RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

I. THE OUTER CONTINENTAL SHELF LANDS ACT AND RENEWED DRILLING IN THE GULF

Ensco Offshore Co. v. Salazar, 781 F. Supp. 2d 332 (E.D. La. 2011)

The United States District Court for the Eastern District of Louisiana issued an injunction ordering the Secretary of the Interior, Kenneth Salazar, to act within thirty days on five pending permit applications in which an offshore drilling supply company, Ensco Offshore Co., held a contractual interest. *Ensco Offshore Co. v. Salazar*, 781 F. Supp. 2d 332 (E.D. La. 2011).

A. Factual Background

On April 20, 2010, the Deepwater Horizon exploded. CURRY L. HAGERTY & JONATHAN L. RAMSEUR, CONG. RESEARCH SERV., R41262, DEEPWATER HORIZON OIL SPILL: SELECTED ISSUES FOR CONGRESS 1 (July 30, 2010). Seawater erupted from the rig as it was completing an exploratory well, the Macondo Prospect. *Methane Bubble Led to Rig Blast*, WASH. TIMES, May 7, 2010, http://www.washingtontimes.com/news/2010/may/07/investigation-series-failures-led-rig-blast/. Within seconds the two-hundred-and-forty foot geyser of seawater was replaced by an uncontrollable surge of sedimentary muck and methane gas. *See id.* The methane gas ignited. *Id.* A series of fatal detonations and an irrepressible inferno ensued. *Id.* A conflagration engulfed the Deepwater Horizon for thirty-six hours before the molten structure sank five thousand feet to her watery grave beneath the Gulf of Mexico. *See id.*

Following the Deepwater Horizon catastrophe, President Obama instructed Secretary Salazar to conduct a thirty-day investigation and write a report on the safety practices of the offshore oil and gas exploration and production industry. DEP'T OF THE INTERIOR, INCREASED SAFETY MEASURES FOR ENERGY DEVELOPMENT ON THE OUTER CONTINENTAL SHELF 1 (May 27, 2010), http://www.doi.gov/deepwaterhorizon/loader.cfm?csModule=security/getfile&PageID=33598. Secretary Salazar issued the requested report, *Increased Safety Measures for Energy Development on the Outer Continental Shelf*, to President Obama on May 27, 2010. *Id.* The report called for "a six-month moratorium . . . [and] an immediate halt to drilling operations . . . in the Gulf of Mexico." *Id.* In accordance with the report's recommendations, the President announced a cessation of all domestic deepwater drilling, outside of the BP relief wells. *President Barack Obama Suspends Drilling at 33 Wells in the Gulf of Mexico*, TIMES PICAYUNE, May 27, 2010, http://nola.com/news/gulf-oil-spill/index.ssf/2010/05/president_barack_obama_suspend.html. Soon after the President's public announcement, Secretary Salazar issued a moratoria memorandum to the Director of the Minerals Management Service (MMS). Memorandum from Sec'y of the Interior Kenneth Salazar to Dir., MMS (May 28, 2010), *available at* http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&PageID=33715. This moratoria memorandum required: (1) "a six month suspension of all pending, current, or approved offshore drilling operations of new deepwater wells in the Gulf of Mexico and the Pacific regions"; (2) a "halt [to] drilling

activity" for those operators who were already drilling new deepwater wells; (3) that the "MMS . . . not process any new applications for permits to drill"; and (4) that "Letters of Suspension and any other appropriate documentation . . . [be] sent to all affected lessees, owners, and operators immediately." *Id.*

The deepwater drilling moratorium was met with an unprecedented slew of politically charged controversy. Those in support of the moratorium, such as the Sierra Club, contended that "the . . . harmful effects of deepwater drilling [have had] severe impacts on the fish, wildlife and ecosystems of the Gulf." Complaint in Intervention at 7, *Hornbeck Offshore Servs., L.L.C. v. Salazar*, 696 F. Supp. 2d 627 (E.D. La. 2010) *appeal dismissed as moot*, 396 F. App'x 147 (5th Cir. 2010) (No. 10-1663(F)(2)), 2010 WL 2520742, at 7. Meanwhile, critics of the moratorium, such as Louisiana Governor Bobby Jindal, countered, "The drilling Moratoria [were] having a systemic effect on Louisiana's economy, including the loss of 4,000 Louisiana jobs . . . anticipated loss[es] of [an additional] 20,000 [jobs], reduced tax revenue for the State, increased output of unemployment benefits, and the depletion of numerous funds dependent on oil and gas revenue." Amicus Brief on Behalf of Bobby Jindal, Governor of the State of Louisiana, and the State of Louisiana In Opposition to Defendant's Motion to Dismiss at 2, *Hornbeck*, 696 F. Supp. 2d 627 (No. 10-1663(F)(2)), 2010 WL 3484586, at 2 (footnotes omitted).

In response to Secretary Salazar's moratorium, a number of offshore service companies filed suit requesting that the court issue a preliminary injunction striking it down. *See* Plaintiffs' Original Complaint and Application for Temporary Restraining Order and Injunctive Relief at 14-15, *Hornbeck*, 696 F. Supp. 2d 627 (No. 10-1663(F)(2)), 2010 WL 2850952, at 14-15. On June 22, 2010, in *Hornbeck*, the Eastern District of Louisiana issued the plaintiffs' requested injunction, blocking the President's moratorium on deepwater offshore drilling. *See* 696 F. Supp. 2d at 630. Following the court's determination, Secretary Salazar issued a second deepwater drilling moratorium on July 12, 2010. *See Hornbeck Offshore Servs., L.L.C. v. Salazar*, No. 10-30585, 2010 WL 3219469, at *1 (5th Cir. Aug. 16, 2010) (per curiam). The second moratorium, however, was ultimately lifted before a court could rule on its legitimacy. *See* Press Release, U.S. Dep't of the Interior, Salazar: Deepwater Drilling May Resume for Operators Who Clear Higher Bar for Safety, Environmental Protection (Oct. 12, 2010), *available at* http://www.doi.gov/news/pressreleases/Salazar-Deepwater-Drilling-May-Resume-for-

Operators-Who-Clear-Higher-Bar-For-Safety-Environmental-Protection.cfm.

However, contrary to expectations of an expedient revival, Secretary Salazar's withdrawal of the second moratorium did not result in a rapid return of drilling activity to the Gulf. *See Ensco*, 781 F. Supp. 2d at 333. Rather, the Department of the Interior imposed administratively burdensome regulations that have caused substantial delays in the predecessor to the Bureau of Ocean Exploration, Regulation and Enforcement's (BOEMRE's) formerly expedient issuance of both shallow water and deepwater drilling permits, which has culminated in the stagnation of an industry inexorably tied to the economic success of the Gulf Coast and her peoples. *See id.* at 334-35.

B. Statutory and Regulatory Background

In 1953, the United States Congress enacted the Outer Continental Shelf Lands Act (OCSLA) to allow for the "expeditious and orderly development" of oil and gas resources located beneath the Outer Continental Shelf (OCS). Patrick H. Martin as updated by Edward B. Poitevent & Carlos A. Solé, *Outer Continental Shelf Leases and Operating Regulations*, *in* 2 ROCKY MOUNTAIN MINERAL LAW FOUND., LAW OF FEDERAL OIL AND GAS LEASES § 25.04[1] (2011). In its enactment, Congress delegated the responsibility for the administration of OCS leasing activity to the Department of the Interior (DOI). OCSLA, 43 U.S.C. § 1334(a) (2006). The DOI in turn has tasked the Bureau of Ocean Energy Management, Regulation, and Enforcement, with the management of leasing, exploration, and oil and gas production activities on the OCS. *See* Martin, *supra*, § 23.03[2] (referring to BOEMRE's predecessor, the MMS).

The management and administration of leasing activity on the OCS has been seen as involving a four-phase framework: (1) preparation of a five-year leasing plan; (2) lease sales; (3) lease exploration; and (4) lease development and production. *Sec'y of the Interior v. California*, 464 U.S. 312, 337 (1984). The OCSLA requires OCS lessees to submit an exploration plan prior to engaging in phase three, lease exploration, of the four-phase framework. *Id.* at 339. Under the OCSLA, a lease exploration plan is to include: "(A) a schedule of anticipated exploration activities to be undertaken; (B) a description of equipment to be used for such activities; (C) the general location of each well to be drilled; and (D) such other information deemed pertinent by the Secretary." 43 U.S.C. § 1340(c)(3) (footnote omitted). The BOEMRE is required to

either approve or disapprove lessee exploration plans within thirty days of their submission. *Id.* § 1340(c)(1).

However, the regulations imposed on lease exploration do not end with a lessee's submission of an exploration plan. The DOI requires that OCS lessees also submit applications for permits to drill (APDs) to the local District Manager of the BOEMRE prior to engaging in exploratory drilling activities. 30 C.F.R. § 250.410 (2011). Unlike exploration plans, however, APDs are not mandated under the OCSLA. As such, until the recent jurisprudence set forth by the *Ensco* court and a bill recently passed by the United States House of Representatives, no time limit has ever been prescribed for BOEMRE to issue either approval or disapproval of APDs. *See Ensco*, 781 F. Supp. 2d at 334; Putting the Gulf of Mexico Back To Work Act, H.R. 1229, 112th Cong. § 101(a) (1st Sess. 2011).

C. The Court's Decision

In *Ensco*, an offshore drilling supply company, Ensco Offshore Co., sought a preliminary injunction compelling BOEMRE to act on five pending permit applications that it held a contractual stake in. *Ensco*, 781 F. Supp. 2d at 334. Writing for the Eastern District of Louisiana, Article III-Judge Martin Feldman held that the court could only issue the plaintiffs' injunction if they were able to show:

> (1) a substantial likelihood of prevailing on the merits; (2) a substantial threat of irreparable injury if the injunction is not granted; (3) the threatened injury outweighs any harm that will result to the non-movant if the injunction is granted; and (4) the injunction will not disserve the public interest.

Id. at 335 (quoting *Ridgely v. FEMA*, 512 F.3d 727, 734 (5th Cir. 2008)).

