ENVIRONMENTAL LAW

Kellie E. Billings-Ray, Megan Maddox Neal, and Mary E. Smith*

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The following Survey provides a brief overview of important environmental law decisions of the United States Court of Appeals for the Fifth Circuit that occurred within the survey period, July 2013 through June 2014.¹

I. CLEAN WATER ACT

A. United States ex rel. Administrator of EPA v. CITGO Petroleum Corp.

The United States, on behalf of the Environmental Protection Agency (EPA), sued CITGO for civil penalties and injunctive relief following CITGO's discharge of over two million gallons of oil into waterways surrounding CITGO's Lake Charles, Louisiana refinery.² The district court awarded the United States injunctive relief and \$6 million.³ The Government appealed, arguing that the award was inadequate because the district court:

^{*} Kellie Billings-Ray, Megan Neal, and Mary Smith are Assistant Attorneys General in the Environmental Protection Division of the Texas Attorney General's Office.

^{1.} The views and opinions in this Article are solely those of the authors and do not express the official position of the Texas Attorney General's office or any state agency represented by the Attorney General.

^{2.} United States ex rel. Adm'r of EPA v. CITGO Petrol. Corp., 723 F.3d 547, 549 (5th Cir. July 2013).

^{3.} Id. at 550.

(1) failed to provide a reasonable approximation of economic benefit; (2) erred in its consideration of other penalty factors; and (3) failed to apply the penalty range for acts of gross negligence.⁴ The Fifth Circuit vacated the civil-penalty award and remanded the case for further proceedings.⁵

The Clean Water Act (CWA) sets forth a list of factors to consider in assessing civil penalties, including the economic benefit to the violator.⁶ In evaluating this factor, a court considers the financial benefit of delaying capital expenditures or maintenance costs on pollution-control equipment.⁷ Once the civil-penalty factors are considered, a court may assess the civil penalty by either beginning with the maximum penalty and making reductions based on mitigating penalty factors (the "top-down" approach) or beginning with the economic benefit and adjusting the penalty upwards based on penalty-enhancing factors (the "bottom-up" approach).⁸ While the Fifth Circuit does not mandate either approach, it has concluded that district courts must make a reasonable approximation of economic benefit because the factor is critical to the assessment of penalties under any systematic analysis of penalties.⁹

In this case, the district court stated that the evidence was too voluminous and conflicting to determine a specific economic benefit.¹⁰ Instead of quantifying the benefit, the district court found that the economic benefit fell somewhere between \$719 and \$83,000,000.¹¹ The Fifth Circuit found that this range was so large as to amount to a "non-factor," finding that the district court essentially abdicated its duty to consider economic benefit.¹² Holding that the economic-benefit finding was of central importance to the district court's penalty assessment, the Fifth Circuit vacated the civil-penalty award and remanded the award to the district court.¹³

The Fifth Circuit also found error in the district court's evaluation of other penalty factors. It instructed the district court to reconsider CITGO's history of prior violations, noting that CITGO made unauthorized discharges of oily water on six previous occasions and violated its permit for at least 950 days. While it did not find "clear error" in the district court's consideration of CITGO's efforts to minimize or mitigate the spill's effect or the fact that

^{4.} Id. at 551.

^{5.} Id. at 556.

^{6. 33} U.S.C. § 1321(b)(8) (2012).

^{7.} CITGO Petrol. Corp., 723 F.3d at 551-52.

^{8.} Id . at 552 (quoting United States v. Allegheny Ludlum Corp., 366 F.3d 164, 178 n.6 (3d Cir. 2004)).

^{9.} Id. (citing Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546, 567 (5th Cir. 1996)).

^{10.} *Id*.

^{11.} *Id*.

^{12.} *Id.* at 553.

^{13.} Id. at 554.

^{14.} Id. at 553.

the refinery was a major regional employer, the Fifth Circuit encouraged the district court to reevaluate all of the factors on remand.¹⁵

The Fifth Circuit also encouraged the district court to reevaluate its gross negligence determination. Under the CWA, the court may impose a higher civil penalty if the violation was the result of gross negligence or willful misconduct. The district court found ordinary negligence. The Government argued that the district court applied the wrong standard by applying Louisiana state law and ignored overwhelming evidence of gross negligence. The Fifth Circuit concluded that the district court did not rely on the state-law definition of gross negligence. But it also laid out the many facts presented in support of gross negligence and the short list of facts in support of the district court's finding. While declining to make a ruling on whether the court's decision was clearly erroneous, the Fifth Circuit encouraged the district court to reconsider its gross negligence ruling on remand.

