ENVIRONMENTAL LAW

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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 2011 through June 2012.[1]

I. CLEAN AIR ACT CASES

In 2008, an industry group filed suit against the Environmental Protection Agency (EPA) because the EPA had not timely acted on a variety of Texas revisions to its State Implementation Plan (SIP).[2] The industry groups and the EPA reached an agreement, and a consent decree was entered in January 2010, requiring the EPA to act on Texas's submissions within agreed-upon dates.[3] To date, the EPA's actions on Texas SIP revisions have resulted in five Fifth Circuit appeals.[4] Three of those appeals, *Luminant Generation Co. v. U.S.*

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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. BCCA Appeal Grp. v. U.S. EPA, No. 3-08CV1491-G (N.D. Tex. Jan. 21, 2010) (Consent Decree).

3. *Id.*; BCCA Appeal Grp. v. U.S. EPA, 476 F. App'x 579, 582 (5th Cir. June 2012) (per curiam).

4. *See* Luminant Generation Co. v. U.S. EPA, 490 F. App'x 657 (5th Cir. Oct. 2012) (per curiam); Luminant Generation Co. v. U.S. EPA, 699 F.3d 427 (5th Cir. Oct. 2012), *withdrawn and superseded by* No. 10-60934, 2013 WL 1195649 (5th Cir. Mar. 25, 2013); Texas v. U.S. EPA, 690 F.3d 670 (5th Cir. Aug. 2012); *BCCA Appeal Grp.*, 476 F. App'x 579; Luminant Generation Co. v. U.S. EPA, 675 F.3d 917 (5th Cir. Mar. 2012).

EPA (October 24, 2012),[5] *Luminant Generation Co. v. U.S. EPA* (October 12, 2012),[6] and *Texas v. U.S. EPA* (August 2012),[7] were decided by the court after June 2012 and are, therefore, beyond the scope of this survey. The other two appeals, *BCCA Appeal Group v. U.S. EPA* (June 2012)[8] and *Luminant Generation Co. v. U.S. EPA* (March 2012),[9] which were the result of the EPA's disapproval of Texas's Qualified Facilities Program and Pollution Control Standard Permit, are discussed below.

A. BCCA Appeal Group v. U.S. EPA

In the *BCCA Appeal Group* case, the Fifth Circuit addressed petitions for review filed by the State of Texas and industry groups.[10] Petitioners sought review of a final order of the EPA in which the EPA disapproved of SIP revisions that Texas had submitted to the EPA pursuant to the Clean Air Act.[11] The court considered "whether the EPA abused its discretion, acted arbitrarily and capriciously, and exceeded its statutory authority in denying the plan revision."[12] The Fifth Circuit denied the petitions and upheld the EPA's action.[13]

In 1995, the Texas Legislature revised the Texas Clean Air Act so that certain changes at "Qualified Facilities" would not be subject to air permitting requirements.[14] The state and the Texas Commission on Environmental Quality (TCEQ) adopted implementing rules,[15] submitted them (i.e., as the Qualified Facilities Program) to the EPA for approval in 1996, and resubmitted it for approval in 1998.[16] In April 2010, the EPA issued a final rule that disapproved the state's program.[17] The EPA explained that the program failed to meet the Minor New Source Review (NSR) SIP, and in addition, it did not meet the "NSR SIP requirement for a substitute Major NSR SIP revision."[18] The court of appeals has jurisdiction to review final action by the EPA on SIP revisions.[19]

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5. *Luminant Generation Co.*, 490 F. App'x 657.
6. *Luminant Generation Co.*, 699 F.3d 427.
7. *Texas*, 690 F.3d 670.
8. *BCCA Appeal Grp.*, 476 F. App'x at 581.
9. *Luminant Generation Co.*, 675 F.3d at 921.
10. *BCCA Appeal Grp.*, 476 F. App'x at 581.
11. *Id.*
12. *Id.*
13. *Id.*
14. Tex. S.B. 1126, 74th Leg., R.S. (1995); TEX. HEALTH & SAFETY CODE ANN. § 382.003(9)(E) (West 2011) (setting forth the "Qualified Facilities" exception to the definition of "modification of existing facility").
15. *See, e.g.*, 30 TEX. ADMIN. CODE § 116.10(9)(D) (2010) (providing definitions of "modification of existing facility" with exceptions for changes at controlled facilities that do not result in a net increase in emissions).
16. *BCCA Appeal Grp.*, 476 F. App'x at 581.
17. *Id.*
18. *Id.*
19. *Id.*

The Fifth Circuit relied on the two-part test found in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*. in reaching its decision.[20] The Supreme Court in *Chevron* explained, first, when Congress has spoken directly on an issue, the agency and the court "must give effect to the unambiguously expressed intent of Congress."[21] Second, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[22]

The Fifth Circuit then considered the EPA's final action in terms of the Administrative Procedure Act (APA).[23] The APA requires a court to set aside the agency's action when the court finds the action, findings, and conclusions to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[24] The Fifth Circuit acknowledged, however, that the agency's interpretation of its rules is entitled to substantial deference and is given "'controlling weight' unless 'plainly erroneous or inconsistent with the regulation.'"[25]

Petitioners argued that the EPA's disapproval was an abuse of discretion, arbitrary and capricious, and not in accord with the law.[26] The EPA argued that it disapproved of the state's submission in part because the program was incorrectly limited to smaller pollutant sources, which permitted a major source to evade requirements; that Texas's proposed program would allow a regulated entity to theoretically increase pollution emissions without ensuring clean air standards or control strategies were met; and, finally, that Texas failed to provide the EPA with the information necessary to determine that the program met regulatory requirements.[27]

The Qualified Facilities Program was the result of the state's enactment of Senate Bill 1126.[28] "[T]he 'legislative intent of [Senate Bill] 1126 was to provide additional flexibility to certain facilities to make physical and operational changes without a requirement to obtain a permit or other approval from [the Texas Natural Resource Conservation Commission].'"[29] The bill revised the "statutory definition of 'modification of existing facility' by adding . . . physical and operational changes that are not considered to be modifications" and, therefore, do not trigger permitting requirements.[30]

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20. *Id.* at 581-82 (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984)).

21. *Chevron*, 467 U.S. at 842.

22. *Id.* at 843.

23. *BCCA Appeal Grp.*, 476 F. App'x at 582.

24. *Id.* (quoting Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2012)).

25. *Id.* (quoting Pub. Citizen, Inc. v. U.S. EPA, 343 F.3d 449, 455-56 (5th Cir. 2003)).

26. *Id.*

27. *Id.* at 583.

28. *Id.*

29. *Id.* at 584 (quoting TEX. NATURAL RES. CONSERVATION COMM'N, MODIFICATION OF EXISTING FACILITIES UNDER SENATE BILL 1126: GUIDANCE FOR AIR QUALITY 1 (1996)).

