ENVIRONMENTAL LAW: 2014–2015

Kellie E. Billings-Ray, Sireesha V. Chirala, and Megan Maddox Neal[*]

The following Survey provides a brief overview of important environmental law decisions from the United States Court of Appeals for the Fifth Circuit that occurred within the survey period: July 2014 through June 2015.

I. JUDICIAL REVIEW OF AGENCY DECISIONS UNDER THE CLEAN WATER ACT

A. Gulf Restoration Network v. McCarthy

A group of environmental advocacy organizations (the organizations) sued the Environmental Protection Agency (EPA) after the EPA denied their petition for a rulemaking under the Clean Water Act "to control nitrogen and phosphorous pollution within the Mississippi River Basin and the Northern

* The Authors are Assistant Attorneys General in the Environmental Protection Division of the Texas Attorney General's Office. 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.

Gulf of Mexico."[1] The organizations alleged that the EPA violated the Administrative Procedure Act and the Clean Water Act by declining to make a necessity determination under § 1313(c)(4)(B) of the Clean Water Act.[2]

The EPA argued its "decision whether to make a necessity determination was a discretionary act," which the court lacked authority to review.[3] The district court ruled "it had jurisdiction to review the EPA's decision not to make a necessity determination," and under the Supreme Court's decision in *Massachusetts v. EPA*, the EPA could not simply decline to make such a determination in response to the organizations' petition for rulemaking.[4] The Fifth Circuit vacated the district court's order and remanded the case to the district court to decide if "the EPA's explanation for why it declined to make a necessity determination was legally sufficient."[5]

The Clean Water Act provides a framework for both states and the federal government to determine and administer water quality standards.[6] Although states can set standards subject to EPA approval, the EPA may directly establish water quality standards through its own regulations under two circumstances set forth in Clean Water Act § 1313(c)(4): (1) if the EPA Administrator determines a revised or new state standard not to be consistent with the applicable requirements of Chapter 26; or (2) in any case in which the EPA Administrator determines that a new or revised standard is necessary to meet the requirements of Chapter 26.[7] The organizations petitioned the EPA to create nitrogen and phosphorous pollution standards under the latter set of circumstances.[8]

Under the Administrative Procedure Act, "federal courts must apply a general presumption that they have jurisdiction to review final agency actions."[9] This presumption, however, does not apply when a statute precludes judicial review or when the agency action is committed to agency discretion by law.[10] The agency-discretion exception is a narrow one, applying only to rare situations in which statutory terms are so broad that there is "no meaningful standard against which to judge the agency's exercise of discretion," thereby leaving the decision-making to the agency's judgment

1. Gulf Restoration Network v. McCarthy, 783 F.3d 227, 231 (5th Cir. Apr. 2015).
2. *Id.* at 232.
3. *Id.*
4. *Id.* (citing Massachusetts v. EPA, 549 U.S. 497, 534–35 (2007)).
5. *Id.* at 243.
6. *Id.* at 229–31.
7. *Id.* at 231.
8. *Id.*
9. *Id.* at 232.
10. *Id.* at 233.

absolutely.[11] A careful statutory examination is required to determine whether this exception applies.[12]

Under the agency-discretion principle, agency decisions are subject to different presumptions of judicial reviewability.[13] Affirmative decisions are presumptively reviewable, whereas refusals to act are not.[14] More specifically, an agency's denial of a petition for rulemaking is presumptively susceptible to extremely limited and highly deferential judicial review.[15] The presumption for judicial review of agency actions is not easily overcome.[16] The Fifth Circuit employed a two-step analysis of the EPA's action at issue here.[17] First, it determined whether the EPA's action was more similar to a denial of a rulemaking petition—presumptively reviewable—or whether it was actually a refusal to engage in enforcement action—presumptively nonreviewable.[18] Second, the court examined the statutory provision at issue to determine if Congress overrode the appropriate presumption.[19]

Based on the Clean Water Act's language and the distinctions drawn between the Clean Water Act and the Clean Air Act's Notice of Deficiency provisions at issue in *Public Citizen, Inc. v. EPA*, the Fifth Circuit classified the EPA's action in this case as a denial of a rulemaking, not a refusal to engage in an enforcement action.[20] In its analysis of the Clean Water Act, the Fifth Circuit pointed to the following facts: (1) Clean Water Act § 1313(c)(4)(B) does not require that a state do something wrong for the EPA to take action; in fact, a separate section, § 1313(c)(4)(A), provides for mandatory EPA action when it is determined that a state's standards do not meet federal requirements; (2) unlike the Clean Air Act's punitive, enforcement-style sanctions, the Clean Water Act does not authorize financial consequences for noncompliance; and (3) the Clean Water Act requires only general notification procedures (to be prepared and published) for a water-quality standard, without any explicit requirement that affected states be informed.[21] As a result, the Fifth Circuit concluded that the EPA's denial of the rulemaking petition was an action presumptively reviewable in federal court.[22] Therefore, it had subject matter jurisdiction to review the EPA's denial.[23]

---

11. *Id.* (quoting Heckler v. Chaney, 470 U.S. 821, 830 (1985)).
12. *Id.*
13. *Id.*
14. *Id.* at 234. To overcome the judicial reviewability presumption, Congress must be explicit. *Id.*
15. *Id.* (citing Massachusetts v. EPA, 549 U.S. 497, 527–28 (2007)).
16. *Id.* at 235.
17. *Id.*
18. *Id.* at 235–37.
19. *Id.* at 237–42.
20. *Id.* at 235–37; *see* Pub. Citizen, Inc. v. EPA, 343 F.3d 449, 453–55 (5th Cir. 2003).
21. *Gulf Restoration Network*, 783 F.3d at 236–37.
22. *Id.* at 237.
23. *Id.* at 238. In contrast to the denial of a rulemaking petition at issue here, the EPA's Notice of Deficiency in *Public Citizen* was a "decision not to invoke an enforcement mechanism," and was

Under the second step of its analysis, the Fifth Circuit held that Congress provided sufficient guidance for judicial review of the EPA's actions under § 1313(c)(4)(B).[24] The structure of § 1313(c)(4) provides some standard for the EPA when deciding the necessity of regulation or whether to decline making a necessity determination.[25] The Clean Water Act's mandatory obligation to take regulatory action once the EPA makes a judgment or determination that regulation is required contrasts to other statutory provisions that exclusively use discretionary language.[26] Courts have held that actions made under discretionary, permissive provisions are unreviewable.[27] Furthermore, the Clean Water Act's cooperative federalism regime calls for an extraordinary level of federal involvement, which would be frustrated without judicial review.[28] The Fifth Circuit also held that the Clean Water Act's subject matter, environmental regulations, has been consistently reviewed by federal courts.[29] As a result, the court had "jurisdiction to review the EPA's decision not to make a necessity determination."[30]

The final step of the Fifth Circuit's analysis was to evaluate "whether the EPA had discretion to decide not to make a necessity determination."[31] The Fifth Circuit applied the Supreme Court's holding in *Massachusetts v. EPA*: An agency may avoid making a threshold determination if it provides some reasonable explanation with a basis in the statute "as to why it cannot or will not exercise its discretion."[32] The Clean Water Act provision at issue here was similar to the Clean Air Act provision at issue in *Massachusetts v. EPA*.[33]

Under the statutory structure in the Clean Water Act, the EPA Administrator can decline to make a prerequisite determination when the statute allows her to use discretion in making that specific threshold determination regarding whether a substantive standard has been satisfied.[34] According to *Massachusetts v. EPA*, the EPA's reasons for declining to make a necessity determination must be rooted in the statutory language of

---

presumptively unreviewable. *Id.* at 236 (quoting *Pub. Citizen, Inc.*, 343 F.3d at 464). The Notice of Deficiency mechanism is premised on a conclusion by the EPA that the state is not meeting the statutory requirements; within eighteen months after issuing a Notice of Deficiency, the EPA can sanction a non-compliant state if the state does not take corrective actions; and after making a Notice of Deficiency determination, the EPA must provide notice to the state before imposing sanctions. *Id.* at 236–37.