II. DEEPWATER HORIZON LITIGATION

A. In re Deepwater Horizon

Eleven coastal Louisiana parishes sued British Petroleum (BP) and other defendants involved in the Deepwater Horizon oil spill to recover civil penalties under the Louisiana Wildlife Protection Act.²² These suits were removed to federal district court.²³ The federal court denied the parishes' motion to remand and dismissed all of their claims as preempted by federal law.²⁴ The Fifth Circuit upheld the district court's decision.²⁵

First, the Fifth Circuit held that the Outer Continental Shelf Lands Act (OCSLA) supported removal.²⁶ The relevant provision, 43 U.S.C. § 1349(b)(1), provides for jurisdiction when: (1) the activities causing the injury concerned an operation involving the exploration and production of minerals on the Outer Continental Shelf; and (2) the case arises out of, or in connection with, the operation.²⁷ The parishes argued that their cause of

^{15.} Id. at 553-54.

^{16. 33} U.S.C. § 1321(b)(7)(D) (2012).

^{17.} CITGO Petrol. Corp., 723 F.3d at 550.

^{18.} Id. at 554-55.

^{19.} Id. at 554.

^{20.} Id. at 555-56.

^{21.} Id. at 556.

^{22.} La. Rev. Stat. Ann. § 56:40.1 (2004); *In re* Deepwater Horizon, 745 F.3d 157, 161 (5th Cir. Feb.), *cert. denied*, 135 S. Ct. 401 (2014).

^{23.} In re Deepwater Horizon, 745 F.3d at 161.

^{24.} *Id.* at 162.

^{25.} Id. at 174.

^{26.} Id. at 163; 43 U.S.C.A. §§ 1301-1356(b) (West 2007 & Supp. 2014).

^{27. 43} U.S.C.A. § 1349(b)(1) (West 2007); In re Deepwater Horizon, 745 F.3d at 163.

action did not meet the second element—arising out of or in connection with the operation—because the injury to wildlife and resources forming the basis of their state-law claim occurred in state territorial waters and land, and therefore, was not sufficiently connected to the Outer Continental Shelf production and exploration to trigger the OCSLA.²⁸ The Fifth Circuit rejected this argument and held that, because the oil and other contaminants would not have entered Louisiana state waters but for the exploration on the Outer Continental Shelf, a sufficient connection existed to confer jurisdiction on the federal court.²⁹

Finding that the district court had jurisdiction to hear the parishes' state-law claims, the Fifth Circuit next upheld the district court's decision that federal law preempted them.³⁰ The parishes argued that states maintain historic police powers to apply state law in their own waters, notwithstanding federal law, even when the pollution originates outside of the state.³¹ They also argued that savings clauses in the CWA and Oil Pollution Act (OPA) expressly reserved their right to bring penalty claims under state law.³² The court rejected both arguments.³³

Citing the Supreme Court's decisions in *Illinois v. City of Milwaukee, Wisconsin* and *International Paper Co. v. Oullette*, the Fifth Circuit held that the parishes' claim of historic police power in the case of interstate water pollution was "dubious" because federal common law had governed interstate water pollution until the enactment of the CWA, which then created an overarching regulatory framework to protect water.³⁴

Interpreting *Oullette*, in which the Supreme Court held that the CWA preempted Vermont state-law claims for pollution discharged from a permitted source in New York that migrated into the waters of Vermont, the Fifth Circuit held that the parishes' attempt to apply local laws to a discharge that originated in federal waters conflicted with the CWA.³⁵ The parishes argued there was no conflict because *Oullette* only applied to the CWA's permitting, and not its oil-spill, provisions; the decision applied only to interstate, as opposed to federal–state, discharges; and the savings clauses involved in *Oullette* were different.³⁶ The court rejected each of these arguments.³⁷

^{28.} In re Deepwater Horizon, 745 F.3d at 163.

^{29.} *Id.* at 163–64 (citing *In re* Oil Spill by Oil Rig "Deepwater Horizon" in Gulf of Mex., on April 20, 2010, 747 F. Supp. 2d 704, 708 (E.D. La. 2010)).

^{30.} *Id.* at 169–71.

^{31.} *Id.* at 169.

^{32.} Id. at 170.

^{33.} Id. at 169-71.