30. *Id.*

The EPA argued that because the Texas Qualified Facilities Program did not contain an express prohibition against application to major sources, such sources could use the program to evade Major NSR.[31] Petitioners argued that other provisions in Texas law generally requiring major sources to comply with Major NSR prohibited such circumvention.[32] The court, treating the EPA's conclusions regarding circumvention of Major NSR as factual findings, deferred to the EPA.[33]

In overruling Petitioners' arguments, the Fifth Circuit explained that "[t]he EPA's factual findings are entitled to substantial deference and should be upheld if they are supported by the administrative record, even if there are alternative findings supported by the record."[34] The court denied the petitions and upheld the EPA's decision to disapprove the state's plan revisions.[35]

B. Luminant Generation Co. v. U.S. EPA

The TCEQ and other petitioners challenged the EPA's disapproval of TCEQ's proposed revisions to Texas's SIP establishing a standardized permit applicable to pollution control projects (PCP Standard Permit or Permit) under Minor NSR.[36] The Fifth Circuit vacated the EPA's disapproval and remanded with instructions that the EPA was to expeditiously reconsider the regulation.[37]

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31. *Id.* at 583.

32. *Id.*

33. *Id.* at 585. In contrast, on August 13, 2012, a different Fifth Circuit panel, considering a Texas SIP submittal related to the Texas Flexible Permit Program, rejected the EPA's argument that the absence of an explicit statement limiting the program to minor sources supported EPA's disapproval of the SIP submittal. Texas v. U.S. EPA, 690 F.3d 670, 677-78 (5th Cir. Aug. 2012). In that case, the court held that the affirmative requirement to comply with Major NSR in Texas rules prohibited sources from evading review. *Id.* at 678. The court concluded that this language was sufficient to meet the requirements of the Clean Air Act (CAA) and that the EPA's "preference for a different drafting style, instead of the standards Congress provided in the CAA [disturbed] the cooperative federalism that the CAA envisions." *Id.* at 679.

34. *BCCA Appeal Grp.*, 476 F. App'x at 586.

35. *Id.* Judge Leslie Southwick wrote a concurring opinion agreeing with the majority's denial of the petitions but disagreeing with the court's reasoning for doing so. *Id.* at 587 (Southwick, J., concurring). The Judge explained that his concern with the majority's rationale was that "[the court is] taking sides in a dispute over drafting styles. . . . Without any historical pattern or other basis to support the preference, insisting on one expression compared to the other is arbitrary and, perhaps more accurately, capricious." *Id.* However, Judge Southwick explained, the statute provides that the EPA "'shall not approve a revision' to a SIP if it 'would interfere' with NAAQS. . . . EPA found that the [Qualified Facilities Program] would undermine specific NAAQS. Because these conclusions are rooted in agency expertise, adequately explained, and based on the congressionally prescribed factors, our duty is to uphold EPA's final action to disapprove." *Id.* at 589 (quoting 42 U.S.C. § 7410(l) (2006)). Judge Southwick was with the majority of the Flexible Permit Panel referenced in footnote 33. Petitioners have requested rehearing and rehearing en banc in the Qualified Facilities case, and those petitions are still pending with the court. Tex. Oil & Gas Assoc. v. U.S. EPA, No. 10-60459 (5th Cir. 2012) (Petition for Panel Rehearing); Tex. Oil & Gas Assoc. v. U.S. EPA, No. 10-60459 (5th Cir. 2012) (Petition for Rehearing En Banc). The EPA did not request rehearing in the Flexible Permits Program case. *Texas*, 690 F.3d 670. The court has not yet issued the mandate for the case.

36. Luminant Generation Co. v. U.S. EPA, 675 F.3d 917, 925-26 (5th Cir. Mar. 2012).

37. *Id.* at 921.

The Fifth Circuit considered whether the EPA may review and reject a SIP based on compliance, or lack thereof, with state standards; whether Minor NSR standard permits for PCPs must be limited to "similar sources"; and whether the Clean Air Act (CAA) imposes a "replicability" requirement on Minor NSR standard permits.[38]

SIPs must include permitting requirements for the construction and modification of stationary sources—also called NSR permits.[39] If a source meets certain emissions thresholds, it is subject to Major NSR permitting.[40] The CAA and its implementing regulations set forth detailed requirements for Major NSR permitting programs.[41] By contrast, for those sources that do not meet the thresholds, also known as Minor NSR, the CAA merely prescribes regulation "as necessary to assure that [National Ambient Air Quality Standards (NAAQS)] are achieved."[42]

In 1994, Texas expanded its standard permit program to include NSR permits for PCPs.[43] To obtain coverage under the Permit, facilities must complete a detailed registration.[44] In addition to the PCP Standard Permit, the permit holder must also comply with general conditions applicable to all standard permits.[45] Moreover, the Texas regulations allow the Executive Director of the TCEQ to disqualify PCPs from using the standard permit if health-effect concerns or a potential to exceed a NAAQS exists.[46]

In the years following, Texas revised the program several times and submitted those revisions to the EPA for approval as part of the Texas SIP.[47] In 2003, the EPA approved the standard permit program in the Texas SIP but specifically declined to act on the PCP Standard Permit, stating that it was "'not necessary' to its approval" and that it "would 'be addressed in a separate action.'"[48]

In 2006, in response to a D.C. Circuit case vacating an EPA rule that had exempted PCPs from Major NSR permitting, Texas amended its PCP Standard

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38. *Id.* at 925-26.

39. *Id.* at 923 (citing 42 U.S.C. § 7410(a)(2) (2006)).

40. *Id.* at 922 (citing 42 U.S.C. §§ 7470-7503 (2006)).

41. *Id.* (citing 40 C.F.R. §§ 51.165-.166 (2012)).

42. 42 U.S.C. § 7410(a)(2)(C) (internal quotation marks omitted); *Luminant Generation Co.*, 675 F.3d at 922. The EPA "has established National Ambient Air Quality Standards (NAAQS) for . . . air pollutants . . . . The standards were established to protect the public from exposure to harmful amounts of pollutants." *The National Ambient Air Quality Standards*, TEX. COMMISSION ON ENVTL. QUALITY, *available at* www.tceq.state.tx.us/airquality/monops/naaqs.html (last visited Mar. 7, 2013).

43. *Luminant Generation Co.*, 675 F.3d at 923.

44. *Id.* (citing 30 TEX. ADMIN. CODE §§ 116.617(d)(2)(A)-(F), (b)(1)(D) (2011) (State Pollution Control Project Standard Permit)).

45. *Id.* (citing 30 TEX. ADMIN. CODE § 116.115 (2007) (General Conditions)).

46. *Id.* (citing ADMIN. § 116.617(a)(3)(B) (State Pollution Control Project Standard Permit)).

47. *Id.*

48. *Id.* (quoting Approval and Promulgation of Implementation Plans; Texas; Revisions to Regulations for Permits by Rule, Control of Air Pollution by Permits for New Construction or Modification, and Federal Operating Permits, 68 Fed. Reg. 64,543, 64,546-47 (Nov. 14, 2003) (to be codified at 40 C.F.R. pt. 52)).