24. *Id.* at 237–38.
25. *Id.* at 240.
26. *Id.* at 240–41.
27. *Id.* at 241.
28. *Id.*
29. *Id.*
30. *Id.* at 242.
31. *Id.*
32. *Id.* (quoting Massachusetts v. EPA, 549 U.S. 497, 533 (2007)).
33. *Id.*
34. *Id.*

§ 1313(c)(4)(B).[35] The Fifth Circuit held that the EPA had discretion to decide not to make a necessity determination under § 1313(c)(4) of the Clean Water Act if it provided adequate explanation, grounded in the statute, for why it declined to do so.[36] Therefore, the court remanded the case to the district court to decide "whether the EPA's explanation for why it declined to make a necessity determination was legally sufficient."[37]

B. Belle Co. v. United States Army Corps of Engineers

Upon the request of Belle Company, the property owner, and Kent Recycling, a prospective purchaser (collectively Belle), the U.S. Army Corps of Engineers (the Corps) issued a jurisdictional determination that part of Belle's property constituted wetlands subject to the Clean Water Act, and that a 404 permit would be required prior to filling the property.[38] Belle sued the Corps, stating that the jurisdictional determination should be set aside because (1) the jurisdictional determination was arbitrary and capricious; (2) "the administrative appeal process, as applied to Belle, unconstitutionally deprived Belle of liberty and property interests without due process of law; and (3) that the Corps promulgated the change-in-use policy without the proper [Administrative Procedure Act (APA)] rulemaking procedures."[39] The Fifth Circuit affirmed the district court's decision and dismissed the suit for lack of subject matter jurisdiction, concluding that the Corps's jurisdictional determination was not a final agency action reviewable under the APA.[40]

While "[t]he United States may not be sued except to the extent it has consented to such by statute," the APA provides a waiver for claims seeking relief other than monetary damages.[41] In cases in which there is no relevant agency statute that "provides for judicial review, the APA authorizes judicial review only of 'final agency action[s].'"[42] If there is no final agency action, then the court lacks subject matter jurisdiction.[43]

For an agency action to be considered final, two conditions set forth in *Bennett v. Spear* must be met: (1) the action must be the consummation of the agency's final "decisionmaking process—it must not be of a merely tentative or interlocutory nature"; and (2) "the action must be one by which rights or obligations have been determined, or from which legal

35. *Id.* at 242–43.

36. *Id.* at 243.

37. *Id.* The Fifth Circuit provided guidance for the district court's analysis of the EPA's explanation of its denial of the rulemaking petition. *See id.* at 243–44.

38. Belle Co. v. U.S. Army Corps of Eng'rs, 761 F.3d 383, 386–87 (5th Cir. July 2014).

39. *Id.* at 387.

40. *Id.* at 394.

41. *Id.* at 387 (quoting Shanbaum v. United States, 32 F.3d 180, 182 (5th Cir. 1994)).

42. *Id.* at 387–88 (citing 5 U.S.C. § 702 (2012)).

43. *Id.* at 388.

consequences will flow."[44] Additionally, the person seeking judicial review of a final agency action must have no other adequate remedy in court.[45]

To meet the first prong of finality under *Bennett*, an agency must have "'asserted its final position on the factual circumstances underpinning' its action," thereby indicating that the action marks the consummation of the decision-making process.[46] This level of finality can be achieved when an agency action has gone "through an administrative appeal process and is not subject to further agency review."[47] Additionally, the mere possibility that an agency may reconsider its action upon further informal discussion and invited contentions of inaccuracy is not enough to deem an otherwise final agency action nonfinal.[48]

For an agency action to satisfy to the second *Bennett* prong, the action must be one "by which rights or obligations have been determined, or from which legal consequences will flow."[49] This occurs when the action has an effect on the person seeking review of the action, such as forbidding or compelling his conduct, or inflicting an actual, concrete injury on him.[50] Examples of final agency actions that meet this finality requirement are EPA notices of violations that carry adverse legal consequences or that require the payment of a monetary penalty.[51] The Fifth Circuit pointed to the consistency in the federal courts' evaluation of jurisdictional determinations, noting that since the Supreme Court's ruling in *Sackett*, courts have determined that jurisdictional determinations are not final agency actions.[52]

The Fifth Circuit determined that the jurisdictional determination was not subject to further formal review by the Corps because it was subject to, and actually underwent, the administrative appeal process within the Corps.[53] The jurisdictional determination was the Corps's issuance of its final position on the facts underlying jurisdiction and the finding of the presence of waters of the United States, as defined under the Clean Water Act, on Belle's property.[54] The jurisdictional determination was the "consummation of the Corps's decisionmaking process as to the question of jurisdiction," thereby satisfying the first *Bennett* finality prong.[55]

In applying the second *Bennett* prong and *Sackett* precedent to the jurisdictional determination at issue, the Fifth Circuit drew distinctions

---

44. *Id.* (citing Bennett v. Spear, 520 U.S. 154, 177–78 (1997)).
45. *Id.* (quoting Sackett v. EPA, 132 S. Ct. 1367, 1372 (2012)).
46. *Id.* at 389 (quoting Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 483 (2004)).
47. *Id.*
48. *Id.* at 388 (quoting *Sackett*, 132 S. Ct. at 1372).
49. *Id.* at 390 (quoting *Bennett*, 520 U.S. at 178).
50. *Id.* at 390–91 (citing Rochester Tel. Corp. v. United States, 307 U.S. 125, 129–30 (1939) and AT&T Co. v. EEOC, 270 F.3d 973, 975 (D.C. Cir. 2001)).
51. *Belle Co.*, 761 F.3d at 391.
52. *Id.*
53. *Id.* at 390.
54. *Id.*
55. *Id.*

between the Corps's jurisdictional determination and the EPA compliance order in *Sackett*.[56] The court concluded that the jurisdictional determination was not a final agency action under the second finality prong.[57] While the EPA compliance order imposed legal obligations requiring some kind of action from the property owner, here the jurisdictional determination was merely a notification of the Corps's classification of part of Belle's property as wetlands, and that a 404 permit would be required prior to any filling activities on the property.[58] Belle was not required to act or refrain from doing anything to its property.[59] Even before the issuance of the jurisdictional determination at Belle's request, if Belle had begun to fill, it would have still been susceptible to an enforcement action by the Corps or the EPA.[60] Belle would not have been relieved of its "responsibility to obtain the proper DA permits prior to working in wetlands that may occur on this property."[61] Additionally, the Fifth Circuit concluded that any state permit modification required under Louisiana law because of a 404 permit decision (Belle had not yet submitted its 404 permit application) was a future, alleged consequence insufficient to "transform nonfinal federal-agency action into final action for APA purposes."[62]

Unlike the EPA compliance order in *Sackett*, the Corps's jurisdictional determination did not impose coercive consequences, such as penalties through a future enforcement proceeding.[63] Furthermore, neither the jurisdictional determination itself, the Corps regulations, nor the Clean Water Act required Belle to comply with it.[64] Additionally, the jurisdictional determination did not limit Belle's ability to obtain a 404 permit.[65] In fact, the Fifth Circuit noted that it clarified Belle's actions—"informing Belle of the necessity of a 404 permit to avoid enforcement action."[66]

The Fifth Circuit held that the Corps rendered "no regulatory opinion as to Belle's ultimate goal to build a landfill" on the property, and it did not state that Belle was in violation of the Clean Water Act.[67] As a matter of policy, the court ruled that judicial review of jurisdictional determinations "would disincentivize the Corps from providing them, would undermine the system through which property owners can ascertain their rights and evaluate their

56. *Id.* at 391.
57. *Id.* at 394.
58. *Id.* at 391.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 392.
63. *Id.*
64. *Id.*
65. *Id.* at 393.
66. *Id.*
67. *Id.* at 393–94.

options with regard to their properties *before* they are subject to compliance orders and enforcement actions for violations" of the Clean Water Act.[68]

Accordingly, the Fifth Circuit held that the jurisdictional determination failed the second prong and was not a final agency action from which legal consequences flowed or by which rights or obligations had been determined.[69] Although it marked the consummation of the Corps's decision-making process, the Fifth Circuit held that the jurisdictional determination was not a reviewable final agency action under the APA and affirmed the district court's dismissal for lack of subject matter jurisdiction.[70] The court also considered the due process violation and the change-in-use policy violation of the APA alleged by Belle.[71] The district court dismissed all of the claims without prejudice and did not reach Belle's claims on these issues.[72]

On its appeal to the Fifth Circuit, Belle only raised "an as-applied challenge to the Corps's conduct in Belle's administrative appeal process" and argued that its due process claim provided an independent basis for jurisdiction under 28 U.S.C. § 1331—federal question jurisdiction.[73] However, the APA does not create an independent grant of jurisdiction; jurisdiction exists under § 1331 and the APA then serves as a waiver of sovereign immunity.[74] Therefore, the Fifth Circuit determined that because 28 U.S.C. § 1331 does not provide a general waiver of sovereign immunity, Belle still needed to prove that the government waived its immunity under the APA.[75]

The court found that the only waiver of sovereign immunity that Belle cited to was the APA itself, and Belle did not assert "a statutory waiver of sovereign immunity for its due process claim or argue" its claim under the APA.[76] Additionally, Belle did not assert that the jurisdictional determination and the associated administrative process, as applied to Belle, were final agency actions.[77] Therefore, the Fifth Circuit affirmed "the district court's dismissal of this claim for lack of subject-matter jurisdiction."[78]

Belle also argued that the change-in-use policy promulgated in the Stockton Rules, rules that on their face apply only to the Corps's Jacksonville

