenever NEPA is violated. Thus, in evaluating standing claims made by plaintiffs in cases raising claim change issues under NEPA, the principal inquiry can legitimately focus on whether those plaintiffs can show a "concrete and particularized" injury to their interest that is "actual or imminent," and not "conjectural" or "hypothetical." As the Supreme Court's most recent decisions on standing in environmental cases confirm, the failure to make such a showing would be fatal.[81]

B. Summers v. Earth Island Institute

On March 3, 2009, the U.S. Supreme Court issued a 5–4 decision, *Summers v. Earth Island Institute*,[82] reversing a holding by the U.S. Court of Appeals for the Ninth Circuit that allowed environmental groups to challenge certain federal actions in the absence of a dispute over their concrete application. In reaching its decision, the Supreme Court affirmed the principle that standing requires at least some showing that members of these groups would suffer a concrete injury to their interests, even when those interests are just procedural in nature.

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[81] In a recent decision involving claims based on climate change, the Supreme Court brushed aside preliminary objections that the plaintiffs (several states, the City of New York, and three private land trusts) could maintain federal common law public nuisance claims against carbon-dioxide emitters (four private power companies and the federal Tennessee Valley Authority). Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011). Speaking for a unanimous court, Justice Ginsburg stated that:

> The petitioners contend that the federal courts lack authority to adjudicate this case. Four members of the Court would hold that at least some plaintiffs have Article III standing under *Massachusetts* [*v. EPA*], which permitted a [s]tate to challenge EPA's refusal to regulate [GHG] emissions, and, further, that no other threshold obstacle bars review. Four members of the Court, adhering to a dissenting opinion in *Massachusetts* [*v. EPA*], or regarding that decision as distinguishable, would hold that none of the plaintiffs have Article III standing. We therefore affirm, by an equally divided Court, the Second Circuit's exercise of jurisdiction and proceed to the merits.

Id. at 2535 (footnote omitted) (citations omitted); *see* Nye v. United States, 313 U.S. 33, 44 (1941).

[82] 555 U.S. 488 (2009).

In December 2003, five environmental groups filed suit in the Eastern District of California challenging a U.S. Forest Service ("Service") decision.[83] The Service refused to apply certain procedural requirements to the Burnt Ridge Project, a decision to hold a salvage sale of timber damaged by a fire on two hundred and thirty-eight acres of forestland in the Sequoia National Forest. These requirements had been included in regulations the Service adopted to implement the Forest Service Decision-Making and Appeals Reform Act of 1992 ("Act").[84] The regulations exempted certain projects, including salvage timber sales, from the Service's general notice and comment and administrative appeals procedures if the projects were otherwise exempt from requirements to prepare an EIS or EA.[85]

The district court initially granted the plaintiffs' request for a preliminary injunction to prevent the Burnt Ridge Project from going forward. The parties subsequently entered into a settlement that removed the validity of the Burnt Ridge sale as an issue in the case.[86] Nevertheless, the district court concluded that plaintiffs retained standing to pursue claims that the Service's procedural regulations were invalid as a general matter. It then adjudicated the merits of those claims, deciding in favor of the plaintiffs and entering a nationwide injunction against application of the regulations.[87]

The Ninth Circuit affirmed the district court's determination that the Service's procedural exemptions were invalid, and upheld the nationwide injunction.[88] The government then sought review of two issues in the U.S. Supreme Court: (1) whether the respondents had standing to pursue their challenge of the Service's regulations in light of the settlement of their specific dispute over the Burnt Ridge Project; and (2) whether a nationwide injunction was appropriate relief. The Court ruled against the respondents on the first issue and did not address the second issue.

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83 The groups that brought the case included the Earth Island Institute, the Sequoia Forest Keeper, the Center for Biological Diversity, Heartwood, Inc., and the Sierra Club. *Id.*

84 Forest Service Decision-Making and Appeals Reform Act of 1992, Pub. L. 102-381, § 322, 106 Stat. 1419 (codified as amended at 42 U.S.C. § 1612 (2006)).

85 36 C.F.R. §§ 215(a), 215.12(f) (2010).

86 Earth Island Inst. v. Pengilly, 376 F. Supp. 2d 994, 999 (E.D. Cal. 2005), *amended in part sub nom.* Earth Island Inst. v. Ruthenbeck, No. CIV F-03-6386 JKS, 2005 WL 5280466, at *2 (E.D. Cal. Sept. 20, 2005), *aff'd in part, remanded in part*, 490 F.3d 687 (2007), *aff'd in part, rev'd in part sub nom.* Summers v. Earth Island Inst., 129 S. Ct. 1142 (2009).

87 Earth Island Inst. v. Ruthenbeck, No. CIV F-03-6386 JKS, 2005 WL 5280466, at *2 (E.D. Cal. Sept. 20, 2005), *aff'd in part, remanded in part*, 490 F.3d 687 (2007), *aff'd in part, rev'd in part sub nom.* Summers v. Earth Island Inst., 129 S. Ct. 1142 (2009).

88 Earth Island Inst. v. Ruthenbeck, 490 F.3d 687 (2007), *aff'd in part, rev'd in part sub nom.* Summers v. Earth Island Inst., 129 S. Ct. 1142 (2009).

Justice Scalia's majority opinion summarized the familiar *Lujan* requirements for standing in the context of a request for injunctive relief.[89] It also recognized the right of environmental and other groups to claim standing on the basis of injuries to the interests of their members.[90] Finally, it accepted, as the government had conceded, that the respondents might have maintained standing had the injuries alleged in connection with the Burnt Ridge Project continued to be at issue. The problem, however, was that respondents had settled their concerns regarding the Burnt Ridge Project, and the injuries they alleged in that connection were therefore no longer at issue. In sum, even if there had been a legitimate basis for bringing their lawsuit in the first place, plaintiffs voluntarily relinquished it through their settlement. According to Justice Scalia:

> We know of no precedent for the proposition that when a plaintiff has sued to challenge the lawfulness of certain action or threatened action but has settled that suit, he retains standing to challenge the basis for that action (here, the regulation in the abstract), apart from any concrete application that threatens imminent harm to his interests. Such a holding would fly in the face of Article III's injury-in-fact requirement.[91]

The opinion also dismissed the argument that respondents had standing to maintain their suit because of a procedural injury, namely that they had been and would continue to be denied the ability to file comments on some Service actions under the challenged regulations. As Justice Scalia stated, "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing."[92] Moreover, "[i]t

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89 Summers v. Earth Island Inst., 129 S. Ct. 1142 (2009).

