The Supreme Court Accepts Five Environmental Cases During Its 2008-2009 Term

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February 27, 2009

Congressional Research Service
7-....
www.crs.gov
R40441

CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

In the Supreme Court's 2008-2009 term, which likely will conclude in late June, 2009, the Court has accepted for argument five environmental cases—an unusually large number out of the roughly 85 cases accepted for argument. This report reviews the cases, decided and undecided, and then briefly comments.

The one case of the five that is already decided is *Winter v. Natural Resources Defense Council*, holding that the national security interest in the Navy's being able to conduct exercises using "mid-frequency active sonar" clearly outweighs the danger to whales from use of such sonar. In so deciding, the Court also invalidated the Ninth Circuit's lax standard for the issuance of preliminary injunctions.

The four cases remaining to be decided are, first, *Summers v. Earth Island Institute*, raising the question whether a court's awarding nationwide relief from the application of a rule is proper in the context of a site-specific challenge to the rule. Second, the case of *Entergy Corp. v. Environmental Protection Agency* addresses the Clean Water Act's demand that EPA require the "best technology available" to minimize fish mortality from cooling water intake structures; the issue is whether that demand allows EPA to do cost-benefit analysis in deciding what technology to approve. Third, the case of *Coeur Alaska, Inc. v. Alaska Conservation Group* poses the issue whether a discharge prohibited by a Clean Water Act new source performance standard can still be allowed pursuant to a "fill" permit under the act. And fourth, the case of *Burlington Northern and Santa Fe Railway Co. v. United States* takes on two questions at the heart of the Superfund Act's liability scheme: when is there a reasonable basis for apportioning liability for hazardous-substance cleanup costs among responsible parties, in lieu of the joint and several liability that would otherwise apply, and when is a manufacturer liable for having arranged for the disposal of a hazardous substance even though disposal was not the primary purpose of the arrangement. Each of these cases has important implications for the particular program involved, and a few reach well beyond.

Industry views these five cases with optimism; the environmental community with apprehension. A principal reason is that in all five cases, the environmental side won in the decision below. Assuming the conventional wisdom that the Supreme Court does not take cases merely to affirm the decision below, the environmental sweep in the lower appellate courts suggests decisions going the other way in the Supreme Court. The one decision so far, in *Winter v. Natural Resources Defense Council*, follows that prediction.

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In the Supreme Court's 2008-2009 term, which likely will conclude in late June, 2009, the Court has accepted for argument five environmental cases—an unusually large number out of the roughly 85 cases accepted for argument. The reason for this interest in environmental cases at this particular time is speculative; the Court generally does not explain why it accepts cases. This report reviews the cases, decided and undecided, and then briefly comments.

At this writing, one of the five cases has been decided.

The Decided Case

Appropriateness of Preliminary Injunction Limiting Military Exercises: *Winter v. Natural Resources Defense Council*

Facts and litigation history: The Navy scheduled 14 training exercises through January 2009 off the coast of southern California. These exercises involve the use of "mid-frequency active sonar" to detect enemy submarines. Environmentalists claim that the high decibel levels used harms whales, causing beach strandings. In February 2007, however, the Navy issued an environmental assessment under the National Environmental Policy Act (NEPA), concluding that the use of mid-frequency active sonar during the exercises would cause minimal harm to marine mammals.

Petitioners, mostly environmental groups, sought declaratory and injunctive relief against the exercises, on the ground that they violated NEPA, plus other environmental laws not material to the Supreme Court decision. The district court granted a preliminary injunction barring conduct of the exercises. On remand from the Ninth Circuit, the district court modified the preliminary injunction to allow the Navy to use the sonar if it used mitigation measures. On the Navy's second appeal, challenging two of the mitigation measures, the Ninth Circuit affirmed the modified injunction,[1] noting that plaintiffs (petitioners in the Supreme Court) had carried their burden of showing a "possibility" of irreparable injury and that the balance of hardships weighed in favor of plaintiffs.