The court first addressed the plaintiffs' ability to show a substantial likelihood of prevailing on the merits under the requirements of the Administrative Procedure Act (APA). *Id.* at 335-36. In so doing, the court determined that Ensco's claim could only proceed under the APA if the BOEMRE had "failed to take a discrete agency action that it [was] required to take." *Id.* at 336 (emphasis omitted) (quoting *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (internal quotation marks omitted)). Turning then to whether the BOEMRE had a discretionary obligation to grant or deny drilling permit applications, the court found that:

> Although OCSLA grants the Secretary discretion to decide whether to review permit applications . . . once the Secretary exercises that discretion,

> the government is under a duty to act by either granting or denying a permit application within a reasonable time. Not acting at all is not a lawful option.

Id. (citing 43 U.S.C. § 1340(d)). Accordingly, having established the government's nondiscretionary responsibility to act on Ensco's APDs, the court turned its focus to the reasonableness of the government's delay in so acting. *Id.* at 337.

In its evaluation of whether Ensco had met its "difficult burden" of showing that the government's delay had been unreasonable, the court opined that the thirty-day limit that the OCSLA imposed on the DOI's approval or rejection of exploration plans, the OCSLA's express mandate of expeditious development, and the fact that before the drilling moratorium permit applications were customarily processed within two weeks indicated Congress's "blessing to a time frame for action no longer than thirty days." *Id.* at 339 (citing 43 U.S.C. § 1340(d)). Therefore, even though the OCSLA does not provide a length of time within which permit applications must be processed, the court was able to extrapolate that the government's delay in approving Ensco's APDs had been unreasonable. *Id.* In so finding, the court also concluded that Ensco had met its burden of establishing a substantial likelihood of success on the merits of its case. *See id.* at 339-40.

Next, addressing the issue of irreparable injury, whether the harm suffered by plaintiffs absent an injunction would outweigh any harm faced by the government in granting that relief, and whether the issuance of an injunction in Ensco's favor would not disserve the public interest, the court first acknowledged, "Where the injury is merely 'financial' and 'monetary compensation will make [the plaintiff] whole if [the plaintiff] prevails on the merits,' there is no irreparable injury." *Id.* at 340 (alterations in original) (quoting *Bluefield Water Ass'n v. City of Starkville, Mississippi*, 577 F.3d 250, 253 (5th Cir. 2009)). However, the court determined that the threat of Ensco's operations in the Gulf of Mexico being disabled in perpetuity by the government's interminable refusal to process its APDs represented more than a mere economic impairment. *Id.* Rather, the persistent delay rose to the level of an irreparable injury and therefore merited a grant of injunctive relief. *Id.* The court further found that the threat that would result should it not grant Ensco's requested relief outweighed any harm faced by the government, stating, "As the first anniversary of the Deepwater Horizon disaster draws near, any reason that would have justified delays has, under a rule of reason, expired." *Id.* Finally, the court concluded that its issuance of an injunction would not disserve the public interest, because

"[b]eginning to process permit applications will restore normalcy to the Gulf region and repair the public's faith in the administrative process." *Id.* (citing *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984)). Consequently, the court held that Ensco was entitled to its preliminary injunction and ordered the BOEMRE to act on the pending permit applications within thirty days. *Id.*

After receiving the order issuing the injunction, however, the DOI appealed the Eastern District's decision, and requested that the United States Court of Appeals for the Fifth Circuit stay the district court's verdict. Defendant's Notice of Appeal, *Ensco Offshore Co. v. Salazar*, No. 10-1941(F)(2) (E.D. La. filed Mar. 9, 2011). Acting on the DOI's request, the Fifth Circuit issued an order staying the district court's injunction until it could rule on the case. *Ensco Offshore Co. v. Salazar*, No. 10-1941, 2011 WL 1790838, at *1 (E.D. La. May 10, 2011).

Before the Fifth Circuit could review the district court's decision, however, both Ensco and the DOI filed motions cross-moving for summary judgment on the issue of whether the BOEMRE had unreasonably delayed the processing of permits. *Id.* at *3 (order on cross-motions for summary judgment on Count IV of the plaintiffs' second amended complaint). As the basis for its motion, the DOI asserted:

> (1) the plaintiffs' challenge to the three permit applications which have been granted (which include the only two applications related to plaintiff ATP) is moot; (2) Ensco lacks standing to challenge the remaining applications; and (3) BOEMRE's review of the six remaining applications satisfies a rule of reason, for reasons this Court has previously rejected in granting the plaintiffs a preliminary injunction.

Id. Ensco meanwhile defended against the DOI's standing and mootness challenges whilst averring, as it had at the preliminary injunction phase, that the BOEMRE's delays in approving its APDs were unreasonable. *Id.*

Writing once again for the Eastern District, Judge Feldman decided the extended mootness and standing analyses in Ensco's favor by summarizing:

> [P]redictability in the deepwater permitting scheme for the Gulf of Mexico, which would be gained by . . . securing a decision, any decision, from the government on its contractors' permit applications within a reasonable time, [would allow] Ensco [to] proceed in its business activities with certainty and clarity. Both of which are lacking now.

Id. at *6.

Addressing next the merits of the case, Judge Feldman "adopt[ed the court's] prior reasoning in full" and maintained that the "OCSLA,

together with the APA, establishes a non-discretionary duty on the [DOI] to act, favorably or unfavorably, on drilling permit applications within a reasonable time." *Id.* at *7. "The Court has repeatedly acknowledged that some delays are understandable in a more regulated environment, but . . . delays must reach some end. Without evidence showing otherwise, a thirty-day timeline derived from the statute and past practices remains reasonable." *Id.* at *7 n.5. "At some point this must end. With a permit, or without." *Id.* at *7 n.6. Consequently, the court found that the DOI had acted "unlawfully and improperly" by "fail[ing] to establish that the individual permit applications . . . require[d] more (or less) care" within thirty days, and it entered a permanent injunction requiring that the BOEMRE act on six Ensco-related permit applications before June 9, 2011. *Id.* at *7 n.5.

Soon thereafter, the Fifth Circuit dismissed the DOI's appeal on grounds of mootness, and Ensco and the DOI entered into a settlement agreement. *See* Settlement Agreement, *Ensco Offshore Co. v. Salazar*, No. 2:10-cv-01941(F)(2) (E.D. filed La. June 10, 2011). Under the terms of their settlement, the BOEMRE was required to act on Ensco's outstanding permit applications in return for Ensco's agreement to act with the DOI in jointly requesting that the court vacate its injunction and that Ensco dismiss its remaining claims. *See id.* at 3-4.

D. Legislative Response

On March 29, 2011, just prior to the date that the *Ensco* appeal was scheduled to take place, Congressman Doc Hastings of the Fourth Congressional District of Washington State introduced H.R. 1229, *Putting the Gulf of Mexico Back To Work Act*, to the House of Representatives. Putting the Gulf of Mexico Back To Work Act, H.R. 1229, 112th Cong. (1st Sess. 2011). The proposed legislation, amongst other things, seeks to amend the OCSLA to establish a statutory thirty-day timeline within which the BOEMRE must act on APDs. *Id.* § 101(a) (proposing to amend 43 U.S.C. § 1340(d) to state: "The Secretary shall decide whether to issue a permit . . . within 30 days after receiving an application for the permit"). On May 11, 2011, the United States House of Representatives passed, by a majority vote, H.R. 1229. *H.R. 1229: Putting the Gulf of Mexico Back To Work Act*, GOVTRACK.US, http://www.govtrack.us/congress/bill.xpd?bill=h112-1229 (last updated May 16, 2011, 6:10 AM). As of October 2011, however, the United States Senate has yet to take any affirmative action on voting for the Act. *See id.* (on May 16, 2011, the bill was read in the Senate for the Second time and placed on the Senate Legislative Calendar). Thus, the resolution of

the ultimate controversy in *Ensco*, "predictability in the deepwater permitting scheme for the Gulf of Mexico," as Judge Feldman aptly acknowledged, lies in wait for the verdict of the United States Senate and the signature of the President. *See Ensco*, 2011 WL 1790838, at *6 (order on cross-motions for summary judgment on Count IV of the plaintiffs' second amended complaint).

E. Conclusion

Though the Fifth Circuit's refusal to pass judgment on the district court's holding in *Ensco* makes it uncertain as to whether the precedent established by the case—reasonableness requires that the BOEMRE act on applications for permits to drill within thirty days—will prove a lasting one, the precedent that the district court's holding confidently reinforces is interminable:

> [W]here the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President . . . nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803).

Paul Thomas Chastant III

II. THE CWA AND MOUNTAINTOP REMOVAL MINING

National Mining Ass'n v. Jackson,
Nos. 10-1220 (RBW), 11-0295 (RBW), 11-0446 (RBW), 11-0447 (RBW), 2011 WL 4600718 (D.D.C. Oct. 6, 2011)

In *National Mining Ass'n v. Jackson*, the United States District Court for the District of Columbia considered the extent to which the Environmental Protection Agency (EPA) may coordinate with the United States Army Corps of Engineers (Corps) to issue or deny section 404 permits to surface mining companies. Nos. 10-1220 (RBW), 11-0295 (RBW), 11-0446 (RBW), 11-0447 (RBW), 2011 WL 4600718 (D.D.C. Oct. 6, 2011). The suit stemmed from increased EPA oversight in the permitting process for mountaintop removal mining operations in Appalachia. Finding the EPA's section 404 power expressly limited by the Clean Water Act (CWA), the court concluded that the EPA had

overstepped its statutory authority through its involvement in the Corps' permitting process. *Id.* at *10.

A. Background

The National Mining Association (NMA), the national trade association of the mining industry, brought this action in response to a new EPA policy increasing the agency's oversight of the issuance of section 404 permits to mining companies. CWA section 404 governs the issuance of the dredge and fill permits. *See* 33 U.S.C. § 1344 (2006). The statute authorizes the Secretary of the Army to issue permits for the "discharge of dredged or fill material" into the water at specified disposal sites. *Id.* § 1344(a). Streams and other waterways affected by mining operations are considered disposal sites under the CWA. *Id.* Accordingly, before a mining company can begin a mountaintop removal mining project, the company must secure a section 404 permit from the Corps. *See Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 190 (4th Cir. 2009) ("[S]urface mining projects that intend to dispose of excess spoil from their mining operations in jurisdictional waters must obtain a CWA § 404 . . . permit from the Corps." (citing 33 U.S.C. § 1344)). The EPA, by increasing its control over the permitting process, hoped to slow the expansion of mountaintop removal mining in Appalachia.