68. *Id.* at 394.
69. *Id.*
70. *Id.* at 390, 394.
71. *Id.* at 394–97.
72. *Id.* at 394–95.
73. *Id.* at 395.
74. *Id.* (citing Stockman v. FEC, 138 F.3d 144, 151 n.13 (5th Cir. 1998)).
75. *Id.* (quoting Voluntary Purchasing Grps., Inc. v. Reilly, 889 F.2d 1380, 1385 (5th Cir. 1989)); *see* Taylor-Callahan-Coleman Cntys. Dist. Adult Prob. Dep't v. Dole, 948 F.2d 953, 956 (5th Cir. 1991).
76. *Belle Co.*, 761 F.3d at 396.
77. *Id.*
78. *Id.*

District, violated the APA rulemaking requirements.[79] Further, Belle asserted "that the Corps violated a nationwide injunction when it applied" the Stockton Rules in the jurisdictional determination for Belle's property.[80] The Fifth Circuit concluded that because the Stockton Rules had limited application to five applications of prior-converted croplands in the Jacksonville District, and because the jurisdictional determination did not purport to apply the Stockton Rules to Belle's property, it was irrelevant to Belle's property in the New Orleans District.[81] Moreover, Belle's property had been "classified as commenced-conversion cropland at least as early as 2003" and not prior-converted cropland, which is subject to the Stockton Rules.[82] The Fifth Circuit concluded it was "not clear how any action with regard to the Stockton Rules would redress Belle's alleged injury."[83] Therefore, the Fifth Circuit affirmed "the district court's dismissal of this claim for lack of subject-matter jurisdiction."[84]

II. JUDICIAL REVIEW OF AGENCY DECISIONS UNDER THE CLEAN AIR ACT: *LUMINANT GENERATION CO. V. EPA*

Luminant Generation Company, L.L.C. (Luminant), the owner and operator of two coal-fired power plants, petitioned the district court for review of a Notice of Violation (NOV) issued by the EPA in 2012 and amended by the agency in 2013.[85] The EPA issued the NOVs under § 7413(a) of the Clean Air Act for actions taken by Luminant during scheduled outages from 2005 to 2010 and alleged violations of (1) the Clean Air Act's Prevention of Significant Deterioration (PSD) provisions, (2) Texas's PSD provisions, (3) Texas's State Implementation Plan (SIP),

---

79. *Id* at 386–87 (discussing the Stockton Rules). In 2005, the Corps and the Natural Resources Conservation Services jointly issued guidance regarding property designations, "which stated that a previous designation as prior-converted cropland would" continue to be valid if a property was devoted to agricultural use; however, if the property changed to a non-agricultural use, the prior-converted cropland designation was invalid. *Id.* This was called the "change-in-use policy." *Id.* at 387. In 2009, the Corps issued the Stockton Rules, an Issue Paper and Memorandum issued by the Corps, which only governs jurisdictional determinations made in the Jacksonville District in Florida. *Id.* The Stockton Rules "applied the 2005 Guidance to five properties in the Everglades and found that" because the properties had changed from an agricultural to a non-agricultural use, they were not prior-converted croplands. *Id.* Belle was not party to the case regarding the Stockton Rules, upon which Belle relied. *See* New Hope Power Co. v. U.S. Army Corps of Eng'rs, 746 F. Supp. 2d 1272 (S.D. Fla. 2010). In *New Hope*, the Florida district court enjoined the Corps from using the Stockton Rules because they were a final agency action that violated the APA's rulemaking requirements. *Id.* at 1283–84.

80. *Belle Co.*, 761 F.3d at 396.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 397.

85. Luminant Generation Co. v. EPA, 757 F.3d 439, 441 (5th Cir. July 2014). Luminant "owns and operates the Martin Lake Power Plant and operates the Big Brown Power Plant owned by Big Brown Power Company LLC ("Big Brown"). Energy Future Holdings . . . is the . . . corporate parent of Luminant and Big Brown." *Id.* at 440.

(4) Texas's Title V program, and (5) Title V of the Act.[86] The Fifth Circuit concluded that the NOVs were not "final agency actions" and, as a result, the court lacked subject matter jurisdiction to review them.[87]

To have subject matter jurisdiction, a challenged agency action must be a "final action."[88] A final action under Clean Air Act § 7607(b)(1) must meet the same requirements as a final agency action under the APA.[89] Therefore, a petitioner must show that the agency action is the consummation of the agency's decision-making process, and that the action is "one by which rights or obligations have been determined, or from which legal consequences will flow."[90]

The Fifth Circuit held that the EPA does not undertake final agency action when it issues a NOV under § 7413(a) of the Clean Air Act.[91] The EPA does not commit to any particular course of action when it issues a NOV.[92] The Clean Air Act clearly sets forth that NOVs are intermediate and inconclusive, allowing the EPA to pursue various courses of action after the issuance of a NOV, from bringing a civil action to taking no further action at all.[93] Therefore, a notice is not the end of the EPA's decision-making process.[94]

The Fifth Circuit also held that the notice did not affect Luminant's rights and no legal consequences flowed from it.[95] The Clean Air Act and the Texas SIP set forth Luminant's rights and obligations, not the EPA's NOVs.[96] "Issuing a notice of violation does not create any legal obligation, alter any rights, or result in any legal consequences and does not mark the end of the EPA's decisionmaking process."[97]

The court also rejected Luminant's argument that the NOVs were the same as orders issued under Clean Air Act § 7413 and distinguished the two agency actions.[98] Before it issues an order, the EPA is required to give notice, whereas notices themselves do not require an order, demonstrating their interlocutory nature.[99] Notices do not require the EPA to confer with regulated entities in the same way that orders do, and "nothing in the Clean

86. *Id.*

87. *Id.* at 444. The Fifth Circuit consolidated and considered Luminant's separate claims against the NOV issued in 2012 and the amended NOV from 2013. *Id.* at 441.

88. *Id.* (citing 42 U.S.C. § 7607(b)(1) (2012)).

89. *Id.* (citing Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 478 (2001)).

90. *Id.* (quoting Nat'l Pork Producers Council v. EPA, 635 F.3d 738, 755 (5th Cir. 2011)).

91. *Id.* at 442.

92. *Id.*

93. *Id.* After the issuance of a NOV, the EPA "*may* 'issue an order,' 'issue an administrative penalty' after a formal administrative hearing, or 'bring a civil action,'" or it may withdraw or amend the NOV, or take no further action. *Id.* (citing 42 U.S.C. § 7413(a)(1)).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 444.

98. *Id.* at 443.

99. *Id.*

Air Act requires a regulated entity to 'comply' with a notice."[100] The EPA may assess double penalties for violations of an order or the Clean Air Act directly, but because notices do not require compliance, there are no penalties associated with them.[101] Thus, NOVs do not share the same finality as orders.[102]

The Fifth Circuit declined to split from the other circuit courts, which collectively do not treat notices, like the ones at issue in the case, as final agency actions.[103] Moreover, Luminant did not provide any convincing reason for the Fifth Circuit to create a circuit split.[104] Because the EPA's NOVs did not meet the finality test, the Fifth Circuit dismissed the case for want of subject matter jurisdiction.[105]

III. ARRANGER LIABILITY UNDER CERCLA: *VINE STREET LLC V. BORG WARNER CORP.*

Vine Street LLC (Vine Street) purchased property on which a dry cleaning facility, College Cleaners, had previously operated.[106] College Cleaners ran the dry cleaning business in collaboration with a company called Norge, a former subsidiary of Borg Warner Corp.[107] Norge played an active role in College Cleaners's operations—it designed the facility, supplied College Cleaners with several dry cleaning machines, installed and tested the machines, and sent an initial supply of perchloroethylene (PERC)—a chemical used in the dry cleaning process.[108] Norge also designed the drainage system that connected the machines to the sewer system and equipped the dry cleaning machines with water separators to recycle PERC for future use.[109]

---

100. *Id.* The Fifth Circuit even stated that "it makes no sense to say that an entity must comply with a notice or that it has violated a notice." *Id.*

101. *Id.*

102. *Id.* The Fifth Circuit also distinguished the cases cited by Luminant—*Harrison v. PPG Industries, Inc.*, 446 U.S. 578 (1980), and *Sackett v. EPA*, 132 S. Ct. 1367 (2012)—from the facts in this case. *Id.* at 443–44. The court stated that *PPG Industries* did not provide any guidance on the finality of agency actions because the parties agreed that the EPA's decision was a final action. *Id.* at 443. The agency action in *Sackett* was an EPA compliance order under the Clean Water Act, not a NOV, which the Supreme Court found to be a final action. *See id.*

103. *Id.* at 444.

104. *Id.*

105. *Id.* The Court also stated that Luminant could challenge the notices in district court once the EPA takes enforcement action. *Id.* Luminant had already raised the same arguments in district court. *Id.* "Regulated entities have a full opportunity to challenge the adequacy or sufficiency of such notices once the EPA takes final action." *Id.*

106. Vine St. LLC v. Borg Warner Corp., 776 F.3d 312, 314–15 (5th Cir. Jan. 2015).

107. *Id.* at 314.

