

10-15-2012

## Legal Summaries

Emily Edwards

Follow this and additional works at: <http://digitalcommons.pepperdine.edu/naalj>



Part of the [Administrative Law Commons](#), and the [Jurisprudence Commons](#)

---

### Recommended Citation

Emily Edwards, *Legal Summaries*, 32 J. Nat'l Ass'n Admin. L. Judiciary Iss. 2 (2012)

Available at: <http://digitalcommons.pepperdine.edu/naalj/vol32/iss2/12>

This Legal Summary is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Journal of the National Association of Administrative Law Judiciary by an authorized administrator of Pepperdine Digital Commons. For more information, please contact [Kevin.Miller3@pepperdine.edu](mailto:Kevin.Miller3@pepperdine.edu).

**Pepperdine University School of Law  
Legal Summaries**

---

**TABLE OF CASES**

**SUPREME COURT OF THE UNITED STATES**

Pacific Operators Offshore, LLP v. Valladolid, 132 S. Ct. 680 (2012).....	900
FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307 (2012) .....	904

**UNITED STATES COURTS OF APPEAL**

Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board, 684 F.3d 1332 (D.C. Cir. 2012) .....	908
Grocery Manufacturers Ass'n v. EPA, 693 F.3d 169 (D.C. Cir. 2012).....	912
Mack Trucks, Inc. v. EPA, 682 F.3d 87 (D.C. Cir. 2012) .....	916
Friends of Blackwater v. Salazar, 691 F.3d 428 (D.C. Cir. 2012).....	921
Watson v. Solis, 693 F.3d 620 (6th Cir. 2012) .....	924

SUPREME COURT OF THE UNITED STATES

Pacific Operators Offshore, LLP v. Valladolid,  
132 S. Ct. 680 (2012)

*Synopsis:*

A widow of an offshore drilling platform employee who was killed while working on the onshore oil processing facility petitioned for review of the order of the Department of Labor's Benefits Review Board denying her claim for benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA).<sup>1</sup> The Board held that Congress intended to limit the coverage provided by the Outer Continental Shelf Lands Act (OCSLA) to injuries suffered by employees within the geographical zone of the Outer Continental Shelf (OCS).<sup>2</sup> Upon review, the Ninth Circuit Court of Appeals reversed the Board's decision and determined that, in order to qualify for benefits afforded under the OCSLA, a claimant must establish a "substantial nexus" between the injury and "extractive operations" on the OCS.<sup>3</sup> The Supreme Court of the United States granted certiorari and upheld the Ninth Circuit's ruling requiring a claimant to establish a substantial nexus between the injury and the extractive operations in order to qualify for the LHWCA benefits provided by the OCSLA.<sup>4</sup>

*Facts, Analysis, and Ruling:*

The Pacific Operators Offshore, LLP (Pacific) operates two drilling platforms on the OCS off the California Coast and an onshore oil and gas processing facility.<sup>5</sup> Pacific employed Juan

---

<sup>1</sup> Pac. Operators Offshore, LLP v. Valladolid, 132 S. Ct. 680, 685 (2012).

<sup>2</sup> *Id.* The geographical zone of the Outer Continental Shelf, known as the OCS, refers to the "submerged lands' beyond the extended state boundaries, but not the waters above those submerged lands or artificial islands or installations attached to the seabed." *Id.*

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

<sup>4</sup> *Id.* at 691.

<sup>5</sup> *Id.* at 684.

Valladolid as a general manual laborer, or roustabout, as part of its oil exploration and extraction.<sup>6</sup> Valladolid spent ninety-eight percent of his time working on offshore drilling platforms, and the remainder of his time working at the onshore processing facility. Valladolid died while working at the onshore processing facility.<sup>7</sup> Valladolid's widow filed a claim for benefits under the LHWCA, which had been extended by the OCSLA.<sup>8</sup> An Administrative Law Judge (ALJ) dismissed the widow's claim reasoning that Valladolid did not qualify for the LHWCA benefits under the OCSLA because his death occurred on the onshore facility, not on the offshore drilling platforms on the OCS.<sup>9</sup> The United States Department of Labor's Benefits Review Board affirmed the ALJ's decision concluding that Congress intended to limit the benefits to injuries that occurred within the geographical zone of the OCS.<sup>10</sup>

Valladolid's widow appealed, and the Ninth Circuit reversed the Board's order.<sup>11</sup> The Ninth Circuit determined that the OCSLA requires a claimant to establish a substantial nexus between the injury and the extractive operations on the OCS.<sup>12</sup> Thus, the fact that Valladolid died while working at the onshore processing facility did not automatically prevent him from qualifying for the LHWCA benefits. The Ninth Circuit's ruling regarding which employees

---

<sup>6</sup> *Valladolid*, 132 S. Ct. at 684.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* The OCSLA provides that,

[w]ith respect to disability or death of an employee resulting from an injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf, compensation shall be payable under the provisions of the [LHWCA].

43 U.S.C. § 1333(b) (2012).

<sup>9</sup> *Valladolid*, 132 S. Ct. at 684–85.

<sup>10</sup> *Id.* at 685. The ALJ and Board's interpretation of the OCSLA significantly narrowed which employees were eligible for the LHWCA benefits.  
*Id.*

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

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

qualified for LHWCA benefits was the third Circuit Court of Appeals' ruling on this issue.<sup>13</sup> Therefore, the Supreme Court granted Pacific's petition for writ of certiorari in order to resolve the conflict over which employees qualified for LHWCA benefits under the OCSLA.<sup>14</sup>

All of the Circuits and parties agreed that OCSLA covered employees who were injured or killed while working directly on the OCS; thus, the question for the Court remained whether the LHWCA benefits extended to employees who were injured or killed during extraction operations beyond the OCS.<sup>15</sup> The Court first examined the Third Circuit's holding. The Third Circuit had established a "but for" causation requirement in which an employee would qualify for benefits if the injury would not have occurred "but for" operations on the OCS.<sup>16</sup> The Court rejected this approach as it would extend worker's compensation benefits to all employees of a business engaged in extraction of natural resources on the OCS no matter the cause or location of the injury.<sup>17</sup> Thus, the Court determined that the Third Circuit's "but for" causation interpretation of the OCSLA was too broad and did not comply with the language of the OCSLA or Congress's intent to compensate workers for injuries occurring as a result of operations conducted on the OCS.<sup>18</sup>

The Court also rejected the Fifth Circuit's "situs-of-injury" interpretation of the OCSLA.<sup>19</sup> The Fifth Circuit held that, in order to be eligible for workman's compensation, the injury must occur on the OCS; thus the site of the injury would determine eligibility.<sup>20</sup> The Court looked to the language of the OCSLA to determine that requiring the injury to occur on the OCS was against Congressional

---

<sup>13</sup> *Id.* Both the Third and the Fifth Circuit Courts of Appeal had previously ruled on similar cases. *Id.* However, each of the three Circuits that had addressed this issue regarding employee qualification for LHWCA benefits had established a different manner of determining qualification. *Id.* Thus, the Supreme Court granted certiorari in order to establish a unified manner of determining qualification. *Id.*

<sup>14</sup> *Valladolid*, 132 S. Ct. at 685.

<sup>15</sup> *Id.* at 686.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 690–91.

<sup>18</sup> *Id.* at 691.