The NMA claims targeted a 2009 EPA memorandum establishing new EPA influence over the section 404 permit process. On June 11, 2009, the EPA, Corps, and Department of Interior signed a memo titled Memorandum of Understanding on Implementing the Interagency Plan on Appalachian Surface Coal Mining. *Nat'l Mining*, 2011 WL 4600718, at *2. One provision of the plan called for "coordinated environmental reviews of pending permit applications under the [CWA]." *Id.* On the same day, the EPA issued a memoranda detailing the Enhanced Coordination (EC) Process, a two-step process for the issuance of section 404 permits to mining companies operating in Appalachian states. *Id.* In step one, the EPA conducts a Multi-Criteria Integrated Resource (MCIR) Assessment. The assessment serves as a screening process through which the EPA evaluated pending permit applications to determine which applications required step two of the EC Process—"further coordination" between the EPA and Corps to determine whether a permit should be issued and the terms required by the specific permit. *See id.* In September 2009, the EPA issued a list of seventy-nine pending permit applications that would undergo further review by the EPA before the Corps determined whether to issue the section 404 permit, delaying

mining activities at all sites. Press Release, EPA, EPA Releases Preliminary Results for Surface Coal Mining Permit Reviews (Sept. 11, 2009).

Mountaintop removal mining is practiced almost exclusively in Appalachia. Mines are scattered throughout southwestern Virginia, West Virginia, northeastern Tennessee, southern Ohio, and eastern Kentucky. Allison Subacz, Comment, *Mountaintop Removal: Case Studies and Legislative Update of the Permitting Process*, 4 APPALACHIAN NAT. RESOURCES L.J. 49, 49 (2010). Mountaintop removal, as the name suggests, is a process by which the top of a mountain (layers of vegetation, soil, and rock) are removed to expose coal seams concealed within the rock. *Id.* at 51. The mountaintop is first stripped of all vegetation and soil, then successive layers of rock are blasted until the seam is reached, sometimes as far as 800 feet below the surface of the mountain. *Id.* (citing SHIRLEY L. STEWART BURNS, BRINGING DOWN THE MOUNTAINS: THE IMPACT OF MOUNTAINTOP REMOVAL SURFACE COAL MINING ON SOUTHERN WEST VIRGINIA COMMUNITIES, 1970-2004 (2005), http://eidr.wvu.edu/etd/documentdata.eTD?documentid=4047). The resulting mining overburden—the soil and rock removed from the mountaintop—is then dumped directly into the valleys formed at the bases of adjacent mountains in a practice known as "valley fill." *Id.* The impairment of streams navigating these buried valleys bring mine operators within the scope of the dredge and fill provisions of the CWA. *See Aracoma Coal*, 556 F.3d at 190-91 (stating that mining projects that require valley fill trigger CWA jurisdiction).

Mountaintop removal and valley fill are often extremely destructive activities. Valley fills increase sediment in streams, which may raise the mineral levels and acidity of the water, making the water unable to support aquatic life and contaminating local drinking water. Subacz, *supra*, at 52 (citing Burns, *supra*). Mountaintop removal mining also requires the use of coal slurry impoundments—earthen holding tanks similar to stock ponds that are filled with a mixture of liquid and solid mining byproduct. *Id.* at 52 & n.25. In the 1972 Buffalo Creek Flood, an impoundment wall gave way in heavy rains, drowning 125 West Virginians in a 132-million-gallon surge of black waste water. *Buffalo Creek*, W. VA. DIVISION OF CULTURE & HIST., http://www.wvculture.org/history/buffcreek/bctitle.html (last visited Nov. 6, 2011). In October 2000, the bottom of an impoundment in Martin County, Kentucky, broke into an abandoned underground mine, sending over 300 million gallons of sludge containing chemicals, including arsenic and mercury, into nearby waters. Rebecca Leung, *A Toxic Cover-Up?*, CBSNEWS.COM

(Feb. 11, 2009, 8:09 PM), http://www.cbsnews.com/stories/2004/04/01/60minutes/main609889.shtml. Additionally, mountaintop removal mining results in a permanent and jarring alteration of the natural landscape. Densely forested mountains are reduced to "plateaued treeless grasslands" even after remediation efforts. Subacz, *supra*, at 52 (citing Paul A. Duffy, *How Filled Was My Valley: Continuing the Debate on Disposal Impacts*, 17 NAT. RESOURCES & ENV'T 143, 143 (2003)).

On July 20, 2010, the NMA filed suit in the District of Columbia challenging the EPA's presumed authority to implement the EC Process and MCIR Assessment established in the June 11 memorandum. Complaint for Declaratory and Injunctive Relief, *Nat'l Mining*, 2011 WL 4600718 (No. 10-1220 (RBW)), 2010 WL 2910972. The NMA alleged that the EC Process and MCIR Assessment constituted an invasion of the Secretary of the Army's exclusive permitting authority in violation of the CWA. *Nat'l Mining*, 2011 WL 4600718, at *3. The NMA named as defendants the EPA, Lisa Jackson as administrator of the EPA, the Corps, John McHugh as Secretary of the Army, and Lieutenant General Robert L. Van Antwerp as the Chief of Engineers and Commanding General of the Corps. Complaint for Declaratory and Injunctive Relief, *supra*.

The NMA sought an injunction ordering the EPA to vacate the EC Process and MCIR Assessment, enjoining the EPA from enforcing, applying, or implementing either process, and ordering the Corps to process all pending section 404 permits pursuant to the codified, pre-EC/MCIR process. Complaint for Declaratory and Injunctive Relief, *supra*, at 39. U.S. District Court Judge Reggie B. Walton found that the NMA had standing to challenge the EPA actions and that their claims were ripe for review, but denied the requested injunctive relief because the NMA failed to prove the damage to the mining businesses rose to the level of irreparable harm required for the issuance of a preliminary injunction. *Nat'l Mining Ass'n v. Jackson*, 768 F. Supp. 2d 34 (D.C. Cir. 2011). Thereafter, the NMA filed the motion for partial summary judgment giving rise to the decision discussed in this Article.

B. The Court's Decision

In its decision, the court considered two issues: (1) whether the MCIR Assessment and the EC Process violate the CWA because the processes are beyond the authority granted to the EPA by the statute, and (2) whether the EPA's implementation of the MCIR Assessment and EC Process without notice and comment violates the Administrative Procedure Act (APA). *Nat'l Mining*, 2011 WL 4600718, at *3. Judge

Walton found for the NMA, answering both questions affirmatively. *Id.* at *10.

The critical issue to be determined in this case, the resolution of which determined whether the EC Process would be vacated or receive the court's blessing, was the permissible extent of EPA influence in the section 404 permit process. As expected, the NMA interpreted the statute as defining narrow boundaries on the agency's involvement, while the EPA read broad authority in the statute. *Id.* at *4.

The NMA argued that the CWA assigned the EPA only two powers related to the issuance process for section 404 permits: (1) developing guidelines with the Corps for the Corps to apply when designating an area as a disposal site subject to section 404 permitting and (2) exercising its authority to veto the Corps' decision to issue a permit for a particular disposal site following consultation with the Corps and notice and comment with public hearings. *Id.* (referring to 33 U.S.C. § 1344(c)).

Additionally, the NMA asserted that the CWA, by its plain language, limited EPA/Corps section 404 coordination to three specific scenarios: (1) joint development of section 404(b)(1) guidelines to identify what area is identified as a disposal site, (2) EPA consultation with the Corps before exercising its section 404(c) veto power to prohibit the designation of an area as a disposal site, and (3) an agreement to ensure that permit decisions are made within ninety days of notice that a section 404 application is issued. *Id.* It followed, then, that the increased coordination and EPA influence established by the EC Process violated the CWA because they added both an additional task not delegated to the EPA by the statute and a prohibited coordination between the two entities. *See id.*

The EPA framed the EC Process as within the broad authority conferred upon the agency by the CWA and as a necessary compliment to related authority expressly granted by the statute. Section 404(c) endows the EPA with a limited veto power over the designation of disposal sites. 33 U.S.C. § 1344(c). The subsection authorizes the EPA to deny a site specification as a disposal site if the agency determines, after consultation with the Secretary of the Army and public hearing, that discharge of materials into the area would have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational activities. *Id.* The subsection addresses the sites which would be subject to permitting rather than the permitting process itself. *See id.* The EPA argued that the MCIR Assessment and EC Process were a necessary corollary to this section 404(c) veto power. *Nat'l Mining*, 2011 WL 4600718, at *4. Additionally, the EPA viewed

the three scenarios of EPA/Corps coordination described above as the *minimum* coordination required by the CWA, not a ceiling on agency coordination as argued by the NMA. *Id.*

Judge Walton found the NMA's arguments for a narrow reading of the statute persuasive, and anchored his decision on what he recognized as a fundamental limitation imposed on EPA by section 404. *Id.* at *6. Section 404(a) establishes the Secretary of the Army as the sole permitting authority for dredge and fill permits. *See* 33 U.S.C. § 1344(a) ("The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites."). The subsection does not mention the EPA, which Judge Walton read as a limitation on the EPA's role in the permitting process. *Nat'l Mining*, 2011 WL 4600718, at *5. Following this broad grant of permitting authority to the Corps, subsequent subsections identify specific roles for the EPA to play in the permitting process, including its section 404(c) veto power. *Id.* The court concluded that the carving out of these individual limited circumstances for EPA involvement in the permitting process amounted to a statutory ceiling on EPA involvement. *Id.* Because section 404 is unambiguous in its allocation of authority, EPA encroachment into territory reserved for the Corps through the EC Process and MCIR Assessment constituted a violation of the CWA. *Id.* at *6.

The court supported this holding by citing the D.C. Circuit's decision in *Railway Labor Executives' Ass'n v. National Mediation Board*. *Id.* at *5 (citing *Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994)). In *Railway Labor Executives' Ass'n*, the D.C. Circuit considered the authority of the National Mediation Board (Board) to investigate disputes among a carrier's employees under the Railway Labor Act (RLA). *Id.* (citing *Ry. Labor Executives' Ass'n*, 29 F.3d at 658-59). The RLA states that a Board investigation can be initiated only "upon request of either party to the dispute." *Id.* (quoting 45 U.S.C. § 152 subsec. ninth (2006)). Although the relevant statutory provision states that carriers are *not* considered parties, the Board allowed carriers to initiate dispute investigations in certain instances. *Ry. Labor Executives' Ass'n*, 29 F.3d at 658 (citing 45 U.S.C. § 152 subsec. ninth). Adopting an argument similar to the EPA's position in *National Mining*, the Board claimed that the court should assume that the RLA granted the Board a delegation of power sufficient to authorize carriers to initiate claims because Congress did not expressly withhold that power. *Id.* at 659. According to the Board's interpretation, a minimum on Board action was provided by the statute, not a ceiling.