Permit to apply only to Minor NSR.[49] Texas submitted the 2006 revision to the EPA for approval as part of the Texas SIP.[50] More than two years after the EPA's deadline to act on the submission, the EPA issued its disapproval of the PCP Standard Permit.[51] Texas, as well as other petitioners, timely appealed the disapproval.[52]

The Fifth Circuit held that the EPA improperly reviewed the PCP Standard Permit for compliance with Texas law when it was authorized only to review for compliance with the CAA.[53] In addition, the court found that no "similar source" requirement exists in the CAA and, therefore, that it is not a basis for rejecting the PCP Standard Permit.[54] Finally, the court found that the CAA does not impose a "replicability" requirement for Minor NSR permitting; therefore, the EPA could not reject the PCP Standard Permit on this basis.[55]

In the EPA's notice of disapproval, the EPA repeatedly stated that its reason for disapproving the PCP Standard Permit was that the Permit did not meet the standards of Texas law.[56] The court noted that the provisions of the CAA that govern Minor NSR allow the EPA to reject a SIP only if the revision would interfere with attainment of the NAAQS or any applicable requirement of the CAA.[57] Nowhere does the CAA allow the EPA to reject a SIP because it does not meet state law.[58] The EPA conceded this point but directed the court to several instances in the disapproval where it stated it was rejecting the SIP because it did not meet the CAA.[59] The court rejected this argument, holding that "these bald assertions are belied by the entirety of the EPA's discussion of the PCP Standard Permit," which included an evaluation of the Permit's compliance with Texas—rather than federal—law.[60]

The EPA argued that it disapproved Texas's Permit because it was not limited to similar sources—"'narrowly defined categor[ies] of emission sources,' such as 'oil and gas facilities, asphalt concrete plants, [or] concrete batch plants'"—and was, therefore, unenforceable.[61] The Fifth Circuit refused

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49. *Id.* at 923-24.

50. *Id.* at 924.

51. *Id.* (citing Approval and Promulgation of Implementation Plans; Texas; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Nonattainment NSR (NNSR) for the 1-Hour and the 1997 8-Hour Ozone Standard, NSR Reform, and a Standard Permit, 75 Fed. Reg. 56,424 (Sept. 15, 2010) (to be codified at 40 C.F.R. pt. 52)).

52. *Id.* at 925.

53. *See id.* at 926-27.

54. *Id.* at 927-30 (internal quotation marks omitted).

55. *Id.* at 930-32 (internal quotation marks omitted).

56. *Id.* at 926.

57. *Id.*

58. *See id.*

59. *Id.*

60. *Id.* at 926-27.

61. *Id.* at 927 (quoting Approval and Promulgation of Implementation Plans; Texas; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Prevention of Significant Deterioration (PSD), Nonattainment NSR (NNSR) for the 1997 8-Hour Ozone Standard, NSR Reform, and a Standard Permit Approval and Promulgation of Implementation Plans; Texas; Revisions to the New Source Review (NSR)

to defer to the EPA's interpretation that the CAA required a similar source limitation.[62] The court reasoned that the absence of a similar source requirement in the Minor NSR section of the CAA was significant in light of the fact that another section of the CAA, specifically Title V of the CAA, explicitly imposed such a requirement.[63] The court further reasoned that because Texas regulations stated that the TCEQ had the discretion not to authorize the project if the Executive Director determined that the activity had the potential to exceed a NAAQS, the Permit provision met the requirements for Minor NSR permitting and was enforceable.[64] Because states enjoy "wide discretion in implementing the [CAA], the imposition of newfound restrictions upsets the [CAA's] careful balance between state and federal authority" and was, thus, arbitrary and capricious.[65]

Finally, the Fifth Circuit rejected the EPA's argument that the Permit should be disapproved because the permitting regime allowed TCEQ's Executive Director to impose additional requirements if he found that the permitted activity threatened a NAAQS.[66] Noting that it was "at a loss to comprehend" why the EPA would disapprove a procedure that allowed the TCEQ to impose additional requirements to protect air quality and that the EPA had approved less environmentally protective regimes for Minor NSR in Georgia, the court found that the CAA does not require replicability in a state's Minor NSR program.[67] Thus, the court held that the EPA acted in excess of its statutory authority by imposing such a requirement on Texas.[68]

II. CLEAN WATER ACT CASES

A. Atchafalaya Basinkeeper v. Chustz

In this case, the court considered whether the Clean Water Act (CWA) authorizes citizen suits to enforce conditions of a § 1344 permit.[69] The dispute in this case arose when the Louisiana Environmental Action Network (LEAN) and the Atchafalaya Basinkeeper (Appellants) sued the Atchafalaya Basin

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State Implementation Plan (SIP); Prevention of Significant Deterioration (PSD), Nonattainment NSR (NNSR) for the 1997 8-Hour Ozone Standard, NSR Reform, and a Standard Permit, 74 Fed. Reg. 48,467, 48,467 (Sept. 23, 2009)).

62. *See id.* at 929.

63. *See id. Compare* 42 U.S.C. § 7661c(d) (2006) (operating permit rules), *with id*. § 7410 (stating the requirements for Minor NSR).

64. *Id.* (citing 30 TEX. ADMIN. CODE § 116.617(a)(3)(B) (2011) (State Pollution Control Project Standard Permit)).

65. *Id.* (quoting Union Elec. Co. v U.S. EPA, 427 U.S. 246, 250 (1976); Fla. Power & Light Co. v. Costle, 650 F.2d 579, 587 (5th Cir. Unit B June 1981)).

66. *See id.* at 930-31.

67. *Id.*

68. *Id.* at 932.

69. Atchafalaya Basinkeeper v. Chustz, 682 F.3d 356, 357 (5th Cir. Apr. 2012) (per curiam); *see* 33 U.S.C. § 1344 (2006).

Program (the Program), arguing that the Program failed to comply with the conditions of a permit issued by the Army Corps of Engineers (the Corps).[70]

Appellants brought suit in this case as private entities with an interest in the protection of the Bayou under § 1365 of the CWA, which authorizes citizen suits under certain circumstances.[71] Appellants' complaint alleged that the Program failed to comply with provisions of its permit by improperly maintaining "spoil banks" during its dredging activities of the Bayou Postillion.[72] These spoil banks, "which are large piles of dredged material that must be deposited along the sides of the Bayou," allow water flow and flooding that are essential to sustain wetland plant life.[73] The Fifth Circuit held that the CWA does not permit citizens to sue to enforce § 1344 permit conditions.[74]

The CWA prohibits a pollutant from being discharged without compliance with certain statutory exceptions.[75] Sections 1342 and 1344 set forth the permitting scheme through which a permittee might have an authorized discharge.[76] The Corps is authorized to issue permits under § 1344 to allow certain discharges of dredged or fill material, and § 1342 provides the EPA with the authority to issue a permit for other pollutant discharges.[77] Section 1365(a)(1) of the CWA provides for citizen suits and states in part, "[a]ny citizen may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under this chapter."[78]