<sup>19</sup> *Valladolid*, 132 S. Ct. at 687.

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

intent as the language of the act specifically allowed for employees to recover for injuries that occurred as a result of the operations conducted on the OCS.<sup>21</sup> Considering that offshore platforms and onshore processing facilities were often connected and employees often worked on both sites, the Court rejected the Fifth Circuit's "situs-of-injury" interpretation as too narrow.<sup>22</sup> The Court also rejected the Solicitor General's suggestion of a status-based inquiry, which would apply two different standards to injuries that occurred on the OCS and those that occurred off the OCS.<sup>23</sup> The Court acknowledged that this suggestion had merit, but determined that the language of the OCSLA did not provide for a status-based inquiry, and it was up to the Legislature, not the Court to enact new legislation.<sup>24</sup>

After rejecting these three interpretations, the Court adopted the Ninth Circuit's "substantial nexus" interpretation. The Ninth Circuit determined that an employee could qualify for benefits under the OCSLA if he or she can show a substantial nexus between the injury and the extractive operations on the OCS.<sup>25</sup> Thus, the employee must show a significant causal link between the injury he or she suffered and the employer's offshore operations conducted for the purpose of extracting natural resources from the OCS.<sup>26</sup> The Court determined that this "substantial nexus" interpretation best reflected the language of the OCSLA, and provided the ALJs and courts with discretion to interpret an employee's eligibility on a case-by-case basis.<sup>27</sup> The Court then remanded the case to Ninth Circuit for further proceeding.<sup>28</sup>

---

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

<sup>22</sup> *Id.* at 687–88.

<sup>23</sup> *Id.* at 690.

<sup>24</sup> *Valladolid*, 132 S. Ct. at 690. In refusing to adopt the Solicitor General's status-based inquiry, the Court displays its adherence to its role of enforcing the present legislation enacted by Congress, and leaving the drafting of legislation to the Legislative Branch. *Id.*

<sup>25</sup> *Id.* at 691.

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

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

<sup>28</sup> *Id.*

*Impact:*

With this decision, the Court unified the manner in which the employees' eligibility for LHWCA benefits will be evaluated under the OCSLA by establishing the "substantial nexus" test as the test to apply. Having an established test to apply may lead to greater consistency in the outcomes of these types of cases. However, the "substantial nexus" test places the burden on the petitioner to show the injury was substantially related to the offshore operations, which may prove a difficult task, especially if an employee is killed and the family must provide this information. Furthermore, the test provides the ALJs and courts with a great amount of discretion in determining whether a "substantial nexus" exists; thus, these decisions will potentially be subject to multiple appeals.

**FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307 (2012)***Synopsis:*

The FCC issued notices of apparent liability against both Fox Television Station (Fox) and ABC for violating the FCC's indecency enforcement regime.<sup>29</sup> The alleged violations included two isolated incidents of fleeting expletives during two Fox broadcasts, and the brief showing of a nude buttocks of an adult female during NYPD Blue on the ABC network.<sup>30</sup> Both Broadcasters petitioned the United States Court of Appeals for the Second Circuit for review of the FCC order.<sup>31</sup> The Second Circuit overturned the FCC order against Fox, finding it unconstitutionally vague.<sup>32</sup> The Second Circuit then overturned the order against ABC based on its previous decision in Fox.<sup>33</sup> The Supreme Court granted certiorari and consolidated the

---

<sup>29</sup> FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2316–17 (2012).

<sup>30</sup> *Id.* at 2314.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 2315.

<sup>33</sup> *Id.* at 2317; *see* ABC, Inc. v. FCC, 404 F. App'x 530, 533 (2d Cir. 2011).

Fox and ABC cases.<sup>34</sup> The Court determined that the FCC's decision to modify its indecency enforcement regime was not arbitrary or capricious, but that the FCC's orders, applied to the broadcasts in question, were vague as the FCC failed to provide Fox and ABC with sufficient notice of the change in the regime before issuing the orders.<sup>35</sup> Therefore, the Court set aside the orders.<sup>36</sup>

Facts, Analysis, and Ruling:

Before discussing the facts of these cases, it is important to understand the regulatory framework through which the FCC regulates broadcast indecency. The FCC was tasked by Congress to regulate the use of "any obscene, indecent, or profane language" on both radio and television broadcasts.<sup>37</sup> Historically, the FCC has not sanctioned broadcasters for incidents of isolated or fleeting indecency or obscenity.<sup>38</sup> Even the framework established by the FCC to help broadcasters determine when content is patently offensive refers to "whether the material dwells on or repeats at length" obscene or indecent content.<sup>39</sup> However, in 2004, the FCC changed its indecency enforcement regime with the Golden Globes Order, and began issuing sanctions for isolated or fleeting incidents of indecency or obscenity.<sup>40</sup>

There are three separate incidents of alleged indecency involved in this case. The first incident took place during Fox's 2002 broadcast of the Billboard Music Awards when singer Cher said "f\*\*\* 'em" on live television.<sup>41</sup> The second incident occurred during Fox's 2003 broadcast of the Billboard Music Awards when Nicole Richie remarked "have you ever tried to get cow s\*\*\* out of a Prada

---

<sup>34</sup> *Fox Television Stations, Inc.*, 132 S. Ct. at 2317.

<sup>35</sup> *Id.* at 2320.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 2312. *See also* 18 U.S.C. § 1464 (2012).

<sup>38</sup> *Fox Television Stations, Inc.*, 132 S. Ct. at 2313.

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

<sup>40</sup> *Id.* *See also In re Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd. 4975, 4976 n. 4 (2004).

<sup>41</sup> *Fox Television Stations, Inc.*, 132 S. Ct. at 2314.



purse? It's not so f\*\*\*ing simple".<sup>42</sup> The third incident occurred in 2003 when ABC broadcast the nude buttocks of an adult female character for about seven seconds and the side of her breast for a moment during an episode of NYPD Blue.<sup>43</sup> These incidents all occurred before the Golden Globes Order; however, the FCC applied the new policy regarding sanctioning broadcasters for fleeting expletives and nudity to all three incidents.<sup>44</sup>

The FCC applied its tripartite definition of patently offensive material<sup>45</sup> and the new Golden Globes Order allowing for sanctioning of isolated or fleeting incidents of indecency to the two Fox broadcasts involving expletives.<sup>46</sup> The FCC found the expletives actionable indecency, and Fox appealed to the Second Circuit.<sup>47</sup> The Second Circuit found the FCC order arbitrary and capricious as the FCC changed its indecency enforcement regime without providing a reasonable explanation.<sup>48</sup> The Supreme Court then found that the FCC order was not arbitrary or capricious as the FCC did not have to provide a detailed justification for the change in policy, and the reasons for expanding the scope of the enforcement regime were rational.<sup>49</sup> Thus, the Court remanded the Fox case to the Second Circuit.<sup>50</sup> The Second Circuit then held that the FCC's order against

---

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

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

<sup>44</sup> *Id.* at 2315.

<sup>45</sup> *Id.* The FCC's tripartite definition of patently offensive includes the following three factors:

- 1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; 2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; 3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.

*In re Indus.* Guidance on Comm'n's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency, 16 FCC Red. 7999 (2001).

<sup>46</sup> *Fox Television Stations, Inc.*, 132 S. Ct. at 2315.

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

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

<sup>49</sup> *Id.* at 2316.

