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Judge Stephen Williams' Environmental Jurisprudence

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CSAS Working Paper 21-34

The Gray Center's Symposium in Honor of Judge Stephen F. Williams

[draft]

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My assignment is to review Judge Williams' environmental law jurisprudence. An appropriate way to begin that review is with his understanding of the word environment that appears in many of the federal laws and regulations he was called upon to interpret and enforce over his 34 years on the United States Court of Appeals for the District of Columbia.

In *Kingman Park Civic Association v. Bowser* the plaintiff Association claimed that the District of Columbia had failed to prepare a required environmental impact statement in its approval of a street car project affecting the Kingman Park neighborhood.¹ The district court determined that the District's approval of the project was not arbitrary, capricious or an abuse of discretion and therefore ruled against the Association.² On appeal the District contended that the injuries alleged by the Association ("increased car traffic, electromagnetic radiation from the overhead wires, noise, dust and particle pollution, and water pollution") did not require an EIS under the District law because, unlike the National Environmental Policy Act that refers to the "human environment," the District of Columbia D.C. Environmental Policy Act refers only to the "environment." "The logic escapes us," wrote Judge Williams:

The word "environment" would seem to encompass every environment, whereas the "human environment," if actually intended to be different from the "environment," appears narrower, potentially excluding any "non-human" environment—though as a practical matter such an exclusion would seem very narrow in effect, given the human race's near-ubiquity in the portions of the universe where a government might undertake a project.

Indeed, the suggestion that the (unmodified) "environment" excludes community effects appears hopelessly artificial. Traffic, for example, consists of vehicles moving over the land and through air, impacting the surface, emitting gases, and unleashing sound waves. We find it hard to imagine a concept of the environment that would exclude such effects (unless done so specifically). Unsurprisingly, the District's own Environmental Impact Screening Form asks about traffic impacts.³

Williams went on to note that although "reliance on the legislative history is quite unnecessary," the District of Columbia Council report on the bill supported his interpretation.⁴

Law and Economics

¹ *Kingman Park Civic Ass'n v. Bowser*, 815 F.3d 36, 41 (D.C. Cir. 2016)

² *Kingman Park II*, 27 F.Supp.3d at 178–83

³ 815 F.3d at 41

⁴ *Id.*

In thinking about the environment, Judge Williams often confounded the many environmental advocates who see economics not as useful to our understanding of environmental problems but as the source of those problems. One of his most interesting opinions in this regard was a concurrence in *Brady v. Federal Energy Regulatory Commission*,⁵ a case in which lakefront homeowners challenged a Federal Energy Regulatory Commission (FERC) approval of the expansion of a commercial marina located on property of a hydroelectric project. Having been a law professor before commencing his distinguished career on the federal bench, Williams can be forgiven for stating, without qualification, that “[t]wo generations have now grown up with Garrett Hardin’s famous article, *The Tragedy of the Commons*.”⁶ Among professors of environmental and natural resources law that statement was largely accurate, but in the general population and among government policymakers it is likely that few had any understanding of what Hardin labeled the tragedy of the commons. As Williams made clear in his concurrence, the latter would make better policy choices if they did.

Williams recounted Hardin’s example of the grazing commons in which farmers share a right to pasture their cows. In doing so he actually misstated the effect of the commons on individual farmers in writing that “because of the trampling and crowding of the already grazing cows, . . . [an additional] cow and her owner would enjoy no net benefits” To the contrary, individual farmers have every incentive to add another cow because each farmer derives the full benefit of the cow (even if less that of previously added cows) while the costs are shared by all the farmers. It is true that the benefits from each cow will be less as the pasture becomes more burdened. But the reason for the tragedy of the commons is that net benefits to individual farmers increase from the addition of each cow while the aggregate benefits to all the farmers decline – until the commons is destroyed. However, Williams got right the central lesson to be drawn from Hardin’s famous article. The challenge is to devise institutional arrangements under which farmers have the incentive to “add cows only to the point where the feeding benefits for the next added cow just equaled the reduction in benefits for cows already in the field.”⁷

In the case at hand Williams credited the majority with having “flirted with Hardin’s insight, but it didn’t click.” Instead of cows competing for limited pasturage it involved recreational boaters competing for limited boating waters. Although the licensing of hydroelectric projects involves a multitude of tradeoffs to be resolved with reference to FERC’s authorizing legislation and any legislation relating to the particular project, Williams observed that in the instant case “a recreational resource has been created as a side effect of power development. The sole issue is how to use it.” The pasture, so to speak, was created when the project was authorized. FERC justification of less than the optimal level of recreation on the basis of factors relevant to the original licensing (i.e. “increases in tourism, employment and tax revenues”) would mean that FERC wants those things “to a degree that diminishes the lake’s contribution to aggregate welfare. Such an interpretation of the statute,” said Williams, “is not self-evidently reasonable.”⁸

⁵ *Brady v. Fed. Energy Regulatory Comm’n*, 416 F.3d 1 (D.C. Cir. 2005)

⁶ *Id.* at 11, citing Garrett Hardin, *The Tragedy of the Commons*, 162 *Science* 1243 (1968)

⁷ *Id.*

⁸ *Id.* at 11-12

Williams drew on his experience as a professor of oil and gas law with an analogy to oil-and-gas unitization. By limiting the number of wells, he observed, we avoid having the costs of an additional well exceed its net benefits to the particular field. If FERC were in charge of oil and gas regulation and concluded that 20 wells would be optimal, posited Williams, could it later approve “another 10 [wells] because their construction and operation would generate local taxes and employment?” “Could the employment and taxes drawn to the locality (and presumably *away* from another locality, as the money spent on the extra wells would have had multiplier effects in its alternative uses) qualify as “development” under the guiding statutes? Again,” concluded Williams, “the answer is not obviously affirmative.”⁹ Because the plaintiffs had failed to challenge FERC’s reliance on tourism, employment and taxes, Williams concurred in the court’s ruling. But his discussion of the tragedy of the commons made clear that had the plaintiff’s raised the question an understanding of basic economic principles would have benefitted the court’s reasoning.