See id. at 666 (referring to the Board's argument that because the statute does not expressly forbid the Board from allowing new entities to initiate an investigation, it should not be prohibited from doing so). The court disagreed and held that the absence of any language in the RLA conferring upon the Board the power to authorize carrier initiation was evidence of Congress's intention that the Board not possess that power. *Id.* at 659. Judge Walton understood the same considerations to be present in *National Mining*. In the CWA, Congress specifically named the Corps as the section 404 permitting authority and relegated the EPA to a "lesser, clearly defined supporting role." *Nat'l Mining*, 2011 WL 4600718, at *6. An assumption of powers beyond that supporting role renders the plain language of the statute meaningless. Just as the National Mediation Board was barred from conferring upon itself powers in excess of the statutory limitations of the RLA, the EPA here must be barred from delegating itself permitting authority in excess of the clear limitations defined by the CWA. *Id.*

The court next considered the second major issue raised by the NMA: whether the EPA's implementation of the MCIR Assessment and EC Process without notice and comment violated the APA. Courts recognize two types of agency rules: legislative rules, which have the force and effect of law, and procedural rules, which "do not themselves alter the rights or interests of parties." *Id.* (quoting *James V. Hurson Assocs., Inc. v. Glickman*, 229 F.3d 277, 280 (D.C. Cir. 2000)). Legislative rules are characterized by "substantive changes or major legal additions to existing rules or regulations" as well as the adoption of agency positions inconsistent with existing rules and regulations. *Id.* (citing *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 34-35 (D.C. Cir. 2005)). Legislative rules are subject to the APA's notice and comment procedures, while procedural rules are excused from the process. *Id.* (citing *Hurson Assocs.*, 229 F.3d at 280); *see* 5 U.S.C. § 553(b)(3)(A) (2006).

The NMA and EPA differed on whether the new EPA policies constituted legislative or procedural rules. *Nat'l Mining*, 2011 WL 4600718, at *6-7. The NMA argued that the MCIR Assessment and EC Process "effectively amended" the section 404 permitting regime and was therefore a legislative rule subject to notice and comment procedures. *Id.* at *6. The federal defendants claimed the new policies were merely procedural because they did not alter the rights and obligations of any parties as permit applicants remained subject to the permitting standards established by the CWA. *Id.* at *7.

As before, Judge Walton agreed with the industry plaintiff. The court concluded that because the MCIR Assessment changed the agency that reviewed pending section 404 permits, transferring that authority from the Corps to the EPA, the rule "signifie[d] a substantive, rather than procedural, change to the permitting framework." *Id.* at *8. Further, the court earlier established that the MCIR Assessment and EC Process were inconsistent with the legal duties granted to the EPA by the CWA. When a legal duty does not exist prior to an agency action, the action is a legislative rule which requires notice and comment. *Id.* at *9 (citing *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1110 (D.C. Cir. 1993)). Because the MCIR Assessment and EC Process both transferred permitting authority from the Corps to the EPA and conferred upon the EPA a new legal duty not granted by the CWA, the new policies constituted a legislative rule. *Id.* Accordingly, the court set aside the two policies because the EPA failed to follow APA notice and comment rules. *Id.* at *10. Having found the MCIR Assessment and EC Process invalid as a violation of both the CWA and APA, the court granted the NMA's motion for partial summary judgment.

C. Conclusion

Mountaintop removal mining continues to pose a danger to rural Appalachia and its inhabitants. While the court in *National Mining* vacated the EPA's recent MCIR Assessment and EC Process actions as a violation of both the CWA and the APA, nothing indicates that the Obama Administration will abandon its efforts to reduce the practice of mountaintop removal mining significantly. The agency will simply be denied one arrow in its quiver. As a clearly undeterred EPA stated in a press release issued after Judge Walton's decision:

> [T]he ruling was a procedural decision that does not affect our Clean Water Act authority to protect [families living in Appalachia] from public health and environmental impacts caused by poor coal mining practices . . . . We will work under the law to meet our Clean Water Act responsibilities to keep Appalachian streams clean for drinking[,] fishing, . . . swimming[,] and to assure environmentally responsible coal mining proceeds.

Ruling on EPA Attracts Praise, NEWSANDSENTINEL.COM (Oct. 8, 2011), http://www.newsandsentinel.com/page/content.detail/id/552811/Ruling-on-EPA-attracts-praise.html?nav=5061 (quoting statement by the EPA).

Andrew King

III. NONNATIVE INVASIVE SPECIES—PUBLIC NUISANCE

Michigan v. United States Army Corps of Engineers,
No. 10-3891, 2011 WL 3836457 (7th Cir. Aug. 24, 2011)

The waterways of the United States are under attack. This attack is coming from a foreign source that is here for our resources. However, this attack is coming from a fish, more specifically, two types of fish collectively known as the Asian carp. Asian carp first entered U.S. waterways in the 1970s after escaping aquaculture facilities near the Mississippi River. *Michigan v. U.S. Army Corps of Eng'rs*, No. 10-3891, 2011 WL 3836457, at *19 (7th Cir. Aug. 24, 2011) (citing *Bighead and Silver Carp* (Hypophthalmichthys nobilis *and* H. molitrix), WIS. DEP'T NAT. RESOURCES, http://dnr.wi.gov/invasives/fact/asian_carp.htm (last revised Sept. 3, 2004)). Since their introduction, they have moved up the Mississippi River and are now braced to enter the Great Lakes via the Chicago Area Waterway System (CAWS). *Id.* at *1. The CAWS is a system of canals, channels, locks, and dams that provides a link between the Mississippi River and the Great Lakes. These fish have a voracious appetite and can readily adapt to their environment. *Id.* Once they establish a breeding colony they can sustain their populations and wreak havoc on the surrounding ecosystem. *See id.*

The plaintiffs, a group of states and intervening Native American organizations, are concerned that the carp will enter through the CAWS and cause irreparable harm to the industries of the Great Lakes, as well as irreversibly change the Great Lakes ecosystems. *Id.* The plaintiffs assert that they fear the CAWS is being mismanaged by the United States Army Corps of Engineers (Corps) and that this mismanagement will lead to a sustainable carp population in the Great Lakes, hurting the region's billion dollar industries. *Id.* The plaintiffs claim that the Corps' failure to close sections of the CAWS to prevent the carp from entering the Great Lakes constitutes a violation of the federal common law of nuisance. *Id.* (citing *Am. Elec. Power Co. v Connecticut*, 131 S. Ct. 2527 (2011)). The plaintiffs asked for declaratory and injunctive relief and moved for a preliminary injunction forcing the defendants to put in a series of preventative measures to stop the carp, including physical barriers. *Id.* The United States District Court for the Northern District of Illinois denied the preliminary injunction. *Id.* The United States Court of Appeals for the Seventh Circuit affirmed the district court's ruling and denied the preliminary injunction. *Id.* at *33. While the Seventh Circuit agreed that the chances of harm from the carp were real, the court stated this was not enough to warrant automatic injunctive relief. *Id.* at *2. The

Seventh Circuit found a compelling reason to deny the injunction because of the steps the Corps took and were planning to take to manage the carp. *Id.* The court believed that any preliminary interference by the courts could be detrimental to these efforts. *Id.*

The court ruled that in order to have a preliminary injunction, the plaintiffs must show (1) "they are likely to succeed on the merits of the claims," (2) "that they are likely to suffer irreparable harm" unless the injunction is given, (3) that the harm they would suffer is greater than the harm that the injunction would inflict on the defendants, and (4) "that the injunction is in the public interest." *Id.* (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

The court disagreed with the lower court's assumption that the chance of success on the merits was "at best, a very modest likelihood of success." *Id.* at *2-3. In its analysis, the court first decided whether the plaintiffs' federal common law nuisance claim could proceed. *Id.* The court pointed out that in the past, it had held that federal common law can apply to prevent a fellow state from polluting and causing a public nuisance. *Id.* at *3 (quoting *Am. Elec. Power*, 131 S. Ct. at 2535-36). The Corps, in its brief, stated that public nuisance law only applies to traditional pollutants and that the carp are not what have traditionally been held as pollutants. *Id.* at *4. The court rejected this argument and stated that it would be incorrect to only extend protection to industrial pollutants and not to a nonnative species introduced into an environment. *Id.* The court also dismissed the Corps' argument that they should not be held responsible because they are not the ones moving the fish. *Id.* The court stated that it does not matter what the Corps is physically doing, only that their actions are causing the nuisance to occur. *Id.* The court reasoned that the best application of public nuisance principles for this matter should follow the United States Supreme Court's view of shared water resources. *Id.* at *5. The Seventh Circuit held that under this analysis, the federal common law of nuisance applied to the plaintiffs' claim. *Id.*

The defendants also claimed that the plaintiffs could not win on the merits because they could not make a claim against the United States because the federal government had not waived its sovereign immunity. *Id.* at *7. The court rejected this claim as well, finding that the Corps read too much into silence in the Federal Tort Claims Act and that the Act does not bar claims seeking injunctive relief. *Id.* at *9 (citing 28 U.S.C. §§ 2674, 2680 (2006)). The defendants further argued that congressional action has displaced the federal common law. *Id.* at *10. The defendants pointed to such legislation as the National Invasive Species Act, which

directs the Corps to "investigate and identify environmentally sound methods for preventing and reducing the dispersal of aquatic nuisance species between the Great Lakes [basin] and the Mississippi River [basin] through the Chicago River Ship and Sanitary Canal." *Id.* at *12 (alterations in original) (quoting Aquatic Nuisance Prevention and Control Act, 16 U.S.C. § 4722(i)(3)(A) (2006)). The court held that this and other legislation allowed the Corps to take actions; the court also reminded the parties that recent invasive carp proposals had failed in both Houses. *Id.* at *13 (citing Close All Routes and Prevent Asian Carp Today Act of 2010, H.R. 4472, 111th Cong. (2d Sess. 2010); Close All Routes and Prevent Asian Carp Today Act of 2010, S. 2946, 111th Cong. (2d Sess. 2010)).