^{34.} *Id.* at 169 (citing Int'l Paper Co. v. Oullette, 479 U.S. 481, 494 (1987); Illinois v. City of Milwaukee, Wis., 406 U.S. 91, 107 (1972)).

^{35.} Id. (citing Oullette, 479 U.S. at 494).

^{36.} Id.

^{37.} *Id*.

The Fifth Circuit stated that subsequent interpretations of *Oullette* by the Supreme Court and Fourth Circuit indicated that the holding was not limited to the CWA's permitting provisions.³⁸ For example, in *Arkansas v. Oklahoma*, the Supreme Court referred to interstate discharges irrespective of type or permit status.³⁹ And in *North Carolina ex rel. Cooper v. Tennessee Valley Authority*, the Fourth Circuit applied *Oullette* to emissions under the Clean Air Act (CAA).⁴⁰

The Fifth Circuit similarly found the parishes' distinction between interstate and federal–state discharges without merit.⁴¹ It noted that the federal government's interests in encouraging economic development while preserving the environment were no different than those of a point-source state.⁴²

Finally, the court found that the savings clauses the parishes cited did not apply to their claims. The CWA, 33 U.S.C. § 1321(o)(2), provides that, "[n]othing in this Section shall [preempt any state or local] requirement or liability with respect to the discharge of oil . . . into any waters within such state." The parishes argued that discharge includes any means by which oil enters state waters. The Fifth Circuit disagreed, finding that the definition of discharge in the CWA, which included "active conduct" such as spilling, leaking, pumping, pouring, emitting, emptying, or dumping, could not be interpreted to include the concept of the migration of floating oil into state waters. In the concept of the migration of floating oil into state waters.

The Fifth Circuit also rejected the parishes' argument that the OPA, 33 U.S.C. § 2718(c), preserved their claims, finding that if the OPA savings clause superseded the CWA and *Oullette*, the result would be an implied repeal of the "point-source primacy ordained by the CWA."⁴⁷ Noting that the CWA had been amended since the addition of the OPA savings clause—without any amendment to the CWA savings clause—the court further concluded that Congress did not intend for the OPA clause to enlarge the remedies available to non-point-source states. ⁴⁸ Instead, the court found that the provision only saves remedies for oil pollution that originates on the land or in the navigable waters of the state. ⁴⁹

^{38.} Id. at 170-71.

^{39.} *Id.* at 169–70 (citing Arkansas v. Oklahoma, 503 U.S. 91, 100 (1992)).

^{40.} *Id.* at 170 (citing North Carolina *ex rel*. Cooper v. Tenn. Valley Auth., 615 F.3d 291, 306–07 (4th Cir. 2010)).

^{41.} *Id*.

^{42.} Id.

^{43.} Id. at 171.

^{44.} Id. (alteration in original) (quoting 33 U.S.C. § 1321(o)(2)).

^{45.} *Id*.

^{46.} Id. at 171-72 (citing 33 U.S.C. § 1321(a)(2)).

^{47.} Id. at 173.

^{48.} Id.

^{49.} Id. at 174.

B. United States v. B.P. Exploration & Production, Inc. (*In re* Deepwater Horizon)

The federal government sought penalties under the CWA for discharges of oil resulting from the Deepwater Horizon oil spill.⁵⁰ The CWA provides for the assessment of fines against owners or operators of any vessel or facility from which oil is discharged.⁵¹ The Government moved for summary judgment on BP's and Anadarko's, the defendants, civil liability for oil discharges from the well.⁵² The defendants, co-owners of the well and co-lessees of the continental shelf block where the well was located, filed a cross-motion on the same issue, arguing that the discharge originated from the riser owned by Transocean—not from any vessel or facility that they owned.⁵³ The district court found for the Government, holding that oil released from Transocean's broken riser was a discharge from the well.⁵⁴ The Fifth Circuit upheld the decision.⁵⁵

The Fifth Circuit found that discharge under the CWA and common usage denotes the loss of controlled confinement.⁵⁶ While there was no dispute that controlled confinement was lost, the defendants argued that the point of discharge should be the point at which the oil ultimately entered the marine environment—specifically at the riser.⁵⁷ The Fifth Circuit stated that the defendants offered no relevant legal authority to support this theory and only cited cases in which liability was imposed on facilities for discharges of oil that flowed over land or that flowed through property owned by other parties before reaching the water.⁵⁸ While these cases largely involved pollutants that moved through properties owned by innocent third parties, whereas Transocean owned equipment that contributed to the discharge, the Fifth Circuit acknowledged that "courts have consistently rejected attempts to shift [civil penalty] liability on the basis of shared fault, instead choosing to consider any contributing cause as a mitigating factor at penalty calculation."59 Therefore, the court held that the CWA should not be read to exempt the defendants from liability because of the potential culpability of

^{50.} United States v. B.P. Exploration & Prod., Inc. (*In re* Deepwater Horizon), 753 F.3d 570, 571 (5th Cir. June 2014), *reh'g en banc denied*, 775 F.3d 741 (5th Cir. 2015).