90 *Id.*

91 *Id.* at 1149–50 (citing City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983)). Other than with respect to the Burnt Ridge Project, plaintiffs submitted only a single affidavit to the district court to document "injuries" sufficient to support standing to challenge the Service's procedural regulation. *Id.* The affidavit included statements by one of the plaintiffs that he had been injured in the past by development on Service land, that he had visited many National Forests before, and that he planned to visit several unnamed National Forests in the future. *Id.* at 1149. The affidavit failed to mention any particular timber sale or other project subject to the regulations at issue. *Id.* The majority opinion dismissed these statements as insufficient to "'support a finding of the "actual or imminent" injury that our cases require.'" *Id.* at 1151 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992)).

92 *Id.*

makes no difference [whether a] procedural right has been accorded by Congress[, as in fact was true in the present case]. That can loosen the strictures of the redressability prong of our standing inquiry . . . . Unlike redressability, however, the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute."[93]

Justice Breyer dissented, joined by Justices Stevens, Souter, and Ginsburg. The dissent criticized the majority's standing analysis, suggesting that it relied too heavily on an argument that the alleged injury to a plaintiff's interest must be "imminent," as opposed to conjectural or hypothetical. Justice Breyer acknowledged that the Court had, in the past, "used the word 'imminent' in the context of constitutional standing."[94] But, he argued, the word was "more appropriately considered in the context of ripeness or the necessity of injunctive relief."[95] When it comes to standing all that is necessary is that "there is a *realistic likelihood* that the challenged future conduct will, in fact, recur and harm the plaintiff."[96] Proposing this "realistic likelihood" test, the dissent relied on the Court's 1983 decision in *Lyons*,[97] which predated *Lujan*'s definitive articulation of the requirements for standing by nearly a decade.[98]

The dissent also suggested that its standing analysis complied with *Massachusetts v. EPA*. Justice Breyer viewed *Massachusetts v. EPA* as holding that the Commonwealth of Massachusetts had "*standing* to complain of a procedural failing, namely, EPA's failure properly to determine whether to restrict carbon dioxide emissions, even though that failing would create Massachusetts-based harm which (though likely to occur) might not occur for several decades."[99] As discussed, however, this characterization is incomplete and somewhat misleading. First, Massachusetts did not merely rely on a characterization of harms it faced through global warming as a "procedural" injury; rather, it offered factual evidence that the Commonwealth was currently suffering concrete harm as a result of global warming.[100] Second, Massachusetts,

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93 *Id.*

94 *Id.* at 1155 (Breyer, J., dissenting).

95 *Id.*

96 *Id.* at 1156 (emphasis in original).

97 City of Los Angeles v. Lyons, 461 U.S. 95 (1983).

98 *Lyons* addressed a set of facts that bore little resemblance to the issues in *Lujan* and *Summers*. *See id.* at 107, 108 n.7 (discussing how the plaintiff had been subject to an unlawful police chokehold in the past and was found to lack standing absent a showing that there was a "realistic threat" that possible recurrence of this behavior would cause him harm in the reasonably near future).

99 *Summers*, 129 S. Ct. at 1156 (Breyer, J., dissenting) (citing Massachusetts v. EPA, 549 U.S. 497, 522–23 (2007)).

100 *Massachusetts*, 549 U.S. at 522. As the Court indicated:

as a state, had a special "stake in protecting . . . quasi-sovereign interests, which entitled [it] to special solicitude in [the Court's] standing analysis."[101] Without its *combined* demonstration of present injury and "quasi-sovereign" status, there is no reason to believe that Massachusetts (any more than the other public and private petitioners) would have been granted the right to proceed. Justice Breyer's suggestion in the dissent in *Summers*—that Article III standing can be established through prediction of a harm that "might not occur for several decades"—is inconsistent with *Massachusetts v. EPA* and with the Supreme Court's jurisprudence on standing, developed subsequent to *Lujan*.[102]

Summers was initially criticized by some as imposing new limitations on the rights of plaintiffs to seek redress for environmental wrongs in federal court.[103] These criticisms were unwarranted. The *Summers* decision simply confirmed the principal that has been widely recognized, since *Lujan*, as fundamental to the constitutional doctrine of

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> According to petitioners' unchallenged affidavits, global sea levels rose somewhere between [ten] and [twenty] centimeters over the [twentieth] century as a result of global warming. These rising seas have already begun to swallow Massachusetts' coastal land. Because the Commonwealth "owns a substantial portion of the state's coastal property," it has alleged a particularized injury in its capacity as a landowner. The severity of that injury will only increase over the course of the next century . . . .

Id. at 522–23 (footnote omitted) (citations omitted).

101 *Id*. at 520.

102 *Summers*, 555 U.S. at 506. In addition to its criticism of the majority opinion's discussion of the test for standing under Article III, the dissent questioned its failure to consider various affidavits submitted by respondents in an endeavor to establish injury subsequent to the district court's judgment. *Id.* at 508–09. In making this point, the dissent relied on "Federal Rule of Civil Procedure 15(d), which says that '[t]he court may permit supplementation even though the original pleading is defective in stating a claim or defense.'" *Id*. at 509 (quoting FED. R. CIV. P. 15(d)). The majority dismissed this argument out of hand, stating that:

> The dissent cites no instance in which "supplementation" has been permitted to resurrect and alter the outcome in a case that has gone to judgment, and indeed after notice of appeal had been filed. If Rule 15(b) allows additional facts to be inserted into the record after appeal has been filed, we are at the threshold of a brave new world of trial practice in which Rule 60 [specifying grounds for relief from district court judgments and orders] has been swallowed whole by Rule 15(b).