<sup>50</sup> *Id.*

Fox was unconstitutionally vague and invalidated the FCC's indecency policy as the FCC failed to give notice to broadcasters of what would be considered indecent under the new policy.<sup>51</sup>

The FCC also applied the same tripartite definition of patently offensive material and the new Golden Globes Order to ABC's fleeting broadcast of nudity, and found the nudity patently offensive.<sup>52</sup> The FCC imposed a forfeiture on each of the 45 ABC-affiliated stations that aired the NYPD Blue episode.<sup>53</sup> ABC petitioned the Second Circuit for review of the FCC's order, and the Second Circuit vacated the forfeiture order based on its decision to invalidate the FCC indecency policy in the Fox case.<sup>54</sup> The Supreme Court consolidated the Fox and ABC cases, and granted certiorari.<sup>55</sup>

The Due Process Clause of the Fifth Amendment requires invalidation of impermissibly vague laws; thus, the Court had to determine whether the FCC's new indecency enforcement regime was impermissibly vague.<sup>56</sup> In order to avoid vagueness, the Court asserted that regulated parties should know what the law requires of them, and that precision and guidance are necessary to ensure enforcement is not arbitrary or discriminatory.<sup>57</sup> The Court then looked to the policies in place during the incidents of alleged indecency.<sup>58</sup> All three of the incidents occurred prior to the FCC's change in their indecency enforcement regime; therefore, the Court determined that the policy in place at the time of the broadcasts in question did not provide Fox or ABC with notice that a fleeting expletive or brief showing of nudity would be considered actionable indecency.<sup>59</sup> By failing to provide Fox and ABC with notice that their policies regarding fleeting expletives and nudity had changed, the FCC failed to adhere to its own regulatory standards of providing "fair notice of what is prohibited."<sup>60</sup> Furthermore, the fact that the

---

<sup>51</sup> *Fox Television Stations, Inc.*, 132 S. Ct. at 2316.

<sup>52</sup> *Id.* at 2316–17.

<sup>53</sup> *Id.* at 2317.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Fox Television Stations, Inc.*, 132 S. Ct. at 2317.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 2318.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

FCC claimed it would not consider Fox's prior indecent broadcasts in any subsequent actions, was insufficient to remedy the constitutional violation.<sup>61</sup> Thus, the Court held that the FCC's failure to provide sufficient notice caused the standards applied to the Fox and ABC broadcasts in question to be unconstitutionally vague and set aside the FCC orders.<sup>62</sup>

Impact:

The Court resolved these cases on fair notice grounds under the Due Process clause.<sup>63</sup> Therefore, the Court has yet to address the First Amendment implications of the FCC's indecency policy. Additionally, the Court only ruled that the broadcasters lacked notice that their broadcasts would be actionably indecent under the then-existing FCC indecency regime. The Court did not address the constitutionality of the FCC's new indecency policy under the Golden Globes Order.<sup>64</sup> Thus, the Court will likely have to address both the First Amendment and constitutionality issues in subsequent cases. Finally, the Court upheld the FCC's right to modify its current indecency policy depending on the FCC's discretion regarding public interest and legal requirements.<sup>65</sup>

**UNITED STATES COURTS OF APPEAL**

**Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board, 684 F.3d 1332 (D.C. Cir. 2012)**

Synopsis:

Copyright Royalty Judges (CRJs) set default royalty rates and terms applicable to Internet-based "webcasting" of digitally recorded

---

<sup>61</sup> *Fox Television Stations, Inc.*, 132 S. Ct. at 2318.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 2320.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

music.<sup>66</sup> Intercollegiate, an association of noncommercial webcasters, appealed the CRJs final decision in *Intercollegiate Broadcasting System, Inc.* alleging that the position and authority of CRJs violates the Appointment Clause.<sup>67</sup> The United States Court of Appeals for the District of Columbia vacated and remanded the CRJ's final decision, founding that the CRJ's position violated the Appointment Clause.<sup>68</sup> The Court invalidated and severed the restrictions on the Librarian of Congress's ability to remove CRJs, thus resolving the constitutional problem.<sup>69</sup>

*Facts, Analysis, and Ruling:*

The Copyright Royalty Board was established in 2004 and is composed of three Copyright Royalty Judges (CRJs) who are appointed by the Librarian of Congress. This Board is the administrative body responsible for adjusting and setting reasonable rates and terms of royalty payments.<sup>70</sup> In 2008, SoundExchange, Inc., a non-profit clearinghouse for musicians' webcast royalty payments, initiated ratemaking proceedings before the CRJs to set default rates for the years 2011-2015.<sup>71</sup> Intercollegiate could not reach a settlement regarding the default rates, and thus the CRJs issued a final decision in which the CRJs adopted the royalty structure of a \$500 flat annual fee per station for both "educational" and other noncommercial webcasters whose "Aggregate Tuning Hours" stay below a monthly threshold.<sup>72</sup> The CRJs specifically rejected Intercollegiate's proposal to establish different rate structures for "small" and "very small" noncommercial webcasters like Intercollegiate.<sup>73</sup>

Intercollegiate appealed the CRJs final decision pursuant to Copyright Royalty and Distribution Reform Act of 2004, 17 U.S.C.

---

<sup>66</sup> *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1333 (D.C. Cir. 2012).

<sup>67</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>68</sup> *Intercollegiate Broad.*, 684 F.3d at 1334.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 1335.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Intercollegiate Broad.*, 684 F.3d at 1335.

§§ 803(d)(1) and (d)(3).<sup>74</sup> Intercollegiate also alleged that the CRJ's power was unsuitable for an Article III court, however, the Court of Appeals did not address this objection.<sup>75</sup> Intercollegiate specifically alleged that the CRJs violated the Appointment Clause art. II § 2, cl. 2 on two grounds: (1) the CRJs exercise a significant amount of ratemaking authority without the effective control of a superior, making them "principal" officers who must be appointed by the President with Senate confirmation; and (2) even if the CRJs are "inferior" officers, the Librarian of Congress is not a "Head of Department" in whom Congress may vest appointment power.<sup>76</sup>

The Court of Appeals evaluated each of the alleged violations in turn and agreed with Intercollegiate as to the first claim, but not the second.<sup>77</sup> Regarding the first violation, the Court looked at all of the powers CRJs hold and determined that CRJs exercise significant authority as they had broad discretion in determining reasonable rates, and that their ratemaking decisions have considerable consequences for entire industries.<sup>78</sup> Furthermore, the Court applied *Edmond v. United States*, 520 U.S. 651 (1997) when evaluating whether the CRJs were principal or inferior officers for purposes of the Appointment Clause.<sup>79</sup> The Court determined that because the Librarian of Congress can only remove the CRJs for misconduct or neglect of duty and because the CRJs decisions are final for the executive branch, the CRJs are principal officers.<sup>80</sup>

---

<sup>74</sup> Any aggrieved participant in the proceedings may appeal the CRJ's decision in the United States Court of Appeals for the District of Columbia Circuit. *See* 17 U.S.C. § 803(d)(1) (2012). The Court of Appeals can modify or vacate a determination of the CRJs and enter its own determination with respect to the royalty rates or the Court may vacate the determination and remand the case back to the CRJs for further proceedings. *See* 17 U.S.C. § 803(d)(3) (2012).