While the facts in *Brady* invited reference to the tragedy of the commons as a case of misplaced incentives, other of Judge Williams’s opinions further illustrate his recognition of the relevance of economics knowledge, particularly for judges called upon to assess the reasonableness of the vast sea of federal regulations. For example in *Colorado Interstate Gas Commission v. Federal Energy Regulatory Commission* the plaintiff challenged the classification of a Kansas ad valorem property tax as a severance tax under the National Gas Policy Act of 1978.¹⁰ Section 110 of that act allowed producers of gas to raise their prices above federally established ceilings “to the extent necessary to recover . . . [s]tate severance taxes.”¹¹ Williams agreed with FERC that Kansas tax was based on production factors, observing that “past production is used to estimate the net present value of future production from a gas-producing property, and thus the property’s taxable value.” But he offered a homely analogy to emphasize that past production influences property value: “The capital value of any property is in essence the net present discounted value of its anticipated income stream; this is true even for a shirt, which generates a stream of (non-pecuniary) income in the form of satisfaction as it is worn.” Noting that FERC had “den[ie]d severance tax treatment for Texas’s seemingly indistinguishable tax,” Williams concluded that the Commission “failed to offer any principle for determining what relation to production is enough for a tax to qualify under § 110” and therefore its “treatment of the . . . [Kansas tax] “fell short of reasoned decision-making.”¹² He knew not only that knowledge of economics is essential to resolving the question, but also the importance of communicating that message in terms lay people (including some regulators) could understand.

Standing

In his 2018 opinion in *Exelon Corporation v. Federal Energy Regulatory Commission*, citing the Supreme Courts 1992 ruling in *Lujan v. Defenders of Wildlife* Judge Williams reminded the parties and his colleagues that standing and other questions of justiciability are

⁹ Id. at 12

¹⁰ *Colorado Interstate Gas Co. v. F.E.R.C.*, 850 F.2d 769 (D.C. Cir. 1988)

¹¹ Id. at 770, citing 15 U.S.C. § 3320(a) (1982)

¹² Id.

always present whether, or not, the parties raise them. “While FERC does not contest standing, we have an ‘independent obligation to assure [ourselves] that standing exists.’”¹³ It is thus not surprising that he wrote frequently on the topic of standing, particularly in environmental cases often brought by parties either seeking delay or not satisfied with the legislative or administrative outcomes. In *Exelon Corporation* he was clear, as he had been in many previous decisions, on what he described as “the familiar three-part test” for standing: Plaintiffs must have suffered or be likely to suffer ““(1) an injury in fact, (2) fairly traceable to the challenged agency action, (3) that will likely be redressed by a favorable decision.””¹⁴

In *Animal Legal Defense Fund, Inc. v. Espy*¹⁵ plaintiffs challenged regulations promulgated by the Department of Agriculture that failed to include birds, rats, and mice as “animals” within the meaning of that term in the Federal Laboratory Animal Welfare Act (FLAWA)¹⁶. Judge Williams dissented from a majority opinion ruling that the plaintiffs lacked constitutional standing because their alleged injuries were not imminent. While acknowledging that plaintiff’s “animal research from 1972 to 1988 . . . does not ‘in itself’ establish the requisite imminence” and recognizing that she had “interrupted her research in 1988 for undisclosed reasons,” Williams saw “no reason to doubt her claim” that “she ‘will be required’ to engage in future research that she has already planned; as failure to do so would require her to forego virtually all future return on her sizable investment in psychobiological research.”¹⁷ Although the majority did not rule on whether plaintiff’s alleged professional (from loss of data due to harmful treatment of birds) and personal (from witnessing the plight of mistreated animals) injuries qualified as injury-in-fact, Williams concluded that they did.¹⁸

Judge Williams’ precise analysis of standing doctrine was also evident in his ruling in *Mountain States Legal Foundation v. Glickman*.¹⁹ The plaintiffs challenged implementation of a Forest Service decision to limit timber harvesting in a national forest. The district court dismissed the claims for a lack of standing. On review, Williams thought it important “to make the point – perhaps obvious but on which we’ve found no cases – that on any given claim the injury that supplies constitutional standing must be the same as the injury within the requisite ‘zone of interests’ for purposes of prudential standing.” By way of example he observed that “if plaintiffs established an interest sufficiently aligned with the purposes of the ESA for prudential standing, but failed to show (for example) an adequate causal relation between the agency decision attacked and any injury to that interest, we could not adjudicate the claim—even if plaintiffs had constitutional standing with respect to some other interest that was outside the requisite ‘zone.’”²⁰ With respect to the plaintiffs’ claim that the Forest Service decision put

¹³ *Id.*, quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 499, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009)

¹⁴ *Exelon Corp. v. Fed. Energy Regulatory Comm'n*, 911 F.3d 1236, 1240 (D.C. Cir. 2018), quoting *Kansas Corp. Comm'n v. FERC*, 881 F.3d 924, 929 (D.C. Cir. 2018)

¹⁵ *Animal Legal Def. Fund, Inc. v. Espy*, 23 F.3d 496 (D.C. Cir. 1994)

¹⁶ 7 U.S.C. § 2131 *et seq.* (1988)

¹⁷ 23 F.3d at 506

¹⁸ *Id.* at 504

¹⁹ *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228 (D.C. Cir. 1996)

²⁰ *Id.* at 1232

grizzly bears at risk, Williams acknowledged that protecting the grizzly was clearly within the zone of interest contemplated under the Endangered Species Act, but found that the plaintiffs having failed to assert any concrete interest in the grizzly or even that grizzly bears were known to inhabit the area, had no standing. He then quoted the distinguished legal authority Bob Dylan: “If you've got nothing, you've got nothing to lose.”²¹

In the same case, however, Judge Williams argued that “where the statute governs the use of public property, and thus the ‘regulated’ entity and the decisionmaking agency are one and the same, denial of standing to private parties adversely affected by excessive agency zeal would leave the countervailing values with no conceivable champion in the courts.” Some of the plaintiffs claimed that the Forest Service decision negatively affected their economic prospects by reducing the supply of timber which Williams described as “an eminently plausible relationship between their interests and policy values that play an important constraining role in the statutes at issue, and thus must be said to underlie those statutes.” He expressly noted that he was “thus part[ing] company with the Ninth Circuit, which has held economic interests to be fundamentally at odds with the statutory purpose of the ESA, and any vindication of them to be a frustration of that purpose.” He acknowledged that the ruling created a circuit split but observed that the Supreme Court had already granted certiorari in the Ninth Circuit case so “any error we make will be corrected not only swiftly but cheaply – with no additional burden on the Court.”²²