With these preliminary questions disposed of, the court was ready to evaluate the success of the plaintiffs' claims. The court posited that the lower court underestimated the plaintiffs' likelihood of success. *Id.* at *14. The court reminded the parties that for an injunction to be granted there does not need to be any actual harm, just the real and immediate threat of harm. *Id.* at *15 (quoting *Missouri v. Illinois*, 200 U.S. 496, 518 (1906)). Further, the court explained that the likelihood of success standard is actually quite low. The court cautioned to never equate likelihood of success with *actual* success when considering a preliminary injunction. *Id.* at *16 (quoting *Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 546 n.12 (1987)). The Seventh Circuit ruled that the district court lost sight of this distinction. *Id.* However, the court conceded that some key information regarding the carp has only recently been presented. *Id.* at *18. The court pointed to the Obama Administration's finding that the carp could survive on the food sources in the Great Lakes and that the Great Lakes coastal areas could support Asian carp breeding. *Id.* The court acknowledged this key information may not have been available to the district court. However, the court in the end stated that with regard to the fish infiltration, "it would be impossible to un-ring the bell" and that because of this, the court believed the plaintiffs had presented enough evidence to show that they could succeed on the merits. *Id.* at *19.

The court initially took issue with the generality of the plaintiffs' claims. The court stated that the plaintiffs had given "broad strokes of additional steps they would like us to order the defendants to take, but they have not furnished many details about how this relief would be implemented, on what schedule, at what cost, and on whose nickel." *Id.* at *24. The court claimed that this vagueness stood in the way of a grant of injunctive relief. *Id.* (citing *Patriot Homes, Inc. v. Forest River*

Housing, Inc., 512 F.3d 412, 414-15 (7th Cir. 2008); *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 619-20 (7th Cir. 1998)). The court then analyzed the five actions the plaintiffs sought to compel the defendant to do: (1) close the locks separating the CAWS and Lake Michigan, (2) install screens over sluice gates, (3) add block nets in local rivers, (4) use rotenone to poison fish in the CAWS, and (5) accelerate the Great Lakes and Mississippi River Interbasin Study (GLMRIS). *Id.*

The court first made it clear that there is no guarantee that compelling these actions would prevent the carp from entering the Great Lakes. *Id.* at *25. The court pointed to the fact that there are eighteen other access points through which the carp could gain entrance, reducing the strength of the argument that the injunction would prevent the harm. *Id.* However, the court continued analyzing the five factors. The court first found that closing the locks is not effective, because in order to be effective, the locks would have to install bulkheads. *Id.* These bulkheads could prevent timely reactions to flooding, potentially placing the public at risk. *Id.* Furthermore, there is no guarantee that closing the locks with bulkheads would even prevent the fish from spreading. *Id.* The court held that simply reducing the risk of carp introduction was not a correct balance to the safety of the public. *Id.* The court then addressed placing screens over the sluice gates. *Id.* at *26. Sluice gates operate much like locks and are opened to control flooding. *Id.* The Great Lakes district has already installed screens over some of the gates. *Id.* The court questioned the time necessary to install these screens effectively and safely, fearing that the trial could be over before the Corps could implement this plan. *Id.* The court was also concerned about the placement of block nets given that the Corps already considered doing this without an injunction, but had found the nets created a flood risk. *Id.* The court was similarly dismissive about using the poison rotenone to kill the carp. *Id.* at *27. The court ruled that there was nothing in the record that showed this "would be a sound step toward reducing the risk that invasive carp will migrate into the Great Lakes." *Id.* Lastly, the plaintiffs asked for the acceleration of the GLMRIS. The court reminded the plaintiffs that they could not "ask the Corps to study harder and think faster." *Id.* The court ruled that although the plaintiffs were able to show some undefined reduction in the likelihood the carp would spread, there was no guarantee these actions would stop the carp from spreading. *Id.* at *28.

The court took note of the plaintiffs' glib tone when stating that the issue for the defendant was "just a matter of money." *Id.* The court eloquently emphasized that the government must be concerned about the

price tag and does not have endless money, stating, "19 members of the plaintiff states' delegations to Congress recently voted against raising the federal borrowing limit." *Id.* The court expounded on the costs the federal government would incur if the preliminary injunction were to be put into effect. *Id.* The court felt it unfair to saddle the federal government and the State of Illinois with the cost of the injunction because the spread of carp is a forty-year problem that touches many states. *See id.* at *28-29. The court also reminded the plaintiffs that installing the requested bulkheads would cost thousands per day. *Id.* at *29. Furthermore, the sluice screens would require cleaning, with the cleaning methods being untested and costly. *Id.*

The court pointed out that the Corps is doing its best to abate the problem of the carp. *Id.* at *30. The court also made it clear that it has, generally, been the policy of the courts to defer to governmental agencies. *Id.* (quoting *Am. Elec. Power*, 131 S. Ct. at 2539-40). The court feared that if it became too involved and did not allow the agency to do its job, it could cause "multiple and perhaps contradictory decrees emanating from different branches of government and confusion about what standards should govern." *Id.* (citing *North Carolina, ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 301-04 (4th Cir. 2010)). The court made it clear that it was going to respect the efforts made by government officials. In fact, the court praised many of the efforts done by the government to stop the spread of Asian carp, acknowledging the intricacies of some of these projects, such as the eight-category project of the Asian Carp Regional Coordinating Committee. *Id.* at *31-32. It was projects like these that the court was afraid to interfere with and derail with injunctions before a full trial on the merits. *See id.* at *32-33.

Additionally the court noted that the Corps was also employing traditional strategies to curb the carp problem. *Id.* at *33. These traditional methods include netting, electrofishing, and rotenone poisoning. The court also found that the defendants were willing to take as many reasonable steps as possible to control the carp. *Id.* The court found that the existing battle against the spread of carp "tips the balance of harms decisively in favor of the defendants." *Id.* So in the public interest, the court upheld the lower courts' denial of the injunction. *Id.*

The court in this case struck a hard line, deciding that it was better to allow a government agency to do what it felt was best in its field of expertise. At no point during its opinion did the court call what was recommended by the plaintiffs unreasonable; the court balanced everything against the interests of each of the parties. Ultimately, the court determined that what the plaintiffs wanted done was not feasible—

either for monetary or practical reasons. The court also did not exclude the possibility of granting the injunction in the future. *Id.* at *33. The court stated, "[I]f the agencies slip into somnolence or if the record reveals new information at the permanent injunction stage, this conclusion can be revisited." *Id.* at *2. This reflects jurisprudence at its best and also demonstrates a real dedication to fairness as well as an open mind for the future.

Jon Adam Ferguson

IV. THE ENDANGERED SPECIES ACT

In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litigation, No. 08-764 (EGS), 2011 WL 2601604 (D.D.C. June 30, 2011)

In February 2005, the Center for Biological Diversity (CBD) petitioned the Secretary of the Interior (Secretary) to list the polar bear as a threatened or endangered species under the Endangered Species Act of 1973 (ESA) due to observed and anticipated declines in the Arctic sea ice that is essential for the polar bear's survival. *In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litigation*, No. 08-764 (EGS), 2011 WL 2601604, at *4 (D.D.C. June 30, 2011). After a three-year investigation by the United States Fish and Wildlife Service (FWS), in which over 160,000 pages of documents and approximately 670,000 comment submissions were considered, a final rule listing the polar bear as a threatened species was issued in May 2008. *Id.* at *1 (citing Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Polar Bear (Ursus Maritimus) Throughout Its Range, 73 Fed. Reg. 28,212 (May 15, 2008) (Listing Rule) (codified at 50 C.F.R. pt. 17 (2010))). Following the publication of the Listing Rule, numerous individuals and organizations brought suit. *Id.* at *1. Most notable among the plaintiffs was the CBD, which, among other issues raised, claimed that the polar bear should have been listed as an endangered species. *Id.* at *8. Also bringing suit was the Conservation Force (CF or joint plaintiffs), which, among other issues raised, claimed that the polar bear should not have been listed as only a threatened species. *Id.* at *7-8. These suits were consolidated in the United States District Court for the District of Columbia and decided in a memorandum opinion in which the court granted the federal defendants' motion for summary judgment. *Id.* at *2. The court held that the FWS's decision to list the polar bear as a threatened species under the ESA represented "a reasoned exercise of the

agency's discretion based upon the facts and the best available science." *Id.*

The statutory terms that were at issue in the cases were primarily confined to the ESA. *Id.* at *10. The ESA requires the Secretary to publish and maintain a list of species that have been designated as threatened or endangered. *Id.* at *3 (citing ESA, 16 U.S.C. § 1533(c) (2006)). Congress defined an endangered species as "any species which is in danger of extinction throughout all or a significant portion of its range," while a threatened species is "any species which is likely to become an endangered species within the foreseeable future." *Id.* (quoting 16 U.S.C. § 1532(6), (20)). The Secretary must list a species after it determines that "any one or a combination" of five statutorily prescribed factors demonstrate that the species is threatened or endangered. *Id.* (citing 16 U.S.C. § 1533(a)(1)(A)-(E)). Importantly, the ESA also mandates that this determination must be made "solely on the basis of the best scientific and commercial data available." *Id.* (quoting 16 U.S.C. § 1533(b)(1)(A)).

Consequently, central to the issues raised before the court was the voluminous record examined by the FWS in determining that the polar bear was a threatened species. An undisputed biological fact established the context for the extensive scientific record. Fatefully, polar bears are "ice-obligate," in that they are evolutionarily adapted to and completely reliant on sea ice for their survival. *Id.* Unfortunately, as the original CBD petition forewarned, the FWS concluded that the extent of sea ice had been decreasing over the preceding decades and it was very likely a trend that would continue for the foreseeable future. *Id.* at *4. The FWS found that a diminished amount of sea ice led to "nutritional stress in polar bears because of lower overall numbers of ice-dependent prey, decreased access to the prey that remain, shorter hunting seasons and longer seasonal fasting periods, and higher energetic demands from traveling farther and swimming longer distances across open water to reach sea ice." *Id.* at *5.