In this case, the district court rejected the arguments of Appellants on two grounds.[79] First, the court explained that if Appellants' interpretation of the CWA were to be followed, another section of the CWA would be redundant; second, the section of the CWA relied upon by Appellants does not address permit violations under § 1344.[80]

In affirming the decision of the district court, the Fifth Circuit relied on the long-standing rule of statutory construction "that no provision should be construed to be entirely redundant."[81] The court explained, if § 1365(f)(1) allowed citizen suits for § 1342 permit violations, as argued by the Appellants, then § 1365(f)(6), which provides for citizen suits for violation of a permit under § 1342, would be unnecessary.[82] Further, the court explained, if Congress had intended to allow citizen suits for § 1344 permit violations, it

70. *Atchafalaya Basinkeeper*, 682 F.3d at 357.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 360.
75. *Id.* at 358 (quoting 33 U.S.C. §§ 1311(a), 1362(6) (2012)).
76. *Id.*
77. *Id.*
78. *Id.* (quoting 33 U.S.C. § 1365(a)(1) (2006)) (internal quotation marks omitted).
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 359.

could have added a subsection that allowed for the same right to suit as provided under § 1365(f)(6) for violations of § 1342 permit conditions.[83] In addition, the court relied on *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, in which the Supreme Court said,

> [I]t cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens. . . . [I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate.[84]

B. Louisiana Environmental Action Network v. City of Baton Rouge

LEAN, a non-profit community organization, brought a citizen suit against the City of Baton Rouge (the City) and East Baton Rouge Parish (the Parish) for violations of the CWA that occurred at three wastewater treatment facilities owned and operated by the City and the Parish.[85] The Fifth Circuit considered whether the CWA's bar of citizen suits—in which the EPA or the State has commenced a civil or criminal action and is diligently prosecuting that action—is a jurisdictional consideration.[86] The Fifth Circuit reversed the district court judgment and remanded for further proceedings.[87]

The CWA prohibits an unauthorized discharge into navigable waters of the United States.[88] The National Pollutant Discharge Elimination System (NPDES) establishes authorization for the administrator of the EPA or a state that is authorized to issue an NPDES permit to authorize discharges of pollutants under certain conditions through an NPDES permit.[89] Failure to comply with the CWA and permit requirements subjects the permit holder to state and federal enforcement actions.[90]

A citizen action can be brought under the CWA in certain circumstances, which authorizes a civil action by a private citizen to enforce an NPDES permit standard.[91] The CWA provides, "Except as provided in subsection (b) of this section . . . , any citizen may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of . . . an

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83. *Id.*
84. *Id.* (quoting Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 14-15 (1981)).
85. La. Envtl. Action Network v. City of Baton Rouge, 677 F.3d 737, 739-40 (5th Cir. Apr. 2012).
86. *Id.* at 747.
87. *Id.* at 750.
88. *Id.* at 739.
89. *Id.*
90. *Id.* (citing 33 U.S.C. §§ 1319, 1342 (2012)).
91. *Id.*

effluent standard or limitation under this chapter."[92] The citizen's right to bring a suit is limited when the EPA or the state "has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order."[93] As authorized by the CWA, the Louisiana Department of Environmental Quality (LDEQ) administers a permit program—the Louisiana Pollutant Discharge Elimination System (LPDES).[94]

The City and the Parish were the owners and operators of three wastewater treatment plants that discharge treated sanitary wastewater into the Mississippi River.[95] In 1988, the United States filed a complaint under the CWA against the City and the State of Louisiana for violations of the CWA at all three of the facilities.[96] Later that year, the district court entered a consent decree to resolve the complaints and ordered full compliance with the CWA by the end of 1996.[97] In 2001, the State of Louisiana and the United States brought an enforcement action against the City and the Parish, arguing that the same three facilities violated their NPDES permits as well as the CWA.[98] As a result of that enforcement action, the parties lodged another proposed consent decree in the district court.[99] The consent decree was entered in 2002 and was later modified in 2009.[100]

LEAN's members contended that the untreated wastewater was being discharged onto the member's properties, and members were concerned about the overflow of sewage.[101] LEAN, after reviewing the City's and the Parish's Discharge Monitoring Reports, determined that the sewage facilities were not in compliance with the consent decree.[102] LEAN sent a notice of violation to the City and the Parish, the EPA, and the LDEQ, arguing that all three wastewater treatment plants were in violation of the decree and the CWA.[103] LEAN subsequently filed a citizen suit against the City and the Parish, asserting that neither the EPA nor the LDEQ were diligently prosecuting ongoing violations.[104] LEAN sought a declaratory judgment that the City and the Parish were in violation of the CWA and their permits and requested an injunction compelling compliance, an award of civil penalties, and attorney's fees.[105]

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92. *Id.* at 740 (quoting 33 U.S.C. § 1365(a)(1) (2006)) (internal quotation marks omitted).
93. *Id.* (quoting § 1365(b)(1)(B)) (internal quotation marks omitted).
94. *Id.*
95. *Id.*
96. *Id.* at 741.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 741-42.
101. *Id.* at 742.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*

The City and the Parish filed a 12(b)(6) motion to dismiss LEAN's citizen suit on the grounds that it was barred under the CWA's diligent prosecution provision and argued that they were subject to the consent decree, which required compliance by 2015.[106] Additionally, they argued both that LEAN's claims were based on the same violations that were the subject of the consent decree and that the citizen suit would undermine the CWA's enforcement scheme.[107] LEAN argued that the City and the Parish could not immunize themselves from violations of the CWA merely because a consent decree existed in an administratively closed case.[108]

The district court granted the City's and the Parish's Rule 12(b)(6) motion for failure to state a claim, explaining that it believed LEAN's actions should be dismissed as moot.[109] The district court, in reaching its decision, relied on the Fifth Circuit's prior analysis in *Environmental Conservation Organization v. City of Dallas* and applied the mootness standard, explaining that "the party denying mootness must show that there is a realistic prospect that the alleged violations will continue despite the [existence of a consent decree]."[110]

The Fifth Circuit reversed the decision of the district court and remanded the case for further proceedings.[111] The court held that while the district court granted the Rule 12(b)(6) motion to dismiss for failure to state a claim, the district court held that the citizen claim was moot because the Parish and the City were in compliance with the consent decree.[112] Therefore, LEAN's suit was dismissed for lack of federal jurisdiction, not for failure to state a claim.[113]

"Mootness is the doctrine of standing in a time frame. The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness)."[114] If a case is moot, the federal courts have no constitutional authority to address the claims presented.[115] The Fifth Circuit held that the district court improperly dismissed LEAN's claim by erroneously applying the *City of Dallas* mootness standard to this case.[116] LEAN's action was filed eight years after the consent decree, and no subsequent developments rendered the lawsuit moot.[117]

The Fifth Circuit next discussed whether the diligent prosecution bar was jurisdictional and, after considering this question of first impression, held that it