Holding/rationale of Supreme Court: The Supreme Court ruled November 12, 2008[2] (by which time 13 of the 14 scheduled exercises had been conducted). The majority opinion, by the five justices generally identified as conservative,[3] held that as an initial matter the Ninth Circuit's "possibility" test for issuance of a preliminary injunction is too lenient; plaintiffs must show that irreparable injury is "likely" in the absence of an injunction. However, the Court continued, even if plaintiffs had shown irreparable injury (and, too, likelihood of success on the merits), it is "plainly outweighed" by the Navy's interest in effective, realistic training of its sailors. That factor alone requires denial of the requested injunctive relief. For the plaintiffs, the most serious possible injury would be harm to an unknown number of marine mammals. In light of the foregoing, the Court reversed the decision below and vacated the preliminary injunction.

[1] 518 F.3d 658 (9th Cir. 2008).

[2] 129 S. Ct. 365 (2008). For more extended discussion of the context of the case and the Supreme Court's decision, see CRS Report RL34403, *Whales and Sonar: Environmental Exemptions for the Navy's Mid-frequency Active Sonar Training*, by (name redacted).

[3] The opinion was authored by Chief Justice John Roberts, and joined by Justices Scalia, Kennedy, Thomas, and Alito.

Parenthetically, said the Court, the same balancing factor requiring vacatur of the preliminary injunction here would also bear on a challenge to any future permanent injunction.

The Court did not address the merits of the lawsuit—that is, whether the Navy exercises violated NEPA or the other federal environmental laws claimed to be violated.

Comments: This case was accepted by the Supreme Court in an unusual posture: as a challenge to a preliminary injunction, rather than to the merits of petitioners' statutory claims. The Court made clear, however, that its perception of an overriding national security interest in the challenged training exercises should lead the district court to reject a final injunction as well, in the event the military is found to have violated an environmental statute. Note, too, that the United States had sought the judicial rejection of the Ninth Circuit's "mere possibility" test for issuance of injunctions before,[4] succeeding this time.

The Ninth Circuit is widely regarded as an environmentally friendly circuit, and the Supreme Court, in reversing it here, was doing what it has done many times before. Three of the four undecided environmental cases this term are also from the Ninth Circuit.

The Cases Remaining to Be Decided

Propriety of Challenge to Nationwide Application of Rule Based on Site-specific Application of Rule: *Summers v. Earth Island Institute*

Facts and litigation history: On June 4, 2003, acting under the Forest Service Decision-making and Appeals Reform Act (ARA), the Forest Service promulgated regulations codified at 36 CFR §§ 215.12(f) and 215.4(a). These regulations precluded notice, opportunity for comment, and administrative appeals for projects and activities implementing forest plans where those plans and activities are covered by categorical exclusions under the National Environmental Policy Act (NEPA). The following day, the Forest Service designated salvage timber sales of 250 acres or less as categorical exclusions. Later in 2003, the Forest Service approved the timber sale of 238 acres of post-fire forest, stating that the project was not subject to appeal because of the regulations. In a challenge to the 2003 regulations as applied to this timber sale, the district court invalidated the regulations and issued a nationwide injunction against their application.

On appeal, the Ninth Circuit in *Earth Island Institute v. Ruthenbeck*, 490 F.3d 687 (9th Cir. 2007), held first that plaintiffs had Article III standing because there is injury in fact:[5] here, deprivation of procedural rights and the possibility of reduced recreational enjoyment of the national forests. As a further preliminary matter, the court found the claims against the appeal prohibition ripe because they had been applied to the timber sale in question to block plaintiff Earth Island Institute's administrative appeal. On the merits, the Ninth Circuit found that 36 C.F.R. §§

[4] See the United States' petition for certiorari in *United States Forest Service v. Earth Island Institute* (No. 06-797), *cert. denied*, 549 U.S. 1278 (2007). The decision below is at 442 F.3d 1147 (9th Cir. 2007).

[5] By limiting the jurisdiction of federal courts to "cases" and "controversies," Article III of the Constitution has long been construed to require that only those persons suffering "injury in fact" have standing to sue in such courts.

215.12(f) and 215.4(a) conflict with the plain language of the ARA, affirming the district court. It also affirmed the nationwide scope of the district court's injunction against the regulations' enforcement.