Id. at 500.

103 *See, e.g.*, Maria Banda, Comment, Summers v. Earth Island Institute, 34 HARV. ENVTL. L. REV. 321, 321 (2010) (listing a number of law firm "commentators . . . conclud[ing] that the Supreme Court had created additional jurisdictional obstacles for environmental plaintiffs to prove standing in cases involving procedural injuries"); *see also* Michelle Fon Anne Lee, Note, *Surviving* Summers, 37 ECOLOGY L. Q. 381, 383 (2010) ("According to certain commentators, *Summers* represents a significant tightening of standing doctrine . . . .").

standing: namely, that any private party seeking redress from a court must demonstrate a real injury for which redress is indeed meaningful. That requirement applies regardless of whether the interest is substantive, or simply an interest in seeing that the government follows proper administrative procedures to implement its regulatory authority.

C. Monsanto v. Geertson Seed Farms

In *Monsanto Co. v. Geertson Seed Farms*,[104] the Supreme Court addressed standing specifically within the context of a request for injunctive relief from agency actions allegedly violating NEPA. *Monsanto* does not concern climate change per se; however, the Court's treatment of the standing issue reinforces the importance of injury in fact for any case involving claims under NEPA and related environmental statutes.

Monsanto involved a decision by the Animal and Plant Health Inspection Service ("APHIS"), within the U.S. Department of Agriculture, to deregulate a variety of genetically engineered alfalfa known as "Roundup Ready Alfalfa" ("RRA").[105] The district court held that APHIS violated NEPA by issuing its deregulation decision without first completing an EIS.[106] To remedy the violation, the district court: (1) vacated the agency's decision completely deregulating the alfalfa variety in question; (2) ordered APHIS not to act on the deregulation petition in whole, or in part, until it completed a detailed environmental review; and (3) enjoined almost all future planting of the genetically engineered alfalfa pending the completion of that review.[107] The appellate court subsequently affirmed the district court's entry of permanent injunctive relief.[108]

The Court addressed standing as a preliminary issue before addressing the merits of the case:

> Article III standing requires an injury that is (i) concrete, particularized, and actual or imminent, (ii) fairly traceable to the challenged action, and (iii) redressable by a favorable ruling. Petitioners are injured by their inability to sell or license RRA to prospective customers until APHIS completes the EIS. Because that injury is caused by the very remedial order that petitioners

104 130 S. Ct. 2743 (2010).
105 *Id.*
106 *Id.* at 2743–44.
107 *Id.* at 2746.
108 *Id.*

> challenge on appeal, it would be redressed by a favorable ruling from this Court.[109]

With respect to petitioners' contention that respondents lacked standing to seek injunctive relief, the Court rejected petitioners' argument that respondents had failed to show that any of the named respondents were likely to suffer a constitutionally cognizable injury absent injunctive relief.[110] The Court noted the district court's finding that respondents, including conventional alfalfa farmers, had "'established a "reasonable probability" that their organic and conventional alfalfa crops will be infected with the engineered gene' [in RRA] if RRA is completely deregulated."[111] According to the Court, this "reasonable probability of harm" was sufficient to establish standing:

> Such harms, which respondents will suffer even if their crops are not actually infected with the Roundup ready gene, are sufficiently concrete to satisfy the injury-in-fact prong of the constitutional standing analysis. Those harms are readily attributable to APHIS's deregulation decision, which, as the [d]istrict [c]ourt found, gives rise to a significant risk of gene flow to non-genetically-engineered varieties of alfalfa. Finally, a judicial order

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109 *Id*. at 2747 (citation omitted). Among the arguments advanced in support of the fact that the petitioners lacked standing was that petitioners' injury was actually caused by the district court's vacatur of APHIS's deregulation decision. *Id*. at 2754. "The practical consequence of the vacatur was to restore RRA to the status of a regulated article, . . . the growth and sale" of which ordinarily would be banned. *Id.* at 2752. "Because petitioners did not specifically challenge the vacatur, respondents [argued that] they lacked standing to challenge" issuance of an injunction that had no independent consequences for the vacatur. *Id*. at 2753. The Court rejected this argument, finding that petitioners had "preserved their objection [to] the vacated deregulation decision" by suggesting that the vacatur "should have been replaced by [an] injunction" and that "if the [d]istrict [c]ourt had adopted [this] suggested remedy, there would still be authority for the continued planting of RRA because there would, in effect, be a new deregulation decision." *Id.* at 2753. In addition, the Court stated that:

> If the injunction were lifted, we do not see why the [d]istrict [c]ourt would have to remand the matter to the agency in order for APHIS to effect a partial deregulation. And even if a remand were required, we perceive no basis on which the [d]istrict [c]ourt could decline to remand the matter to the agency so that it could determine whether to pursue a partial deregulation during the pendency of the EIS process.

Id. at 2754.

110 *Id*.

111 *See id*. at 2754–55 n.3 ("At least one of the respondents in this case specifically allege[d] that he owns an alfalfa farm in a prominent seed-growing region and faces a significant risk of contamination from RRA. Other declarations . . . [suggested] that the deregulation of RRA pose[d] a significant risk of contamination . . . ."(internal citations omitted)).

> prohibiting the growth and sale of all or some genetically engineered alfalfa would remedy respondents' injuries by eliminating or minimizing the risk of gene flow to conventional and organic alfalfa crops. We therefore conclude that respondents have constitutional standing to seek injunctive relief from the complete deregulation order at issue here.[112]

The "reasonable probability of harm" test on which the Court relied in *Monsanto* sounds similar to the "realistic likelihood" test employed by the dissent, but rejected by the majority, in *Summers*. However, the harm faced by the respondents in *Monsanto* was not just the probabilistic risk that the crops of some of the respondents might be contaminated by the modified RRA gene. Rather, the harm was the alleged non-probabilistic certainty that those respondents would suffer an imminent economic injury because of their need to take various costly measures to address that risk, like testing to confirm whether contamination was, in fact, present.[113] The substantial and imminent nature of these economic harms caused the Court to find injury in fact for standing purposes—the realistic likelihood of crop contamination was, at most, a secondary consideration. Viewed from that perspective, the "reasonable probability of harm" test that the *Monsanto* Court employed is entirely consistent with the Court's emphasis in prior cases on the necessity of a concrete and imminent injury in fact for standing purposes (whether or not the injury alleged is procedural).