Although often generous in his recognition of standing, Williams was insistent on doing the analysis correctly. Concurring in part and dissenting in *National Wildlife Federation v. Burford*, he questioned the majority’s lax application of standing doctrine that he said required the plaintiffs to “(1) identify lands that are affected by each program; (2) demonstrate that third parties are likely to respond to the regulatory changes with development activities; and (3) identify activities of members in specific areas that would suffer an adverse impact from such third-party conduct.”²³ Williams concluded that NWF had failed to plead the requisite facts on the latter two elements, but he found that “[t]he record, however, provides modest support for the inference that some types of the disputed regulatory status changes have a material likelihood of leading to development activity potentially injurious to the activities of plaintiff’s members” The generosity of his conclusion was made clear by his referencing BLM data showing that withdrawal revocations on 12 million acres resulted in 7,000 claims and the filing of plans for operations on only 540 acres. “[N]ot much, out of 180,000,000 acres, but bearing in mind that *threatened* environmental damage is also a ground for standing, it seems minimally sufficient [when] [c]ombined with the concession at oral argument that some of the acreage opened to mining was in the vicinity of lands used by one of plaintiff’s members in Arizona”²⁴

²¹ Id. at 1236-1237, quoting B. Dylan, “Like a Rolling Stone,” Highway 61 Revisited (Columbia Records 1965)

²² Id. at 1237-1238, citing *Bennett v. Plenert*, 63 F.3d 915 (9th Cir.1995)

²³ *Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 327-28 (D.C. Cir. 1987)

²⁴ Id. at 329-330

That Judge Williams was willing to give plaintiffs some slack was also evidenced in *Utility Air Regulatory Group v. E.P.A.*²⁵ The environmental petitioners (National Parks Conservation Association) claimed that an EPA rule under the Clear Air Act threatened visibility in some national parks. Notwithstanding the absence of evidence that the plaintiff's members would travel to the parks likely to be impacted, Williams concluded, "with some hesitation," that "given the organizations large membership – over 320,000 members in all 50 states – . . . it reasonable to infer that at least one member will suffer injury-in-fact." Acknowledging that some courts "purport to reject reliance on mathematical likelihood," he suggested that "that viewpoint overlooks the reality that all empirical issues are matters of probability." He went on to chastise the plaintiffs for failing to provide "better evidence [that was presumably] within easy reach."²⁶

In an earlier case that year Judge Williams took the opportunity to elaborate further on probabilities in the context of standing law, suggesting a possible difference between alleged environmental and other harms. In *Virginia State Corporation Commission v. Federal Energy Regulatory Commission* the plaintiff challenged two FERC orders declining to consider whether certain wholesale and retails costs associated with transmission development could be treated as regulatory assets.²⁷ After noting that the plaintiff alleged two types of harm – to retail customers in the form of possibly higher rates and to investors in the form of possibly incorrect evaluation of a utility's financial health, and "put[ting] . . . aside" "petitioners' dramatic switch from being a champion of ratepayers . . . against . . . current investors, to being a champion of investors as a class, against uncertainty,"²⁸ Williams concluded that the plaintiff lacked standing. Noting that probabilities of injury range from slight to substantial, he suggested that only a showing of the latter can establish standing. Acknowledging that the word substantial "poses questions of degree" and that his court has "left open . . . the question whether, in the realm of environmental risk, 'any 'scientifically demonstrable increase in the threat of death or serious illness' . . . is sufficient for standing," he suggested that "outside the realm of environmental disputes . . . a claim of increased risk or probability cannot suffice."²⁹

In *Sierra Club v. Environmental Protection Agency* Judge Williams allowed plaintiff Sierra Club "some slack in showing a causal relation between its members' injury and the legal violation claimed."³⁰ Sierra Club had challenged EPA's determination that it was in full compliance with certain requirements of the Clean Air Act. EPA contended that Sierra Club lacked standing having "offered no 'basis to believe that, if EPA were forced to revisit those emission standards and set numeric limitations . . . the resulting level of control would be any more stringent" Williams analogized Sierra Club's position to "that of a party 'living adjacent to the site for proposed construction of a federally licensed dam ... [who] challenge[s] the licensing agency's failure to prepare an environmental impact statement, even though he

²⁵ *Util. Air Regulatory Grp. v. E.P.A.*, 471 F.3d 1333 (D.C. Cir. 2006)

²⁶ *Id.* at 1339-1340

²⁷ *Virginia State Corp. Comm'n v. F.E.R.C.*, 468 F.3d 845, 847 (D.C. Cir. 2006)

²⁸ *Id.* at 848

²⁹ *Id.*

³⁰ *Sierra Club v. E.P.A.*, 699 F.3d 530, 533 (D.C. Cir. 2012)

cannot establish with any certainty that the statement will cause the license to be withheld or altered.”³¹

In *National Association of Home Builders v. U.S. Army Corps of Engineers*³² Judge Williams applied the second requirement for standing, namely that the alleged harm must be “fairly traceable to the challenged agency action.” The Corp of Engineers had issued a new nationwide permit (NWP 46) under Section 404 of the Clean Water Act that, as Williams pointed out, might be thought to benefit the plaintiff’s members by cutting the red tape involved in acquiring a permit to dredge and fill.³³ But the plaintiff claimed, in Judge Williams words, that the issuance of the nationwide permit “puts its members between the Scylla of complying (perhaps unnecessarily) with the Corps's permitting scheme and the Charybdis of risking criminal or civil penalties under the CWA.” “Assuming the adequacy of this injury,” wrote Williams, it is not fairly traceable to NWP 46. The risk of sanctions attendant on filling upland ditches without Corps approval predates, and is in no way aggravated by, the issuance of NWP 46.”³⁴ Williams also rejected NAHB’s claim that the resources it spent commenting on and responding constituted sufficient injury to establish standing. Quoting an earlier DC Circuit opinion he stated that “[t]he mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient’ for standing.”³⁵