The Supreme Court granted certiorari on January 18, 2008.[6] Paraphrasing the petition for certiorari, the questions presented are: (1) whether the Forest Service's promulgation of 36 C.F.R. § 215.4(a) and § 215.12(f), as distinct from the particular site-specific project to which those regulations were applied in this case, was a proper subject of judicial review; (2) whether respondent environmental groups established standing; (3) whether respondents' challenge to 36 C.F.R. § 215.4(a) and § 215.12(f) remains ripe after the timber sale to which the regulations had been applied was withdrawn, and respondents' challenges to that sale had been voluntarily dismissed with prejudice, pursuant to settlement between the parties; and (4) whether the Ninth Circuit erred in affirming the nationwide injunction issued by the district court. The case was argued before the Supreme Court on October 8, 2008, the same day as *Winter*, *supra*, but has not yet been decided.

Comments: Environmental groups have long used site-specific challenges to achieve program-wide reform. Thus, the stakes in this decision are potentially large. A defeat for such groups—that is, a holding that site-specific application of a rule does not give a plaintiff the right to a nationwide remedy—could greatly increase the burden on public interest groups seeking to invalidate a government program as contrary to statute by requiring multiple lawsuits where one currently might suffice. That the Court, or at least its conservative justices, might so rule is suggested by the generally restrictive view of the role of the courts held by such justices.

Whether Cost-benefit Analysis May Be Used to Determine "Best Technology Available" Under the Clean Water Act: *Entergy Corp. v. Environmental Protection Agency*

Facts and litigation history: "Power plants and other industrial operations withdraw billions of gallons of water from the nation's waterways each day to cool their facilities. The flow of water into these plants traps ... large aquatic organisms against grills or screens, which cover the intake structures, and draws ... small aquatic organisms into the cooling mechanism ... [resulting in] the kill[ing] or injur[ing] of billions of aquatic organisms every year."[7] Addressing this problem, Clean Water Act (CWA) section 316(b)[8] demands that rules under the act require that "the location, design, construction, and capacity of cooling water intake structures reflect the best technology available [BTA] for minimizing adverse environmental impact." In 2004, EPA issued the rule at issue here, governing cooling water intake structures at large, existing power plants.[9] The rule permitted EPA to conduct cost-benefit analysis in determining BTA.

In *Riverkeeper Inc. v. United States*, 475 F.3d 83 (2d Cir. 2007), the Second Circuit invalidated the use of cost-benefit analysis under section 316(b). The language of that provision, it noted,

[6] 76 U.S.L.W. 3391 (No. 07-463).

[7] Riverkeeper, Inc. v. United States, 475 F.3d 83, 89 (2d Cir. 2007).

[8] 33 U.S.C. § 1326(b).

[9] The rule at issue here is often referred to as the "Phase II" cooling water intake rule. The Phase I cooling water intake rule, issued in 2001, governs intake at *new* power plants. The Phase III rule, issued in 2006, applies at facilities other than power plants.

"plainly indicates that facilities must adopt the *best* technology available and that cost-benefit analysis cannot be justified ..."[10] When Congress has intended that an agency do cost-benefit analysis, said the court, it has said so on the face of the statute, which it did not do in section 316(b). By contrast, EPA may consider cost in two other ways: first, to determine what technology can reasonably be borne by the industry, and second, to do cost *effectiveness* analysis (the court reasoning that BTA selection based in part on cost effectiveness, while taking cost into account, remains technology rather than cost driven).

The Supreme Court granted certiorari on April 14, 2008.[11] As phrased in the petition for certiorari, the question presented is whether CWA section 316(b) authorizes EPA to compare costs with benefits in determining the "best technology available for minimizing adverse environmental impact" at cooling water intake structures. The case was argued December 2, 2008.

Comments: In the 1970s, when almost all the federal environmental laws were enacted, there was much resistance to cost-benefit analysis. In part, the opposition stemmed from a belief that one simply cannot put a dollar value on all the things that environmental laws protect and that when agencies do use such dollar values, they are often low. There has been a shift of late, however, to greater acceptance of cost-benefit analysis. This case will test whether the justices on the Supreme Court generally viewed as conservative, often more sympathetic to business concerns such as cost, will continue that shift. Industry presumably would welcome a decision that could be used to legitimize cost-benefit analysis elsewhere in the CWA where it is not expressly authorized, and in federal pollution control statutes generally.

This case has also put a spotlight on Justice Breyer, who before becoming a judge on the First Circuit criticized government regulation for not often enough considering costs, as through cost-benefit analysis.[12] This may explain the effort in Riverkeeper's brief to the Court to argue, as did the Second Circuit, that there are avenues for consideration of costs in CWA section 316(b) other than a cost-benefit analysis.