^{51.} *Id*.

^{52.} Id. at 572.

^{53.} Id. at 571–72.

^{54.} Id. at 572.

^{55.} Id. at 576.

^{56.} Id. at 573.

^{57.} *Id*.

^{58.} *Id.* at 573–74 (citing Pepperell Assocs. v. EPA, 246 F.3d 15 (1st Cir. 2001); Union Petrol. Corp. v. United States, 651 F.2d 734 (Ct. Cl. 1981) (per curiam); Pryor Oil Co. v. United States, 299 F. Supp. 2d 804 (E.D. Tenn. 2003) (mem. op.)).

^{59.} Id. at 575.

Transocean, and affirmed the district court's decision to grant the Government's motion for summary judgment against the defendants.⁶⁰

III. ENDANGERED SPECIES ACT

A. Aransas Project v. Shaw⁶¹

The Aransas Project (TAP) sued the Texas Commission on Environmental Quality (TCEQ) under the Endangered Species Act (the Act), alleging the death of twenty-three cranes from the world's only wild flock. 62 The district court granted an injunction prohibiting the TCEQ from issuing new permits to withdraw river waters feeding the Guadalupe Estuary (the Estuary), the flock's winter home, and requiring the TCEQ to seek an incidental-take permit from the United States Fish and Wildlife Service. 63 The Fifth Circuit stayed the injunction pending appeal and reversed the district court's judgment. 64 The TCEQ regulates surface water in the rivers that feed the Estuary and, through permitting and other regulatory powers, can affect the availability of water in those rivers. 65

TAP argued that the TCEQ caused the cranes' deaths by issuing water permits to private parties who, in turn, withdrew water from the rivers and reduced freshwater inflow into the Estuary.⁶⁶ Thus, TAP alleged that the TCEQ's water-permitting practices ultimately led to an illegal "take" under the Act and sought declaratory and injunctive relief to prevent future takes.⁶⁷

The Fifth Circuit considered whether the TCEQ's action in administering the permits to take water from the Guadalupe and San Antonio Rivers foreseeably and proximately caused the death of the whooping cranes.⁶⁸ The Fifth Circuit reversed the district court, reasoning that the court either misunderstood the relevant liability test or misapplied proximate cause

^{60.} Id.

^{61.} Aransas Project v. Shaw, 756 F.3d 801 (5th Cir. June) (per curiam), *amended and superseded by* 775 F.3d 641 (5th Cir.) (per curiam), *reh'g en banc denied*, 774 F.3d 324 (5th Cir. 2014). A December 15, 2014, per curiam opinion has since replaced this opinion. *Aransas Project*, 775 F.3d 641. That opinion does not significantly diverge from the substance of the original panel's opinion discussed in this Article. *See id.*

^{62.} Aransas Project, 756 F.3d at 806.

^{63.} Id.

^{64.} Id.

^{65.} Id.

^{66.} Id. at 807.

^{67.} *Id.* at 806–07. Under the ESA, the term "take" means "to harass, harm, . . . wound, [or] kill" a protected species. *Id.* (alteration in original) (quoting 16 U.S.C. § 1532(19)). Harm under the Act can include significant habitat modification or degradation resulting in the death of protected species or significant impairment of essential activities, such as breeding, feeding, or sheltering. *Id.* (citing 50 C.F.R. § 17.3(c)). "Congress intended 'take' to apply broadly to cover indirect as well as purposeful actions." *Id.* at 807 (quoting Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 704 (1995)).

^{68.} Id. at 816-23.

when it "held the state defendants responsible for remote, attenuated, and fortuitous events following their issuance of water permits." 69

A party must prove proximate cause and foreseeability to establish violations of the Act. Citing the Supreme Court's decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, the Fifth Circuit noted that the Supreme Court rejected the concept that harm under the Act was a form of strict liability, unlimited by causal connection. The Supreme Court reasoned that the Act prohibits takings if they are "foreseeable rather than merely accidental."