108. *Id.*

109. *Id.*

After Vine Street purchased the property, it discovered that the property was contaminated with PERC.[110] Vine Street sued several parties, including Borg Warner, to offset the costs it incurred as a result of cleaning up the property.[111] The district court found that Borg Warner was a responsible person under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Texas Solid Waste Disposal Act (TSWDA) and was 75% responsible for the past, present, and future cleanup costs, along with other expenses.[112] The Fifth Circuit considered the district court's legal conclusion that Borg Warner was a responsible person under CERCLA and TSWDA in light of the Supreme Court's decision in *Burlington Northern & Santa Fe Railway Co. v. United States*.[113] The court vacated the district court's judgment and remanded the case for entry of judgment in favor of Borg Warner.[114]

To establish liability under CERCLA, a plaintiff must establish the following statutory requirements:

> (1) that the site in question is a "facility" as defined in [42 U.S.C.] § 9601(9); (2) that the defendant is a responsible person under [42 U.S.C.] § 9607(a); (3) that a release or a threatened release of a hazardous substance has occurred; and (4) that the release or threatened release has caused the plaintiff to incur response costs.[115]

At issue on appeal in the Fifth Circuit was the second requirement—whether Borg Warner was a responsible person under CERCLA's "arranger" category.[116] An arranger is

> any person who by contract, agreement, or otherwise arranged for disposal or treatment, or otherwise arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances.[117]

In the Fifth Circuit, the arranger-liability standard prior to *Burlington Northern* incorporated the "useful product" doctrine, which means that "a party is not liable as an arranger if it [was] engaged in the mere sale of a

---

110. *Id.* at 315.
111. *Id.*
112. *Id.* at 313–14. Vine Street was responsible for the remainder of the cleanup costs. *See id.*
113. *Id.* (citing Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 619 (2009)).
114. *Id.* at 314.
115. *Id.* at 315 (alterations in original) (quoting Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 668 (5th Cir. 1989)).
116. *Id.*
117. *Id.* at 315–16 (citing 42 U.S.C. § 9607(a)(3) (2012)).

useful product that is not properly considered to be 'waste.'"[118] The Fifth Circuit did not require an intentional disposal of waste; liability as an arranger only required that a "sufficient 'nexus' exist between the purported arranger and the disposal of waste."[119] After the ruling in *Burlington Northern*, however, this standard partially changed.[120]

In *Burlington Northern*, the Supreme Court clarified arranger liability under CERCLA.[121] The Court stated that the term *arrange* implies action directed to a specific purpose, and defined an "arranger" as an entity that may have taken intentional steps to dispose of hazardous waste.[122] The Court described two illustrative scenarios on the spectrum of arranger-entity liability:

> (1) an entity is always liable under CERCLA if it enters into a transaction "for the sole purpose of discarding a used and no longer useful hazardous substance"; and (2) an entity is *not* liable under CERCLA "merely for selling a new and useful product if the purchaser of that product later, and unbeknownst to the seller, disposed of the product in a way that led to contamination.[123]

The Supreme Court held that a company's mere awareness of frequent chemical spills by its customers or its ability to anticipate spills is insufficient to establish arranger liability, especially when any disposal by the customer "occurs as a peripheral result of the legitimate sale of an unused, useful product."[124]

Because Borg Warner acknowledged that it shared its liability with Norge, the Fifth Circuit's analysis centered on Norge's actions.[125] The court narrowed the focus of its inquiry to the interpretation of the phrase "arranged for disposal of hazardous substances" as it applied to Norge.[126] In light of *Burlington Northern*, the Fifth Circuit noted that the term *arrange* implies a scienter requirement, and the term *disposal* draws a distinction between waste and useful products.[127] As such, an examination of the underlying transaction and its purpose regarding the hazardous substances, as well as the actions of the purported arranger, are necessary to determine liability.[128] Under this evaluation, the court stated that entities that attempt to dispose of hazardous wastes or substances through deceptive guises to escape liability

118. *Id.* at 317.
119. *Id.* (citing Geraghty & Miller, Inc. v. Conoco, Inc., 234 F.3d 917, 929 (5th Cir. 2000)).
120. *Id.*
121. *Id.* at 316–17.
122. *Id.* (quoting Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 611 (2009)).
123. *Id.* at 316 (quoting *Burlington N.*, 556 U.S. at 610).
124. *Id.* at 316–17.
125. *Id.* at 316.
126. *Id.*
127. *Id.* (citing 42 U.S.C. § 9607(a)(3) (2012)).
128. *Id.* at 318 (discussing the Supreme Court's analysis of Shell's actions in *Burlington Northern*).

for their disposal are liable as arrangers under CERLCA.[129] Therefore, to assert CERCLA liability, a "plaintiff must establish that the purported arranger took 'intentional steps to dispose of a hazardous substance.'"[130]

When viewed under the *Burlington Northern* standard, the Fifth Circuit determined that Norge's actions were plainly unintentional—the business relationship between Norge and College Cleaners was not created for the disposal of waste but instead involved the successful operation of a dry cleaning business.[131] Norge sold PERC to College Cleaners as an unused, useful product necessary to College Cleaners's dry cleaning operations.[132] Norge designed the dry cleaning machines to recycle as much PERC as possible, and the recycled PERC was then used by College Cleaners.[133] Moreover, Norge took additional measures to reduce any discharges of PERC after it learned that its water separators were not completely recycling PERC and that spills were occurring.[134]

The Fifth Circuit held that Norge's subsequent remedial measures and its design of the water separators cut against a finding of intent.[135] The court concluded that according to the *Burlington Northern* standard, Norge did not intend to discharge or dispose of PERC; therefore, Borg Warner was not an arranger under CERCLA.[136]

Under the TSWDA, an entity is an arranger if

> (3) by contract, agreement, or otherwise, arranged to process, store, or dispose of, or arranged with a transporter for transport to process, store, or

---

129. *Id.* at 319 (quoting Dayton Indep. Sch. Dist. v. U.S. Mineral Prods. Co., 906 F.2d 1059, 1066 (5th Cir. 1990)).

130. *Id.* at 317 (quoting Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 611 (2009)).

131. *Id.* at 318–19.

132. *Id.* at 318. The Fifth Circuit likened the business relationship between Norge and College Cleaners to the relationship between Shell and its distributors in *Burlington Northern*. *Id.* Like Norge, Shell sent useful chemicals to distributors and did not intend to dispose of them. *Id.* Furthermore, "Shell took steps to encourage its distributors to reduce the likelihood of such spills" after it became aware of their occurrence. *Id.* The court contrasted these business transactions to the one in *United States v. General Electric Co.*, in which the alleged arranger accumulated a surplus of low-quality scrap material, sold it at bargain prices to manufacturers, and continued to send the scrap materials even after payment was suspended. *Id.* at 319 (citing United States v. Gen. Elec. Co., 670 F.3d 377, 380 (1st Cir. 2012)). These suspicious facts demonstrated that the arranger did not view the product as valuable and instead "attempted to dispose of excess waste products through the guise of a legitimate transaction." *Id.*

133. *Id.* at 318–19.

134. *Id.* at 319.

135. *Id.* at 320. The Fifth Circuit also distinguished Norge's actions from the purported arranger's actions in *Team Enterprises, LLC v. Western Investment Real Estate Trust*. *Id.* In that case, although the Ninth Circuit noted, in dicta, that the manufacturer connected the equipment to the sewer, it "plainly did not hold that merely connecting dry cleaning equipment" was sufficient evidence of intent. *Id.* (citing Team Enters., LLC v. W. Inv. Real Estate Tr., 647 F.3d 901, 911 (9th Cir. 2011)). The equipment manufacturer was not a CERCLA arranger. *Id.* Moreover, both the equipment in *Team Enterprises* and Norge's machines had the obvious purpose of recovering recyclable, usable PERC that would have otherwise been discarded. *Id.*

136. *Id.*

> dispose of, solid waste owned or possessed by the person, by any other person or entity at:
>
> (A) the solid waste facility owned or operated by another person or entity that contains the solid waste; or
>
> (B) the site to which the solid waste was transported that contains the solid waste.[137]

In *Celenese Corp. v. Martin K. Eby Construction Co.*, the Fifth Circuit held that it was confident that the Texas Supreme Court would apply *Burlington Northern* to a party's SWDA claim.[138] Therefore, the court held that Vine Street's TSWDA claims failed for the same reasons as its CERCLA claims.[139]

IV. DEEPWATER HORIZON LITIGATION

In 2008, BP Exploration & Production, Inc. (BP) obtained a lease from the United States for oil and natural gas reservoirs in the Gulf of Mexico.[140] BP and its affiliates entered into contracts in which Transocean Deepwater Drilling Co. (Transocean) provided a drilling rig and crews to drill wells under the supervision of BP.[141] The mobile offshore drilling rig was known as the *Deepwater Horizon*.[142]

In 2010, the crew of the *Deepwater Horizon* was working to temporarily abandon a well—known as the Macondo Well—by sealing it with cement, allowing the crew to retrieve the oil and gas later.[143] This action caused the well to blowout and the *Deepwater Horizon* to explode, resulting in the death of eleven men, severe injuries to several others, and millions of gallons of oil and other chemicals being spilled into the Gulf of Mexico.[144] As a result of the explosion and oil spill, years of litigation has ensued. Below are summaries of some of the Deepwater Horizon cases from this year's survey period.