Conflicting Regulatory Coverage Under the Clean Water Act: *Coeur Alaska, Inc. v. Alaska Conservation Group*

Facts and litigation history: Coeur Alaska proposes to revive a long-defunct gold mine in Alaska's Tongass National Forest. The company proposes to dispose of the wastewater produced by the mine—210,000 gallons daily, including 1,440 tons of tailings—by piping it to a nearby 23-acre lake in the national forest. The discharge would kill all the fish and nearly all the other aquatic life in the lake. Because the discharge ultimately would raise the lake bottom by 50 feet (necessitating a dam), the Corps of Engineers reasoned that it was covered by the permit program under Clean Water Act (CWA) section 404[13] for discharges of "fill material" into U.S. waters. The Corps issued the section 404 permit in 2005.

[10] 475 F.3d at 98-99 (emphasis in original).

[11] 76 U.S.L.W. 3554 (No. 07-588).

[12] *See, e.g.*, Stephen Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 Harv. L. Rev. 549, 570 (1979) ("Ideally, one might expect regulators to set standards through the use of cost-benefit principles.").

[13] 33 U.S.C. § 1344.

In *Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers*, 486 F.3d 638 (9th Cir. 2007), the Ninth Circuit addressed the fact that two different CWA regulations, dictating different results, seemed to apply to Coeur Alaska's proposed discharge. First, the Corps and EPA define "fill material" as material placed in waters of the United States that changes the bottom elevation of such waters.[14] No one disputes that the discharge from Coeur's gold mine would do this and, as noted, the "404 permit" has been issued. Second, however, EPA has a new source performance standard promulgated under CWA section 306[15] that specifically prohibits discharges from Coeur Alaska's type of ore processing ("a froth flotation mill") into waters of the United States.[16] This prohibition is required under the CWA to be incorporated into the mill's section 402 (National Pollutant Discharge Elimination System, or "NPDES") permit.[17]

The court concluded that the CWA's plain language requires that the Section 306 performance standard apply, through an NPDES permit. Section 404, said the court, contains no implied exemption from the performance standards whenever a proposed discharge meets the definition of "fill material." Moreover, the court said, EPA's and the Corps' statements when the regulatory definition of "fill material" was adopted show that they did not intend waste products subject to performance standards to be regulated as fill material. Thus, in the court's view, the Corps should not have issued a 404 permit here and the district court's contrary ruling must be reversed.

The Supreme Court granted certiorari on June 27, 2008.[18] Paraphrasing the petition for certiorari, the question presented is whether the Ninth Circuit erred in reallocating the permitting authority of the Corps of Engineers under CWA section 404, to EPA under CWA section 402. The case was argued Jan. 12, 2009.

Comments: The grant of certiorari was unexpected in this case because there was no circuit split and the United States did not seek review. The consequences of a reversal could be significant if the Court gives the Corps wide latitude to remove discharges from EPA's NPDES program by redefining "fill material."

Liability Apportionment and "Arranger" Liability Under the Superfund Act: *Burlington Northern and Santa Fe Railway Co. v. United States*

Facts and litigation history: U.S. EPA and the State of California spent a considerable sum to clean up the toxic contamination at an agricultural chemical storage and distribution facility. EPA and the state then sued to recover their cleanup costs under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA; popularly "Superfund Act"), which attaches liability for such government cleanup costs to past and present owners and operators of a contaminated site, those who transported the hazardous substance to the site, and those who

[14] 33 C.F.R. § 323.3(e)(1)(i).

[15] 33 U.S.C. § 1316.

[16] 40 C.F.R. § 440.104(b)(1). New source performance standards are incorporated into permits under CWA section 402, 33 U.S.C. § 1342—required for point sources of discharges into waters of the United States. These permits are known as National Pollutant Discharge Elimination System (or "NPDES") permits.

[17] 33 U.S.C. § 1342.

[18] 76 U.S.L.W. 3683 (No. 07-984).

arranged for the disposal of the hazardous substance at the site ("arranger liability").[19] In light of this liability scheme, EPA and the state sued (a) the company that operated the facility, which later became defunct, (b) two railroads (including Burlington Northern), which owned part of the site when the contamination occurred, and (c) Shell Oil Co., which supplied and delivered some of the chemicals to the facility.