The Fifth Circuit explained that courts have previously held that certain regulations violated the Act "where a close connection existed between the liable actor's conduct and habitat destruction or killing of endangered species", for example: permitting timber removal in the forest home of red cockaded woodpeckers, licensing the use of gillnets and lobster traps with an awareness that right whales had been and could be injured by the traps, and regulation of nocturnal vehicular beach traffic that directly resulted in killing newly-hatched loggerhead turtles.⁷⁴

The court stated, however, that not all government action has such direct consequences.⁷⁵ Here, the line of causation between the TCEQ's permitting and the death of the cranes was too attenuated to meet the proximate cause standard.⁷⁶ While TAP offered evidence that the cranes suffered from food stress and searched upland for sources of food and water, the crane population increased in subsequent years after the 2008–2009 deaths.⁷⁷ "At best, the [district] court found but-for causation. Proximate cause, however, requires the causal factors and the result to be reasonably foreseeable."⁷⁸

The Fifth Circuit found that the district court's opinion did not establish how the state could have anticipated the cranes' deaths from their continued permitting policy. The district court only discussed foreseeability concerns in a 2007 United States Fish and Wildlife Service International Whooping Crane Recovery plan that noted, "[u]pstream reservoir construction and water diversions for agriculture and human use reduce freshwater flows." The

^{69.} Id. at 816-17.

^{70.} Id. at 817 (citing Babbitt, 515 U.S. at 700).

^{71.} Id. (citing 50 C.F.R. § 17.3 (1994); Babbitt, 515 U.S. at 690-708).

^{72.} Babbitt, 515 U.S. at 700.

^{73.} Aransas Project, 756 F.3d at 819.

^{74.} *Id.* (citing Loggerhead Turtle v. Cnty. Council of Volusia Cnty., Fla., 148 F.3d 1231, 1258 (11th Cir. 1998); Strahan v. Coxe, 127 F.3d 155, 165 (1st Cir. 1997); Sierra Club v. Yeutter, 926 F.2d 429, 432–33 (5th Cir. 1991)).

^{75.} Id. at 820.

^{76.} Id.

^{77.} Id.

^{78.} *Id.* at 820–21 (citing Babbitt v. Sweet Home Chapter of Cmtys. For a Great Or., 515 U.S. at 687, 697 n.9 (providing that an ESA take must be foreseeable)).

^{79.} Id. at 821.

^{80.} Id. (alteration in original) (quoting Aransas Project v. Shaw, 930 F. Supp. 2d 716, 747 (S.D. Tex.

Fifth Circuit determined that this statement did not indicate that freshwater inflows into the San Antonio Bay were decreasing materially, just that diversions in general reduce freshwater inflows.⁸¹ It was not enough to satisfy TAP's burden to prove the drought was foreseeable or that a year after the report was issued, freshwater inflows would decrease to a level that would cause harm to the cranes.⁸²

A number of contingencies also show the lack of foreseeability and causal connection between permitting and crane deaths.⁸³ The court explained that none of the contingencies were within the state's control and that the state could not control the amount of water that is diverted from the rivers.⁸⁴ Further, forces of nature such as weather, tides, and temperature can affect the water's salinity.⁸⁵

The Fifth Circuit found that all of these factors together caused the 2008–2009 crane deaths. The court explained that "[f]inding proximate cause and imposing liability on the State defendants in the face of multiple, natural, independent, unpredictable and interrelated forces affecting the cranes' estuary environment goes too far." Without proximate causation, there is no liability on the state. We have a superior to the state. We have a superior to the state of the state. We have a superior to the state of the state. We have a superior to the state of the state. We have a superior to the state of the state of the state. We have a superior to the state of the state of the state of the state. We have a superior to the state of the state of the state of the state. We have a superior to the state of the state of the state of the state.

IV. FEDERAL POWER ACT

A. Simmons v. Sabine River Authority of Louisiana

The Fifth Circuit determined that the Federal Power Act (the Act) preempts state-law property damage claims arising from negligence allegations.⁸⁹ Specifically, the Act preempts failure to act in a way the Federal Energy Regulatory Commission (FERC) has expressly declined to require during the operation of an FERC-licensed project.⁹⁰

The Sabine River Authority of Louisiana and the Sabine River Authority of Texas (the Authorities) jointly regulate the Sabine River's waterways.⁹¹ The Authorities were granted a license (the License) from the Federal Power Commission to commence "construction, operation and

^{2013) (}mem. op.), rev'd, 756 F.3d 801 (5th Cir. June 2014) (per curiam)).

