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*by Andy Hosaido**

As a consequence of the U.S. Supreme Court's landmark 2007 decision in *Massachusetts v. Environmental Protection Agency*, reduced standing requirements have enabled litigators to pursue environmental claims and compel U.S. Federal agencies to enforce existing statutes. *Center for Biological Diversity v. Environmental Protection Agency* is predicated upon these reduced standing requirements. On May 14, 2009, the Center for Biological Diversity ("CBD") filed a complaint in the Western District of Washington against the Environmental Protection Agency ("EPA") based on EPA's failure to list and regulate damage caused to Washington's coastal waters by ocean acidification.[1] In the suit, the CBD alleged that the EPA's approval of Washington's list of impaired waters, which only included inland waters and did not include the adversely affected coastal ocean areas, harmed the right of its members to enjoy the marine animals in the area.[2] As a result of the EPA's action, CBD also claimed that its members suffered procedural and informational injury.[3] Pursuant to the holding in *Massachusetts*, where the Court found that the EPA violated its statutory obligation when it declined to regulate CO_2 and greenhouse gasses ("GHG"), the CBD is seeking to compel similar EPA action by requesting declaratory relief against the EPA for its procedurally improper approval of Washington's list of impaired waters.[4]

Prior to *Massachusetts*, environmental litigants had difficulty meeting requirements for substantive and procedural standing, because comprehensive regulations such as the Clean Air Act ("CAA") preempted claims that fell under its mandate.[5] *Massachusetts* was significant because the Court found substantive standing despite the difficulty of proving injury, traceability, and redressability, and it also vested environmental litigants with the right to enforce procedural violations by federal agencies such as the EPA.[6] *Massachusetts* held that a plaintiff can claim procedural standing when the alleged harm can be redressed by the government agency reconsidering the administrative decision that caused the harm.[7] This procedural standing forms the basis of much of the current litigation against government agencies for not enforcing statutory regulations according to provisions of the Clean Air Act, Clean Water Act, National Environmental Policy Act, Endangered Species Act, and other federal and state environmental protection laws.

As a result of the decision in *Massachusetts*, courts have found standing in several recent cases of environmental litigation.[8] *Center for Biological Diversity v. Environmental Protection Agency* follows in the footsteps of these prior cases.

At issue in *Center for Biological Diversity v. Environmental Protection Agency* is the listing provision of the Clean Water Act ("CWA"), which requires states to establish water quality standards and prepare lists of water bodies where pollution controls are insufficient (known as the "impaired waters list").[9] After the list is prepared, it is submitted to the EPA and approved, disapproved, or partially disapproved.[10] On August 15, 2007 the CBD submitted data to Washington Department of Ecology ("WDE") to notify them that Washington's coastal ocean waters should be included on the impaired waters list because the pH level was outside the range proscribed by state law, and was causing damage to ocean fauna.[11] Subsequently, CBD petitioned the WDE to include the ocean waters on the CWA impaired waters list.[12] However on June 23, 2008 when WDE submitted the list to the EPA for approval, the acidified ocean waters were not included.[13] As a result, the CBD submitted letters to the EPA with scientific documentation contending that Washington's coastal ocean waters were impaired due to substantial changes in pH level that were beyond statutory limits, and requested that the EPA include the acidified waters on the list.[14] Despite the evidence submitted by CBD that demonstrated that the waters were impaired due to ocean acidification, the EPA approved Washington's list on January 29, 2009.[15]

CBD brought suit against the EPA because of its approval of Washington's list of impaired waters without the acidified ocean waters allegedly violated CWA section 303(d).[16] CBD also contends that the EPA's approval of the list violated the Administrative Procedure Act, which allows judicial review of agency action that is arbitrary, capricious, and not in accordance with the law.[17] CBD seeks declaratory relief from the court that the EPA violated its duties under the CWA and an order to require that the EPA add the impaired ocean waters to the list.[18] If CBD's complaint is successful, the EPA would be compelled to address the effect of CO_2 emissions on ocean acidification.

The decisions in *Massachusetts* and its successors have had a significant impact on environmental litigation in the United States. Although some provisions of the various environmental laws discussed above may be rendered obsolete for the purpose of climate-related litigation because of their absorption into a new climate and energy regulatory regime under consideration in Congress, *Center for Biological Diversity v. Environmental Protection Agency* demonstrates that the reduced requirement for substantive and procedural standing established in *Massachusetts* will continue to stimulate environmental litigation against agencies' lack of regulatory enforcement.[19]

Endnotes: Environmental Litigation Standing After Massachusetts v. EPA: Center for Biological Diversity v. EPA *continued on page 82*

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[1] Ctr. for Biological Diversity v. EPA, Case No: 2:09cv00670 (W.D. Wash. filed May 14, 2009).
[2] *Id*. at 5.
[3] *Id*.
[4] Massachusetts v. EPA, 549 U.S. 497, 536-535 (2007).
[5] Jonathan H. Adler, *Warming Up to Climate Change Litigation*, 93 Va. L. Rev. In Brief 63, 66 (2007), *available at* http://www.virginialawreview.org/inbrief/2007/05/21/adler.pdf.
[6] Adler, *supra* note 5 at 68; *Mass.*, 549 U.S. at 518.
[7] *Mass.*, 549 U.S. at 518.
[8] *See*, *e.g*., Comer v. Murphy Oil, No: 07-60756, 2009 WL 3321493 at 2 (5th Cir. Oct. 16, 2009) (holding that plaintiffs had standing to assert their public and private nuisance, trespass, and negligence claims); Connecticut v. Am. Elec. Power, Nos. 05-5104-cv, 05-5119-cv, 2009 WL 2996729 at 32 (2d Cir. Sept. 21, 2009) (holding that plaintiffs had standing to maintain their nuisance claim); Ctr. for Biological Diversity v. DOI, 563 F.3d 466 at 479 (D.C. Cir. 2009) (holding that petitioner established procedural standing for the OCSLA and NEPA based climate change claims).
[9] Ctr. for Biological Diversity, Case No: 2:09cv00670 at 7.
[10] Clean Water Act § 303(d), 33 U.S.C. § 1313(d)(2) (2008)
[11] Ctr. for Biological Diversity, Case No: 2:09cv00670 at 13.
[12] *Id*.
[13] *Id*. at 14.
[14] *Id*.
[15] Ctr. for Biological Diversity, Case No: 2:09cv00670 at 14.
[16] *Id*.
[17] *Id*.; Administrative Procedure Act, 5 U.S.C. § 706(2)(a) (2008).
[18] Ctr. for Biological Diversity, Case No: 2:09cv00670 at 15.
[19] American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009).