The district court found the railroads liable as past and present owners of the site and Shell liable as an "arranger." It then multiplied a variety of percentages (e.g., the percentage of the overall site owned by the railroads) to find the railroads liable for 9% of total cleanup costs, and Shell liable for 6% of total cleanup costs.

In *United States v. Burlington Northern and Santa Fe Railway Co.*, 520 F.3d 918 (9th Cir. 2008), the Ninth Circuit addressed two questions. First, are the railroads and Shell liable for all the cleanup costs or, as the district court held, only some of them? The court held that as a purely legal matter, the harm at issue here is capable of apportionment—for example, some of the contamination occurred before the railroads' parcel became part of the facility, and only some of the toxic substances were stored on that parcel. But, the court said, neither the railroads nor Shell has provided any reasonable basis for an apportionment here—for example, leakage or disposal evidence cannot suffice to provide such a basis because relative toxicity and migratory potential are also relevant. The second question answered by the court was whether Shell was liable as an "arranger." That term, said the court, is not limited to "direct" arranger liability, where the central purpose of the transaction is to dispose of the hazardous substance. In addition, CERCLA case law includes "broader" arranger liability, where the transaction contemplates disposal as a part of, but not the focus of, the transaction. Here, Shell arranged a transaction in which there necessarily would be leakage or some other form of disposal, and that is sufficient for arranger liability.

The Supreme Court granted certiorari on October 1, 2008.[20] As phrased in Burlington Northern's petition for certiorari, the question presented is whether the Ninth Circuit erred by reversing the district court's apportionment of responsibility under CERCLA and by adopting a standard of review that departs from common law principles and conflicts with decisions of other circuits. As phrased in Shell Oil's petition for certiorari, the questions presented are (1) whether liability for "arranging" for disposal of hazardous substances under CERCLA may be imposed upon a manufacturer who merely sells and ships, by common carrier, a commercially useful product, transferring ownership and control to a purchaser who then causes contamination involving that product, and (2) whether joint and several liability may be imposed upon several potentially responsible parties under CERCLA even when there is an objectively reasonable basis for divisibility that would suffice at common law. The case was argued on February 24, 2009.

Comments: This case raises fundamental Superfund Act issues that the Court has repeatedly denied certiorari on in the past. Some observers opine that this is the most important Superfund case ever to reach the Court, raising issues as to which the government has enjoyed favorable precedent until now.

The heart of the Superfund statute is its expansive liability scheme, designed by Congress to maximize the likelihood that solvent responsible parties would be found at a site to reimburse the government for its cleanup costs. One element of that expansive liability, legislative history

[19] 42 U.S.C. §§ 9607(a)(1)-(4). Transporters are liable only if they selected the site. Id. at § 9607(a)(4).

[20] 77 U.S.L.W. 3195 (No. 07-1601).

shows, is that parties made liable under the act are jointly and severally liable (each is potentially liable for the entire cleanup) unless there is some reasonable basis for apportioning liability. *Burlington Northern*, in raising the issue of what constitutes a reasonable basis, may critically affect how often the government will be able to recover its costs (through court awards of damages or negotiated settlements). Thus, if the Supreme Court substitutes a lax standard for finding a reasonable basis in place of the Ninth Circuit's demanding one, the federal treasury would very likely have to absorb a portion of total cleanup costs more often than under current precedent. In the same way, if the Court adopts a tighter standard for "arranger" liability than the Ninth Circuit, there could be fewer parties in the pool of potential defendants, and, once again, a greater likelihood that the treasury would have to foot some of the cleanup bill. Industry, of course, is concerned as to what the liability of a manufacturer is in selling a product—that is, in instances when it is not, in an obvious sense, "arrang[ing] for disposal."