<sup>75</sup> *Intercollegiate Broad.*, 684 F.3d at 1336.

<sup>76</sup> *Id.* The Librarian of Congress appoints the CRJs to the Copyright Royalty Board for a staggered six-year term. *Id.* at 1333.

<sup>77</sup> *Id.* at 1337.

<sup>78</sup> *Id.* at 1338–39.

<sup>79</sup> *Id.* The degree to which an officer is principal or inferior with regards to the Appointment Clause depends on the degree to which that officer was directed and supervised by a presidential appointee. *Id.* Therefore, the greater amount of supervision the greater likelihood the officer will be inferior. *Id.*

<sup>80</sup> *Intercollegiate Broad.*, 684 F.3d at 1340.

As the CRJs are principal officers, the structure of the Copyright Royalty Board violates the Appointments Clause because principal officers must be appointed by the President and confirmed by the Senate.<sup>81</sup> In order to remedy this violation, the Court of Appeals invalidated and severed the restrictions on the Librarian of Congress's ability to remove the CRJs.<sup>82</sup> By removing these restrictions, the Librarian of Congress can direct, supervise, and exert some control over the CRJ's decisions.<sup>83</sup> Thus, the Librarian of Congress, as a principal officer, constrains the CRJs authority making the CRJs inferior officers under the Appointment Clause.<sup>84</sup>

Finally, the Court of Appeals rejected Intercollegiate's second allegation that the Librarian of Congress was not a "Head of Department."<sup>85</sup> The Court determined that the Library of Congress was a freestanding entity that met the definition of "Department" as it performs a range of different services and is exercised primarily for legislative purposes.<sup>86</sup> Furthermore, as the President with the advice and consent of the Senate appoints the Librarian of Congress, the Librarian of Congress is a Head of Department as defined in the Appointment Clause.<sup>87</sup> Therefore, the Librarian of Congress has the authority to appoint the CRJs.<sup>88</sup>

Impact:

Though the D.C. Circuit sought to resolve the constitutional violations in a manner that would cause the least disruption possible to the structure of the Copyright Royalties Board, the D.C. Circuit essentially limited the authority of CRJs and the Copyright Royalties Board. Even though their individual decisions are not reversible, the

---

<sup>81</sup> *Id.* See also 17 U.S.C. § 801 *et seq.* (2012).

<sup>82</sup> *Intercollegiate Broad.*, 684 F.3d at 1340.

<sup>83</sup> *Id.* at 1341.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* The Library of Congress is a "freestanding component of the Executive Branch, not subordinate to or contained within any other such component," and thus "constitutes a 'Department' for purposes of the Appointment Clause." See *Free Enterprise Fund v. Public Accounting Oversight Bd.*, 130 S. Ct. 3138, 3162 (2010).

<sup>87</sup> *Intercollegiate Broad.*, 684 F.3d at 1341.

<sup>88</sup> *Id.*

threat of removal provides the Librarian of Congress with significant influence over the ratemaking power of the CRJs. Thus, the Copyright Royalties Board becomes subject to direct influence and supervision of the Librarian of Congress. As the President with the advice of the Senate appoints the Librarian of Congress, the ratemaking decisions of the CRJs may become indirectly influenced by the political and economic agenda of the Executive Branch. Furthermore, the D.C. Circuit refused to address Intercollegiate's arguments regarding the merits of the rates set by the CRJs. Thus, the D.C. Circuit's refusal to address this argument left it open and subject to future challenges and litigation both at the Copyright Royalty Board and the Appellate Court level.

**Grocery Manufacturers Ass'n v. EPA,**  
**693 F.3d 169 (D.C. Cir. 2012)**

*Synopsis:*

Three trade organizations comprised of engine manufacturers, petroleum suppliers, and food producers, petitioned for review of the Environmental Protection Agency's (EPA) final decision to grant Clean Air Act (CAA) partial waivers approving the introduction of E15, a blend of gasoline and 15% ethanol, into commerce for use in select motor vehicles and engines.<sup>89</sup> The introduction of E15 was pursuant to the renewable fuel standard (RFS) of the Energy Policy Act.<sup>90</sup> The D.C. Circuit dismissed all petitions for lack of jurisdiction, as the D.C. Circuit determined that all three trade organizations lacked standing.<sup>91</sup>

*Facts, Analysis, and Ruling:*

In the Energy Policy Act of 2005, Congress incorporated the Renewable Fuel Standard (RFS) into the Clean Air Act (CAA).<sup>92</sup>

---

<sup>89</sup> Grocery Mfrs. Ass'n v. EPA, 693 F.3d 169, 172 (D.C. Cir. 2012).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 180.

<sup>92</sup> *Id.* at 172. See also Pub. L. No. 109-58, § 1501(a), 119 Stat. 594 (2005) (RFS).

The RFS requires qualifying refiners and importers of gasoline or diesel fuel to introduce into United States' commerce a specified volume of renewable fuel.<sup>93</sup> The refiners and importers primarily blend corn-based ethanol into the fuel supply to meet the RFS requirements.<sup>94</sup> In order to bring a new renewable fuel to market, the manufacturer must apply for a waiver of the CAA restriction, which limits manufacturers from introducing into commerce “any fuel or fuel additive [...] which is not substantially similar to any fuel or additive used in federal emissions certification.”<sup>95</sup> The Administrator of the EPA may grant a waiver if he determines that the applicant can establish that the fuel or fuel additive, or a specified concentration thereof, and its emissions products will not cause or contribute to a vehicle failing the emission standards.<sup>96</sup>

In 2009, Growth Energy applied for a CAA Section 211(f)(4) waiver to introduce E15, a gasoline blend with fifteen percent ethanol, into the market.<sup>97</sup> The EPA granted Growth Energy two partial waivers. The first waiver approved E15 for use in light-duty motor vehicles from model year 2007 and later.<sup>98</sup> The second waiver extended the use of E15 in light-duty motor vehicles and engines from model years 2001-2006.<sup>99</sup> These waivers are conditioned on the E15 manufacturers submitting a plan for the implementation of “misfueling mitigation conditions” for approval by the EPA.<sup>100</sup> After the EPA granted these waivers, three trade organizations representing engine manufacturers, petroleum suppliers, and food producers, petitioned the court for review of the EPA waivers.<sup>101</sup> The Petitioners alleged that (1) the EPA lacks authority under the CAA

---

<sup>93</sup> 42 U.S.C. § 7545(o)(2)(A)(i) (2012).

<sup>94</sup> *Grocery Mfrs.*, 693 F.3d at 173. The current national gasoline supply consists of E10, gasoline blended with 10 percent ethanol. *Id.*

<sup>95</sup> *Id.* See 42 U.S.C. § 7545(f)(4) (2012).