^{81.} *Id*.

^{82.} *Id*.

^{83.} Id. at 822.

^{84.} Id.

^{85.} *Id*.

^{86.} See id. at 823.

^{87.} Id.

^{88.} See id.

^{89.} Simmons v. Sabine River Auth. of La., 732 F.3d 469, 477 (5th Cir. Oct. 2013), cert. denied, 134 S. Ct. 1876 (2014).

^{90.} *Id.* at 471–72. "[T]he Federal Power Commission was reorganized and renamed the Federal Energy Regulatory Commission" or FERC. *Id.* at 471 n.1.

^{91.} *Id.* at 471.

maintenance of Project Number 2305 (the 'Project'). The Project included the construction of a dam . . . , a large reservoir, a spillway, and a hydroelectric plant." FERC provided "Entergy the right to oversee the generation of power and to purchase the generated power" under the Power Sales Agreement (the Agreement). "Entergy [was] subject to the terms and conditions of the License." Pursuant to the License, the Authorities must maintain a normal maximum reservoir elevation. 95

Between 2000 and 2003, FERC denied several requests to modify the Project's operations. FERC determined that the dam had no "significant effect" on flooding and observed that it could not "provide any significant flood control benefits." But FERC required improvements to the Project's Emergency Action Plan. 88

Twenty-eight people, the plaintiffs, filed suit when their properties flooded and eroded after the Authorities and Entergy opened the spillway gates for a month.⁹⁹ "Plaintiffs filed suit in Louisiana state court, alleging negligence, nuisance, trespass, unconstitutional taking, damage of property without just compensation, and due process violations under the Louisiana and United States constitutions." Additionally, the plaintiffs sought damages and a permanent injunction. ¹⁰¹

The defendants removed the action to federal court.¹⁰² In their motion to remand, the plaintiffs argued there was no federal question.¹⁰³ While that motion was pending, the defendants moved to dismiss the suit.¹⁰⁴ The plaintiffs moved for leave to amend their complaint, which removed the reference to the United States Constitution but left their claim for injunctive relief.¹⁰⁵

Six months later, no action had been taken on those motions, and the plaintiffs again moved for leave to amend their petition to remove the claim for injunctive relief.¹⁰⁶ Without ruling on the pending motions, the district court granted the defendants' motion to dismiss, concluding the

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92. Id. at 472.
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^{93.} Id. (footnote omitted).

^{94.} Id.

^{95.} *Id.* A minimum reservoir elevation is required to generate power. *Id.* Water is released through the spillway gates, power turbines, or both to maintain these levels. *Id.*

^{96.} Id.

^{97.} Id. (internal quotation marks omitted).

^{98.} Id.

^{99.} Id.

^{100.} Id.

^{101.} Id.

^{102.} *Id.* (stating that the defendants removed the action to federal court under 16 U.S.C. § 825p and 28 U.S.C. § 1331).

^{103.} *Id*.

^{104.} *Id.* (explaining that the motion to dismiss fell under FED. R. CIV. P. 12(b)(6) and 12(b)(7)).

^{105.} Id. at 472-73.

^{106.} Id. at 473.

state-law-based property claims were preempted by the Federal Power Act and the License. 107

"Conflict preemption occurs 'where compliance with both federal and state regulations is a physical impossibility, and those instances where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." The Fifth Circuit found that the defendants pled and proved preemption as an affirmative defense and dismissed the suit. 109

The Fifth Circuit considered the text of the Federal Power Act as well as case law to determine whether the Act preempts state property damage claims. The court explained, "[t]he Federal Power Act of 1935 indicates congressional intent for 'a broad federal role in the development and licensing of hydroelectric power. Section 4(e) of the Act authorized FERC to issue licenses for projects "necessary or convenient . . . for the development, transmission, and utilization of power across, along, from, or in any of the streams . . . over which Congress has jurisdiction."

Section 10(a)(1) requires FERC to issue licenses determined by the Commission to be the "best adapted' for power development and other public uses of the waters, including flood control." Section 10(c) requires a licensee to "maintain the project and conform to Commission rules." This section also states that licensees are "liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor." The Act careful[ly] preserv[ed] separate interests of the states throughout the Act, without setting up a divided authority over any one subject." Congress intended the states to retain some water rights. 117

The district court relied on the Supreme Court's decisions in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission* and *California v. FERC* in making its preemption determination.¹¹⁸ The Fifth Circuit found these cases informative but not directly on point because the cases concerned state-water-permitting schemes, not state tort law.¹¹⁹ The Fifth Circuit also

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107. Id.
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^{108.} Id. at 473-74 (quoting Arizona v. United States, 132 S. Ct. 2492, 2501 (2012)).