In 2016, EPA adopted a rule,³⁶ modifying regulations governing state air monitoring networks under the Clean Air Act. In the interest of reduced state costs the new rule allowed for less frequent state sampling under specified conditions, a modification challenged by Sierra Club in *Sierra Club v. Environmental Protection Agency*.³⁷ For Sierra Club to have an increased risk of harm as a result of the modification, and therefore to have standing, wrote Williams “(1) [a] state must request a reduction in sampling frequency; (2) the request must concern a monitor near one of Sierra Club’s members; (3) the request must be approved by the Regional Administrator; (4) there must be a likelihood that a spike in PM2.5 levels near that monitor will occur at a time when the monitor would have been sampling but for the approved reduction; (5) and conditions must be such that no nearby monitor would pick up the spike.” Because facts proving the existence of these conditions could not be pled in advance of the new rule’s implementation, it is not surprising that Williams concluded that “Sierra Club’s claim to standing ‘stacks speculation upon hypothetical upon speculation’³⁸” and therefore failed. Sierra Club had met a similar fate two years earlier when Judge Williams ruled that they lacked standing to challenge EPA’s modification of prior understandings of how to measure a proposed

³¹ Id., quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992)

³² *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 663 F.3d 470 (D.C. Cir. 2011)

³³ Id. at 475

³⁴ Id. at 474

³⁵ Id. at 476, quoting *Association for Retarded Citizens v. Dallas County Mental Health & Mental Retardation Center Bd. of Trustees*, 19 F.3d 241, 244 (5th Cir.1994)

³⁶ *Revisions to Ambient Monitoring Quality Assurance and Other Requirements*, 81 Fed. Reg. 17,248 (Mar. 28, 2016)

³⁷ 925 F.3d 490 (D.C. Cir. 2019)

³⁸ *N.Y. Regional Interconnect, Inc. v. FERC*, 634 F.3d 581, 587 (D.C. Cir. 2011)

transportation project's impact on ambient air levels of particulate matter. "Their difficulty," observed Williams, "lies in their having failed to adduce evidence that the change will have any effect on any of the projects" referenced as affecting the Club's members.³⁹

In *Waterkeeper Alliance v. Environmental Protection Agency* the plaintiff challenged an EPA rule exempting farms from reporting requirements of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 and the Emergency Planning and Community Right-to-Know Act of 1986.⁴⁰ EPA justified the exemption on the ground that emissions of ammonia and hydrogen sulfide from animal waste are *de minimis*, making the reporting requirement as applied to them superfluous. Although Judge Williams agreed that "emissions are miniscule for pet owners," he observed that "they can be quite substantial for farms that have hundreds or thousands of animals."⁴¹ But it was not the prospect of those emissions that gave Waterkeeper Alliance standing. Rather it was the deprivation of information, the public disclosure of which would otherwise be required by both statutes. "A plaintiff suffers an 'injury in fact'" wrote Williams, "when agency action cuts him off from 'information which must be publicly disclosed pursuant to a statute.'"⁴²

As part of a plan to develop a streetcar line centered on the Kingman Park neighborhood of Washington, D.C., the District of Columbia enacted a statute authorizing the installation of aerial wires to provide electricity to the street cars. The Kingman Park Civic Association challenged that law as a violation of an 1888 federal statute and the entire project for failure to prepare an environmental impact statement and as a violation of the equal protection clause of the 14th amendment. The district court ruled that the plaintiff lacked standing, but in *Kingman Park Civic Association v. Bowser* Judge Williams disagreed.⁴³ After explaining that the association "may establish standing by showing either an injury to itself . . . or a cognizable injury to one or more of its members," he wrote that the latter -- "associational standing" -- exists where "the member interests that the organization seeks to protect are germane to its purposes and neither the claim nor the relief requires the members' participation." Williams concluded that the obstruction of views resulting from the installation of aerial wires qualified as a concrete injury, traceable to the District's actions and remediable by an injunction against those actions.⁴⁴

In *Ethyl Corporation v. Environmental Protection Agency* the plaintiff challenged EPA's Compliance Assurance Program under the Clean Air Act on the grounds that private vetting of testing procedures deprived them of their right to notice and comment and denied them the opportunity to observe the rulemaking process and thus gain information useful to the development and improvement of its products.⁴⁵ Judge Williams ruled that Ethyl Corporation had Article III standing not because of its interest in the waiver process but because of "its interest in obtaining information about vehicle certification for present-day research and

³⁹ *Sierra Club v. Env'tl. Prot. Agency*, 873 F.3d 946, 950 (D.C. Cir. 2017)

⁴⁰ *Waterkeeper All. v. Env't Prot. Agency*, 853 F.3d 527 (D.C. Cir. 2017)

⁴¹ *Id.* at 530

⁴² *Id.* at 533, quoting *FEC v. Akins*, 524 U.S. 11, 21, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998)

⁴³ *Kingman Park Civic Ass'n v. Bowser*, 815 F.3d 36 (D.C. Cir. 2016)

⁴⁴ *Id.* at 39

⁴⁵ *Ethyl Corp. v. E.P.A.*, 306 F.3d 1144, 1146 (D.C. Cir. 2002)

development of products that will be judged (by both the government and consumers) according to their effect on vehicle emissions.”⁴⁶ He also ruled that the plaintiff had prudential standing, observing that the test for prudential standing “is not a particularly demanding one . . . and includes not only those challengers expressly mentioned by Congress, but also unmentioned potential challengers that Congress would have thought useful for the statute's purpose (whose challenges thereby support an inference that Congress would have intended eligibility).”⁴⁷