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106. *Id.* at 742-43 (citing 33 U.S.C. § 1365(b)(1)(B) (2006)).
107. *Id.* at 743.
108. *Id.*
109. *Id.*
110. *Id.* (quoting Envtl. Conservation Org. v. City of Dall., 529 F.3d 519, 527 (5th Cir. 2008)) (internal quotation marks omitted).
111. *Id.* at 750.
112. *Id.* at 744.
113. *Id.*
114. *Id.* (quoting *Envtl. Conservation Org.*, 529 F.3d at 524-25) (internal quotation marks omitted).
115. *Id.* (citing *Envtl. Conservation Org.*, 529 F.3d at 525).
116. *Id.*
117. *Id.* at 744-45.

was not.[118] Because the provision was not jurisdictional, LEAN was protected by Rule 12(b)(6), and the court, therefore, had to accept all of LEAN's well-pled allegations as true and provide it an opportunity to prove that there was no "diligent prosecution" of the matter.[119] The Fifth Circuit based its decision on its analysis of Supreme Court cases providing guidance on whether a provision is jurisdictional.[120]

The Supreme Court has said that a rule should be considered jurisdictional when it governs the court's adjudicatory capacity relating to subject matter or personal jurisdiction.[121] Claims-processing rules, which seek to promote the orderly progress of litigation, should not be described as jurisdictional.[122] In *Arbaugh v. Y & H Corp.*, the Supreme Court set forth the "'readily administrable bright line' rule" to provide guidance to the lower courts in jurisdictional determinations: "A provision is jurisdictional '[i]f the Legislature *clearly states* that a threshold limitation on a statute's scope shall count as jurisdictional.' However, 'when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.'"[123]

The Fifth Circuit explained that the diligent-prosecution section is not clearly jurisdictional.[124] Although the language is phrased in mandatory terms, the Supreme Court has not taken the position that all mandatory provisions are jurisdictional.[125] The Fifth Circuit determined that because the diligent-prosecution bar is located in the "Notice" section, it suggests that Congress intended the provision to be a claim-processing rule.[126]

The court found no historical analysis treating the diligent-prosecution provision in the CWA as jurisdictional and, therefore, no long line of case law that Congress left undisturbed.[127] Based on this analysis, the Fifth Circuit held that the diligent-prosecution bar was not a jurisdictional limitation on citizen suits.[128] Whether LEAN's citizen suit was barred by the diligent prosecution provision in the CWA is a fact-specific question regarding the details of compliance and prosecution and, therefore, best determined by the district court.[129]

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118. *Id.* at 745-49.
119. *Id.* at 745 (citing Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC, 594 F.3d 383, 387 (5th Cir. 2010)).
120. *Id.* at 745-46.
121. *Id.* at 746 (citing Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1198 (2011)).
122. *Id.* (citing *Henderson*, 131 S. Ct. at 1202-03).
123. *Id.* (quoting *Arbaugh*, 546 U.S. at 516).
124. *Id.* at 748.
125. *Id.* (citing *Henderson*, 131 S. Ct. at 1205).
126. *Id.*
127. *Id.* at 749.
128. *Id.*
129. *Id.* at 750.

C. Board of Mississippi Levee Commissioners v. U.S. EPA

This case addressed whether the district court properly granted summary judgment and determined that the EPA had authority under § 404(c) of the CWA to veto a project proposed by the Board of Mississippi Levee Commissioners to reduce flooding in Mississippi.[130]

The CWA generally provides that unless a discharge is made in compliance with § 404 of the CWA, a discharge of any pollutant by any person is unlawful.[131] Section 404(r) of the CWA was added in 1977 and exempts certain discharges from the § 404 requirements if information on the effect of the discharge is included in an Environmental Impact Statement (EIS) reported to Congress.[132] The EIS must comply with the provisions of the National Environmental Policy Act (NEPA), which requires that "when an agency proposes a 'major Federal action[] significantly affecting the quality of the human environment,' the agency must prepare an EIS that documents the environmental impact of the proposed action and provides other alternatives as a comparison."[133]

In a series of statutory enactments and amendments dating as far back as 1928, Congress authorized a levee system to help control flooding from the Mississippi River.[134] The project at issue in this case came about after a 1941 amendment in which the Mississippi River Commission presented a report recommending a levee be extended along the west bank of the Yazoo River to protect the Yazoo Backwater Area from flooding (the Project).[135] The Project was one of three plans proposed by the Mississippi River Commission and was ultimately the plan Congress selected to protect the Yazoo Backwater Area from flooding.[136]

Congress modified the Project several times from 1959 through 1983, and in March 1983, a member of the Corps mailed two identical letters, one to Senator Robert T. Stafford, Chairman of the Committee on Environmental and Public Works, and one to Representative James J. Howard, Chairman of the Committee on Public Works and Transportation.[137] The letter stated, "A copy of the proposed report of the Chief of Engineers on Yazoo Backwater Project, Mississippi—Fish and Wildlife Mitigation Report, and other pertinent reports [with] a Final Environmental Impact Statement, with addendum, are enclosed for your information."[138]

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130. Bd. of Miss. Levee Comm'rs v. U.S. EPA, 674 F.3d 409, 412-13 (5th Cir. Mar. 2012).
131. *Id.* at 412 (citing 33 U.S.C. § 1311(a) (2012)).
132. *Id.* at 413.
133. *Id.* (quoting National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. § 4332(2)(C) (2006)).
134. *Id.* at 413-14.
135. *Id.* at 414.
136. *Id.*
137. *Id.*
138. *Id.* at 414-15 (internal quotation marks omitted).

Construction began on the Project in 1986.[139] Construction stopped soon afterward, however, with the passage of the Water Resources Development Act of 1986, which placed a requirement that local sponsors share in construction costs.[140] Construction halted until 1996 when that provision was reversed.[141] From 1998 through 2000, the EPA made attempts to reduce the environmental impact of the Project, and in 2000, because of the length of time that had elapsed since the environmental study, the Corps decided to update its analysis of the Project's impact to the environment under NEPA.[142]

The EPA worked alongside the Corps from 2002 through 2005 in an effort to continue to reduce the Project's environmental impact.[143] The EPA formally vetoed the Project in 2008 after the EPA received public comments and after it considered its own analysis of the environmental impact.[144] The EPA ultimately determined that § 404(r), exempting certain discharges, was inapplicable to the Project and determined that it had veto authority over the Project under § 404(c) of the CWA.[145]

The Board brought suit against the EPA, arguing that the EPA did not have authority to veto the Project under § 404(r).[146] Both the Board and the EPA filed motions for summary judgment.[147] The district court granted summary judgment to the EPA, finding that the EPA did not improperly veto the Project because there was no record evidence that the EIS for the Project was submitted to Congress.[148] The Fifth Circuit found that there was insufficient evidence to show that an EIS complying with NEPA and § 404(b)(1) was submitted to Congress, and it affirmed the decision of the district court, granting summary judgment to the EPA.[149]

