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## Alaska Wilderness League v. Jewell

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*Alaska Wilderness League v. Jewell*, 788 F.3d 1212 (9th Cir. 2015)

**Kevin Rechkoff**

The Ninth Circuit employed *Chevron* deference in their decision to confirm BSEE’s approval of Shell’s Oil Spill Response Plans. This holding represents a potential nail in the coffin for the parties seeking to block offshore drilling permits. Although the dissent refutes the majority’s interpretation of the ESA and NEPA consultation processes, this case stands as an example of how ambiguity in statutory language can have dire consequences on citizens seeking to enforce harsher environmental standards under an APA challenge.

I. INTRODUCTION

At issue in *Alaska Wilderness v. Jewell*, was whether the Bureau of Safety and Environmental Enforcement (“BSEE” or “Agency”) had discretionary authority to consider supplementary factors in its Oil Spill Response Plans (“OSRP”) review process.<sup>1</sup> In addition, the plaintiffs, comprised of numerous environmental advocacy groups, objected to the federal agency’s claims that they were not required to conduct Endangered Species Act (“ESA”) or National Environmental Policy Act (“NEPA”) consultation in their ORSP approval process.<sup>2</sup> The statute that governs the required contents of OSRPs contains two conflicting sections.<sup>3</sup> In one, six required components of the plans are enumerated.<sup>4</sup> If these requirements are met, the BSEE is mandated to approve the plan regardless of the plan’s gaps in adherence to other environmental statutes.<sup>5</sup> Conversely, the parties seeking approval are also required to construct plans containing response measures that mitigate the environmental damage to the “maximum extent practicable.”<sup>6</sup> In dealing with this conflict, the United States Court of Appeals for the Ninth Circuit held that the BSEE acted within its regulatory authority when it decided the mandatory nature of the listed requirements was controlling in its approval process.<sup>7</sup> The plaintiffs, in a losing effort, claimed the Agency’s approval violated provisions of the Clean Water Act (“CWA”) and the ESA by not conducting necessary NEPA consultation prior to federal agency action.<sup>8</sup> However, the Ninth Circuit disagreed, stating the BSEE was not required to undertake ESA, CWA, or NEPA review because the Agency

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<sup>1</sup> *Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1220 (9th Cir. 2015).

<sup>2</sup> *Id.* at 1219.

<sup>3</sup> *Id.* at 1220.

<sup>4</sup> *Id.*; see Clean Water Act, 33 U.S.C. § 1321(j)(5)(D) (2012).

<sup>5</sup> *Jewell*, 788 F.3d at 1220; see 33 U.S.C. § 1321(j)(5)(E)(iii).

<sup>6</sup> 33 U.S.C. § 1321(j)(5)(D)(iii); see *Jewell*, 788 F.3d at 1215.

<sup>7</sup> *Jewell*, 788 F.3d at 1223.

<sup>8</sup> *Id.* at 1219.

was mandated to approve an OSRP if the statutory requirements had been met.<sup>9</sup> Thus, because consultation would have no impact on BSEE's discretion to approve or reject the OSRP, the court held it would be unreasonable to require the Agency to complete the NEPA or ESA process.<sup>10</sup>

## II. FACTUAL AND PROCEDURAL BACKGROUND

In a series of cases concerning off shore oil and gas development, the latest decision by the Ninth Circuit comes after a longstanding effort by Shell Gulf of Mexico, Inc., and Shell Offshore, Inc. (collectively "Shell"), to conduct offshore drilling operations in Alaskan waters.<sup>11</sup> In 2002, the Mineral Management Service ("MMS") established a five-year leasing schedule for Alaska's outer continental shelf.<sup>12</sup> Between 2005 and 2008, Shell acquired leases to drill in the Beaufort and Chukchi Seas.<sup>13</sup> Shell then submitted its OSRPs and exploration plans, with the goal of beginning extraction in 2010.<sup>14</sup> In March 2010, MMS approved both of Shell's OSRPs.<sup>15</sup>