^{109.} Id. at 473.

^{110.} Id. at 474-75.

^{111.} Id. at 474 (quoting California v. FERC, 495 U.S. 490, 496 (1990)).

^{112.} *Id.* (alterations in original) (quoting 16 U.S.C. § 797(e)).

^{113.} Id. (citing 16 U.S.C. § 803(a)).

^{114.} Id. (citing 16 U.S.C. § 803(c)).

^{115.} Id. (quoting 16 U.S.C. § 803(c)).

^{116.} *Id.* (alterations in original) (quoting First Iowa Hydro-Elec. Coop. v. Fed. Power Comm'n, 328 U.S. 152, 174 (1946)) (internal quotation marks omitted).

^{117.} *Id*.

^{118.} Id. at 475.

^{119.} Id.; see California v. FERC, 495 U.S. 490, 493-95 (1990); First Iowa Hydro-Elec. Coop., 328

looked to the Supreme Court's decision in *Federal Power Commission v. Niagara Mohawk Power Corp.* 120

The Fifth Circuit noted the importance of having one agency in charge of public-water use and dam operations and highlighted the difficulty with this case—a FERC license granted to agencies in both Texas and Louisiana and claims asserted by the plaintiffs only under Louisiana law. The court explained the fact "[t]hat each state may have different causes of action and different standards of conduct that it could impose on the FERC licensee is problematic when states are jointly involved in such a project." The court is problematic when states are jointly involved in such a project.

The Fifth Circuit held that *FERC*'s holding was instructive on § 10(c)'s limited savings clause because it "cannot be interpreted so broadly as to allow state tort law to supplant FERC's exclusive control of dam operations." The Fifth Circuit further explained that state-law property damage claims were conflict preempted because they infringed on FERC's operational control. "FERC, not state tort law, must set the appropriate duty of care for dam operators." 125

The Fifth Circuit explained that "[t]he Supreme Court has recognized that damages claims can serve the same [purpose] as regulations." The plaintiffs were unsuccessful in persuading FERC to change its regulations and instead proceeded under state tort law to achieve the same objective. The court found that this lawsuit equated to an attempt to veto a project approved and licensed by FERC and that it was a collateral attack on the License. The Fifth Circuit held that the "district court properly concluded that the [Federal Power Act] preempt[ed] Plaintiffs' claim." 129

The plaintiffs also complained that the district court abused its discretion by not allowing them to amend their complaints before it dismissed the suit. The Fifth Circuit explained that "[c]learly, if a complaint as amended is subject to dismissal, leave to amend need not be given." Because only the preempted state-law claims would have remained, the court

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U.S. at 161.
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^{120.} Simmons, 732 F.3d at 475 (citing Fed. Power Comm'n v. Niagara Mohawk Power Corp., 347 U.S. 239 (1954)).

^{121.} Id. at 476.

^{122.} Id.

^{123.} Id.

^{124.} Id.

^{125.} Id. (citing 16 U.S.C. § 803(c)).

^{126.} Id. at 477 (citing Kurns v. R.R. Friction Prods. Corp., 132 S. Ct. 1261, 1269 (2012)).

^{127.} Id.

^{128.} *Id.* (citing California v. FERC, 495 U.S. 490, 507 (1990); City of Lowell v. ENEL N. Am., Inc., 796 F. Supp. 2d 225, 231 (D. Mass. 2011)).

^{129.} Id.

^{130.} Id.

^{131.} *Id.* at 478 (quoting Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 546 (5th Cir. 1980), *abrogated on other grounds by* Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 536 n.33 (1983)).

determined that the district court did not abuse its discretion in implicitly denying the motions to amend. 132

V. STANDING IN ENVIRONMENTAL CASES

A. Louisiana Department of Environmental Quality v. United States Environmental Protection Agency

The Fifth Circuit considered the Louisiana Department of Environmental Quality's (LDEQ) petition for review of the EPA's objection to three title V permits issued by the LDEQ to Nucor Steel Louisiana (Nucor). The Fifth Circuit dismissed the petition for lack of subject matter jurisdiction. The Fifth Circuit dismissed the petition for lack of subject matter jurisdiction.