V. STANDING UNDER NEPA IN THE CONTEXT OF GLOBAL CLIMATE CHANGE

Although Supreme Court jurisprudence may seem clear, several district courts have sought to grant standing in cases that seem inconsistent with Court precedent. In particular, three cases—*Border*

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112 *Id.* at 2755.

113 *Id.* The Court noted representations made in the declarations that:

> [T]o continue marketing their product to consumers who wish to buy non-genetically-engineered alfalfa, respondents would have to conduct testing to find out whether and to what extent their crops have been contaminated. Respondents also allege that the risk of gene flow will cause them to take certain measures to minimize the likelihood of potential contamination and to ensure an adequate supply of non-genetically-engineered alfalfa.

Id. (citations omitted); *see id.* (echoing respondents who stated that, "'[d]ue to the threat of contamination, I have begun contracting with growers outside of the United States to ensure that I can supply genetically pure, conventional alfalfa seed'"). "'Finding new growers has already resulted in increased administrative costs at my seed business.'" *Id.*

Power Plant Working Group v. DOE ("*Border Power I*"),[114] *Friends of the Earth, Inc. v. Watson*,[115] and *Center for Biological Diversity v. U.S. Department of Interior*[116]—seem out of line with Supreme Court mandates.

A. Expanding Lujan *in* Border Power I

Border Power I,[117] one of the first cases brought under NEPA to consider the issue of standing in the context of global climate change, involved a decision by the Department of Energy ("DOE") and the Federal Bureau of Land Management ("BLM") to forgo the preparation of an EIS for the construction of transmission lines designed to connect new Mexican power plants to the California power grid.[118] The DOE and the BLM independently prepared initial EAs for the project.[119] Based on the analysis contained in the EAs, both agencies "issued a [f]inding of [n]o [s]ignificant [i]mpact," each of which concluded that NEPA required no further environmental review.[120] The plaintiff, an organization allegedly established for the sole purpose of challenging the project, filed an action asserting that the agencies' NEPA review was inadequate because they failed to evaluate the impact of emissions from the Mexican power plants that would be generating the electricity transported by the transmission line project.[121]

The court first evaluated whether the plaintiff had standing under NEPA and APA. Neither the DOE nor the BLM challenged the plaintiff's standing to bring the action in federal court. However, the district court determined that an evaluation of standing was necessary in order to establish jurisdiction over the plaintiff's claims.[122] The district court began its standing analysis with a recitation of the *Lujan* criteria, but it then observed that the most important of these three criteria in procedural cases brought under NEPA and APA is the requirement of injury in fact.[123] According to the district court, the Ninth Circuit Court

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114 *See infra* Part V.A (discussing *Border Power I*).

115 *See infra* Part V.B (discussing *Friends of the Earth*).

116 *See infra* Part V.C (discussing *Center for Biological Diversity*).

117 260 F. Supp. 2d 997 (S.D. Cal. 2003).

118 *See id*. at 1006 (discussing how the DOE had been asked to issue "[p]residential [p]ermits" to allow crossborder construction of the power lines). BLM had been asked to issue similar permits for necessary rights of way across the United States where the lines would be located. *Id.*

119 *See id*. at 1008.

120 *Id*.

121 *See id*.

122 *See id*. at 1008–11.

123 *Id*. at 1009. In this context, the district court cited footnote 7 in the *Lujan* plurality opinion, which the court claimed acknowledged the special status of "'procedural rights'" in cases involving statutes like NEPA. *Id.* The Court stated that:

of Appeals, in particular, has emphasized the importance of injury in fact in procedural cases and reduced the elements that must be shown to establish procedural standing to the following: "'(1) that he or she is a person who has been accorded a procedural right to protect [his or her] concrete interests . . . and (2) that the plaintiff has some threatened concrete interest . . . that is the ultimate basis of [his or her] standing.'"[124]

Having articulated its views on the applicable requirements for standing under NEPA, the district court found that the plaintiff, an association comprised of various individuals living near the proposed transmission project, met those requirements.[125] It based that finding on the declarations of association members who allegedly lived "near" the project (in either Imperial County, California or Mexicali, Mexico) and "who shar[ed] a concern for the environmental health of the border region."[126] Beyond that, it did not discuss with any specificity how the proposed project would in fact result in a concrete injury that could form the basis for standing under *Lujan*. In particular, the court did not indicate whether it considered the potential contribution to global warming by carbon dioxide emissions from the Mexican power plants as a basis for plaintiff's standing, even though it accepted plaintiff's evidence "that carbon dioxide emissions are the greatest by weight of all pollutants emitted by natural gas turbines" of the sort proposed for use in those facilities.[127]

After glossing over the standing question, the court considered whether the alleged connection between the federal action and climate

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> The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 572 n.7 (1992).

[124] *Border Power I*, 260 F. Supp. 2d. at 1010 (citing Douglas Cnty. v. Babbitt, 48 F.3d 1495, 1500 (9th Cir. 1995)); *see* Pac. Nw. Generating Coop. v. Brown, 25 F.3d 1443, 1450 (9th Cir. 1994) (holding that plaintiffs with an economic interest in preserving salmon have a procedural interest in ensuring that the ESA is followed); Friends of the Earth, Inc. v. U.S. Navy, 841 F.2d 927, 933 (9th Cir. 1988) (holding that residents who live near the site of a proposed port have procedural standing to sue for the Navy's alleged failure to follow permitting regulations); City of Davis v. Coleman, 521 F.2d 661, 671 (9th Cir. 1975) (holding that a city located near a proposed freeway interchange has procedural standing to challenge an agency's failure to prepare an EIS).

[125] *See Border Power I*, 260 F. Supp. 2d. at 1010–11.

[126] *Id.* at 1010 (internal quotation marks omitted).