Less than one month later, the Deepwater Horizon ("Deepwater") catastrophe occurred.<sup>16</sup> The explosion, rig sinking, and subsequent release of over 4 million barrels of oil resulted in a moratorium on offshore drilling projects<sup>17</sup> and shifted the authority to approve OSRPs from the MMS to the BSEE.<sup>18</sup> Additionally, authority to approve exploration plans transferred from the MMS to the Bureau of Ocean Energy Management.<sup>19</sup> From a policy standpoint, the Department of the Interior ("DOI") responded to the Deepwater catastrophe by issuing stricter guidance on the content required to be in the OSRPs.<sup>20</sup> Shell submitted revised OSRPs in accordance with the new requirements in May 2011 and the beginning of 2012.<sup>21</sup> BSEE approved both OSRPs.<sup>22</sup>

The plaintiffs then sued DOI and the Secretary of the Interior, the parties overseeing the BSEE, under the Administrative Procedures Act ("APA"), stating

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<sup>9</sup> *Id.* at 1221.

<sup>10</sup> *Id.* at 1226.

<sup>11</sup> *Id.* at 1216.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> David Barstow, David Rohode, Stephanie Saul, *Deepwater Horizon's Final Hours*, N.Y. TIMES (Dec. 25, 2010), available at [http://www.nytimes.com/2010/12/26/us/26spill.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/12/26/us/26spill.html?pagewanted=all&_r=0).

<sup>17</sup> Hari M. Osofsky, *Multidimensional Governance and the Bp Deepwater Horizon Oil Spill*, 63 FLA. L. REV. 1077, 1079 (2011).

<sup>18</sup> *Jewell*, 788 F.3d at 1217.

<sup>19</sup> *Id.* at 1216.

<sup>20</sup> *Id.* at 1217.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

that BSEE had approved OSRPs that were inadequate in their response measures, violating the arbitrary and capricious standard of the APA.<sup>23</sup> The United States District Court for the District of Alaska granted summary judgment in favor of the federal agency defendants and intervenor Shell, stating that the BSEE's interpretations, and approval of the OSRPs was not unreasonable.<sup>24</sup>

### III. ANALYSIS

#### A. OSRP Statutory Ambiguity

On appeal, the plaintiffs again argued the BSEE had violated the APA by acting arbitrarily and capriciously when approving Shell's OSRPs.<sup>25</sup> In particular, the plaintiffs accused the BSEE of disregarding Shell's oil spill recovery rate of ninety-percent, which they considered unreasonable and unsubstantiated.<sup>26</sup> In its review, the Ninth Circuit disagreed that BSEE had relied on Shell's claims when approving the OSRP, and held that the plaintiff's incorrectly interpreted that language of the OSRP.<sup>27</sup>

After dismissing the APA components of the plaintiffs argument, the court stated the approval of the OSRP would only be overturned if the BSEE relied on authority that Congress "did not intend" to impart upon it when designing the statute.<sup>28</sup> According to the court, the statute explaining the requirements of the OSRP was ambiguous both in its language and its construction.<sup>29</sup> The court found the statute's language ambiguous because it was silent on BSEE's discretion to consider "additional environmental factors" in its review of an OSRP.<sup>30</sup>

At conflict were two sections of the OSRP statute. 33 U.S.C. § 1321(j)(5)(A)(i) states that owners and operators of drilling platforms are required to respond to a worst-case scenario spill to the "maximum extent practicable."<sup>31</sup> Under this language, BSEE has discretion to determine if the OSRP has provided enough evidence that the owner or operator will be able to respond fully to a worst-case scenario.<sup>32</sup> The other subpart of the statute, 33 U.S.C. § 1321(j)(5)(D), provides a list of requirements for OSRPs, and states

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<sup>23</sup> *Id.* at 1217; *see* Administrative Procedures Act, 5 U.S.C. § 706(2)(A) (2012).

<sup>24</sup> *Jewell*, 788 F.3d at 1217.

<sup>25</sup> *Id.* at 1218.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 1219.

<sup>28</sup> *Id.* at 1217 (quoting *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008)).

<sup>29</sup> *Id.* at 1220.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 1220 (quoting 33 U.S.C. § 1321(j)(5)(A)(i)).