In *Louisiana Environmental. Action Network v. Environmental Protection Agency* Judge Williams found that the plaintiff had standing to challenge a waste disposal regulation promulgated by EPA pursuant to the Resource Conservation and Recovery Act notwithstanding that some of the plaintiff's members would likely benefit from the regulation while others would suffer harm.⁴⁸ Noting that the court had “previously held that such a conflict of interest within an organization does not deprive the organization of representative standing if no internal procedural violation has been shown,”⁴⁹ Williams observed that “[o]rganizations, like people, may face the problem of “two souls in one breast,” but—as long as they do not violate internal procedures—they are free to choose for themselves which purpose to pursue on any specific occasion. That LEAN may act against its other-regarding purposes is no more a bar to standing than that it acts against the self-interest of some of its own members.”⁵⁰ Although the plaintiffs did not contend that a second petitioner (a waste treatment company trade association) had standing, Williams nonetheless observed parenthetically that “firms selling environmental services lack standing to challenge RCRA regulations as insufficiently stringent.”⁵¹

Citing *Lujan v. Defenders of Wildlife* 504 U.S. 555, 560 (1992) for the proposition that an alleged injury must be “actual or imminent,” a dissenting Judge Sentelle would have denied plaintiffs standing in the foregoing case. While not disputing Sentelle's reliance on imminence as a determining factor, Judge Williams stated his rebuttal in terms of probability rather than imminence. It is a distinction he had implied in his opinion in *Virginia State Corp. Comm'n v. F.E.R.C* when he quoted a Seventh Circuit opinion in which the court stated: “Standing depends on the probability of harm, not its temporal proximity.”⁵² His reliance on probability analysis helped bridge what he called “a gulf between the antipodes of standing doctrine—the “imminent” injury that suffices and the merely “conjectural” one that does not. We have insisted” he wrote in *DEK Energy Co. v. F.E.R.C.*, “that to escape the latter characterization the claimant must show a substantial (if unquantifiable) probability of injury.”⁵³

⁴⁶ Id. at 1148

⁴⁷ Id., citing *Clarke v. Securities Industry Association*, 479 U.S. 388, 399 (1987)

⁴⁸ *Louisiana Env'tl. Action Network v. U.S. E.P.A.*, 172 F.3d 65, 67 (D.C. Cir. 1999)

⁴⁹ Id. at 68, quoting *National Maritime Union v. Commander, Military Sealift Command*, 824 F.2d 1228, 1232–34 (D.C.Cir.1987)

⁵⁰ Id. at 69

⁵¹ Id. at 67

⁵² 468 F.3d at 848, quoting *520 S. Mich. Ave. Assocs. Ltd. v. Devine*, 433 F.3d 961, 962 (7th Cir.2006)

⁵³ *DEK Energy Co. v. F.E.R.C.*, 248 F.3d 1192, 1195 (D.C. Cir. 2001)

In *Williams Gas Processing-Gulf Coast Co., L.P. v. F.E.R.C.* Judge Williams considered what he labeled “a novel path-dependency theory” of standing.⁵⁴ The plaintiff sought to challenge FERC’s classification of another company’s pipeline as a transportation rather than a gathering facility making it subject to the agency’s jurisdiction. Recognizing the D.C. Circuit’s “long line of decisions rejecting claims of standing based merely on supposed adverse precedential effect”⁵⁵ the plaintiff did not press its argument for standing on that basis. Rather it argued that a finding of FERC jurisdiction in the case at hand would increase the likelihood of a future finding of jurisdiction over plaintiff’s facility because the proximity of other facilities already determined to be subject to its jurisdiction is among the factors considered by FERC. Although Judge Williams said the court was “ready to assume the theoretical soundness of . . . [the plaintiffs’] claim,” he concluded that the plaintiff had “failed to establish in this case the kind of effects that are minimally necessary for it to be aggrieved under the theory.”⁵⁶

Although Williams accepted the “theoretical soundness” of the path-dependency theory of standing, his concluding paragraph in the opinion made clear that plaintiffs would seldom if ever succeed in establishing standing on that basis. He recognized that the court’s finding of no standing could lead the plaintiff to “suffer death by inches – the Commission’s errors could accrete so gradually that no one prior step would be significant enough to afford it standing.” But, argued Williams:

[W]here the accretions are small, it follows as a matter of logic that, in order to build into a massive obstacle for the late applicant, there must be many of them. This increases the likelihood that some similarly positioned applicant will find it worthwhile to challenge a Commission decision adverse to it. While a suit controlled by another is not the same as a party's own suit, we know from class action law that in some cases it is enough. We think it sufficient to close the theoretical gap that results here from the application of traditional standing law.⁵⁷

Thus, the path-dependency theory of standing would seem to offer hope to plaintiffs only where future agency rulings are substantially dependent on prior rulings under similar circumstances – not because those prior rulings are precedential but because the future applications of a regulation are clearly dependent on prior applications of the regulation.

Taken together these and many other standing opinions outside the environmental area demonstrate a consistency in the application of both constitutional and prudential standing doctrine. At the same time, they reflect a judge with compassion for citizens from all walks of life and a recognition of the immense powers of government. Judge Williams was clearly intent on allowing access to the courts without turning the courts into venues for circumvention of the political branches of government.

Separation of Powers

⁵⁴ *Williams Gas Processing-Gulf Coast Co., L.P. v. F.E.R.C.*, 145 F.3d 377, 378 (D.C. Cir. 1998)

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 380

The many federal environmental laws enacted in the three decades before Judge Williams was appointed to the bench assured that the D.C. Circuit, in particular, would face a steady diet of administrative law questions. Others will no doubt address Williams' Administrative Procedures Act jurisprudence, but an overarching issue with particular relevance to environmental law is the constitutional separation of powers. The complexity of many environmental problems, combined with a reluctance on the part of Congress to take responsibility for the many constraints inherent in environmental regulation, has led to the emergence of a vast bureaucracy and a plethora of regulations based on often vague, politically cautious, direction from Congress. As a result, the courts are repeatedly tasked to resolve disputes over whether administrative regulations either exceed what Congress has authorized or fail to achieve what Congress has mandated.