---

137. TEX. HEALTH & SAFETY CODE ANN. § 361.271(a)(3)(A)–(B) (West Supp. 2015).

138. *Vine Street*, 776 F.3d at 321 (quoting Celanese Corp. v. Martin K. Eby Constr. Co., 620 F.3d 529, 534 (5th Cir. 2010)).

139. *Id.*

140. United States v. Kaluza, 780 F.3d 647, 650 (5th Cir. Mar. 2015). In *Kaluza*, the Fifth Circuit affirmed the district court's dismissal of a twenty-three count indictment, including eleven counts of seaman's manslaughter against two of BP's well-site operators, because neither defendant fell within the purview of the criminal statute. *Id.* While *Kaluza* focused on the defendant's criminal conduct, it also presents a detailed description of the events leading up to the explosion on the *Deepwater Horizon*. *See id.* at 650–53.

141. *Id.* at 650.

142. *Id.*

143. *Id.* at 652.

144. *Id.* at 652–53.

A. United States v. Transocean Deepwater Drilling, Inc.

In this case, the Fifth Circuit considered whether the Chemical Safety and Hazard Investigation Board (the Board) had authority to investigate the Deepwater Horizon incident and whether the Board had authority to issue administrative subpoenas relating to that investigation.[145] The Fifth Circuit affirmed the district court's order and concluded that the Board had authority to investigate the incident at the well and to issue administrative subpoenas.[146]

The Board was created under "the Clean Air Act Amendments of 1990 and modeled after the National Transportation Safety Board" (NTSB).[147] The Board was created in part to investigate accidental releases of hazardous substances into the ambient air and to report its findings to the public with the goal of minimizing the risk of industrial chemical accidents.[148]

The Board has the authority to issue administrative subpoenas as a part of its investigative procedures.[149] "Administrative subpoenas issued in aid of an investigation will generally be enforced judicially if '(1) the subpoena is within the statutory authority of the agency; (2) the information sought is reasonably relevant to the inquiry; and (3) the demand is not unreasonably broad or burdensome.'"[150]

The Board issued five subpoenas to Transocean as a part of its investigation into the explosion, fire, and oil spill at the Macondo Well.[151] Transocean argued the Board lacked authority to conduct an investigation because the incident did not occur on a stationary source and was a marine spill, which the Board has no jurisdiction over.[152] As a result, Transocean failed to fully comply with the Board's subpoenas.[153] The district court determined the Board investigated "only the release of airborne gases from the blowout and explosion" and not the oil spill itself.[154] The Board would only be precluded from an investigation of the incident if it involved a marine oil spill that the NTSB was authorized to investigate.[155]

Transocean claimed that the *Deepwater Horizon* did not meet the statutory definition of "stationary source."[156] Stationary sources are "any buildings, structures, equipment, installations or substance emitting

145. United States v. Transocean Deepwater Drilling, Inc., 767 F.3d 485, 488 (5th. Cir. Sept. 2014).
146. *Id.* at 496.
147. *Id.* at 488.
148. *Id.*
149. *See id.*
150. *Id.* (quoting Burlington N. R.R. Co. v. Office of Inspector Gen., R.R. Ret. Bd., 983 F.2d 631, 638 (5th Cir. 1993)).
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.* at 489.

stationary activities (i) which belong to the same industrial group, (ii) . . . located on one or more contiguous properties, (iii) . . . under the control of the same person . . . , and (iv) from which an accidental release may occur."[157] The Fifth Circuit disagreed with Transocean's argument that because the word *stationary* is not defined separately from the term *stationary source*, courts should construe the term *stationary* in terms of its common meaning.[158]

Further, the Fifth Circuit explained that the question of whether the *Deepwater Horizon* is a vessel does not answer the question of whether it meets the Clean Air Act's definition of "stationary source."[159] When Congress provides a specific definition of a term, the courts must accept that meaning and limit its analysis to the definition provided.[160] The Fifth Circuit determined nothing under the Clean Air Act's definition of "stationary source" precluded a vessel from satisfying the statutory requirements.[161] The *Deepwater Horizon* was dynamically positioned and retained a complex thruster and satellite global positioning device to stabilize itself.[162] It remained in place for approximately two months.[163] While the *Deepwater Horizon* was capable of propulsion, that propulsion allowed units to arrive and remain in one place while in different locations to drill in deeper water.[164] "This economic advantage to the oil and gas industry does not mean, however, that the activity of the mobile drilling units cannot come under the [Board's] jurisdiction as a stationary source if other statutory conditions are met, even though the drilling unit is also a vessel."[165] The Fifth Circuit agreed with the district court that the drilling unit as a whole was a stationary source.[166]

Transocean next contended that the Board lacked jurisdiction to investigate the incident because the incident was a marine oil spill, which under the Clean Air Act, the Board is precluded from investigating.[167] The Board is statutorily permitted to "investigate (or cause to be investigated), determine and report to the public in writing the facts, conditions, and circumstances and the cause or probable cause of any accidental release resulting in a fatality, serious injury or substantial property damages."[168] "An 'accidental release' is 'an unanticipated emission of a regulated substance or

157. *Id.* (quoting 42 U.S.C. § 7412(r)(2)(C) (2012)).
158. *Id.* at 489–90.
159. *Id.* at 490 (citing 42 U.S.C. § 7412(r)(2)(C)).
160. *Id.*
161. *Id.*
162. *Id.* at 491.
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.* at 492.
167. *Id.*
168. *Id.* at 489 (quoting 42 U.S.C. § 7412(r)(6)(C)(i) (2012)).

other extremely hazardous substance into the ambient air from a stationary source.'"[169] The Fifth Circuit determined that the Board was investigating the release of gases and the explosion prior to the oil release and not the marine oil spill itself.[170] It was the release of these airborne gases that provided the Board with the authority to investigate, and Transocean's argument incorrectly assumed the Board could not investigate any release of gas associated with a marine oil spill.[171]

Transocean's statutory interpretation argument did not persuade the Fifth Circuit. The court concluded that the word *which* was preceded by a comma that did not create a nonrestrictive clause and did not preclude investigation by the Board.[172] However, "a purported plain-meaning analysis based only on punctuation is necessarily incomplete and runs the risk of distorting a statute's true meaning."[173] Additionally, the court will "disregard the punctuation, or repunctuate, if need be, to render the true meaning of the statute."[174] When looking at the full text of the statute, rather than the isolated provision suggested by Transocean, the structure of the statute and its purpose of public safety demonstrate that Congress did not intend to preclude the Board from investigating any incidents that involve marine oil spills.[175]

Further, the Fifth Circuit determined it was the Board and not the NTSB that was the appropriate entity to investigate.[176] Transocean argued that the *Deepwater Horizon* was a vessel in navigation and, therefore, because it related to transportation, the NTSB was the appropriate agency to investigate the incident.[177] The Fifth Circuit, however, determined the *Deepwater Horizon* was dynamically positioned and attached to the seabed for several months of operations.[178] Simply because a disaster involved a vessel does not mean the incident related to transportation.[179]

Judge Jones filed a dissenting opinion and argued that the majority's opinion disregarded the plain meaning of words and grammar under the Clean Air Act in construing the definition of a vessel.[180] The Board and NTSB routinely investigate accidents and, as a result, the statute that established the Board required the agency to cooperate or take a second seat to other agencies.[181] Judge Jones argued that the *Deepwater Horizon* was not

169. *Id.* (quoting 42 U.S.C. § 7412(r)(2)(A)).
170. *Id.* at 493.
171. *Id.* at 493–94.
172. *Id.* at 495.
173. *Id.* (quoting U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 454 (1993)).
174. *Id.* (quoting *U.S. Nat'l Bank of Or.*, 508 U.S. at 462).
175. *Id.* at 496.
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.* at 496–97.
181. *Id.* at 497.

a stationary source and that the Board lacked the authority to investigate.[182] Further, she argued that a vessel capable of transportation could not be a stationary source, thereby erasing the line between stationary and mobile sources.[183]

B. In re Deepwater Horizon *(May 1, 2015)*

The Mexican States of Veracruz, Tamaulipas, and Quintana Roo (Mexican States) filed suit against BP (the owner of the well, operator, and lessee), Transocean (the owner of the *Deepwater Horizon*), and Cameron (the manufacturer of the blowout preventer) for damages that resulted from the spill, including preparation and monitoring costs, water contamination, and lost economic revenue.[184] The district court granted summary judgment to BP, Transocean, and Cameron and determined that the Mexican States lacked the requisite proprietary interest to overcome the rule set forth in *Robins Dry Dock & Repair Co. v. Flint*.[185] Citing to a substantially similar suit brought by the Mexican federal government, the district court determined the Mexican federal government was the true owner of the property damaged and not the Mexican States.[186]