[127] *Id.* at 1029.

change warranted review under NEPA.[128] To reach this issue, the court first had to determine whether emissions from the proposed Mexican power plants were properly within the scope of environmental review,[129] as NEPA only applies to projects that are "subject to [federal] control and responsibility."[130] The court concluded that they were properly excluded from the scope of the proposed federal action for NEPA purposes because the proposed power plants were outside of the jurisdiction of the United States.[131] The court went on to conclude, however, that emissions from the plants could be considered as indirect or "cumulative impact[s]" of the proposed federal action and, therefore, should have been addressed in the EAs for the project.[132]

The court's discussion in *Border Power I* of the potential environmental impacts of power plant carbon dioxide emissions on climate change was cursory at best. The court simply noted that: (1) "[t]he record shows that carbon dioxide is one of the pollutants emitted by a natural gas turbine and that it is a [GHG]"; (2) emissions from the turbines to be used at the proposed power plants in Mexico "have potential environmental impacts"; and (3) the government's "failure to disclose and analyze [the] significance" of carbon dioxide emissions "is counter to NEPA."[133] The DOE subsequently issued an EIS that included an evaluation of emissions from the proposed Mexican power facilities as part of its analysis of project alternatives, but initial claims attacking the document's cumulative impact analysis were subsequently

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128 *See id*. at 1012.

129 *Id.*

130 10 C.F.R. § 1021.104(b) (2007).

131 *See Border Power I*, 260 F. Supp. 2d at 1013.

132 *See id*. at 1033. In reaching this conclusion, the court relied primarily on the Ninth Circuit's decisions in *Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105 (9th Cir. 2000) and *Sylvester v. U.S. Army Corps of Engineers,* 884 F.2d 394 (9th Cir. 1989). In *Wetlands Action Network*, the court held that agencies are only required to consider impacts associated with a non-federal action if the causal linkage between the two is such that the non-federal action cannot proceed without the related federal action. 222 F.3d at 1118. In *Sylvester*, the court held that federal agencies are required to consider the indirect or cumulative impacts of a project that is not within the defined scope of a proposed federal action, if that project and another project that is within federal jurisdiction constitute "two links of a single chain." 884 F.2d at 400. The court stated that it is not enough if one project might benefit from the other project's presence. *Id*. The link between the two projects must be such that each action could not exist without the other. *Id*. The district court in *Border Power I* concluded that, because one of the proposed Mexican power plants was to be constructed solely for the purpose of supplying the U.S. energy grid over the proposed transmission line, the two projects were sufficiently linked to require consideration of the plant's emissions under NEPA. 260 F. Supp. 2d at 1017.

133 *Border Power I*, 260 F. Supp. 2d at 1028–29.

dropped.[134] In its final decision, the court did not address the adequacy of the EIS's analysis of potential climate change impacts.[135] While *Border Power I* stretched the contours of *Lujan* standing, another case, decided two years later, continued this expansion.

B. Greater Standing Expansion under Friends of the Earth, Inc. v. Watson

In *Friends of the Earth, Inc. v. Watson,*[136] the U.S. District Court for the Northern District of California stretched the limits of standing criteria articulated in *Lujan* even further than the *Border Power I* court had. The plaintiffs were several U.S. cities and an environmental group, who brought an action against two quasi-governmental agencies—the Overseas Private Investment Corporation ("OPIC") and the Export-Import Bank of the United States ("Ex-Im Bank" or "Ex-Im")—to compel the agencies to conduct EAs under NEPA to address the global warming impacts of projects supported by the agencies outside of the United States. The plaintiffs claimed that the impacts of global warming on the United States' environment required the agencies to address global warming pursuant to NEPA, even though none of the projects supported by the agencies were located in the United States.[137] By making such an assertion, plaintiffs sought to extend NEPA's environmental review requirements to GHG-emitting projects located throughout the world, even where the involvement of U.S. governmental agencies is only modest.

The actions challenged in the litigation involved a very limited role that OPIC and the Ex-Im Bank play in supporting U.S. business interests oversees. OPIC's mission is "[t]o mobilize and facilitate the participation of United States private capital and skills in the economic and social development of less developed countries and areas, and countries in

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134 *See* Border Power Plant Working Grp. v. Dep't of Energy ("*Border Power II*"), 467 F. Supp. 2d 1040, 1040 (S.D. Cal. 2006).

135 *See id*. Plaintiffs challenged the EIS under NEPA, alleging that the EIS inadequately considered project alternatives and mitigation measures and an alleged failure to ensure the scientific accuracy of relied upon information; the court, however, rejected these challenges in all respects. *Id*. at 1044–45.

136 No. C02-4106JSW, 2005 WL 2035596, at *35 (N.D. Cal. Aug. 23, 2005).

137 *See* Friends of the Earth, Inc. v. Mosbacher, 488 F. Supp. 2d 889, 897–901 (N.D. Cal. 2007). The *Watson* and *Mosbacher* decisions were part of the same litigation over alleged climate change consequences stemming from decisions by OPIC and the Ex-Im Bank. *See generally id*.; *Watson*, 2005 WL 2035596. During the pendency of the litigation, Peter Watson, who was named as a defendant in the first case in his capacity as President and Chief Executive Officer of OPIC, was replaced by Robert Mosbacher, Jr., who was therefore substituted in as a named defendant in the second phase of the litigation. *Compare id.* at *1 (naming Watson as the defendant), *with Mosbacher*, 488 F. Supp. 2d at 889 (naming Mosbacher as the defendant).

transition from nonmarket to market economies . . . ."[138] It fulfills that mission by providing: (1) political risk insurance; (2) financing through loan guarantees; and (3) direct loans to transactions involving small U.S. businesses.[139] OPIC has no role in the development or approval of the projects for which an applicant might seek insurance or loan guarantees to cover the applicant's risk of project participation.[140] While OPIC provides financial support for exports from the United States,[141] the Ex-Im Bank provides export credit insurance and "guarantees to commercial banks and other financial institutions in connection with exports of U.S. capital goods and services, a variety of insurance products for short- or medium-term credits, direct loans, and guarantees for working capital loans made by commercial banks to U.S. exporters."[142]