<sup>96</sup> *Grocery Mfrs.*, 693 F.3d at 173.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* Misfueling refers to the use of E15 fuel in pre 2001 vehicles and other non-approved vehicles, engines, and equipment. *Id.* The plan for implementing misfueling mitigation conditions includes pump-labeling requirements, participation in pump-labeling and fuel-sample compliance surveys, and proper documentation of ethanol content on transfer documents. *Id.*

<sup>101</sup> *Grocery Mfrs.*, 693 F.3d at 173.



section 211(f)(4) to grant partial waivers approving the use of E15; (2) Growth Energy failed to meet a required evidentiary burden under section 211(f)(4); (3) the EPA failed to provide sufficient opportunity to comment on the waiver decision; and (4) the record does not support the EPA's decision to grant the partial waivers.<sup>102</sup> The D.C. Circuit never addressed the merits of the Petitioners' claims as the D.C. Circuit determined that none of the three petitioners had standing, and thus dismissed all petitions for lack of jurisdiction.<sup>103</sup>

The D.C. Circuit first established that all three trade organizations had standing to sue on behalf of its members; however, the organizations needed to show that a member would have standing to sue in his or her own right.<sup>104</sup> Thus, the organizations needed to show that approving the partial waivers for E15 caused any of their members injury in fact for which the court could provide redress.<sup>105</sup> The engine manufacturers' organization asserted that the waiver approving E15 injured their members because individuals will use the E15 fuel in unauthorized vehicles and engines, thus causing harm to the emission control devices and systems and subjecting the engine manufactures to liability.<sup>106</sup> The D.C. Circuit rejected this argument on two grounds. First, the engine manufacturers failed to provide any evidence of a substantial probability that E15 would cause engine harm.<sup>107</sup> Second, the engine manufacturers based their theory of causation on the acts of third parties, not the EPA's granting of the partial waivers.<sup>108</sup> The engine manufacturers alleged that misfueling would subject them to liability; however, any harm that might occur would be caused by third party consumers who misfueled engines with E15, not the actual approval of E15 by the EPA.<sup>109</sup> Furthermore, the engine manufacturers failed to indicate why they would be subject to liability for damages caused by consumer-

---

<sup>102</sup> *Id.* at 173–74.

<sup>103</sup> *Id.* at 174, 180.

<sup>104</sup> *Id.* at 175.

<sup>105</sup> *Id.*

<sup>106</sup> *Grocery Mfrs.*, 693 F.3d at 175.

<sup>107</sup> *Id.* at 176.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

induced misfueling.<sup>110</sup> Thus, the D.C. Circuit determined the engine manufacturers failed to establish standing to bring their petition.

The D.C. Circuit next looked to the standing of the petroleum suppliers. The petroleum suppliers alleged that introducing E15 into the market would subject their members to substantial costs including special fuel production, transportation, and fuel segregation.<sup>111</sup> However, the petroleum suppliers failed to show how these costs were related to the EPA's approval of E15's use in certain vehicles.<sup>112</sup> By granting the partial waivers, the EPA in no way forced, required, or encouraged the petroleum suppliers to introduce the new fuel.<sup>113</sup> The partial waivers simply provide fuel manufacturers and petroleum suppliers the option of introducing the new fuel.<sup>114</sup> The petroleum suppliers have the choice whether to assume the costs associated with dealing with E15; thus, any injury which may stem from this choice is a self-inflicted harm that is in no way traceable to the EPA's granting of the partial waivers.<sup>115</sup> As the alleged potential liability of introducing E15 is assumed voluntarily, and not traceable to the EPA's actions, the petroleum suppliers also lack standing to bring their petition.<sup>116</sup>

Finally, the D.C. Circuit examined the standing of the food producers' organization. The food producers alleged that the EPA's partial waivers approving the introduction of E15 would increase the demand for corn; hence increasing the prices their members would have to pay for corn.<sup>117</sup> The food producers argue that this interest is protected by the Energy Independence and Securities Act (EISA), which requires the EPA to review the impact the use of renewable fuels will have on the supply and price of agricultural commodities when setting renewable fuel volume requirements.<sup>118</sup> However, the

---

<sup>110</sup> *Id.*

<sup>111</sup> *Grocery Mfrs.*, 693 F.3d at 177.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* The D.C. Circuit notes that the petroleum suppliers' argument that the introduction of E15 is forced due to the renewable fuel RFS requirements. *Id.* However, the petroleum suppliers did not attempt to trace the alleged injuries to the RFS requirements, but challenged the partial waivers. *Id.*

<sup>116</sup> *Grocery Mfrs.*, 693 F.3d at 178.

<sup>117</sup> *Id.* at 179.

<sup>118</sup> *Id.* The EISA was the legislation that set forth the RFS. *Id.*

D.C. Circuit determined that this argument lacked prudential standing as the interest the food producers sought to protect, the price of corn, was not within the zone of interests the CAA fuel waiver provision sought to protect or regulate.<sup>119</sup> The D.C. Circuit determined that maintaining a low price of corn was too far removed from partial waivers approving the introduction of renewable fuel sources; therefore, the food producers also lacked standing to bring their petition.<sup>120</sup> After determining that none of the trade organizations had standing, the D.C. Circuit dismissed all petitions for lack of jurisdiction.<sup>121</sup>

*Impact:*

With this decision, the D.C. Circuit both clarified and narrowed the petitioners who would have standing to challenge a similar EPA waiver in the future. However, in mentioning that petroleum suppliers might be forced to assume liability by the RFS, the D.C. Circuit also provided a potential means for this trade organization to establish standing and challenge similar EPA waivers on alternative grounds. The D.C. Circuit also seemed to show deference to the EPA and its findings regarding the appropriateness of approving implementation of E15 into the United States' market. Furthermore, because the D.C. Circuit dismissed all petitions for lack of jurisdiction, the D.C. Circuit never addressed the merits of the petitioners' allegations. Therefore, as no precedent was established, the D.C. Circuit and/or other Circuits will likely be presented with similar petitions for review of EPA waivers.

**Mack Trucks, Inc. v. EPA, 682 F.3d 87 (D.C. Cir. 2012)**

*Synopsis:*

In 2012, the EPA approved an interim final rule (IFR), which permitted manufacturers of heavy-duty diesel engines to continue

---

<sup>119</sup> *Id.* at 178. See also Nat'l Petrochemical & Refiners Ass'n v. EPA, 287 F.3d 1130, 1147 (D.C. Cir. 2002).

<sup>120</sup> *Grocery Mfrs.*, 693 F.3d at 179.

<sup>121</sup> *Id.* at 180.

selling non-compliant engines if they paid nonconformance penalties (NCPs).<sup>122</sup> When approving the IFR, the EPA invoked the “good cause” exception provided by the Administrative Procedure Act (APA), and made the decision without providing formal notice or an opportunity for comment.<sup>123</sup> Manufacturers of compliant heavy-duty diesel engines petitioned the United States Court of Appeals for the D.C. Circuit for review of the IFR.<sup>124</sup> The D.C. Circuit determined that the EPA failed to meet the statutory criteria for invoking the “good cause” exception, and therefore vacated the IFR.<sup>125</sup>

*Facts, Analysis, and Ruling:*

In 2001, the EPA, through the Clean Air Act (CAA), enacted a rule requiring a 95% reduction in emissions of nitrogen oxide from heavy-duty diesel engines.<sup>126</sup> The EPA provided the industry nine years to develop the necessary technologies for compliance, and established the effective date as 2010, effectively referred to as the 2010 NOx standard.<sup>127</sup> During the nine-year interim, most heavy-duty diesel engine manufacturers invested in a technology called “selective catalytic reduction” as this technology allowed the manufacturers to meet the 2010 NOx standard.<sup>128</sup> One manufacturer, Navistar, invested in “exhaust gas recirculation” instead.<sup>129</sup> However, this technology proved less effective, and the Navistar engines failed to meet the 2010 NOx standard.<sup>130</sup> Navistar continued to pursue this “exhaust gas recirculation” technology and continued to sell the noncompliant engines for the past few years by utilizing emissions credits, but these credits are running out.<sup>131</sup> Thus, Navistar

---

<sup>122</sup> Mack Trucks, Inc. v. EPA, 682 F.3d 87, 89 (D.C. Cir. 2012).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 87.