In what my environmental law colleagues unanimously agree is Williams' most prominent environmental decision he sought to breath new life into the long moribund nondelegation doctrine. Not since 1935 had the U.S. Supreme Court invalidated Congressional enactments for failing to provide adequate direction to the executive branch.⁵⁸ In *American Trucking Associations, Inc. v. U.S. E.P.A* Judge Williams effectively invited the U.S. Supreme Court to revive the nondelegation doctrine.⁵⁹ Citing the 1928 Supreme Court ruling in *Hampton, Jr. & Co. v. United States*, Williams, in a per curium opinion coauthored by Judge Douglas Ginsburg, ruled that in promulgating rules under sections 108 & 109 of the Clean Air Act EPA had "articulated no 'intelligible principles' to channel its application of . . . [the statutory] factors; nor is one apparent from the statute."⁶⁰ Williams wrote that requiring EPA to set primary ambient air quality standards "the attainment and maintenance of which ... are requisite to protect the public health" with "an adequate margin of safety," "is as though Congress commanded EPA to select 'big guys,' and EPA announced that it would evaluate candidates based on height and weight, but revealed no cut-off point. The announcement, though sensible in what it does say, is fatally incomplete. The reasonable person responds, "How tall? How heavy?"⁶¹ Noting that a dissenting Judge Tatel referenced the consensus of the Clean Air Scientific Advisory Committee (CASAC) recommending the adopted standard, Williams replied that "whether EPA acted pursuant to lawfully delegated authority is not a scientific one. Nothing in what CASAC says helps us discern an intelligible principle derived by EPA from the Clean Air Act."⁶²

Unfortunately, at least for those who believe unconstrained administrative power has corrupted the constitutional separation of powers, the Supreme Court disagreed with Williams' interpretation of the nondelegation doctrine. While agreeing that Congress "must provide substantial guidance on setting air standards that affect the entire national economy," Justice Scalia wrote for a unanimous Court that "even in sweeping regulatory schemes we have never

⁵⁸ *Panama Refining v. Ryan*, 293 U.S. 388 (1935) and *Schechter Poultry Corp. v. United States* 295 U.S. 495 (1935)

⁵⁹ *Am. Trucking Associations, Inc. v. U.S. E.P.A.*, 175 F.3d 1027 (D.C. Cir. 1999)

⁶⁰ *Id.* at 1035, quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)

⁶¹ *Id.* at 1034

⁶² *Id.* at 1036

demanded, as the Court of Appeals did here, that statutes provide a ‘determinate criterion’ for saying ‘how much [of the regulated harm] is too much.’”⁶³ Quoting from his dissent in *Mistretta v. United States*, Scalia opined that “a certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action,”⁶⁴ thus extending a, by that time, fifty-four year judicial abdication of its responsibility to require that Congress give the executive branch direction sufficient to avoid the need for significant executive branch lawmaking. Give Judge Williams credit for a worthy try.

Absent a viable nondelegation doctrine, the judicial task remains to assess whether executive actions are authorized. Having a healthy respect for the separation of powers, Judge Williams did not hesitate to invalidate administrative regulations that exceed the authority, however vague, granted by Congress. In *Waterkeeper Alliance v. Environmental Protection Agency*, for example, the Court of Appeals vacated an EPA rule exempting farms from Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Emergency Planning and Community Right-to-Know Act (EPCRA) notification requirements for air releases of hazardous substances from animal wastes. EPA asserted that reports from the exempted farms would yield little useful information and were therefore unnecessary. In his opinion Judge Williams observed that EPA was effectively invoking an “implied *de minimis* authority to create even certain categorical exceptions to a statute ‘when the burdens of regulation yield a gain of trivial or no value.’” “In light of the record,” he concluded, “we find that those reports aren’t nearly as useless as the EPA makes them out to be.”⁶⁵

Judge Williams had a second significant ruling reversed by the Supreme Court in *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*,⁶⁶ although this time Justice Scalia agreed with him. Among the issues in the case was the meaning of the term “harm” in the definition of “take” in Section 9 of the Endangered Species Act. The Fish & Wildlife Service had defined “harm” to include “‘significant’ habitat modification that leads to an injury to an endangered species of wildlife.” The plaintiffs argued that this expansive definition was not authorized by the statute and, on rehearing, Judge Williams agreed, finding that “the Service’s definition of ‘harm’ was neither clearly authorized by Congress nor a “reasonable interpretation” of the statute”⁶⁷ “As a matter of pure linguistic possibility one can easily recast any withholding of a benefit as an infliction of harm,” wrote Williams:

In one sense of the word, we “harm” the people of Somalia to the extent that we refrain from providing humanitarian aid, and we harm the people of Bosnia to the extent that we fail to stop “ethnic cleansing”. By the same token, it is linguistically possible to read “harm” as referring to a landowner’s withholding of the benefits of a habitat that is beneficial to a species. A farmer who harvests crops or trees on

⁶³ *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 475 (2001)

⁶⁴ *Mistretta v. United States*, 488 U.S. 361, 417 (1989)

⁶⁵ *Waterkeeper All. v. Env’t Prot. Agency*, 853 F.3d 527, 530 (D.C. Cir. 2017)

⁶⁶ *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 17 F.3d 1463 (D.C. Cir. 1994), *rev’d*, 515 U.S. 687, 115 S. Ct. 2407, 132 L. Ed. 2d 597 (1995)

⁶⁷ *Id.* at 1464

which a species may depend harms it in the sense of withdrawing a benefit; if the benefit withdrawn be important, then the Service's regulation sweeps up the farmer's decision.⁶⁸

But, argued Williams, “[t]he immediate context of the word . . . argues strongly against any such broad reading.” Every other word in the definition of take “contemplate the perpetrator’s direct application of force against the animal taken.”⁶⁹

In a second case titled *American Trucking Association v. Environmental Protection Agency*,⁷⁰ Judge Williams dissented from an opinion rejecting the plaintiff’s claim that a California rule regulating transportation refrigeration units (TRUs) constituted a de facto national standard in violation of the Clean Air Act. The rule applied to all trucks with TRUs entering the state of California. Noting that “[t]he closest the EPA comes to considering ATA's argument is in the concluding passage, where it merely says that nothing in the statute confines California to regulation of “engines that operate solely or even a majority of their time in California,” Williams responded: “Really? By this language, it would be perfectly all right for the California rule to say that no vehicle may enter California if any other vehicles, anywhere in the United States and owned by the same firm, were noncompliant with the California standard.” “In short,” he concluded, “EPA's discussion here is a paradigmatic instance of an agency's failure to ‘examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.’”⁷¹