As a threshold question, the court considered the applicability of the *Robins Dry Dock* rule to this case.[187] The rule precludes "recovery 'for economic loss if that loss resulted from physical damage to property in which [the plaintiff has] no proprietary interest.'"[188] The *Robins Dry Dock* rule bars recovery for economic damages, absent physical injury to the proprietary interest of the plaintiff.[189] The plaintiff must show they are an owner of the damaged property, and when the plaintiff is not the owner, the *Robins Dry Dock* rule precludes economic recovery.[190] The purpose of the rule is to limit consequences of negligence and to exclude what could be widespread and open-ended indirect economic consequences.[191]

The Mexican States argued that the *Robins Dry Dock* rule is limited to civil negligence and other unintentional conduct and was inapplicable here because the only intentional conduct at issue was BP's guilty plea to intentional obstruction of a congressional investigation.[192] This intentional

182. *Id.*
183. *Id.* at 498.
184. State of Veracruz v. B.P., P.L.C. (*In re* Deepwater Horizon), 784 F.3d 1019, 1022 (5th Cir. May 2015).
185. *Id.* at 1023 (citing Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 307–09 (1927)).
186. *Id.*
187. *Id.*
188. *Id.* (alteration in original) (quoting Bertucci Contracting Co. v. Steele (*In re* Bertucci Contracting Co.), 712 F.3d 245, 246 (5th. Cir. 2013)).
189. *See id.*
190. *See id.*
191. *Id.* at 1024.
192. *Id.*

conduct made the Mexican States' damages worse because it caused or lulled regulatory authorities and others into delaying appropriate and mitigating actions.[193]

The Fifth Circuit explained that with only one exception, the criminal conduct at issue in this case was exclusively negligent; therefore, the Fifth Circuit began its analysis in consideration of criminal negligence.[194] The court first turned to the First Circuit's analysis in *Ballard Shipping Co. v. Beach Shellfish*.[195] In *Ballard Shipping*, the First Circuit held that criminal negligence does not bar application of the *Robins Dry Dock* rule.[196] The Fifth Circuit found the First Circuit's analysis persuasive and determined there was no reason to distinguish between civil and criminal negligence—particularly because criminal law had criminalized negligence in the context of oil spills in navigable waters.[197]

The Fifth Circuit next turned to BP's criminal obstruction of a congressional investigation.[198] The court agreed with the finding of the district court that intent to obstruct a congressional investigation did not directly correlate "to the intent to cause damage to the Mexican States."[199]

The Mexican States cited to four arguments to show they had a proprietary interest in the damaged property as required under the *Robins Dry Dock* rule.[200] First, the Mexican States pointed to certain statutory provisions.[201] Second, they looked to language in their own state constitutions.[202] Third, they obtained affidavits from state ministers from Tamaulipas and Qunitana Roo. Finally, the Mexican States obtained an affidavit from a real estate developer who argued he had significant interactions with the state of Tamaulipas in regards to a development.[203] The Fifth Circuit concluded that none of the sources cited to by the Mexican States proved they were the owners of the property at issue.[204] Rather, the court agreed with the district court and determined that the Mexican federal government was the true owner of the property.[205]

---

193. *Id.*
194. *Id.*
195. *Id.* (citing Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 624 (1st Cir. 1994)).
196. *Id.* at 1025; *see Ballard Shipping*, 32 F.3d at 631. In *Ballard Shipping*, an oil tanker ran aground and spilled hundreds of thousands of gallons of oil into a Rhode Island bay. *Ballard Shipping*, 32 F.3d at 624. Dealers of shellfish brought a lawsuit claiming violations of general maritime law, and the First Circuit dismissed the claims, relying on the *Robins Dry Dock* rule. *Id.* at 631.
197. *In re Deepwater Horizon*, 784 F.3d at 1025.
198. *Id.*
199. *Id.*
200. *Id.* at 1027.
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*

Contrary to the arguments of the Mexican States, the Fifth Circuit explained that the Mexican Supreme Court had "interpreted the term 'Nation' narrowly, stating that '[t]he nation cannot be mistaken for a state, and consequently, State officials are not the ones who represent it because it is unique and represented by its federal agencies.'"[206] Further, "all of the 'elements' that compose the national territory of Mexico (including their corresponding natural resources) belong to the Mexican Nation (and not to the Federation or to each of the federal entities), with the legal and political understanding that the Nation is represented by the federal government."[207] The Fifth Circuit also recognized that while the Mexican States hold some power, the elaborate regime of Mexican federal statutory law created federal supremacy with respect to the property at issue.[208]

Additionally, the Fifth Circuit held that the affidavits relied upon by the Mexican States were flatly contradicted by the Mexican Constitution.[209] The ultimate question was not whether the Mexican States had some authority to use or exploit the land, but rather whether their interests rose to the level required.[210] The court determined it did not.[211]

C. In re Deepwater Horizon *(November 5, 2014, and January 9, 2015)*

The Fifth Circuit readdressed its earlier June 2014 opinion regarding a civil enforcement action brought for violations of the Clean Water Act against BP and Anadarko Petroleum Corporation (Anadarko) for discharges of oil that resulted from the Deepwater Horizon oil spill.[212] The Fifth Circuit upheld the decision of the district court in that case, finding for the government and holding that oil released from Transocean's broken riser was a discharge from the well.[213]

BP and Anadarko filed Petitions for Rehearing, requesting an en banc rehearing of the Fifth Circuit's affirmation of a partial summary judgment award of the district court.[214] The Fifth Circuit considered BP's request for reconsideration.[215] While the court disagreed with BP's argument that its earlier opinion would sow error in the ongoing trial below, the court

206. *Id.* at 1028 (alteration in original) (quoting *In re* Oil Spill by the Oil Rig "Deepwater Horizon," 970 F. Supp. 2d 524, 533 (E.D. La. 2013)).

207. *Id.* (quoting JORGE A. VARGAS, MEXICO AND THE LAW OF THE SEA 9 (2011)).

208. *Id.* at 1029.

209. *Id.* at 1030.

210. *Id.*

211. *Id.* at 1030–31.

212. United States v. B.P. Expl. & Prod., Inc. (*In re* Deepwater Horizon), 753 F.3d 570, 571 (5th Cir. 2014); *see* Kellie E. Billings-Ray, Megan Maddox Neal & Mary E. Smith, *Environmental Law*, 47 TEX. TECH L. REV. 585, 587 (2015) (discussing civil litigation in the wake of the Deepwater Horizon oil spill).

213. *In re Deepwater Horizon*, 753 F.3d at 571.

214. *In re* United States v. B.P. Expl. & Prod., Inc. (*In re* Deepwater Horizon), 772 F.3d 350, 351–52 (5th Cir. Nov. 2014).

215. *Id.*

addressed some of BP's arguments to clarify its earlier opinion.[216] The court did not, however, alter its earlier decision to affirm the district court's opinion.[217]

First, BP and Anadarko alleged that there were factual errors in the opinion, and second, they alleged errors in the panel's legal analysis.[218] Despite Anadarko's arguments, the Fifth Circuit determined that there were no additional facts that would change its determination that controlled confinement was lost in the well, and the only facts material to this analysis were undisputed.[219] The Fifth Circuit explained that its findings in its earlier opinion did not intend to imply that cement had created a successful seal, and the court record was clear that the cement job failed to prevent hydrocarbons from migrating into the wellbore.[220]

Next, Anadarko argued that it was denied its Seventh Amendment right to a jury trial because it was not allowed to present evidence to show what time controlled confinement was lost.[221] But the Fifth Circuit found that the district court did not place any limit on the amount of admissible evidence Anadarko could put forward to oppose the government's summary judgment motion.[222] Further, Anadarko stated in its summary judgment briefing that there were no disputes of material fact concerning this issue.[223] Both BP and Anadarko attempted to shift the focus to the *Deepwater Horizon* owned by Transocean.[224] The Fifth Circuit, however, affirmed that its finding that controlled confinement was lost in the well did not preclude a determination that controlled confinement was lost elsewhere.[225]

The Fifth Circuit next turned to the alleged legal errors in its opinion.[226] BP and Anadarko questioned the Fifth Circuit's "conclusion that 'a vessel or facility is a point "from which oil or a hazardous substance is discharged" if it is a point at which controlled confinement is lost.'"[227] The court disagreed with BP's interpretation that only one instrumentality can bear Clean Water Act liability for a discharge of a given quantum of oil—a theory that would have suggested Transocean could not be held liable at all.[228] The Fifth Circuit, however, noted that its earlier opinion made it clear that culpability on the part of *Deepwater Horizon*'s operators did not eliminate the well

---

216. *Id.* at 352.
217. *See id.*
218. *Id.* at 352–54.
219. *Id.* at 353.
220. *Id.* at 352.
221. *Id.* at 353.
222. *Id.*
223. *Id.*
224. *Id.* at 354.
225. *Id.*
226. *Id.*
227. *Id.* (quoting United States v. B.P. Expl. & Prod., Inc. (*In re* Deepwater Horizon), 753 F.3d 570, 573 (5th Cir. 2014)).
228. *Id.*

owners' liability.[229] Because Transocean had settled its claims, the Fifth Circuit determined it did not need to consider whether the well was a discharge from the *Deepwater Horizon*.[230]