<sup>125</sup> *Id.* at 89.

<sup>126</sup> *Id.*

<sup>127</sup> *Mack Trucks*, 682 F.3d at 89.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

will soon be unable to sell the noncompliant heavy-duty diesel engines in the United States.<sup>132</sup>

Recognizing that Navistar was running out of credits, the EPA issued an interim final rule (IFR), which allowed manufacturers of heavy-duty diesel engines, like Navistar, to continue selling non-compliant engines if they paid nonconformance penalties (NCPs).<sup>133</sup> In order to issue the NCPs, the EPA must find the new emission standard is “more stringent” or “more difficult to achieve” than a prior standard, that “substantial work will be required to meet the standard for which the NCP is offered,” and that “there is likely to be a technological laggard.”<sup>134</sup> The EPA determined that the 2010 NOx standard met these three criteria as the new standard permits a significantly smaller amount of emissions than the prior standard; the standards will require substantial work as compliant engines will require new technologies; and that there is likely to be a laggard because an engine manufacturer, Navistar, has not met the compliance requirements for technological reasons.<sup>135</sup> Once the EPA determined that the NCP criteria was met, the EPA set the penalty amount and established the highest limit of emissions permitted for the noncompliant heavy-duty diesel engines.<sup>136</sup>

When authorizing the NCPs, the EPA also forewent notice and comment procedures by invoking the “good cause” exception of the Administrative Procedure Act (APA). The EPA justified this action by claiming that notice and comment procedures were impracticable, unnecessary, and contrary to public interest.<sup>137</sup> Specifically, providing for notice and comment would mean (1) the possibility that an engine manufacturer would be unable to certify a 2012 and 2013 product line; (2) the EPA only amended limited provisions in existing NCP regulations; (3) the IFR was for limited duration; and (4) there was no risk to public interest in providing the

---

<sup>132</sup> *Mack Trucks*, 682 F.3d at 89.

<sup>133</sup> *Id.* at 90.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* The EPA set the penalty amount at \$1,919 per engine and the emissions limit at fewer than 0.50 grams of nitrogen oxide per horsepower-hour. *Id.* This emissions limit is two and a half times the emissions allowed by the 2010 NOx standard. *Id.*

<sup>137</sup> *Mack Trucks*, 682 F.3d at 90.

option of NCPs for manufacturers.<sup>138</sup> In response, manufacturers of compliant heavy-duty diesel fuel engines requested administrative stay of the EPA's IFR.<sup>139</sup> The compliant manufacturers asserted that the EPA lacked good cause when issuing the IFR, that the EPA misapplied its own regulatory criteria for determining when a penalty is warranted, and that the EPA arbitrarily and capriciously set the amount of the penalty and the permissible emissions limit.<sup>140</sup> The EPA denied the manufacturer's request for administrative review; thus, the manufacturers petitioned the D.C. Circuit for review of the EPA's IFR. The D.C. Circuit determined that the compliant manufacturers had standing as direct competitors to Navistar, and thus granted the review.<sup>141</sup>

The D.C. Circuit had to determine whether notice and comment requirements of the NCPs were impracticable, unnecessary, or contrary to public interest, thus allowing the EPA to invoke the good cause exception and dispense with notice and comment requirements when issuing the IFR.<sup>142</sup> First, the EPA determined that the notice and comment requirement was not impracticable as the main purpose of the IFR was to allow Navistar to certify a complete product line of engines in the years 2012 and 2013 despite noncompliance.<sup>143</sup> Thus, notice and comment would have been practicable as the IFR does not prevent any imminent threat to the environment, safety, or national security, but instead only addresses the potential economic harm faced by Navistar for noncompliance.<sup>144</sup>

Second, the D.C. Circuit examined whether notice and comment was unnecessary by determining if the administrative decision was routine, insignificant in nature and impact, and inconsequential to the industry and to the public.<sup>145</sup> The D.C. Circuit determined that the IFR was not unnecessary as members of public, specifically the compliant manufacturers, were greatly interested in

---

<sup>138</sup> *Id.* at 90–91.

<sup>139</sup> *Id.* at 91.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Mack Trucks*, 682 F.3d at 93.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 94.

the IFR decision and the impact it would have on the industry.<sup>146</sup> Furthermore, the IFR was not routine or insignificant as the IFR implemented an NCP that established a higher emissions limit and penalty.<sup>147</sup>

Finally, the D.C. Circuit evaluated whether the notice and comment would be contrary to public interest.<sup>148</sup> The public interest aspect of the good cause exception only applies in rare circumstances when procedures presumed to serve the public interest would actually harm the interest.<sup>149</sup> However, in this situation, the only harm the EPA suggests will occur is the economic harm Navistar might suffer from not certifying a complete product line.<sup>150</sup> The D.C. determined that this argument failed to establish notice and comment was contrary to public interest.<sup>151</sup>

As the EPA failed to establish that notice and comment would be impracticable, unnecessary, or contrary to public interest, the EPA incorrectly invoked the good cause exception when issuing the IFR.<sup>152</sup> Therefore, the D.C. Circuit vacated the IFR and remanded the case for further proceedings.<sup>153</sup>

*Impact:*

With this decision, the D.C. Circuit reminded the EPA that it must follow appropriate administrative procedures when invoking IFRs. The NCPs are meant to be temporary means for manufacturers to meet new compliance standards, and should only be available when the manufacturers have made every effort to comply with the standards. Thus, the NCPs are not meant to bail out manufacturers who voluntarily continued to adopt a noncompliant technology. Moreover, the D.C. Circuit emphasized that the EPA must prevent NCPs from providing a competitive disadvantage to manufactures who comply with new regulations, as these manufactures assumed

---

<sup>146</sup> *Id.*

<sup>147</sup> *Mack Trucks*, 682 F.3d at 94.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Mack Trucks*, 682 F.3d at 94.

<sup>153</sup> *Id.*

the costs of developing and implementing compliant technologies. Overall, with this decision, the D.C. Circuit established that any EPA exceptions to new compliance regulations should be narrowly construed and reluctantly countenanced<sup>154</sup> and that the notice and comment requirements of the NCPs process will be strongly enforced.

**Friends of Blackwater v. Salazar, 691 F.3d 428 (D.C. Cir. 2012)**

*Synopsis:*

Environmental organizations brought an action against the United States Fish and Wildlife Services (FWS) challenging the FWS delisting of the West Virginia Northern Flying Squirrel under the Endangered Species Act (ESA).<sup>155</sup> The United States District Court of Columbia granted the organization's summary judgment determining that the FWS violated the ESA by removing the West Virginia Northern Flying Squirrel from the list of endangered species when several criteria in the agency's Recovery Plan for the species were not satisfied.<sup>156</sup> The FWS appealed the summary judgment, and the United States Court of Appeals for District of Columbia determined that the district court erred in its interpretation that the Recovery Plan was binding on the Secretary of the Interior in his delisting decisions.<sup>157</sup> The D.C. Circuit also determined that the FWS's decision was not arbitrary, capricious, or contrary to law; thus, the D.C. Circuit reversed and remanded the summary judgment.<sup>158</sup>

*Facts, Analysis, and Ruling:*

The West Virginia Northern Flying Squirrel historically lives in the Southern Appalachian Mountains; however, in 1985 the Fish

---

<sup>154</sup> *Id.* at 96.