The Fifth Circuit explained that, under the APA, the court may overturn a ruling of an agency only "if it is arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence on the record taken as a whole."[150] The court's analysis started with a presumption that the agency's decision is valid, and the court reviewed the agency's decision to determine if it is supported by substantial evidence.[151] The court gives

139. *Id.* at 415.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* at 416.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.* at 420.
150. *Id.* at 417 (quoting Buffalo Marine Servs., Inc. v. United States, 663 F.3d 750, 753 (5th Cir. Nov. 2011)) (internal quotation marks omitted).
151. *Id.*

deference to a final decision by an agency and to the construction of a statute by an agency.[152]

Section 404(r) requires three criteria to be met in order for that section to bar the EPA's exercise of veto authority.[153] First, Congress must authorize the project.[154] Second, an EIS satisfying both § 404(b)(1) and Congress's requirements must be submitted to Congress, and finally, "the EIS must be 'submitted to Congress before the actual discharge of dredged or fill material in connection with the construction of such project and prior to either authorization of such project or an appropriation of funds for such construction.'"[155]

The Board argued that the letters sent to Senator Robert T. Stafford and Representative James J. Howard were proof that the project was "submitted to Congress."[156] The court found, however, that the attachment submitted to Representative Howard and Senator Stafford were not included in the administrative record and that even if the "final EIS" referenced in the letter was related to the Project, it is unlikely that the EIS was actually final in accordance with the regulations.[157] The court concluded, "[E]ven if an EIS related to the Project was sent to Congress in March 1983, the EPA's conclusion that it was not 'final' should not be set aside as no Record of Decision had been signed until after the letters were sent."[158] In addition, the court found that the record indicated that the Corps's effort to obtain a state water quality certification shows that the Corps did not believe § 404(r) applied, that "the Corps was aware of the process for seeking a [§] 404(r) exemption and that, had it intended to do so, it would have followed the Standard Operating Procedures."[159]

III. DEEPWATER DRILLING CASE—*GULF RESTORATION NETWORK V. SALAZAR*

Both before and concurrent with the 2010 Deepwater Horizon oil spill disaster, during which 4.9 million barrels of oil spilled into the Gulf of Mexico, the Department of the Interior (DOI) processed mineral lease applications for the exploration and development of new oil wells in the Gulf of Mexico.[160] The Sierra Club, the Gulf Restoration Network, and the Center for Biological Diversity (Petitioners) sought judicial review in the Fifth Circuit, challenging sixteen DOI plan approvals under the Outer Continental Shelf Lands Act

152. *Id.*
153. *Id.* at 418.
154. *Id.* (quoting Clean Water Act (CWA), 33 U.S.C. § 1344(r) (2006)).
155. *Id.* (quoting § 1344(r)).
156. *Id.*
157. *Id.* at 419.
158. *Id.* at 420.
159. *Id.*
160. Gulf Restoration Network, Inc. v. Salazar, 683 F.3d 158, 163-64 (5th Cir. May 2012).

(OCSLA).[161] Petitioners argued that the plan approvals violated both OCSLA and NEPA and sought to have the approvals vacated and the plans remanded to the DOI.[162] The Fifth Circuit held (1) that four of the sixteen plans were moot but that the remaining twelve were justiciable; (2) that approval of the plans was subject to judicial review under OSCLA; (3) that Petitioners' failure to participate in the administrative proceedings did not remove the complaint from the Fifth Circuit's jurisdiction because participation is non-jurisdictional; but (4) that Petitioners failed to show sufficient justification to excuse them from participating in the administrative process and satisfying the exhaustion requirement.[163] The court dismissed twelve of Petitioners' petitions for their failure to participate in the administrative proceedings and dismissed the other four as moot.[164]

OSCLA sets forth four distinct administrative phases that must be pursued by the development of an offshore oil well lease purchaser or mineral lessee.[165] First, the DOI must formulate a five-year leasing plan.[166] Second, there must be lease sales, and third, there must be exploration by lessees.[167] Finally, development and production must exist.[168] Each stage requires separate regulatory review and includes requirements for consultation with Congress, states, or federal agencies.[169] Only the exploration and development phases are relevant to this case.[170] These stages are subject to input from governors and local governments and are subject to consistency review.[171] The purpose of the four-part division is to avoid premature litigation from harmful or adverse environmental effects that will flow from the final two stages—if at all.[172]

The court determined that it had appellate jurisdiction to review the DOI's approval of the exploratory plans pursuant to 43 U.S.C. § 1349(c)(2), which states that OCSLA provides, "Any action of the [DOI] to approve . . . any exploration plan . . . shall be subject to judicial review only in a United States court of appeals for a circuit in which an affected State is located."[173] Here, because Louisiana is within the Fifth Circuit's jurisdiction, judicial review of the DOI's plan approval was properly before the court.[174]

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161. *Id.* at 164; Outer Continental Shelf Lands Act (OCSLA) §§ 2-31, 43 U.S.C. §§ 1331-1356a (2006).

162. *Gulf Restoration Network*, 683 F.3d at 164; National Environmental Policy Act (NEPA) of 1969 §§ 2-209, 42 U.S.C. §§ 4321-4370f (2006).

163. *Gulf Restoration Network*, 683 F.3d at 164.

164. *Id.*

165. *Id.* at 165.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 165-66.

172. *Id.* at 166.

173. *Id.* at 169 (quoting Outer Continental Shelf Lands Act (OSCLA), 43 U.S.C. § 1349(c)(2) (2006)) (internal quotation marks omitted).

174. *Id.*

The DOI and intervenors argued that even if jurisdiction existed to review the DOI's approval in these matters, such judicial review was only available to those who participated in the administrative proceedings.[175] Petitioners argued that § 1349(c)(3)(A) was not jurisdictional but merely jurisprudential and, therefore, that Petitioners should have exhausted their administrative remedies; Petitioners, however, requested to be excused from this requirement in light of the circumstances.[176] The Fifth Circuit agreed with Petitioners that the provision is not jurisdictional but held that Petitioners could not be excused from the consequences of failing to exhaust their remedies, and therefore, their petitions were denied.[177]

Again relying on the Supreme Court's ruling in *Arbaugh v. Y & H Corp.*, the Fifth Circuit applied the same approach to determine whether § 1349(c)(3)(A)'s requirement that a party must have participated in the administrative proceedings to seek judicial review of the decision barred Petitioners' claim.[178] The court explained that the statute does not clearly state that the participation requirement is "jurisdictional" and that "[it] is located in a provision 'separate' from those granting federal courts subject-matter jurisdiction."[179] Federal courts of appeals have jurisdiction to "review the DOI's approval, modification, or disapproval of plans" during the exploration or development and production stages, unconditioned on whether the person seeking judicial review participated in the administrative proceedings.[180] Nor does any factor suggest that this statute can be read to "'speak in jurisdictional terms or refer in any way to the jurisdiction of the' federal courts."[181] Merely because a statute requires a party to take certain action before filing a lawsuit does not make it an automatic prerequisite to filing suit.[182] "Rather, the jurisdictional analysis must focus on the 'legal character' of the requirement, which must be discerned by looking to the condition's text, context, and relevant historical treatment."[183] Other threshold requirements that must be exhausted before filing suit have similarly been treated as nonjurisdictional.[184]