The Fifth Circuit rejected BP and Anadarko's arguments that the movement of oil into a vessel constitutes a discharge.[231] The mere moving of oil from a facility into a vessel does not necessarily result in a loss of controlled confinement and does not necessarily mean oil will enter into navigable waters.[232] A vessel is not the only liable entity when controlled confinement of oil in a facility is lost because it enters a vessel and then navigable waters.[233]

BP and Anadarko argued that the panel incorrectly included a "control" element in its definition of "discharge" under the Clean Water Act.[234] The panel's determination of whether the well was at a point where "controlled confinement was lost (without regard to which party, if any, was responsible for the loss of control)" was, however, totally consistent with such a test.[235] Anadarko attacked the opinions determining the point at which oil is discharged as being unworkable.[236] But Anadarko failed to provide any reason why it would be difficult to establish where controlled confinement was lost in a system that was interconnected.[237]

The Fifth Circuit also declined BP and Anadarko's contentions that the panel should have applied the anti-penalty canon or the rule of lenity to construe § 311 narrowly so it would not apply to them.[238] "[S]uch presumptions are warranted only 'if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended.'"[239]

The Fifth Circuit denied BP and Anadarko's Petition for Rehearing En Banc, but a dissenting opinion, authored by Judge Clement and joined by Judges Jolly, Jones, Owen, Elrod, and Southwick, called for a rehearing.[240] Contrary to the majority opinion, Judge Clement was concerned that the denial of the rehearing would ensure that precedent concerning liability for

229. *Id.* at 355.
230. *Id.*
231. *Id.* at 356.
232. *Id.*
233. *Id.*
234. *Id.* at 357.
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.* (quoting Barber v. Thomas, 560 U.S. 474, 488 (2010)).
240. United States v. B.P. Expl. & Prod., Inc. (*In re* Deepwater Horizon), 775 F.3d 741, 742 (5th Cir. Jan. 2015). Judges Jolly, Jones, Clement, Owen, Elrod, and Southwick voted in favor of rehearing, and Chief Judge Stewart and Judges Davis, Dennis, Prado, Haynes, Graves, and Costa voted against rehearing. *Id.*

oil spills under the Clean Water Act would continue to be unclear.[241] The Clean Water Act provides that liability is for the "'owner, operator, or person in charge of any vessel . . . or offshore facility from which oil . . . is discharged' into navigable waters."[242] Discharge is defined as spilling, leaking, pumping, pouring, emitting, emptying, or dumping.[243] Judge Clement explained that the panel opinion defined discharge as the loss of controlled confinement, and that this test is inconsistent with the language of the Clean Water Act.[244]

In addition, Judge Clement argued that the panel's issuance of a supplemental opinion suggested it determined an ambiguity existed in the Clean Water Act and ignored clear precedent holding that when ambiguities exist in civil-penalty statutes, those ambiguities should be resolved in the defendant's favor.[245] Further, the panel incorrectly applied the new controlled confinement test by holding confinement was lost in the well when hydrocarbons moved from formation into the well—despite the fact that hydrocarbons traveled through the blowout preventer and rose before entering the Gulf of Mexico and despite the determination that no hydrocarbons were confined and the well was not designed to confine them.[246] Thus, Judge Clement argued that the panel's holding failed to reconcile that even though hydrocarbons were never confined in the well, controlled confinement was lost in the well.[247]

Finally, Judge Clement stated that the supplemental opinion changed the panel opinion's holding, leaving unclear the law of the circuit by holding there was never confinement in the well.[248] She argued that the absence of the confinement test is further from the text of the Clean Water Act and implicates a greater number of potentially liable actors.[249]

V. ENDANGERED SPECIES ACT: *ARANSAS PROJECT V. SHAW*

In December 2014, the Fifth Circuit superseded its earlier June 2014 opinion in *Aransas Project v. Shaw*.[250] The court's new opinion does not significantly diverge from its earlier opinion.

After the death of twenty-three cranes from the world's only wild whooping crane flock, The Aransas Project (TAP) sued the Texas

241. *Id.*
242. *Id.* at 742–43 (quoting 33 U.S.C. § 1321(b)(7)(A) (2012)).
243. *Id.* at 743.
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. Aransas Project v. Shaw, 756 F.3d 801, *amended and superseded by* 775 F.3d 641 (5th Cir. Dec. 2014) (per curiam).

Commission on Environmental Quality (TCEQ) under the Endangered Species Act (the Act).[251] TAP sought an injunction that prohibited the TCEQ from issuing any permits to withdraw river waters from the estuary where the cranes winter.[252] The Fifth Circuit ultimately held the whooping crane deaths were too remote from the TCEQ authorized withdrawal of water from the rivers, and the State could not be held liable for a "take" under the Act.[253] For a discussion of this case, see last year's Environmental Law Survey Article.[254]

VI. MIGRATORY BIRD TREATY ACT AND THE EAGLE PROTECTION ACT: *MCALLEN GRACE BRETHREN CHURCH V. SALAZAR*

Attendees of a powwow, a Native American religious ceremony, were in possession of eagle feathers without the permit required under the Migratory Bird Treaty Act (MBTA).[255] One of the attendees identified as a member of the Lipan Apache Tribe, a tribe that is not recognized by the federal government.[256] After abandoning the feathers, several interested parties, including an attendee, sued the Department of Interior (Department), arguing that the confiscation of eagle feathers violated the Free Exercise Clause of the First Amendment.[257] The district court granted the Department's motion for summary judgment.[258] The Fifth Circuit reversed the district court's grant and held that the Department did not provide sufficient evidence that the regulatory scheme "of limiting permits for the possession of eagle feathers to members of federally recognized tribes survive[d] the scrutiny required by" the Religious Freedom Restoration Act (RFRA).[259]

The MBTA, enacted in 1916, "prohibits the harming, selling, or possessing of migratory birds or their parts" but grants the Department the authority to permit takings of migratory birds when compatible with the terms of the various conventions.[260] In 1940, the Eagle Protection Act was passed to "protect the bald eagle from extinction because it is 'a symbol of the American ideals of freedom.'"[261] Specifically, the Eagle Protection Act "prohibits the taking, possession, sale, barter, purchase, transport, export, or import of bald eagles or golden eagles or any parts of bald eagles or golden

251. *Shaw*, 775 F.3d at 641.
252. *Id.* at 645.
253. *Id.* at 664.
254. Billings-Ray, Neal & Smith, *supra* note 212.
255. McAllen Grace Brethren Church v. Salazar, 764 F.3d 465, 468–69 (5th Cir. Aug. 2014).
256. *Id.*
257. *Id.* at 469.
258. *Id.*
259. *Id.* at 468.
260. *Id.* at 469 (citing 16 U.S.C. § 703(a) (2012)).
261. *Id.* (quoting Eagle Protection Act, 76 Pub. L. No. 567, 54 Stat. 250 (1940)).

eagles, except as permitted by the Secretary of the Interior."[262] When compatible with the preservation of eagles, the Secretary may issue permits for the taking of eagles or eagle parts for "public museums, scientific societies, zoos, Indian religious uses, wildlife protection, agricultural protection, and 'other interests.'"[263] Such permits may be given to Native Americans who are authentic, bona fide practitioners of such religion, and under the current regulatory structure, must demonstrate that they are members of federally recognized tribes.[264] After the Secretary of the Interior issues a permit, the permit is sent to the National Eagle Repository in Colorado, which distributes dead eagle parts "to qualified permit applicants on a first-come, first-served basis."[265] Orders for loose eagle feathers can take approximately six months to fulfill.[266]

RFRA prohibits government action that substantially burdens the "exercise of religion even if the burden results from a rule of general applicability."[267] The government may substantially burden the exercise of religion when it demonstrates that the burden "(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[268] The compelling interest test is a question of law and fact and "requires the government to explain how applying the statutory burden to the person whose sincere exercise of religion is being seriously impaired furthers the compelling governmental interest."[269] The governmental interest must be closely tailored to the law,[270] and when a regulatory scheme provides an exception for a specific group, "the government will have a higher burden in showing that the law, as applied, furthers the compelling governmental interest."[271] The government bears the burden of proof in these cases.[272]

Additionally, the "least restrictive means" test is an exceptionally demanding test that is a severe form of the narrowly tailored test.[273] The Fifth Circuit emphasized the heavy burden of proof the least restrictive means test places on the government, especially in light of *Hobby Lobby*.[274] Here, the Fifth Circuit stated that the Department "must demonstrate that 'no

262. *Id.* (citing 16 U.S.C. §§ 668, 668a). In 1962, the Eagle Protection Act did not initially apply to golden eagles or contain exceptions for Native American tribes as it does now. *Id.*

263. *Id.*

264. *Id.*

265. *Id.* at 470.

266. *Id.*

267. *Id.* at 471.