<sup>155</sup> *Friends of Blackwater v. Salazar*, 691 F.3d 428, 429 (D.C. Cir. 2012).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*



and Wildlife Service (FWS) documented only ten living squirrels and deemed the species endangered.<sup>159</sup> As required by the Endangered Species Act (ESA), the FWS created a recovery plan for the “conservation and survival” of the squirrel.<sup>160</sup> The plan established 4 criteria that when accomplished the squirrel could be removed from the list of endangered species.<sup>161</sup> These criteria included: (1) the squirrel population was expanding at a minimum of 80% across all Geographic Recovery Areas (GRAs); (2) there is sufficient ecological data and timber management data to assure future protection and management; (3) GRAs are managed to ensure sufficient habitat and habitat corridors; and (4) the existence of high elevation forests is not threatened by pests or environmental pollutants.<sup>162</sup>

In 2002, the FWS hired a biologist to investigate the possibility of removing the squirrel from the endangered species list.<sup>163</sup> In 2006, the Secretary of the Interior relied on the persistence<sup>164</sup> of the squirrel population to determine that the population was robust, and thus the squirrel no longer met the definition of endangered or threatened.<sup>165</sup> Furthermore, the Secretary determined that the recovery plan criteria are not explicit reference points for delisting a species, as the criteria do not specifically address the five threat factors used for delisting a species.<sup>166</sup> Therefore, the criteria only serve as guidance for the Secretary when determining when recovery has been achieved and if a species should be delisted.<sup>167</sup>

The Friends of Blackwater filed a complaint in the district court alleging that the FWS violated the ESA by delisting the squirrel

---

<sup>159</sup> *Id.* at 430.

<sup>160</sup> *Friends of Blackwater*, 691 F.3d at 430.

<sup>161</sup> *Id.* at 431.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* The FWS defined persistence as “continuing capture of [the squirrel] over multiple generations at previously documented sites throughout the historical [habitat] range.” *Id.* In 2006, as opposed to the 10 squirrels captured in 1990, the scientists investigating the squirrel population captured 1,063 individual squirrels at 107 sites. *Id.*

<sup>165</sup> *Friends of Blackwater*, 691 F.3d at 431.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

before meeting the criteria in the Recovery Plan, and alleged that the use of persistence to delist the species was arbitrary and capricious as it did not rely on the best available science.<sup>168</sup> The district court granted summary judgment in favor of the Friends of Blackwater on the grounds that the Secretary was bound by the criteria in the Recovery Plan, and his decision to delist the squirrel without meeting the criteria constituted a revision to the Recovery Plan without proper notice and comment procedures as required by the EAS.<sup>169</sup> The FWS appealed the summary judgment, and the United States Court of Appeals for the District of Columbia granted review.<sup>170</sup>

The D.C. Circuit first examined the Friends of Blackwater's claim that the criteria of the Recovery Plan must be met before a species can be delisted.<sup>171</sup> In order to resolve this, the D.C. Circuit looked to the language of the ESA; however, they determined that the statute was ambiguous.<sup>172</sup> After looking at the legislative history and structure of the ESA, the D.C. Circuit determined that, although the Secretary was required to design and implement a Recovery Plan, the Plan is only a statement of intention, not a binding contract on the FWS or the Secretary.<sup>173</sup> However, the D.C. Circuit was careful to emphasize that the Secretary should use the Recovery Plan criteria as guidance when making delisting decisions.<sup>174</sup>

Next, the D.C. Circuit evaluated whether the Secretary's reliance on persistence was arbitrary and capricious.<sup>175</sup> The Friends of Blackwater allege that because the Secretary failed to use population-based data, the Secretary's decision was arbitrary and capricious.<sup>176</sup> However, the D.C. Circuit determined that the Secretary was only required to use the best available data, and is not required to conduct its own independent studies when determining

---

<sup>168</sup> *Id.* at 432.

<sup>169</sup> *Id.*

<sup>170</sup> *Friends of Blackwater*, 691 F.3d at 432.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 433–34. The D.C. Circuit emphasized the fact that events may occur over the lifetime of the Recovery Plan, which make meeting the criteria of the Plan irrelevant; thus, the Secretary needs to be free to delist the species without meeting the criteria. *Id.* at 434.

<sup>174</sup> *Id.*

<sup>175</sup> *Friends of Blackwater*, 691 F.3d at 434.

<sup>176</sup> *Id.*

whether to delist a species.<sup>177</sup> The best available data requirement of the ESA only prevents the Secretary from disregarding available scientific evidence that is better or more reliable than evidence the Secretary would rely on. In this situation, the Secretary adequately showed that population data was not available, but data on the persistence of the squirrels was available.<sup>178</sup> Therefore, the Secretary's reliance on the persistence data to determine that the squirrel population was no longer endangered was reasonable, and not arbitrary or capricious.<sup>179</sup>

The D.C. Circuit determined that the Secretary reasonably interpreted that the ESA does not require the Recovery Plan criteria to be met before removing a species from the list of endangered species, and that the Secretary's reliance on persistence data was not arbitrary or capricious. Thus, the D.C. Circuit reversed the district courts' summary judgment order.

*Impact:*

With this decision, the D.C. Circuit provided the Secretary of the Interior with broad authority to determine when a species can be removed from the list of endangered species. This decision establishes that though the FWS must design and implement a Recovery Plan when declaring a species endangered, the criteria in this plan only serve as guidance when determining whether a species should be removed from the list of endangered species. Thus, the Secretary of the Interior retains the ultimate authority in determining the status of allegedly threatened or endangered species.

**Watson v. Solis, 693 F.3d 620 (6th Cir. 2012)**

*Synopsis:*

In 2002, Patricia Watson ("Watson") filed a claim for survivor benefits under the Department of Labor's Energy Employees Occupational Illness Compensation Program Act of 2000

---

<sup>177</sup> *Id.* at 435.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 435–36.

(“Act”).<sup>180</sup> The Department of Labor denied Watson’s claim, finding that she was not “incapable of self-support,” and therefore not entitled to benefits under the Act as a “covered child.”<sup>181</sup> Watson filed a complaint in the district court seeking review of the Department of Labor’s interpretation and application of the Act.<sup>182</sup> The district court denied Watson’s motion for summary judgment and dismissed her case with prejudice.<sup>183</sup> Watson appealed the district court’s decision, alleging that the Department of Labor acted arbitrarily and capriciously in denying her claim for benefits.<sup>184</sup> The United States Court of Appeals for the Sixth Circuit granted review and determined that the Department of Labor did not act arbitrarily or capriciously in denying Watson benefits under the Act.<sup>185</sup> Thus, the Sixth Circuit affirmed the district court’s decision.<sup>186</sup>

Facts, Analysis, and Ruling:

In 2000, Congress enacted the Energy Employees Occupational Illness Compensation Program Act in order to provide benefits to employees with illnesses caused by exposure to radiation and other toxic substances during their work for the Department of Energy or its predecessor agencies.<sup>187</sup> Under this Act the employees or their eligible survivors could receive a lump sum payment of \$150,000 as compensation and medical benefits for covered individuals.<sup>188</sup> The Act determined that:

[A] covered employee’s child is eligible for survivor compensation as a covered child if said child: as of the employee’s death—  
(a) had not attained the age of 18 years;

---

<sup>180</sup> *Watson v. Solis*, 693 F.3d 620, 622 (6th Cir. 2012).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Watson*, 693 F.3d at 626.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 622. *See* *Hayward v. U.S. Dep’t of Labor*, 536 F.3d 376, 377 (5th Cir. 2008).