Despite the fact that § 1349(c)(3)(A) was held to be nonjurisdictional, the Fifth Circuit did not find an exception excusing Petitioners' failure to participate in the administrative proceedings.[185] The court declined to consider on review issues and arguments that were not raised in the administrative

175. *Id.* at 171.
176. *Id.*
177. *Id.* at 171-72.
178. *See id.* at 173 (citing Arbaugh v. Y & H Corp., 546 U.S. 500, 515 (2006)).
179. *Id.* (citing Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237, 1245-46 (2010)).
180. *Id.* (citing *Reed Elsevier*, 130 S. Ct. at 1246).
181. *Id.* (quoting *Arbaugh*, 546 U.S. at 515) (citing *Reed Elsevier*, 130 S. Ct. at 1246).
182. *Id.* (citing *Reed Elsevier*, 130 S. Ct. at 1246).
183. *Id.* (quoting Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982)) (internal quotation marks omitted) (citing *Reed Elsevier*, 130 S. Ct. at 1246).
184. *Id.* at 173-74 (citing *Reed Elsevier*, 130 S. Ct. at 1251).
185. *Id.* at 176.

proceedings.[186] The court explained that § 1349(c)(3)(A) provides for judicial review only when the person took part "'in the administrative proceedings related to the actions' of the DOI about which he or she" is complaining.[187] Further, the court may only consider complaints about the DOI's actions if the issues on which the complaints are based are submitted to the DOI during an administrative proceeding, and the court of appeals should consider the matter under review solely based on the record made by the agency.[188]

The Fifth Circuit determined that Petitioners did not argue or show an established exception to the statutory requirement of administrative exhaustion and determined that, even if the court had the authority to recognize a new exception, Petitioners failed to demonstrate that their absence from the administrative proceedings was caused by any act or omission by the DOI.[189]

IV. NATIONAL ENVIRONMENTAL POLICY ACT CASE—*SIERRA CLUB V. FEDERAL HIGHWAY ADMINISTRATION*

The Fifth Circuit considered whether the Federal Highway Administration, along with the other Appellees, complied with statutory requirements in the preparation of its final EIS for a segment of a planned highway project in Houston.[190] The highway project in this case is known as the Grand Parkway, Texas State Highway 99.[191] It is a 180-mile highway that encircles the Houston area.[192] The project was split into eleven segments.[193] This case specifically addressed Segment E of the project.[194]

In 1993, "the Texas Department of Transportation [(TxDOT)] and the Federal Highway Administration . . . filed a Notice of Intent to build Segment E" and started the preparation of an EIS.[195] A draft of the EIS was published in 2003 after a series of public meetings in 1993 and 2000.[196] A final EIS was issued in November 2007 after a public hearing was held on the draft EIS, and in 2008, the Federal Highway Administration issued a Record of Decision to approve the construction of Segment E.[197]

Sierra Club filed suit in 2009 against TxDOT, the Federal Highway Administration, the United States Department of Transportation, and other individuals in their official capacities (the Agencies), alleging that the Agencies

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186. *Id.* at 176-77.
187. *Id.* at 175 (quoting Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1349(c)(3)(A) (2006)).
188. *Id.* at 175-76 (quoting § 1349(c)(4)-(6)).
189. *Id.* at 176-77.
190. Sierra Club v. Fed. Highway Admin., 435 F. App'x 368, 371 (5th Cir. Aug. 2011) (per curiam).
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*

violated NEPA in the preparation of its final EIS.[198] Sierra Club argued that the Agencies failed to analyze "(1) the alternatives to construction of Segment E; (2) the impacts on floodplains; (3) the impacts on wetlands; (4) the impacts on air quality; (5) the noise impacts; and (6) the indirect and cumulative impacts."[199] In June 2009, the Agencies drafted a re-evaluation of the final EIS to address a design change for Segment E.[200] The Federal Highway Administration issued a Revised Record of Decision, in which it reaffirmed its selection of the revised Segment E.[201]

In 2009, the Sierra Club filed to amend its compliant to add Harris County as a defendant and to add the Houston Audubon Society as a plaintiff.[202] The district court granted the motion to permit the Houston Audubon Society to be added but denied it with respect to the other claims.[203] The parties filed cross motions for summary judgment.[204]

The district court granted summary judgment to the Agencies and concluded that the Agencies did not act arbitrarily or capriciously in issuing the Record of Decision or the final EIS.[205] The Fifth Circuit, in reviewing the district court's decision, explained, "'NEPA-related decisions are accorded a considerable degree of deference,' and 'courts are to uphold the agency's decisions unless the decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with [the] law.'"[206]

NEPA requires federal agencies to analyze the environmental impact of actions and proposals.[207] "NEPA is a strictly procedural statute and does not mandate that the agency reach any particular conclusion. [It] ensures that agencies will engage in an environmentally-conscious process, not that they will reach the most environmentally-friendly result."[208]

NEPA requires federal agencies to construct an EIS when "they engage in 'major Federal actions significantly affecting the quality of the human environment.'"[209] The EIS must contain the environmental impact, the adverse impacts that are unavoidable if the action is implemented, the alternatives to the proposal, "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any

198. *Id.* "NEPA was created to ensure that agencies will base decisions on detailed information regarding significant environmental impacts and that information will be available to a wide variety of concerned public and private actors." Miss. River Basin Alliance v. Westphal, 230 F.3d 170, 175 (5th Cir. 2000)) (citing Morongo Band of Mission Indians v. FAA, 161 F.3d 569, 575 (9th Cir. 1998)).

199. *Id.*

200. *Id.*

201. *Id.* at 372.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* (quoting Spiller v. White, 352 F.3d 235, 240 (5th Cir. 2003)).

207. *Id.* at 373.

208. *Id.* (citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989)).