One example of the role OPIC and the Ex-Im Bank play in supporting projects outside the United States, cited repeatedly by the parties and the district court, involves an oil pipeline in Chad and Cameroon ("Chad-Cameroon Project") for which both agencies provided indirect financial assistance.[143] The Chad-Cameroon Project was part of a larger development project involving oil fields in Chad and oil-loading facilities off of the coast of Cameroon. Its cost was an estimated $2.2 billion, and the cost of the larger development project was estimated to be $3.5 billion.[144] OPIC provided up to $250 million in political risk insurance coverage to a subcontractor in the Chad-Cameroon Project that supplied oil field drilling and related services.[145] The Ex-Im Bank separately provided a $200 million loan guarantee to a bank participating in the financing of the larger development project, but did not provide any direct financing for the Chad-Cameroon Project or the component pipeline project.[146] The loan guarantee by Ex-Im was intended to cover only "'political risks (primarily war and civil unrest, expropriation and transfer risks)' during the construction of the" Chad-Cameroon Project and after it "was completed and operati[onal]."[147]

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138 22 U.S.C. § 2191 (2006).

139 *See id*. § 2194.

140 *See* Defendant OPIC's Cross Motion for Summary Judgment at 3, Friends of the Earth, Inc. v. Mosbacher, 488 F. Supp. 2d 889 (N.D. Cal. 2007) (No. 02–4106).

141 *See* 12 U.S.C. § 635 (2006).

142 *See Mosbacher*, 488 F. Supp. 2d at 895.

143 *Id*. at 896.

144 *Id*. at 897.

145 *Id*.

146 *Id*. at 898.

147 *Id*. In addition to the Chad-Cameroon Project, the actions challenged by the plaintiffs included: (1) loan guarantees to three mutual funds loaning money to an oil and gas development project in eastern Russia; (2) a loan guarantee to U.S. capital market investors

Both OPIC and Ex-Im have adopted guidelines requiring assessments of the environmental impacts of certain approved projects.[148] OPIC's guidelines were adopted pursuant to Section 117 of the Foreign Assistance Act.[149] Under those guidelines, OPIC is required to conduct an [EIA], or an [IEA], or both," for projects that are "'likely to have significant adverse environmental impacts that are sensitive (e.g. irreversible, affect sensitive ecosystems, involve involuntary resettlement, etc.), diverse, or unprecedented.'"[150] The Ex-Im Bank's environmental review guidelines specifically "'require adherence to [NEPA's] environmental review procedures'" for long-term project financing, loans, and guarantees.[151] An environmental review is not mandatory for medium-term transactions, credit, and working capital guarantees or short-term insurance products.[152] OPIC and Ex-Im both undertook analyses of the proposed projects at issue in the *Watson* litigation under their respective environmental review guidelines.[153]

OPIC and Ex-Im disputed plaintiffs' standing to challenge their various funding decisions, claiming that, with respect to any of the projects at issue, plaintiffs could not meet the three criteria for standing required under *Lujan*: (1) injury in fact; (2) causation; and (3) redressability.[154] The district court, however, found that the plaintiffs met all three criteria for standing.[155] On the issue of injury in fact, the court found that, because plaintiffs' NEPA challenge raised only "procedural issues," there was no requirement to show that a substantive environmental harm was imminent or that the agencies' support of foreign development "project[s] [would] have particular environmental effects."[156] Instead, the "[p]laintiffs only" had to show

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loaning money to a trust funding an oil and gas-development project in Indonesia; (3) guarantees for U.S. companies exporting services and equipment to support a project to enhance an existing offshore petroleum complex in Mexico; (4) guarantees for similar goods and services to develop oil fields and a small refinery in Venezuela; and (5) guarantees to a U.S. bank providing financing for the expansion of a coal-fired power plant in China. *See* Friends of the Earth, Inc. v. Watson, No. C02–4106JSW, 2005 WL 2035596, at *1 (N.D. Cal. Aug. 23, 2005).

148 *See Mosbacher*, 488 F. Supp. 2d at 893, 895–96.

149 22 U.S.C. § 2151(p) (2006).

150 *Mosbacher*, 488 F. Supp. 2d at 894.

151 *Id.* at 896 (alteration in original).

152 *See id.*

153 *See id.* at 896–97.

154 *See* Friends of the Earth, Inc. v. Watson, No. C02–4106JSW, 2005 WL 2035596, at *2 (N.D. Cal. Aug. 23, 2005) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)).

155 *See id.* at *2–4.

156 *Id.* at *2 (citing Cantrell v. City of Long Beach, 241 F.3d 674, 674 n.4 (9th Cir. 2001)); *see* Citizens for Better Forestry v. U.S. Dep't of Agric., 341 F.3d 961, 972 (9th Cir. 2003) (noting that requiring the plaintiffs to prove that the challenged federal project will have particular

"that 'it [was] reasonably probable that the challenged action [would] threaten their concrete interests.'"[157]

The court noted that, "[w]hile they concede that the impact of [GHG] emissions traceable to projects supported by OPIC and Ex-Im are not yet known with absolute certainty, [p]laintiffs contend the only uncertainty is with respect to how great the consequences will be, and not whether there will be any significant consequences."[158] The court listed a number of contentions, drawn from a series of one-sided declarations, regarding how much carbon dioxide would be emitted by the challenged projects. The court stated that GHGs are the major contributor to global warming in the twentieth century and further increases in GHG emissions will continue to increase global warming with widespread environmental impacts.[159] The court further asserted that these impacts have and will affect areas used and owned by the plaintiffs.[160]

On that basis, "[t]he [c]ourt conclude[ed] that [t]he [p]laintiffs' evidence [was] sufficient to demonstrate that it is reasonably probable that emissions from the projects supported by OPIC and Ex-Im supported projects will threaten [p]laintiffs' concrete interests."[161] The court failed to explain, however, which specific "concrete interests" were, in fact, being threatened. The plaintiffs may have had a generalized interest in maintaining the stability of the global climate. However, it is entirely unclear that such an interest is sufficiently distinct from the interests of any other member of the public in order to confer standing to challenge agency actions in federal court.