It would be a mistake to conclude that Judge Williams’ concern that EPA had not adequately considered the impact of the California regulation challenged in *American Trucking* suggested that he was less than sympathetic with the states’ interest in controlling environmental harms deriving from actions in other states. In *Center for Energy & Economic Development v. Environmental Protection Agency* EPA argued that the plaintiffs lacked standing to challenge regulations promulgated by a regional commission and approved by the Agency because whatever harm the plaintiffs suffered was caused by the state members of the commission rather than by the EPA.⁷² Noting that “the states’ initiative in designing the . . . [regulations did not] undermine the inference that EPA's pressure has been decisive, much less prove that the states acted spontaneously” and that “regional haze is a problem in which the benefits of each state's emissions controls are largely felt in other states,” Williams asserted:

Without federal intervention . . . a state calculating how hard it should press in limiting pollution has no incentive to consider resulting enhancements of other

⁶⁸ Id. at 1464-65

⁶⁹ Id. at 1465

⁷⁰ *Am. Trucking Associations, Inc. v. E.P.A.*, 600 F.3d 624 (D.C. Cir. 2010)

⁷¹ Id. at 330-331, quoting *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)

⁷² *Ctr. for Energy & Econ. Dev. v. E.P.A.*, 398 F.3d 653 (D.C. Cir. 2005)

states' welfare. There is no reason to believe that New Mexico, for example, would without federal pressure tighten limits for in-state polluters an extra notch so that tourists could gaze at clear skies above the Grand Canyon.⁷³

Another case in which Judge Williams found that EPA had exceeded its authority is *America Petroleum Institute v. Environmental Protection Agency*.⁷⁴ Amendments to the Clean Air Act in 2005 and 2007 required EPA to establish a renewable fuel standard program with specified, increasing, volumes of cellulosic biofuels to be sold in successive years. Because such fuels were not yet in commercial production, EPA was authorized to project biofuel production for the coming year and accordingly reduce the mandated level when production was projected to fall short the statutorily mandated level. In addition to considering several factors in making their projection for 2012, EPA acknowledged that “there will be some uncertainty in terms of actual attainment,” and stated that their “intention is to balance such uncertainty with the objective of promoting growth in the industry.” The agency further stated that setting the projection too low would depress the market for cellulosic biofuel whereas a higher projection would “provide the appropriate economic conditions for the cellulosic biofuel industry to grow.”⁷⁵ Judge Williams accepted that “the program *as a whole* is plainly intended to promote.” . . . [biofuels] technology,” but was “not convinced that Congress meant for EPA to let that intent color its work as a predictor, to let the wish be father to the thought.”⁷⁶ Williams found nothing in the statute supporting “EPA's decision to adopt a methodology in which the risk of overestimation is set **deliberately** to outweigh the risk of underestimation.” Rather, wrote Williams, the statute “seems plainly to call for a prediction of what will *actually* happen. EPA pointed to no instance in which the term “projected” is used to allow the projector to let its aspirations for a self-fulfilling prophecy divert it from a neutral methodology.”⁷⁷

In *Baltimore Gas & Electric Co. v. Federal Energy Regulatory Commission*, on the other hand, Judge Williams recognized that not everything an agency might consider must be considered. He dissented from the majority’s agreement that to comply with the reasoned decision requirement that applies to all agencies FERC must distinguish four approved rate filings before denying plaintiff’s similarly situated rate filing. “Given the number of uncontested issues that an agency typically resolves—uncontested,” wrote Williams, “we may infer, either because any adversely affected parties got no notice or, having notice, thought it not worth the trouble to oppose—a requirement that an agency address its past vermicelli, either by reconciling its current decision with the earlier record or by applying *Fox Television*, would tie courts and agencies in linguistic knots for little or no benefit to the rule of law.”⁷⁸

⁷³ Id. at 657-658

⁷⁴ *Am. Petroleum Inst. v. E.P.A.*, 706 F.3d 474, 475 (D.C. Cir. 2013)

⁷⁵ Quoted id. at 478

⁷⁶ Id at 475

⁷⁷ Id. at 479

⁷⁸ *Baltimore Gas & Elec. Co. v. Fed. Energy Regulatory Comm'n*, 954 F.3d 279, 287–88 (D.C. Cir. 2020), citing *Federal Communications Commission v. Fax Television Stations*, 556 U.S. 502 (2009)

Judge Williams' respect for the constitutionally limited role of the courts was perhaps best expressed in his dissent in *National Wildlife Federation v. Burford*:

The majority today upholds a district judge's self-appointment as *de facto* Secretary of the Interior over 180 million acres—nearly one-fourth of all federal lands and more than half of the public lands managed by the Bureau of Land Management (“BLM”). It does so without a showing that the BLM breached any legal requirement as to a single parcel of land. Even assuming such a breach, the record is barren of any hint that it was material or likely to harm plaintiffs' interests—much less irreparably. Unable to sanction such a judicial usurpation of power, I dissent.⁷⁹

Williams agreed with the majority that “[a] party seeking a preliminary injunction must prove that the balance of four elements favors such relief [namely]: ‘(1) the plaintiff's likelihood of success on the merits; (2) the threat of irreparable injury to the plaintiff absent the injunction; (3) the possibility of substantial harm to other parties caused by issuance of the injunction; and (4) the public interest.’”⁸⁰ But in his judgment the plaintiffs failed to meet that test. Noting that “Congress has manifested a deep interest in [both] environmental concerns . . . [and] allow[ance of] reasonable development of mineral resources on the public lands,” Williams concluded that “the public interest does nothing to tilt the balance in favor of the injunction issued.”⁸¹ The lower court, in his view, had ignored the complexity of the policy issues facing the BLM and proclaimed its own independent assessment of public policy.

In the same dissent, Judge Williams further examined the delicate balance between executive authority and judicial review. Observing that the government offered no claim that plaintiffs had failed to exhaust their administrative remedies, he opined, as he did more than once with respect to standing, that “[g]overnment neglect cannot force courts to disregard . . . [the separation of powers] concerns” of exhaustion law.