In making the crucial determination of existing and continuing sea ice losses, the FWS relied on research from two prominent outside organizations. First were the complex climate models and other data produced by the International Panel on Climate Change (IPCC), which the FWS supported as the leading body in climate change science. *Id.* at *4. In line with the conclusions reached by the IPCC, the FWS attributed sea ice losses to rising "Arctic temperatures caused by greenhouse gas emissions and related changes in atmospheric and oceanic circulation." *Id.* Importantly, the FWS noted the IPCC

prediction that the "global climate system is committed to a continued warming trend through the end of the 21st century" and that the projected warming was "generally consistent across all IPCC climate models, regardless of differences in possible emission levels over that period." *Id.* Additionally, the FWS commissioned the United States Geological Survey (USGS) to perform further scientific analysis focused on polar bears. *Id.* at *5. The USGS divided the polar bear range into four ecoregions based on regional patterns of ice formation: Seasonal Ice, Divergent Ice, Convergent Ice, and Archipelago. *Id.* at *6. After utilizing two models to project polar bear population outcomes, the USGS concluded that populations would decline in all four regions over the next 100 years. *Id.* The "Bayesian Network" model, which incorporated multiple stressors including a loss of sea ice, predicted extinction for polar bears in the Seasonal and Divergent Ice ecoregions by year forty-five, and for bears in the Convergent Ice region by year seventy-five. *Id.* With this record before them, the FWS determined that all polar bear populations will be affected by substantial losses of sea ice within the foreseeable future and that polar bears would be unlikely to adapt to these changes. *Id.* at *7. While the FWS did not find that the polar bear was "in danger of extinction" in any portion of its range at the time of the listing, it did conclude that the polar bear would likely become an endangered species by mid-century and was therefore a threatened species. *Id.*

The plaintiff, the CBD, challenged the FWS's determination that the polar bear was not an endangered species. *Id.* at *11. At issue was the distinction the FWS made between a species which "*is* in danger of extinction," an endangered species, and a species "*likely to become* an endangered species within the foreseeable future," a threatened species. *Id.* at *13. In interpreting the language of the ESA, the FWS recognized "two distinct degrees of imperilment based on the temporal proximity of the risk of extinction." *Id.* Additionally, the FWS detailed four categories of previous endangered species listings, finding that the circumstances surrounding polar bear populations did not fit into any of the categories. *Id.* at *12-13. The CBD contended, however, that the temporal proximity distinction was not supported by the statute, contravened the flexible policy of the ESA focused on species recovery, and set an impossibly high bar for an endangered species determination. *Id.* at *14. Furthermore, the CBD reasoned that the polar bear fit into three of the four endangered classifications listed by the agency. *Id.* at *14-16. The CBD argued, for instance, that the FWS's global warming determinations constituted a "catastrophic threat" that brought the

species within the FWS category for "[s]pecies facing a catastrophic threat from which the risk of extinction is imminent and certain." *Id.* at *12. However, the court upheld the agency's endangered and threatened species temporal distinction as not clearly out of line with congressional intent. The court held that the "very troubling" evidence raised by the CBD was insufficient to outweigh a determination by the FWS that was "well within its discretion." *Id.* at *18.

The CBD, along with the CF, also argued that the FWS erred by not designating any polar bear population or ecoregion a distinct population segment (DPS). *Id.* at *24. The ESA provides that the term "species" incorporates "any distinct population segment." 16 U.S.C. § 1532(16). The CBD pointed to findings in the record illustrating that the "life-history dynamics, demography, and present and future status of polar bears in the 4 ecoregions are different," just as the "relationships between polar bears and their sea ice habitat are fundamentally different." *Polar Bear*, 2011 WL 2601604, at *26. Indeed, the court acknowledged that these distinctions "would seem to be enough to satisfy the minimal criterion" for establishing a DPS. *Id.* at *27. However, the court held that the agency's decision not to designate any ecoregion as a DPS did not rise to the level of irrationality, especially considering the reasonable FWS determination that the similarities shared by all polar bears, in particular their universal reliance on a sea ice habitat, outweighed the otherwise minor differences between the ecoregions and individual populations. *Id.*

The CF also contended that the polar bear should not have been considered a threatened species at the time of the listing. *Id.* at *19. The central argument made by the CF was that the FWS arbitrarily selected a forty-five-year time period to represent the "foreseeable future" and that a shorter period would be more reasonable. *Id.* at *21. The CF alleged that the FWS did not consider all five factors laid out in the ESA while setting the forty-five-year standard, arguing, for instance, that future regulatory mechanisms, one of the five factors to be considered, cannot be reasonably predicted over a forty-five-year time period. *Id.* at *22. The court held, however, that the record showed that the FWS did, in fact, consider all five factors and that while a shorter timeframe may have been "*more* foreseeable," and therefore, the joint plaintiffs contend, more reasonable, the applicable standard was instead one of rationality. *Id.* at *23 (citing *Envtl. Def. Fund v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981)). The court concluded that the FWS appropriately exercised its discretion in setting a forty-five-year foreseeable future timeline. *Id.*

In rejecting each of the contentions raised by both the plaintiffs and joint plaintiffs, the court remained ever cognizant of the requisite deference to the agency's judgment that "is particularly appropriate where the decision at issue 'requires a high level of technical expertise.'" *Id.* at *9 (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 375-77 (1989)) (citing *Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (D.C. Cir. 1976)). The court endeavored to hold the agency to "certain minimal standards of rationality" despite a lengthy list of issues, raised by a diverse collection of plaintiffs, that were often undisguised attacks focused purely on the reasonableness of various FWS decisions. *Id.* (quoting *Ethyl Corp.*, 541 F.2d at 36). However, because polar bears are the first species to be listed due to climate change, the agency's troubling conclusions regarding climate change have notably endured our country's administrative and litigious vetting process. Perhaps ESA recognition of the extinction threatening polar bears in the foreseeable future will make them the "canary in the coal mine" for our warming planet.

Roderic Fleming

V. THE RESOURCE CONSERVATION AND RECOVERY ACT

Adkins v. VIM Recycling, Inc., 644 F.3d 483 (7th Cir. 2011)

In *Adkins v. VIM Recycling, Inc.*, the United States Court of Appeals for the Seventh Circuit held both that multiple state enforcement actions by the Indiana Department of Environmental Management (IDEM) did not trigger the statutory bar to a separate citizen suit under the Resource Conservation and Recovery Act (RCRA) as to nonoverlapping claims and that the *Colorado River* and *Burford* abstention doctrines were inapposite. *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 486 (7th Cir. 2011); *Co. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

After a brief overview of the governing law, the court discussed the factual underpinnings and procedural history of the case. The defendants were operators of a solid waste dump site in Elkhart, Indiana, while the citizen plaintiffs were local residents pursuing a RCRA cause of action in federal district court. *Adkins*, 644 F.3d at 487-88. Notably, the case featured a lengthy history of state government involvement in the defendant's facility, ultimately producing multiple enforcement suits. *Id.* at 488. In late 2005 and early 2006, the IDEM conducted site visits and determined that the defendant's property violated statutes relating to both

air pollution and solid waste disposal. *Id.* The State and the defendant signed an "Agreed Order" in January 2007, which required the defendant

> to obtain the required permits for its activities, to stop taking so-called "C" grade waste to non-permitted facilities, to stop putting any unregulated waste on the berm at [its] site, to confirm through sampling and analysis that the berm did not [pose] a threat to human health and the environment, to [discontinue] putting any waste [into its] "C" grade piles, and to remove [all] "C" grade waste by September 2008.

Id. Ultimately, the defendant failed to comply, and the IDEM filed suit in October 2008 in the Circuit Court of Elkhart County to enforce the terms of the Agreed Order, particularly with regard to the defendant's failure to remove the "C" grade waste from its site. *Id.*

The unique circumstances of the case arose after the IDEM filed its first lawsuit. Several area residents, who would later become plaintiffs in the federal citizen suit, first sought to intervene in the initial IDEM lawsuit. *Id.* Notably, they sought to expand the scope of the complaint beyond the terms outlined in the Agreed Order. *Id.* In addition to injunctive relief, the private citizen intervenors further sought damages through common law nuisance, negligence, and trespass causes of action. *Id.* Following objections by the defendant, the state court permitted the intervenors to join the IDEM lawsuit. The court limited the suit to the allegations contained within the state causes of action, however, excluding the citizen plaintiffs' more expansive claims. *Id.* at 488-89. Ultimately, after voluntarily withdrawing their state law claims outside the scope of the first IDEM lawsuit, the residents pursued a RCRA citizen suit in federal district court. *Id.* at 489. The residents submitted a Notice of Intent to File a Complaint to the appropriate parties as required by the statute. The statutory waiting period having elapsed with no governmental action, the plaintiffs then filed suit in October 2009 in the Northern District of Indiana. *Id.* The plaintiffs took pains to differentiate their claim from the first IDEM lawsuit, pointing specifically to the limited grounds upon which the Agreed Order, the fulcrum for the state causes of action, was premised. *Id.* at 489-90.

The IDEM continued to inspect the defendant's site, finding ongoing violations that resulted in a second lawsuit filed in December 2009 in Elkhart Superior Court. *Id.* at 490. Confronted with three distinct lawsuits, the defendant moved to dismiss the federal citizen suit. *Id.* First alleging that the district court lacked federal subject matter jurisdiction under RCRA over the plaintiffs' "violation" and "endangerment" claims due to the IDEM's pursuit of those same claims in state court, the defendant also argued that the abstention doctrines established

by *Burford*, 319 U.S. 315, and *Colorado River*, 424 U.S. 800, should apply. *Adkins*, 644 F.3d at 490. Ultimately, the district court granted the defendant's motion, finding that it lacked jurisdiction over the RCRA violation claim and that it should abstain from exercising jurisdiction over all RCRA claims under the abstention doctrines outlined in *Burford* and *Colorado River*. *Id.* Further, the court elected not to exercise supplemental jurisdiction over the citizen's state law claims. *Id.*

On appeal, the Seventh Circuit first addressed the district court's conclusion that it lacked subject matter jurisdiction to adjudicate the RCRA cause of action. *Id.* at 491. First noting that "'[j]urisdiction' means nothing more and nothing less than 'a court's adjudicatory authority,'" the court reasoned that "[t]he jurisdictional category applies only to 'prescriptions delineating the classes of cases (subject matter jurisdiction) and the persons (personal jurisdiction) implicating that authority.'" *Id.* (quoting *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1243 (2010); *Kontrick v. Ryan*, 540 U.S. 443, 445 (2004) (internal quotation marks omitted)). Having drawn that distinction, the court observed, "If a rule is genuinely jurisdictional, a federal court has an obligation to raise and decide the issue itself even if the parties do not." *Id.* Ultimately, the court concluded, "The RCRA prohibition on bringing a citizen suit when the EPA or a state agency 'has commenced and is diligently prosecuting' an action to require compliance with the same permit, standard, or other requirement falls into the category of claims-processing rules." *Id.* at 492. Consequently, the court held that the citizen plaintiffs had alleged "colorable claims for relief directly under RCRA." *Id.* Even if those claims proved unsuccessful, the court concluded, "whether because of a statutory bar or for some other reason, they were substantial enough to give the district court subject matter jurisdiction over the case, including supplemental jurisdiction over the plaintiffs' state law claims." *Id.* (citing *Rabé v. United Air Lines, Inc.*, 636 F.3d 866, 868-70 (7th Cir. 2011); *Gammon v. GC Servs. Ltd. P'ship*, 27 F.3d 1254, 1256 (7th Cir. 1994)).