The district court's approach to standing in *Watson* directly conflicts with the Supreme Court's analysis in *Lujan.* Among other things, the district court ignored the fact that *Lujan* suggested that a close geographical or economic nexus between a proposed project and alleged injury, while not necessarily determinative, is important when the

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environmental effects would essentially be imposing a requirement that the plaintiff perform the same environmental investigation that he is attempting, through his suit, to compel the agency to undertake). The irony, of course, is plaintiffs did not need to conduct any new environmental analyses to establish standing, since for each of the projects challenged by plaintiffs, OPIC and Ex-Im had already performed relevant environmental analyses. *Mosbacher*, 488 F. Supp. 2d at 896–97. Had the court taken those analyses into account in its assessment of the issue, it would have made the court's determination that standing existed much more problematic.

157 *Watson*, 2005 WL 2035596, at *2 (citing *Citizens for Better Forestry*, 341 F.3d at 969–70); *see* City of Sausalito v. O'Neill, 386 F.3d 1186, 1197 (9th Cir. 2004).

158 *Watson*, 2005 WL 2035596, at *3 (citation omitted).

159 *Id.*

160 *Id.*

161 *Id.*

character of the injury is a procedural one.[162] None of the projects considered by the district court in *Watson* comprise the close geographic or economic connection with the plaintiffs' interests that the Supreme Court had in mind in *Lujan*. The district court's approach is, instead, similar to Justice Blackmun's dissent in *Lujan*, suggesting that a procedural injury per se—essentially, a grievance by an environmental plaintiff premised solely on the failure of a government agency to follow pertinent administrative procedures—is sufficient to establish the injury in fact required to confer standing.[163] The majority opinion in *Lujan*, written by Justice Scalia, expressly rejected this approach, stating that: "We do *not* hold that an individual cannot enforce procedural rights; he assuredly can, so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing."[164]

More importantly, *Lujan* directly stated:

> that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.[165]

The district court in *Watson* provided no explanation as to how the plaintiffs in that case had been harmed by the global warming impacts of the projects at issue in any way that was distinct from harms that arguably impacted U.S. citizens generally. Nor did the court explain

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[162] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

[163] According to Justice Blackmun, "as a general matter, the courts owe substantial deference to Congress' substantive purpose in imposing a certain procedural requirement. . . . There is no room for a per se rule or presumption excluding injuries labeled 'procedural' in nature" as grounds to confer standing to plaintiffs in environmental cases. *Id*. at 606 (Blackmun, J., dissenting) (emphasis omitted) (citation omitted). Justice Blackmun stopped short, however, of suggesting that procedural injuries without some connection to a substantive harm, albeit an implicit one, are sufficient in this context. *Id*. "There may be factual circumstances in which a congressionally imposed procedural requirement is so insubstantially connected to the prevention of a substantive harm that it cannot be said to work any conceivable injury to an individual litigant." *Id*.

[164] *Id*. at 573 n.8 (emphasis in original); *see also* Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Does the Judiciary Have the Tools for Regulating Greenhouse Gas Emissions?*, 46 VAL. U. L. REV. 369, 396 (2012) ("A court must engage in a fresh analysis of traceability and redressability in each case for the specific plaintiffs, specific defendants, specific harms alleged, and specific remedies sought.").

[165] *Lujan*, 504 U.S. at 573–74.

why the relief sought by plaintiffs provided any greater benefits to them than it would to any other member of the public. In the absence of such explanation, it is hard to see how the *Watson* plaintiffs could possibly establish a sufficient injury in fact to meet the standards articulated in *Lujan*.

C. Center for Biological Diversity v. U.S. Department of Interior

In *Center for Biological Diversity v. U.S. Department of Interior*,[166] environmental interests challenged a federal leasing program for oil and gas development on the Outer Continental Shelf ("OCS") in the Beaufort, Bering, and Chukchi Seas off the coast of Alaska. Petitioners alleged that the Department of the Interior failed to consider climate change impacts of the program pursuant to NEPA and the Outer Continental Shelf Lands Act ("OCSLA").[167] The petitioners also alleged that the program violated NEPA and OCSLA because the government did not conduct sufficient baseline research for the affected Alaskan seas.[168]

The petitioners advanced two theories of standing, one substantive and the other procedural.[169] Under the substantive theory, the petitioners relied on *Massachusetts v. EPA* to argue for standing on the basis that the government's "approval of the [p]rogram brings about climate change, which in turn adversely affects the species and ecosystems of those OCS areas, thereby threatening [p]etitioners' enjoyment of the OCS areas and their inhabitants."[170] The court rejected this approach, noting that, unlike the situation in *Massachusetts v. EPA*, there was no sovereign like Massachusetts worthy of "'special solicitude'" for standing purposes.[171] More importantly, however, the court emphasized that the petitioners had not shown the kind of particularized injury that Massachusetts had claimed. As the court observed:

> With respect to Massachusetts's injury, the Court found that Massachusetts "owns a substantial portion of the state's coastal property" that had already been harmed by the EPA's inaction, and that the EPA's failure to

166 563 F.3d 466 (D.C. Cir. 2009).
167 *Id.* at 471.
168 *Id.* at 472. The appellate court dismissed the plaintiff-petitioners' NEPA and ESA claims for lack of ripeness, but concluded that their OCSLA-based challenges were all justiciable. *Id.*
169 *Id.* at 475.
170 *Id.* at 476.
171 *Id.* at 476–77.

> regulate these gases would cause additional harm to its shoreline. Though the Court found that the risks of climate change were widely shared because *global* sea levels had already begun to rise, it nevertheless concluded that Massachusetts had shown a sufficiently particularized injury because Massachusetts had alleged that its particular shoreline had actually been diminished by the effects of climate change. In other words, by showing that climate change had diminished part of its own shoreline, Massachusetts itself had shown that it had been affected "in a personal and individual way" by the EPA's failure to regulate greenhouse gases.[172]

By contrast, the court found that none of the petitioners in the present case alleged that the government's actions would cause individual harm; instead, they relied solely on the effects that the government's actions would have on the climate in general.[173] The court concluded that, as a result, the "[p]etitioners' substantive theory of standing fails because [p]etitioners have not established either the injury or causation element of standing."[174] However, the court found that the petitioners did have standing based on their procedural theory. The court noted that, "a plaintiff may have standing if it can show that an agency failed to abide by a procedural requirement that was 'designed to

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[172] *Id.* at 476 (citations omitted) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 n.1 (1992)).