‘Exhaustion generally is required as a matter of preventing premature interference with agency processes, so that [1] the agency may function efficiently and [2] so that it may have an opportunity [a] to correct its own errors, [b] to afford the parties and the courts the benefits of its experience and expertise, and [c] to compile a record which is adequate for judicial review.’

The latter considerations, Williams noted, “plainly bear on important concerns of judicial economy.”⁸²

Sometimes Judge Williams appeared incredulous at agency defenses of their interpretations of statutes. For example, after observing in *American Chemistry Council v. Johnson* that “the release of large volumes of any liquid, be it juice, milk, or gasoline, has ‘the potential to cause harm to biological or living systems’—for example by causing death by

⁷⁹ Nat'l Wildlife Fed'n v. Burford, 835 F.2d 305, 327 (D.C. Cir. 1987)

⁸⁰ Id. at 334

⁸¹ Id. at 337

⁸² Id. at 330, quoting *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975)

drowning or crop destruction by flooding . . . ,” he declared it “utterly improbable that by creating a list of several hundred toxic chemicals, with authority for add-ons, Congress intended to allow EPA to list all VOCs, orange juice, and water.”⁸³ In *National Mining Association v. U.S. Army Corps of Engineers* he stated that a reasonable interpretation of the Clean Water Act “simply will not accommodate” a Corps of Engineers rule defining “fallback” from dredging as an “addition to the waters of the United States. “[T]he straightforward statutory term “addition,” he wrote, “cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back.”⁸⁴ He went on to commend the candor of the White House in declaring that “Congress should amend the Clean Water Act to make it consistent with the agencies’ rulemaking.” “If the agencies and NWF believe that the Clean Water Act inadequately protects wetlands and other natural resources by insisting upon the presence of an “addition” to trigger permit requirements,” Williams commented, “the appropriate body to turn to is Congress.”⁸⁵

Not only was Judge Williams willing to call nonsense nonsense when proffered by administrative agencies in defense of arbitrary rules, he was frank about a long-established Supreme Court doctrine in terms that have surely occurred to many a beginning constitutional law student. In *Tri County Industries, Inc. v. District of Columbia* the plaintiff challenged a summary suspension of a building permit as a violation of due process under the 5th Amendment. Although he dutifully applied the Circuit’s well-developed law of substantive due process, as distinct from procedural due process, Williams observed in passing that the concept of substantive due process is “oxymoronic”⁸⁶ which, of course, it is.

While Judge Williams was not shy about disciplining the executive branch of government nor in chastising Congress for dodging politically sensitive questions, he was also willing to correct his own judicial overreach. In *Safe Food & Fertilizer v. Environmental Protection Agency* the Court agreed to reconsider its approval of an EPA rule relating to the definition of solid waste under the Resource Conservation and Recovery Act. Although Williams concluded that the precise claim raised by the petitioners on rehearing was not correct, he acknowledged that the Court’s reliance on the conclusions of a particular study, “we may have gone farther than any express EPA language justified in equating it with an EPA study that was in the record and was expressly relied on by EPA, but which we as lay judges found ourselves unqualified to interpret. Thus our original opinion made certain connections that ought to have been made—assuming they can properly be made—by the agency.”⁸⁷

Looking ahead: Judge Williams on the limits of modeling the future

⁸³ *Am. Chemistry Council v. Johnson*, 406 F.3d 738, 742-743 (D.C. Cir. 2005)

⁸⁴ *Nat’l Min. Ass’n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1404 (D.C. Cir. 1998)

⁸⁵ *Id.* at 1410, quoting White House Office on Environmental Policy, *Protecting America’s Wetlands: A Fair, Flexible, and Effective Approach* 23 (Aug. 24, 1993)

⁸⁶ *Tri Cty. Indus., Inc. v. D.C.*, 104 F.3d 455, 459 (D.C. Cir. 1997)

⁸⁷ *Safe Food & Fertilizer v. E.P.A.*, 365 F.3d 46, 48 (D.C. Cir. 2004)

Finally, a few words about an early Judge Williams opinion that warrants attention as the government presses ahead with ever more restrictive and expensive regulations in response to climate change. In *Gas Appliance Manufacturers Association, Inc. v. Department of Energy* the plaintiffs challenged DOE rules designed to limit heat losses from water heaters installed in new federal construction projects.⁸⁸ Judge Williams ruled that the standards were based on incomplete and faulty cost benefit analysis that fell short of statutory requirements. In the course of reaching that conclusion stated with respect to agency reliance on computer models:

Our approach to this is fairly well established. We have noted that although “computer modeling is a useful and often essential tool for performing the Herculean labors Congress impose[s] on [administrative agencies]”, “[s]uch models, despite their complex design and aura of scientific validity, are at best imperfect and subject to manipulation”. Since the accuracy of any computer model “hinges on whether the underlying assumptions reflect reality,” the agency must sufficiently explain the assumptions and methodology used in preparing the model; it must provide a complete analytical defense of its model and respond to each objection with a reasoned presentation. The technical complexity of the analysis does not relieve the agency of the burden to consider all relevant factors and to identify the stepping stones to its final decision. There must be a rational connection between the factual inputs, modeling assumptions, modeling results and conclusions drawn from these results.⁸⁹

Judge Williams continued in response to the Department’s argument that particular deference is owed when the agency “is making predictions, within its area of special expertise, at the frontiers of science.” “In fact,” he observed, “DOE’s expectations about compliance with its standards derive not from any daring new insight into particle physics, but from purported applications of accepted propositions. The issue is whether rather simple inferences are supported. Of course we defer to any relevant scientific or technical expertise, but that does not authorize us to gloss over the critical steps of DOE’s reasoning process.”⁹⁰

⁸⁸ *Gas Appliance Mfrs. Ass'n, Inc. v. Dep't of Energy*, 998 F.2d 1041 (D.C. Cir. 1993)

⁸⁹ *Id.* at 1045-46, quoting *Sierra Club v. Costle*, 657 F.2d 298, 332 (D.C.Cir.1981)

⁹⁰ *Id.* at 1046