Title V of the CAA creates a permit program Congress intended to be enforced and administered primarily by local and state air-permitting authorities. Individual states develop permit programs that meet the requirements of title V and submit those programs to the EPA for approval. Louisiana's program requires a facility to submit an application for the title V permit prior to beginning construction. Title V operating permits provide emission limitations, monitoring requirements, standards, other compliance schedules, and conditions that are necessary for compliance with requirements of the CAA.

Title V includes a provision that authorizes the EPA to review title V permits. Title V requires state-permitting authorities to submit each proposed permit to the EPA for review. Title V further requires the EPA Administrator to object within forty-five days after receiving the proposed permit to the issuance of any permit not in compliance with title V requirements. After the forty-five-day review period, any person may submit an objection within sixty days to request the Administrator to object. If the petitioner proves that the permit is not in compliance with the CAA, the Administrator must deny the petition within sixty days after the petition is filed. Title V permits judicial review for decisions of the Administrator to grant or deny a petition.

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132. Id.
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^{133.} La. Dep't of Envtl. Quality v. EPA, 730 F.3d 446, 447 (5th Cir. Sept. 2013).

^{134.} Id. at 450.

^{135.} Id. at 447.

^{136.} *Id*.

^{137.} Id.

^{138.} Id.

^{139.} Id. (citing 42 U.S.C. § 7661d).

^{140.} Id.

^{141.} *Id*.

^{142.} Id. (citing 42 U.S.C. § 7661d(b)(1)).

^{143.} See id.

^{144.} *Id*.

grants the petition and issues an objection, § 7661d states, "No objection shall be subject to judicial review until the Administrator takes final action to issue or deny a permit under this subsection."¹⁴⁵

"LDEQ issued a title V permit to Nucor for [a] pig iron process." A grain-export facility, Zen-Noh Grain Corporation (Zen-Noh), located adjacent to Nucor's planned iron-making facility, filed an objection, requesting in part that the Administrator object to Nucor's title V permit request. The EPA did not take action on Zen-Noh's request, and Zen-Noh filed suit to compel the EPA to take action. 148

The EPA agreed with Zen-Noh in a settlement that it would issue an order responding to Zen-Noh's petitions to the extent that § 7661d(b)(2) required such a response.¹⁴⁹ Several months later, LDEQ issued a modified permit for Nucor's pig-iron process and, additionally, issued a title V permit for the Direct Reduced Iron process.¹⁵⁰ In response, Zen-Noh filed a second petition for review with the EPA.¹⁵¹

After almost twenty-one months, "the EPA issued an objection to each of [Nucor's] three title V permits." LDEQ filed a response to the objection as well as a petition in the Fifth Circuit for judicial review. In that petition, LDEQ requested the court vacate the objection and issue a ruling that the objection was improper. Nucor intervened in the suit.

The Fifth Circuit determined it lacked subject matter jurisdiction and dismissed LDEQ's petition. The court explained that "LDEQ and Nucor bear the burden of establishing jurisdiction." The Administrative Procedure Act contains a specific waiver of the United States' sovereign immunity, but that waiver does not affect limitations on judicial review and it does not confer authority to grant relief if any other statute that grants consent to suit forbids the relief sought. Section 7661d(c) of title V provides that "no objection shall be subject to judicial review until the Administrator takes final action to issue or deny a permit under this subsection."

^{145.} Id. at 447-48 (quoting 42 U.S.C. § 7661d(c)).

^{146.} *Id.* at 448. "Pig iron" is "crude iron that is the direct product of the blast furnace and is refined to produce steel, wrought iron, or ingot iron." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 939 (11th ed. 2008).

^{147.} La. Dep't of Envtl. Quality, 730 F.3d at 448.

^{148.} Id.

^{149.} Id.

^{150.} Id.

^{151.} *Id*.

^{152.} *Id*.

^{152.} *Id.* 153. *Id.*

^{154.} *Id*.

^{154.} *Id*.

^{155.} *Id*.

^{156.} Id. at 450.

^{157.} Id. at 448.

^{158.} Id. at 449.

^{159.} Id. (quoting 42 U.S.C. § 7661d(c)).

The court determined that because the EPA did not take a "final action to issue or deny a permit under [title V]," judicial review of the objection was denied. 160 The suit was, therefore, dismissed for lack of jurisdiction. 161

^{160.} *Id.* (alteration in original) (quoting Ocean Cnty. Landfill Corp. v. EPA, 631 F.3d 652, 656 (3d Cir. 2011)).

^{161.} Id. at 450.