<sup>188</sup> *Watson*, 693 F.3d at 622.

- (b) had not attained the age of 23 years and was a full-time student who has continuously enrolled as a full-time student in one or more educational institutions since attaining the age of 18 years; or
- (c) had been incapable of self support.<sup>189</sup>

Watson's father worked as a contractor for the Department of Energy from 1954 to 1962, and he died from complications from Hodgkin's disease in 1964. When her father died Watson was nineteen years old, was not a full-time student, worked as a waitress, relied on her parents for economic support, and was declared a dependent on her parent's income tax returns.<sup>190</sup> In 2002, Watson filed claims for survivor benefits with the Department of Labor and received a lump sum compensation of \$150,000 as a survivor of a covered employee with an occupational illness resulting from radiation exposure.<sup>191</sup> Later, Watson filed a claim for more compensation under 42 U.S.C. § 7385s 3(d)(2)(c) of the Act, claiming as a covered child she was "incapable of self-support" at the time of her father's death.<sup>192</sup> The Department of Labor denied her claim finding that she was not "incapable of self-support" as she failed to provide evidence that she was "physically or mentally incapable of self-support" as required by the Department of Labor's Procedure Manual to receive compensation under this section.<sup>193</sup>

Watson challenged the Department of Labor's interpretation of "incapable of self-support" in the District Court claiming the Department's requirement of a showing of physical or mental incapability is impermissible.<sup>194</sup> The District Court denied Watson's motion for summary judgment, and found that the Department of Labor's interpretation of "incapable of self-support" was persuasive.

---

<sup>189</sup> *Id.* See also 42 U.S.C. § 7385s 3(d)(2) (2012).

<sup>190</sup> *Watson*, 693 F.3d at 623.

<sup>191</sup> *Id.* The compensation that Watson received in 2002 came under a different section of the Act; neither that compensation nor that section of the Act are at issue in this case. *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> Thus the Department did not act arbitrarily or capriciously in denying Watson's claim.<sup>196</sup> Watson appealed the District Court's decision, and the United States Court of Appeals for the Sixth Circuit reviewed the District Court's denial of the summary judgment de novo.<sup>197</sup>

The Sixth Circuit determined that under section 7385s (6)(a) of the Act, a court may only modify or set aside a federal agency's final decision regarding survivor benefits if the court finds that the agency's decision was arbitrary and capricious.<sup>198</sup> This is a deferential standard of review in which the decision will not be arbitrary or capricious if the agency can present a reasonable explanation, based on evidence, for the outcome of its decision.<sup>199</sup> In reviewing the Department of Labor's interpretation of "incapable of self-support," the Sixth Circuit applied the two step process utilized by the Supreme Court in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).<sup>200</sup> Applying the two-step process, the Sixth Circuit first determined that the term "incapable of self-support" is ambiguous as it could refer to lacking financial capacity for independent support or it could refer to lacking physical or mental ability to support oneself.<sup>201</sup>

As the term is ambiguous, the Sixth Circuit then had to determine if the Department of Labor's interpretation of the Act was permissible.<sup>202</sup> The Department of Labor's interpretation of "incapable of self-support" is found in an agency manual; thus, the permissibility of the interpretation must be determined by looking at the thoroughness of its consideration, the validity of the reasoning,

---

<sup>195</sup> *Watson*, 693 F.3d at 623.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Cox v. Standard Ins. Co.*, 585 F.3d 295, 299 (6th Cir. 2009).

<sup>200</sup> *Watson*, 693 F.3d at 624. The two-step process first evaluates whether the statutory language is unambiguous, and therefore the intent of Congress is clear. If the statutory language is ambiguous then the court must determine whether the government agency's interpretation of the term is based on a permissible construction of the statute. *See Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

<sup>201</sup> *Watson*, 693 F.3d at 624.

<sup>202</sup> *Id.* at 626.

and its consistency with other Congressional interpretations.<sup>203</sup> These factors determine whether the Department of Labor's interpretation of "incapable of self-support" as "mentally or physically incapable of self-support" is persuasive, and thus permissible.<sup>204</sup> The Sixth Circuit first determined that the focus on mental or physical disability was consistent with the established Congressional interpretation that federal compensation programs were generally meant to cover dependents incapable of self-support due to "physical or mental disabilities."<sup>205</sup> This established interpretation was also thoroughly considered as Congress has adopted this interpretation of incapable of self-support since the mid 1920s.<sup>206</sup> The Sixth Circuit also found that the Department of Labor's interpretation of "incapable" was persuasive as "incapable" is commonly defined as "suffering from such a degree of mental or physical weakness."<sup>207</sup> Furthermore, by adopting this interpretation of "incapable of self-support," the Department of Labor established a class of identifiable beneficiaries, which remain consistent with other federal statutes.<sup>208</sup> Therefore, the Sixth Circuit determined the Department of Labor's interpretation to be persuasive.<sup>209</sup>

After determining that the Department of Labor's interpretation of "incapable of self-support" as physically or mentally incapable of supporting one's self was persuasive, the Sixth Circuit determined that the Department of Labor did not act arbitrarily or capriciously in denying Watson benefits under section 7385s 3(d)(2)(c). The Department of Labor denied Watson's claim because she failed to provide evidence of a physical or mental condition, which made her incapable of self-support.<sup>210</sup> Watson only provided evidence of her economic situation, despite the Department of Labor's requests for records of physical or mental disabilities.<sup>211</sup> As

---

<sup>203</sup> *Id.* at 624–625. See also *Skidmore v. Swift & Co.*, 325 U.S. 134 (2000).

<sup>204</sup> *Watson*, 693 F.3d at 625.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 626.

<sup>209</sup> *Watson*, 693 F.3d at 626.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

standard practice, the Department of Labor requires evidence of mental or physical disabilities when an individual claims benefits under section 7385s 3(d)(2)(c).<sup>212</sup> Watson failed to provide the necessary evidence to meet the requirements for a claim of “incapable of self-support,” thus the Department of Labor did not act arbitrarily or capriciously in denying Watson’s claim for additional compensation under the Act.<sup>213</sup>

*Impact:*

With this decision, the Sixth Circuit showed deference to the Department of Labor and Congress’s established interpretation of who is deemed eligible for federal benefit programs. This deference effectively narrows the scope of covered individuals. The Sixth Circuit may have upheld the narrow scope of qualifying individuals for practical purposes. A broad interpretation of covered survivors, as Watson advocates, would expand the definition of covered survivors beyond those reasonably intended by Congress to have access to federal benefit programs, and the broad interpretation would quickly exhaust the financial capacity of federal benefit programs and recovery funds. Thus, through this decision, the Sixth Circuit recognized and upheld Congress’s established interpretation of who constitutes a covered survivor.

---

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*