[173] *Id.* On the issue of causation, the court focused on the fact that linking the government's actions to any alleged injury required numerous assumptions involving the behavior of others not involved in the litigation, stating that:

> [T]o reach the conclusion that [p]etitioners are injured because of [the government's] alleged failure to consider the effects of climate change with respect to the Leasing Program, [p]etitioners must argue that: adoption of the Leasing Program will bring about drilling; drilling, in turn, will bring about more oil; this oil will be consumed; the consumption of this oil will result in additional carbon dioxide being dispersed into the air; this carbon dioxide will consequently cause climate change; this climate change will adversely affect the animals and their habitat; therefore [p]etitioners are injured by the adverse effects on the animals they enjoy. Such a causal chain cannot adequately establish causation because [p]etitioners rely on the speculation that various different groups of actors not present in this case—namely, oil companies, individuals using oil in their cars, cars actually dispersing carbon dioxide—might act in a certain way in the future.

Id. at 478–79.

[174] *Id.* at 478.

protect some threatened concrete interest' of the plaintiff.'"[175] Under this theory, "'a procedural-rights plaintiff must show not only that the defendant's acts omitted some procedural requirement, but also that it is substantially probable that the procedural breach will cause the essential injury to the plaintiff's own interest.'"[176]

The court concluded that the petitioners could rely on this theory to bring both their OCSLA-based and NEPA-based climate change claims because they had demonstrated "that they possess[ed] a threatened particularized interest, namely their enjoyment of the indigenous animals of the Alaskan areas listed in the Leasing Program."[177] The court pointed out that the Supreme Court noted in *Lujan* that "'the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing.'"[178] However, the court made clear that "[t]his interest, however, will not suffice on its own 'without any description of concrete plans, or indeed even any specification of *when*' the plaintiff will be deprived of the opportunity to observe the potentially harmed species."[179] The court found that the petitioners had met these requirements using affidavits demonstrating their "immediate and definite interest in enjoyment of the animals" and based on the fact that the government's "adoption of an irrationally based Leasing Program could cause a substantial increase in the risk to their enjoyment of the animals affected . . . ."[180]

VI. CONCLUSION

Center for Biological Diversity was decided just a few weeks after the Supreme Court issued its opinion in *Summers*; thus, the appellate court did not have the benefit of the Supreme Court's affirmation in *Summers* of the traditional requirements for standing in environmental cases.[181] Nevertheless, of the various cases that have considered standing for NEPA purposes in the context of global climate change, it is the court of appeals' decision in that case that comes the closest to "getting it right" under the Supreme Court's consistent approach to standing since *Lujan*.

For example, in *Border Power I*, the fact that the plaintiffs had members who lived "near" the proposed transmission lines and

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175 *Id.* at 479 (quoting *Lujan*, 504 U.S. at 573 n.8).

176 *See id.* (quoting Fla. Audubon Soc'y v. Bentsen, 94 F.3d 658, 664–65 (D.C. Cir. 1996)).

177 *Id.*

178 *Id.* (quoting *Lujan*, 504 U.S. at 564).

179 *Id.* (emphasis in original).

180 *Id.*

181 *Center for Biological Diversity v. U.S. Department of Interior* was decided on April 17, 2009—six weeks after the *Summers* decision—and oral argument in the case was completed some months before that. 563 F.3d 466 (D.C. Cir. 2009).

associated power facilities, and who shared "a concern for the environmental health" of the region, by itself, did not say anything about how the failure to adequately analyze those facilities' GHG emissions resulted in an injury that was "actual" or "imminent." The plaintiffs never demonstrated how they would be injured by global warming, and the court did not indicate that it had considered the potential contribution to global warming by GHG emissions from the facilities as relevant to the plaintiffs' standing. Living in close proximity to the site of a proposed federal action may impact the magnitude of a potential injury to one's concrete interests, but that alone should not be enough to demonstrate that there is an injury. Under *Monsanto*, plaintiffs in *Border Power I* should have been required to show that the GHG emissions associated with the proposed project created a "reasonable probability of harm" to their interests in the environment—the fact that they were not so required should have been fatal to their NEPA standing.

This is hardly to say that concerns over the impact of GHG emissions on climate change can never provide the basis for a challenge to federal action under NEPA. *Center for Biological Diversity* shows that it can be under appropriate circumstances. Nevertheless, courts should be careful to recognize that using NEPA as a litigation strategy may have limited value as a weapon in any war on global warming. After more than a quarter century of judicial development, the rules governing standing under NEPA and other federal environmental laws are well established, and they necessarily focus on relatively localized impacts from domestic projects, which have a substantial federal connection with the United States. Those rules are not intended to apply to highly-generalized impacts associated with a global phenomenon like climate change, caused by activities diffusely spread across the planet. In the case of agency actions, like those considered in *Watson*, a requirement to prepare detailed environmental impact studies under NEPA will not reduce global warming in any appreciable way.

The stage for an approach to regulate GHG emissions under the CAA has now been set with the Supreme Court's decision in *Massachusetts v. EPA*.[182] Whether and to what extent that more rational approach is supported by our nation's policy makers remains to be seen.

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[182] Now effectively confirmed by the Court in *Connecticut v. American Electric Power Co.*, 131 S. Ct. 2527 (2011). Some commentators argue GHG emission regulation will occur through Supreme Court decisions like *Massasschusets v. EPA* and *Connectiuct v. American Electric Power Co.* because of Congressional deadlock. *See* Hari M. Osofsky, *Litigation's Role in the Path of U.S. Federal Climate Change Regulations: Implications of* AEP v. Connecticut, 46 VAL. U. L. REV. 447, 447 (2012).