The court next addressed the defendant's motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. Disagreeing sharply with the court below, which had ruled that the second IDEM suit barred the citizens' federal RCRA claim, the appellate court held that RCRA "prohibits only *commencement* of a citizen suit, not the continued prosecution of such an action that has already been filed." *Id.* at 493. Drawing from case law relating to both the Clean Water Act and the Comprehensive Environmental Response, Compensation and Liability

Act, the court ultimately concluded that the later-filed second IDEM suit did not impair the plaintiffs' ability to proceed with their citizen suit. *Id.* at 493-94.

As to the initial state lawsuit representing a potential bar to the citizen suit, the court concluded, "RCRA allows the plaintiffs to pursue their claims that are beyond the scope of the first IDEM suit." *Id.* at 494. The court placed particular emphasis on the specific factual underpinning of each cause of action. To the extent that the plaintiffs' RCRA claims overlapped with the claims the IDEM alleged in its first suit, the court concluded that those claims could not be pursued due to the statutory bar contained in 42 U.S.C. § 6972(b)(1)(B) (2006). *Adkins*, 644 F.3d at 494. Where the citizen suit included allegations related to waste disposal beyond those contained in the state's enforcement action, however, the RCRA claim was not barred by the statute. *Id.*

Finally, the court considered the two abstention doctrines outlined in the *Burford* and *Colorado River* decisions. At the outset, the court noted that federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Id.* at 496 (quoting *Colo. River*, 424 U.S. at 817). Thus, the court noted, "[A] federal court's ability to abstain from exercising federal jurisdiction 'is the exception, not the rule,' and can be justified only in exceptional circumstances." *Id.* at 496 (quoting *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992)). Those exceptional circumstances exist "'where denying a federal forum would clearly serve an important countervailing interest,' such as 'considerations of proper constitutional adjudication,' 'regard for federal-state relations,' or 'wise judicial administration.'" *Id.* at 496-97 (quoting *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996)).

Specifically, the *Colorado River* abstention doctrine applies "when parallel state court and federal court lawsuits are pending between the same parties." *Id.* at 497-98. The appropriate test involves a "two-part inquiry" in which the district court must first determine whether the state and federal actions are indeed parallel. *Id.* at 498 (citing *Tyrer v. City of South Beloit*, 456 F.3d 744, 751 (7th Cir. 2006)). Second, the court must determine whether "exceptional circumstances" justify abstention. *Id.* Under *Tyrer*, lawsuits are parallel under *Colorado River* when "substantially the same parties are contemporaneously litigating substantially the same issues." *Id.* (quoting *Tyrer*, 456 F.3d at 752). Ultimately, the court concluded, "The first and second IDEM suits are not parallel to this citizen suit for purposes of *Colorado River* abstention." *Id.* at 499. The court noted that the parties were different, the claims were different, and the federal court had exclusive jurisdiction

over the plaintiffs' "endangerment" claim, rendering *Colorado River* abstention inappropriate. *Id.* at 499-500.

Next, the court looked to the *Tyrer* precedent to determine whether exceptional circumstances indeed existed. Among the factors to be considered were:

> 1) whether the state has assumed jurisdiction over property; 2) the inconvenience of the federal forum; 3) the desirability of avoiding piecemeal litigation; 4) the order in which jurisdiction was obtained by the concurrent forums; 5) the source of governing law, state or federal; 6) the adequacy of state-court action to protect the federal plaintiff's rights; 7) the relative progress of state and federal proceedings; 8) the presence or absence of concurrent jurisdiction; 9) the availability of removal; and 10) the vexatious or contrived nature of the federal claim.

Id. at 500-01 (quoting *Tyrer*, 456 F.3d at 754).

Having enumerated the above factors, the court noted that a balancing must be undertaken, but with that balance "heavily weighted in favor of the exercise of jurisdiction." *Id.* at 501 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16 (1983)). Ultimately, the court concluded that the district court's invocation of *Colorado River* abstention was "unprecedented." *Id.* at 502. In the court's view, the RCRA citizen suit, having met the statutory requirements, was entitled to proceed. None of the above factors having been present to make abstention appropriate under *Colorado River*, the court next turned to the *Burford* abstention doctrine. *Id.* at 503.

The court first noted that *Burford* abstention arises when "parallel federal court jurisdiction would interfere with a specially designed state regulatory scheme." *Id.* at 503-04 (citing *Burford*, 319 U.S. at 332-34). The court then observed that subsequent decisions had limited the applicability of *Burford* abstention to two circumstances: where the court "is faced with 'difficult questions of state law' that implicate significant state policies," and where "concurrent federal jurisdiction would 'be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" *Id.* at 504 (quoting *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 361 (1989)). While the district court in the instant case concluded that *Burford* abstention was appropriate because Indiana had acted to achieve its own environmental goals, with which the citizen suit would interfere, the circuit court arrived at exactly the opposite conclusion. *Id.* at 506.

The court noted, among other factors, "Suits brought under Indiana's environmental laws are heard in courts of general jurisdiction throughout the state." *Id.* at 504 (citing IND. CODE § 13-30-1-9 (2011)).

"The mere existence of a state regulatory regime," the court reasoned, "even one providing an option for special masters and specific relief, does not permit federal courts to abstain." *Id.* at 505 (citing *New Orleans*, 491 U.S. at 362). The court concluded that the plaintiffs' citizen suit in the instant case was not a collateral attack on any permitting or other regulatory decision by the State of Indiana. *Id.* at 506. Rather, the court noted that the suit was "structured to complement and enhance IDEM's efforts." *Id.* Ultimately, the Seventh Circuit found, "The district court's decision to abstain from exercising its jurisdiction under *Burford* was an abuse of discretion." *Id.* The court reasoned:

> Allowing the plaintiffs to bring their citizen suit under RCRA in federal court will not disrupt IDEM's comprehensive regulatory efforts. To the contrary, exercise of federal jurisdiction in these circumstances will further federal and state environmental policy goals without any real risk of disruption of regulatory efforts by the concerned governmental agencies.

Id. Having concluded that the plaintiffs' nonoverlapping RCRA citizen suit claims should go forward and that the *Colorado River* and *Burford* abstention doctrines should not have been invoked below, the appellate court reversed the lower court's decision and remanded the action for further proceedings. *Id.* at 507.

The Seventh Circuit's sound reasoning in this case represents a particularly strong victory for plaintiffs, many of whom rely upon the citizen suit provisions of federal environmental statutes to pursue meritorious claims where state or federal agencies are either dilatory in their prosecution or unwilling to intervene against polluters. Judge Hamilton's opinion makes clear that where citizen plaintiffs clear the statutory hurdles Congress has included in the legislative framework, abstention should be the exception, not the rule.

Jonathan Cardosi

VI. COASTAL PROPERTY RIGHTS IN TEXAS

Severance v. Patterson, 345 S.W.3d 18 (Tex. 2010)

In *Severance v. Patterson*, the Supreme Court of Texas held that under state law, Texas does not recognize a "rolling" public beachfront easement over previously unencumbered private beachfront property. 345 S.W.3d 18, 31, 34 (Tex. 2010). In response to a series of certified questions issued by the United States Court of Appeals for the Fifth Circuit, the Supreme Court of Texas determined that neither common law

doctrine nor the Texas Open Beaches Act permits private beachfront properties on Galveston Island's West Beach to become impressed with a right of public use without compensation or proof of an easement. *Id.* at 22, 35. Therefore, the State's assertion that a portion of Carol Severance's property came to be located on a public beachfront easement after the vegetation line was pushed landward, as a result of Hurricane Rita, is not supported under common law doctrine or the Open Beaches Act. *Id.* at 22, 38.

Under Texas law, the wet beach, or area where the soil is "covered by the bays, inlets, and arms of the Gulf of Mexico within tidewater limits," constitutes public property held in trust for the benefit of all citizens. *Id.* at 26 (quoting *Lorino v. Crawford Packing Co.*, 175 S.W.2d 410, 413 (Tex. 1943)) (citing *Landry v. Robison*, 219 S.W. 819, 820 (Tex. 1920); *De Meritt v. Robison Land Comm'r*, 116 S.W. 796, 797 (Tex. 1909); TEX. NAT. RES. CODE § 11.012(c) (2011)). Because of the changing nature of the coastal landscape due to the tide, wind, and other natural occurrences, an individual who purchases beachfront property along the Texas coast "does so with the risk that their property may eventually, or suddenly, recede into the ocean." *Id.* at 28. Furthermore, the private owner loses his property to the public trust when beachfront property recedes seaward and becomes submerged under the ocean as a part of the wet beach. *Id.* The wet beach consists of the area from the mean low tide to the mean high tide. *Id.* at 25. Dry beaches, on the other hand, are the areas from the mean high tide line to the vegetation line and, unlike the state-owned wet beaches, are often privately owned. *Id.* The Texas Legislature has recognized:

> [T]he existence of a public right to an easement in a privately owned dry beach area of West Beach is dependent on the government's establishing an easement in the dry beach or the public's right to use of the beach "by virtue of continuous right in the public since time immemorial."