Concluding Thoughts

Though the Navy sonar case is the only one of the five cases accepted by the Supreme Court likely to generate headlines in the popular press, all of these cases are important for their individual programs, and in some cases for standing and administrative law beyond. They are also likely to be revealing of the environmental direction to be taken by the still-emerging Roberts Court, which has split closely on some major environmental cases.[21]

Industry views these five cases with optimism; the environmental community with apprehension. For one thing, the environmental side won in the decision below in all five cases. Assuming the conventional wisdom that the Supreme Court does not take cases merely to affirm the decision below, the environmental sweep in the appellate courts suggests decisions going the other way in the Supreme Court (the one decision so far, in *Winter v. Natural Resources Defense Council*, follows that prediction). Reinforcing this possibility is the fact that four of the five cases are from the Ninth Circuit—as mentioned, a circuit with a high reversal rate in the Supreme Court. As for the principal NEPA case, *Summers v. Earth Island Institute*, it has been noted that the Supreme Court has voted against the environmental position in each of its 15 NEPA decisions.[22] Finally, as an overall matter, today's Supreme Court, with a few notable exceptions, has been less tolerant of regulation and more sympathetic to business concerns than the Court of the 1970s and early 1980s, the first decade-and-a-half of federal environmental legislation.[23]

As for the large number of environmental cases this term, there is always the chance that it is due purely to the random vagaries of the Court's certiorari-granting process (the Court's previous term had *no* environmental cases[24]). Another view is that the conservative justices, realizing the

[21] *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497 (2007) (5-4), and Rapanos v. United States, 547 U.S. 715 (2006) (4-1-4).

[22] *See* Marcia Coyle, *How green is the court?*, NAT'L L.J. (Oct. 20, 2008), at 1, 17.

[23] "Notable exceptions" include *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), and *Massachusetts v. EPA*, 549 U.S. 497 (2007).

[24] The text statement raises the ancient definitional question as to what is an "environmental" case. Two cases decided by the Supreme Court during its previous (2007-2008) term arose in an environmental context, but the legal issues raised were more non-environmental. One case is *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008), which stemmed from the Exxon Valdez oil spill in 1989. *Exxon Shipping* held that maritime common law on punitive damages is not preempted by the Clean Water Act's penalties for water pollution, and at least in the circumstances of this case, maritime law punitive damages should not exceed compensatory damages. The other case is *New Jersey v.* (continued...)

possibility of appointments to the Court by President Obama, want to resolve as many environmental issues as possible before their numbers are diminished. Finally, it has been suggested that the most eminent Supreme Court practitioners of the day are taking a greater interest in environmental cases, and that their skills and their names on the petitions for certiorari increase the likelihood that the Court will accept such cases.[25]

Finally, it is worth noting that the Court continues to reject repeated petitions for certiorari in the most difficult cases, including in the current term. These include preeminently the question of whether certain intrastate applications of the Endangered Species Act comport with the Commerce Clause of the Constitution (petitions rejected at least four times), and efforts to clarify the Court's fractured opinions as to the geographic scope of the Clean Water Act in *Rapanos v. United States*[26] (petitions rejected five times). As with the cases granted certiorari above, the reasons for the Court's nonacceptance of cases are speculative, beyond pointing out that the overwhelming majority of petitions for certiorari are turned down. As to *Rapanos*, however, the reason for nonacceptance (even when, this term, the United States itself was the petitioner) is very likely that the justices on the Court today are the same as in 2006 when *Rapanos* was decided. In that year, no single rationale commanded the support of a majority of the justices, leaving the lower courts in confusion as to the rule of law to be extracted from the decision. That would also likely be the result if the Court were to accept a post-*Rapanos* case now.

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Delaware, 128 S. Ct. 1410 (2008), which arose from Delaware's refusal to grant British Petroleum permission to construct a liquefied natural gas unloading terminal extending from New Jersey's shore 2,000 feet into Delaware territory. The Court held that the governing interstate compact did not grant New Jersey exclusive jurisdiction over all improvements extending outward of its low-water mark, hence Delaware could block the project.

[25] Remarks of Richard Lazarus, Visiting Professor at Harvard Law School, at the Environmental Law Institute's Supreme Court Environmental Preview, Oct. 1, 2008, held at Harvard Law School. (Webcast link available from author). Eminent Supreme Court practitioners having their names on the petitions for certiorari in the five cases discussed here, or on amicus briefs in support, include Ted Olsen in *Coeur Alaska*, Kathleen Sullivan in *Shell Oil Co. v. United States* (consolidated with *Burlington Northern*), and Maureen Mahoney in *Burlington Northern*.

[26] 547 U.S. 715 (2006).