209. *Id.* (quoting 42 U.S.C. § 4332(C) (2012)).

irreversible and irretrievable commitments of resources [that] would be involved in the proposed action should it be implemented."[210]

The Sierra Club argued that the final EIS was insufficient for six reasons.[211] It argued that the final EIS failed to consider other alternatives or address floodplain impacts, impacts to wetlands, impacts to air quality, noise impacts, and indirect and cumulative impacts.[212] The district court and the Fifth Circuit overruled these arguments and held that the Agencies complied with the requirements of NEPA.[213] The Fifth Circuit explained that the purpose and need statement was not so narrow that it prohibited consideration of reasonable route alternatives.[214] While the final EIS only showed a modest improvement in traffic safety and congestion, "NEPA merely prohibits uninformed—rather than unwise—agency action."[215] The court found that the final EIS clearly showed what floodplain it had relied on in its analysis and that the Agencies provided an updated analysis in their re-evaluation to show the floodplain re-evaluation.[216]

Finally, Appellants argued that the district court erred in denying Sierra Club leave to amend its compliant.[217] "The district court granted Sierra Club's motion to add in the Houston Audubon Society as a plaintiff" but, without providing a reason, denied the motion in all other respects.[218] The Fifth Circuit explained that, while it was unable to determine on what grounds the district court denied Sierra Club's motion for leave, any error was harmless.[219] Appellants failed to demonstrate that their substantial rights were affected by the district court's denial of leave.[220] The court found that the final EIS explained both on-site and off-site wetland mitigation efforts and that it included consideration of wetlands impacted by Segment E selections.[221] The court held that the Agencies complied with NEPA in their submission of the final EIS.[222]

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210. *Id.* (citing § 4332(C)).
211. *Id.* at 371.
212. *Id.*
213. *Id.* at 379.
214. *Id.* at 374-75.
215. *Id.* at 375 (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989)) (internal quotation marks omitted).
216. *Id.* at 377.
217. *Id.* at 379-80.
218. *Id.* at 379.
219. *Id.* at 380.
220. *Id.*
221. *Id.* at 378-79.
222. *Id.* at 379.

V. OIL POLLUTION ACT CASE—*BUFFALO MARINE SERVICES, INC. V. UNITED STATES*

This was an appeal from a claim determination that was the result of an oil spill on the Neches River.[223] Appellants filed an appeal of the National Pollution Fund's final denial of reimbursement for the costs from the spill.[224] The Fifth Circuit considered two issues in this case.[225] First, the court considered whether it should defer to the Coast Guard's National Pollution Funds Center's (NPFC) interpretation of 33 U.S.C. § 2703(a)(3); second, it considered whether its determination was arbitrary and capricious and unsupported by substantial evidence.[226] The Fifth Circuit held that the NPFC's statutory interpretation was entitled to deference and that Appellants failed to demonstrate that the NPFC's denial of its affirmative defense claim should have been overturned.[227]

The dispute arose in August 2004 when, in an effort to deliver fuel, a barge and tug owned by Buffalo Marine Services, Inc. (Buffalo Marine) collided with the TORM MARY (the Torm), a large tanker ship.[228] The collision resulted in a rupture of the vessel's skin and 27,000 gallons of heavy fuel being spilled into the Neches River.[229] The effort to clean up the spill was coordinated by Buffalo Marine and the Torm at an assessed cost of $10.1 million.[230] The main dispute underlying this case was the contractual relationship between the parties: the Torm (the fuel's end buyer); Bominflot, Inc. (the seller); LQM Petroleum Services (the broker between Torm and Bominflot); and Buffalo Marine (the agent hired by Bominflot to deliver the fuel to the Torm).[231]

The Oil Pollution Act of 1990 (OPA) establishes a strict liability scheme for oil cleanup costs when "'each responsible party for a vessel . . . from which oil is discharged . . . is liable for the removal of costs and damages . . . that result from such incident.' The 'responsible party' for a vessel is 'any person owning, operating, or demise chartering the vessel.'"[232] The liability of a party is capped by the statute on the gross tonnage of the vessel owned by the responsible party.[233] When the costs of the cleanup are greater than the statutory limit, the responsible party can seek reimbursement of those costs through the Oil Spill Liability Trust Fund.[234] A complete defense to liability is

223. Buffalo Marine Servs., Inc. v. United States, 663 F.3d 750, 751 (5th Cir. Nov. 2011).
224. *Id.* at 752-53.
225. *Id.* at 754.
226. *Id.*
227. *Id.* at 759.
228. *Id.* at 751-52.
229. *Id.* at 752.
230. *Id.*
231. *Id.* at 753.
232. *Id.* (quoting Oil Pollution Act (OPA) of 1990, 33 U.S.C. § 2701(32)(A) (2006)).
233. *Id.*
234. *Id.*

provided to the responsible party under § 2703(a)(3) if the party "'establishes, by a preponderance of the evidence,' that the oil spill was 'caused solely by . . . an act or omission of a third party, other than . . . a third party whose act or omission occurs in connection with any contractual relationship with the responsible party.'"[235]

In March 2007, the insurers and owners of the vessels involved submitted a reimbursement request to the NPFC, the agency tasked with the administration of the Oil Spill Liability Trust Fund.[236] The request was to designate Buffalo Marine as the responsible party; limit Buffalo's responsibility to $2 million, which was the value of the barge under OPA; and exonerate the Torm.[237] In November 2007, "the NPFC denied the claim, concluding that the claimants had not established by a preponderance of evidence that Buffalo Marine's acts were not 'in connection with any contractual relationship with the responsible party.'"[238] The parties filed cross motions for summary judgment, and the district court granted the Government's motion.[239] The Fifth Circuit affirmed the decision of the district court, finding that the agency's statutory interpretation was entitled to deference; that the Torm was properly denied its assertion of a third-party defense; and that defense was not arbitrary, capricious, or otherwise unreasonable.[240]

In considering whether the agency's determination was entitled to deference, the court relied on the decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*.[241] In examining the first step of the *Chevron* analysis, the Fifth Circuit found that Congress has not directly spoken to the issue in this case and that OPA does not provide an express definition of "contractual relationship."[242] After considering *Chevron*'s second step, the court found that the NPFC's determination was based on a permissible construction of § 2703(a)(3) of the statute for four reasons.[243]

First, the drafters chose not to create a limitation to the third-party defense exception that would only apply when a contract exists between the responsible party and the third party; the fact that a contract does not exist does not prevent the parties from having a contractual relationship.[244] Second, "[g]iven the common purposes and shared history of CERCLA[, the Comprehensive Environmental Response, Compensation, and Liability Act,] and the OPA, the use of the phrases 'any contractual relationship' and 'a contractual relationship, existing directly or indirectly' in parallel, similarly worded provisions is

235. *Id.* (quoting Oil Pollution Act (OPA) of 1990, 33 U.S.C. § 2703(a)(3) (2006)).
236. *Id.*
237. *Id.*
238. *Id.* (quoting § 2703(a)(3)).
239. *Id.*
240. *Id.* at 754.
241. *Id.* (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984)).
242. *Id.* at 755.
243. *Id.* at 755-57.
244. *Id.* at 755.

particularly significant."[245] Third, the legislative history confirms that the phrase "any contractual relationship" is meant to encompass indirect contractual relationships as well.[246] Finally, "allowing responsible parties to escape liability even when the third party's act was in connection with an indirect contractual relationship with the responsible party would risk allowing the exception (the third-party defense) to swallow the rule (strict liability for the vessel discharging the oil)."[247] The court found that the agency's determination was entitled to deference, was supported by substantial evidence, and was not arbitrary and capricious.[248]

245. *Id.* at 756 (quoting Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607(b), (d)(3) (2006)).

246. *Id.*

247. *Id.* at 757.

248. *Id.*