Id. (quoting TEX. NAT. RES. CODE § 61.001(8)). Consequently, public beaches under Texas law consist of wet beaches, state-owned dry beaches, and private property on dry beaches where a public easement has been established by the state. *Id.*

In *Luttes v. State*, the Supreme Court of Texas designated the "mean high tide line" as the point where the public trust ends and private rights may be asserted. *Id.* at 28 (citing *Luttes v. State*, 324 S.W.2d 167, 191-92 (Tex. 1958)). Although the designation provided certainty as to the nature and location of coastal boundaries pertaining to private lands and beach areas held in public trust, the Texas Legislature expressed concern that the *Luttes* decision might encourage "overanxious developers" to

erect barriers near high tide areas in an attempt to exclude public access onto private beachfront property. *Id.* at 29 (citing TEX. LEGIS. BEACH STUDY COMM., THE BEACHES AND ISLANDS OF TEXAS, 57th Leg., at 1 (1961), *available at* http://www.lrl.state.tx.us/scanned/interim/56/56_B352.pdf; INTERIM BEACH STUDY COMM., FOOTPRINTS IN THE SANDS OF TIME, 65th Leg., at 22 (Tex. 1969), *available at* http://www.lrl.state.tx.us/scanned/interim/60/B352.pdf). In response to an actual finding of such exclusionary measures, Texas enacted the Open Beaches Act (OBA) as a means of enforcing both the public's right to access and use state-owned beaches and the public's right to use the dry beach on private property where an easement exists. *Id.* (citing TEX. NAT. RES. CODE §§ 61.011(a), .013(a)). Although Texas contemplated a "free and unrestricted right of ingress and egress to State-owned beaches" through passage of the OBA, the Act itself articulates an intention *not* to create new substantive rights for public easements along Texas's beaches and recognizes that "mere pronouncements of encumbrances on private property rights are improper." *Id.* at 22, 29.

In this case, a public beachfront easement for use of a privately owned parcel "seaward of Severance's . . . property" existed prior to her purchase of land on West Beach. *Id.* at 22. Upon purchase of the property in 2005, Severance received an OBA-mandated disclosure from the Texas General Land Office (GLO) explaining that her property "may become located on a public beach due to natural processes such as shoreline erosion" and, as a result, the state could commence suit against the property owner in an attempt to "forcibly remove any structures that come to be located on the public beach." *Id.* at 30 (citing TEX. NAT. RES. CODE § 61.025). Five months after Severance purchased the property, Hurricane Rita devastated the adjacent parcel, causing the vegetation line to be moved landward towards her property. *Id.* at 22. As a result, Severance's house came to be located seaward of the vegetation line on a public beachfront easement. *Id.* In June of 2006, the GLO ordered Severance to remove her home on Kennedy Drive due to its location on a public beach and offered her $40,000 to remove or relocate her home "if she acted before October 2006." *Id.* at 31.

Severance filed suit in the United States District Court for the Southern District of Texas claiming that the State, in its attempt to enforce a public easement without proving its existence on property not previously encumbered by an easement, "infringed her federal constitutional rights and [the action] constituted (1) an unreasonable seizure under the Fourth Amendment, (2) an unconstitutional taking under the Fifth and Fourteenth Amendments, and (3) a violation of her

substantive due process rights under the Fourteenth Amendment." *Id.* at 23. The district court granted the State's motion to dismiss Severance's claim on the merits and held that, under Texas law, an easement on a parcel landward of the plaintiff's property "pre-existed her ownership of the property and that after an easement to private beachfront property had been established between the mean high tide and vegetation lines, it 'rolls' onto new parcels of realty according to natural changes to those boundaries." *Id.* (citing *Severance v. Patterson*, 485 F. Supp. 2d 793, 802-04 (S.D. Tex. 2007)). Although Severance appealed her Fourth and Fifth Amendment challenges to the proposed state action, the Fifth Circuit determined that her Fifth Amendment takings claim was not ripe, but certified three questions pertaining to the Fourth Amendment seizure claim to the Supreme Court of Texas: (1) whether Texas law recognizes a rolling beachfront easement; (2) whether the authority to recognize such an easement, if it exists, is derived from common law or construction of the OBA; and (3) whether landowners are entitled to receive compensation for limitations on use of property impacted by rolling easements which occur as a result of sudden and dramatic changes in coastal boundaries. *Id.* at 21 (citing *Severance v. Patterson*, 566 F.3d 490, 503-04 (5th Cir. 2009), *certified questions accepted*, 52 TEX. SUP. CT. J. 741 (May 15, 2009)).

As mentioned earlier, the existence of a public access easement on privately owned dry beach area is "dependant [sic] on the government's establishing an easement in the dry beach or the public's right to use of the beach 'by virtue of continuous right in the public since time immemorial.'" *Id.* at 25 (quoting TEX. NAT. RES. CODE § 61.001(8)). In addressing the first question of whether the state of Texas recognizes a "rolling" public beachfront easement, the supreme court made reference to the fact that "the Texas Legislature expressly disclaimed any interest in title [to private property on Galveston Island] obtained from the Jones and Hall Grant after [Texas] was admitted to the Union." *Id.* at 31 (citing *Seaway Co. v. Attorney Gen.*, 375 S.W.2d 923, 928 (Tex. Civ. App. 1964)). The court further reasoned that in light of the absence of any "inherent title limitations" or historical custom allowing for public use on private West Beach property, an easement does not automatically "roll" onto the property of an adjoining landowner without "proof of prescription, dedication, or customary rights in the property so occupied." *Id.* at 31 (quoting *Severance*, 566 F.3d at 504).

In justifying its conclusion, the court drew an important distinction between the gradual and imperceptible changes in beachfront boundaries which result from the "daily ebbs and flows of the tide" and the sudden

and perceptible changes caused by avulsive events such as hurricanes and tropical storms. *Id.* at 32. In emphasizing the "different practical implications" of such natural events, the court noted that beachfront property owners generally gain or lose land that is "gradually or imperceptibly added to or taken away from their banks or shores through erosion, the wearing away of land, and accretion, the enlargement of the land." *Id.* at 32-33 (citing *Coastal Indus. Water Auth. v. York*, 532 S.W.2d 949, 952 (Tex. 1976) (discussing erosion, accretion, and avulsion doctrines affecting property boundaries and riparian ownership in the Houston Ship Channel)). The court reasoned that in addition to the availability of ample time for the state and private landowners to reach a solution when coastal boundary movement is gradual, "[i]t would be an unnecessary waste of public resources to require the State to obtain a new judgment for each gradual and nearly imperceptible movement of coastal boundaries exposing a new portion of dry beach." *Id.* at 33.

In the case of avulsive events, however, the court reasoned that the private land encumbered by the easement is lost to the public trust when the land becomes submerged under water, along with the easement attached to that land. *Id.* In justifying the State's duty to establish a separate easement on the newly created dry beach, the court considered the sudden and devastating nature of avulsive events and reasoned, "[I]t would be impossible to prove continued public use in the new dry beach, and it would be unfair to impose such drastic restrictions through the OBA upon an owner in those circumstances without compensation." *Id.* at 33 (citing *Westgate, Ltd. v. State*, 843 S.W.2d 448, 452 (Tex. 1992)). The court noted that any interpretation of an expansive public right to access dry beaches, even when the land the easement originally attached to is eroded, poses the threat of "divest[ing] private owners of significant rights without compensation because the right to exclude is one of the most valuable and fundamental rights possessed by property owners." *Id.* at 33-34 (citing *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 634 (Tex. 2004) (referring to the right to exclude as "one of the most essential sticks in the bundle of rights that are commonly characterized as property" (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994)))). Thus, in answering each of the certified questions, the court ultimately determined that neither common law nor the OBA recognizes a rolling public beachfront easement on private property without compensation or proof of prescription.

In his dissenting opinion, Justice Medina criticized the majority's recognition of a distinction between gradual and avulsive movements of beachfront coastline when "both [gradual and sudden] events are natural

risks known to the property owner." *Id.* at 39 (Medina, J., dissenting). The dissent further noted the unreasonable burden on the state and taxpayers in reestablishing an easement on a dry beach area and compensating the private landowner for avulsive events when beachfront property owners are made aware in sales contracts that coastal erosion and storm events may subject an owner to liability when a structure comes to be located on a public beach. *See id.* at 45-47. In addition to articulating the public policy of the state as contemplating the rolling of beachfront easements with the changing coastline in order to protect the public's right of use, the dissent also criticized the majority's failure to recognize a number of decisions by Texas courts that have continually held that "once an easement is established, it expands or contracts ('rolls'), despite the sudden shift of the vegetation line." *Id.* at 44 (citing *Brannan v. State*, No. 01-08-00179-CV, 2010 WL 375921 (Tex. App. Feb. 4, 2010); *Arrington v. Tex. Gen. Land Office*, 38 S.W.3d 764, 765 (Tex. App. 2001); *Arrington v. Mattox*, 767 S.W.2d 957, 958 (Tex. App. 1989); *Feinman v. State*, 717 S.W.2d 106, 109-10 (Tex. App. 1986); *Matcha v. Mattox*, 711 S.W.2d 95, 100 (Tex. App. 1986)). The majority opinion addressed these concerns by simply noting that although the OBA and Texas case law profess to encourage free and unrestricted access to the public beaches of Texas, the legislature has sought to avoid Fourth Amendment seizure concerns by qualifying "affirmatively-declared public rights" with the condition precedent that the public have already acquired identical rights under the common law doctrines of prescription and dedication. *Id.* at 34 (majority opinion) (quoting Richard J. Elliott, Comment, *The Texas Open Beaches Act: Public Rights to Beach Access*, 28 BAYLOR L. REV. 383, 385-86 (1976)).

Ultimately, *Severance* restricts any state action which purports to expand public access to private beaches on Galveston Island without compensation or proof of an easement. In its attempt to balance the need for public access to beaches with the private landowner's right to exclude, the Supreme Court of Texas recognized the sudden and devastating nature of avulsive environmental events and effectively placed the burden on the state to establish the existence of a new easement on private lands when such dramatic changes alter beachfront boundaries. Despite adherence to the fundamental notion of the landowner's right to exclude, the court remained open to the underlying policy, articulated by the OBA, of "free and unrestricted access" by allowing Texas the opportunity to establish the existence of an easement on previously unencumbered

private property when it has a sufficient basis under its police power to do so.

Samuel K. Ford