<sup>32</sup> *Id.* at 1220.

unequivocally that, if met, the agency must approve the OSRP.<sup>33</sup> In response to this contradiction, the BSEE determined that the enumerated requirements and its mandate to approve, if satisfied, removed all agency discretion to review if the OSRP met the “maximum extent practicable” threshold.<sup>34</sup>

In its review, the court held it was appropriate to grant an agency’s statutory interpretation *Chevron* deference when conflicting language created ambiguity.<sup>35</sup> Additionally, the court stated when statutory language presents uncertainty as to the appropriate construction of a statute, agency interpretation should prevail “unless it is unreasonable.”<sup>36</sup> The BSEE argued that the “maximum extent practicable” section was merely an instruction to issue regulations that delineate how operators can comply with statutory checklist requirements.<sup>37</sup> Therefore, the BSEE read the statutory language of § 1321(j)(5)(D) as a restriction on its discretionary authority.<sup>38</sup> The court held this interpretation was reasonable in light of the Agency’s review of Shell’s OSRP, and thus the plaintiffs’ challenge failed to demonstrate evidence that the BSEE’s interpretation exceeded or fell short of its statutory obligations.<sup>39</sup>

#### B. Impact of Ambiguity and Interpretation on Consultation

The plaintiffs further argued that BSEE was required to engage in ESA consultation prior to approving the OSRPs, and that failure to complete an Environmental Impact Statement (“EIS”) was a violation of NEPA.<sup>40</sup> Thus, the plaintiffs argued that the EIS was required to ensure minimal impact on species affected by a worst-case discharge.<sup>41</sup> However, the court disagreed, holding that the statutory requirements of the ESA could not defeat an agency’s non-discretionary authority to implement a statute they have been charged with administering.<sup>42</sup> In other words, the court found that an agency directly in charge of administering a statute couldn’t expand its implementation authority due to the language of an alternative statute.<sup>43</sup> Therefore, the court held that the process of determining if the requirements of § 1321(j)(5)(D) have been met does not trigger consultation under the ESA.<sup>44</sup> Furthermore, because BSEE must approve

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 1220.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*; see *Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S.

837 (1984).

<sup>37</sup> *Jewell*, 788 F.3d at 1221.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 1223.

<sup>40</sup> *Id.* at 1225.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

the OSRP if all requirements have been met, the court held completing an EIS under NEPA was not required because it would serve no purpose due to the mandatory nature of the language in § 1321(j)(5)(D).<sup>45</sup>

### C. Dissenting Opinion

In contrast, the dissent contended the BSEE was required to conduct ESA and NEPA consultation, stating that because the Agency had the ability to take measures to protect endangered species, it was required to undergo the ESA consultation process before approving an OSRP.<sup>46</sup> The dissent agreed with the majority that the BSEE was required to follow the mandatory nature of the OSRP statutory language and approve the plan if the six requirements listed were met.<sup>47</sup> However, the dissent stated that the BSEE did not have the authority to ignore the mandates of coexisting environmental statutes if the OSRP could be revised or improved to mitigate the impact on environmentally sensitive populations or ecosystems.<sup>48</sup> This interpretation of NEPA, the ESA, and the CWA was not persuasive to the majority.

## IV. CONCLUSION

The court's holding in *Alaska Wilderness League v. Jewell* demonstrates the power of *Chevron* deference. By affirming the BSEE's interpretation as reasonable, the court has promulgated a narrow rule and granted a federal agency the authority to disregard the requirements of parallel environmental statutes in favor of the statute they are in charge of overseeing. In essence, the court made it clear that a federal agency's interpretation of an ambiguous statute, unless it is unreasonable, holds ultimate authority on the issue. The majority's statement that consultation requirements set forth by the ESA and NEPA are in some cases unnecessary has the potential to be an argument raised and debated in similar cases. The necessity of the ESA and NEPA consultation process will be an interesting legal battleground in the future, as parties seeking to drill for oil in America's offshore reserves will likely use this decision to avoid certain requirements of those statutes.

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<sup>45</sup> *Id.* at 1226.

<sup>46</sup> *Id.* at 1227 (Nelson, J., dissenting).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*