268. *Id.* (quoting 42 U.S.C. § 2000bb-1(a)–(b) (2012)).

269. *Id.* at 471–72 (quoting Tagore v. United States, 735 F.3d 324, 330–31 (5th Cir. 2013)).

270. *Id.* at 472 (citing Merced v. Kasson, 577 F.3d 578, 592 (5th Cir. 2009)).

271. *Id.* at 472–73 (citing Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2781–82 (2014) and *Tagore*, 735 F.3d at 331).

272. *See id.*

273. *Id.* at 475 (citing Sherbert v. Verner, 374 U.S. 398, 407 (1963)).

274. *Id.* at 479.

alternative forms of regulation' would maintain" the relationship between the United States and the federally recognized tribes without infringing upon the rights of others.[275]

The Fifth Circuit noted that the Department did not question the powwow attendee's membership in the Lipan Apache Tribe or that his beliefs were sincerely held.[276] The court also pointed to the fact that the Lipan Apache Tribe, while not federally recognized, had a "government to government" relationship with the Republic of Texas.[277] In its analysis of the Department's regulations, the Fifth Circuit identified the compelling governmental interests as (1) the protection of eagles and (2) the fulfillment of the government's unique responsibility to federally recognized tribes.[278] The court accepted the protection of eagles as a compelling government interest because they are a "national symbol, regardless of whether the eagle still qualifies as an endangered species," and because the protection of migratory birds may also qualify as a compelling interest.[279] The court, however, stated that it could not definitively conclude that Congress intended to protect the religious practices of federally recognized tribes exclusively.[280]

The evidence provided by the Department failed to justify that an individual's access to eagle feathers, "whose sincerity is not in question and is of American Indian descent—would somehow cause harm to the relationship between federal tribes and the government."[281] The exceptions created for the possession of eagles, or their parts, were born out of a religious concern and also cover nonreligious uses.[282] Therefore, the Fifth Circuit concluded that the Department did not present sufficient evidence that "the protection of federally recognized tribes is a compelling interest protected by this statute."[283]

In the second step of its examination of the Department's regulations, the Fifth Circuit concluded that there was not enough evidence to show that the regulatory framework was the least restrictive means of achieving its goals.[284] The Department contended that limiting permits to federally recognized tribes advanced the government's interest in preserving eagle populations by (1) combating the illegal trade of eagle feathers and parts, (2) preventing law enforcement from having to verify an individual's Native

---

275. *Id.* at 480 (quoting *Sherbert*, 374. U.S. at 407).

276. *Id.* at 473–74.

277. *Id.* at 473.

278. *Id.*

279. *Id.* (citing Missouri v. Holland, 252 U.S. 416, 435 (1920)) (discussing the Supreme Court's holding that the protection of migratory birds is a national interest of very nearly the first magnitude).

280. *Id.* In reaching this conclusion, the Fifth Circuit relied upon the fact that Congress did not define "Indian tribes" in the pertinent statutory section and that the Department's approach to tribes has not been uniform. *Id.*

281. *Id.* at 474.

282. *Id.*

283. *Id.* at 475.

284. *See id.*

American heritage, and (3) keeping repository wait times from increasing exponentially.[285] The Fifth Circuit evaluated each of the Department's contentions against the expansion of the permitting process.[286]

First, the Fifth Circuit determined that an expansion in the permitting scheme would not increase poaching because this case involved eagle feathers and not carcasses.[287] The court stated that the Department's poaching concern was "mere speculation" because eagles do not have to die for people to obtain their feathers.[288] The court stated that speculation was not sufficient to satisfy a least restrictive means test.[289] Second, the court found that the issuance of permits to a broader group of Native Americans would not substantially change the Department's permitting system.[290] The Department would still have to rely upon anecdotal information and interviews to determine the lawfulness of eagle feather possession.[291] Third, the court concluded that it was not possible to hypothesize about the current regulatory system's ability to keep the black market for eagle feathers at bay.[292] This was because of the possibility that the black market exists for those Native Americans seeking eagle feathers that are not a part of federally recognized tribes.[293] Fourth, the Eagle Protection Act "already contains a broad, catch-all provision for granting permits for 'other interests'" so the Fifth Circuit determined that broadly considering permits were not adverse to the statute's goals.[294]

Furthermore, the Department did not present sufficient evidence at the summary judgment stage to conclude that there were "no other means of enforcement that would achieve the same goals."[295] The Fifth Circuit stated that since the possession of feathers without a permit is allowed, this demonstrated "that there is a method in place for determining whether feathers are legally held."[296] Any difficulty that the Department encountered with enforcement could not validate the diminishing of individual sincerely held "rights, especially if a less restrictive alternative could achieve the same goals."[297] Finally, the Fifth Circuit determined that the Department did not present evidence that those who sincerely practice Native American religions

---

285. *Id.* at 476, 478.
286. *See id.* at 476–79.
287. *Id.* at 476.
288. *Id.*
289. *Id.*
290. *Id.*
291. *Id.*
292. *See id.* at 477.
293. *Id.*
294. *Id.*
295. *Id.*
296. *Id.* The interested parties and the powwow attendees posited that they could collect feathers that have molted in the wild or at zoos. *Id.* The court discussed that the Department did not meet its burden to present evidence to refute this option as nonviable. *Id.*
297. *Id.* (citing Sherbert v. Verner, 374 U.S. 398, 407 (1963)).

could not establish their religious need for eagle feathers.[298] While the Department argued that the current system prevented the Department's agents from becoming "religious police," the court countered that the regulations already require applicants to demonstrate that their need for feathers is for a bona fide tribal religious ceremony.[299]

In evaluating the claim that the repository wait times would increase, the court stated that the Department's evidence regarding the projected number of applicants was inadequate.[300] The Department failed to prove that there would be such an overwhelming number of permits that it would "endanger the ability for the federal government to fulfill its 'unique' responsibilities to federally recognized tribes."[301] The court held that the Department did not provide the evidence necessary to justify the exclusion of individuals who do practice Native American religions that hold eagle feathers sacred but are not members of federally recognized tribes.[302] The Department also failed to address the numerous solutions provided by the powwow attendees and interested parties and did not set forth "evidence to prove that these means would not achieve the government's goals."[303] The Fifth Circuit concluded that the Department failed to carry its burden under RFRA, reversed the district court's grant of summary judgment in favor of the Department, and remanded the case for further proceedings.[304]

VII. THE OIL POLLUTION ACT: *UNITED STATES V. AMERICAN COMMERCIAL LINES, L.L.C.*

An unmanned barge, owned by American Commercial Lines (ACL), was hit by an ocean tanker and spilled large quantities of oil into the Mississippi River near New Orleans.[305] The Coast Guard determined that ACL was a responsible party under the Oil Pollution Act (OPA).[306] ACL

298. *Id.*

299. *Id.*

300. *Id.* at 478.

301. *Id.* The court rejected the Department's argument that the increased number of permits would negatively impact the repository's ability to fulfill federally recognized tribes' requests for eagle feathers, thereby hindering the federal government's obligation to these tribes. *See id.* The court held that there was not sufficient or specific evidence to support this position under a least restrictive means analysis. *Id.* The court also pointed to the federal government's responsibility to ensure its repository ran efficiently, and that the repository's inefficiencies could not justify an infringement on the rights of sincere practitioners. *See id.* at 479.

302. *Id.* at 478. The Department estimated that the number of permit applications it expected to receive with an alteration in the current regulatory scheme would be in the multi-millions. *See id.* Therefore, the Department claimed that the repository could not handle these requests. *See id.* The court, however, deemed these projections insufficient and stated that it required numbers specific to the individuals who are not members of a federally recognized tribe but hold eagle feathers as sacred. *See id.*

303. *Id.* at 479.

304. *Id.*

305. United States v. Am. Commercial Lines, L.L.C., 759 F.3d 420, 421 (5th Cir. July 2014).

306. *Id.* at 422.

contracted with two companies to provide cleanup services (spill responders) but did not pay the full outstanding amounts owed to the spill responders.[307] The spill responders sought reimbursement from the Oil Spill Liability Trust Fund (the Fund), as allowed by statute.[308] The United States paid the spill responders and sued ACL to recover its payment, and ACL joined the spill responders as third-party defendants.[309] The Fifth Circuit affirmed the district court's dismissal of ACL's claims against the spill responders because the OPA displaced its claims.[310]

The Clean Water Act, as amended by the OPA, gives the Coast Guard the primary responsibility to oversee oil spill cleanup.[311] After an oil spill, the Coast Guard identifies responsible parties—"typically 'any person owning, operating, or demise chartering the vessel'"—that must pay for the oil spill cleanup.[312] Responsible parties can contract with spill responders to complete the cleanup of an oil spill.[313]

When a responsible party limits its liability or has a complete defense, or if no responsible parties are identified, the Fund will pay cleanup costs.[314] The Fund also ensures that particular OPA claimants, including spill responders, are paid quickly if a responsible party fails to pay a claim after ninety days.[315] To receive payment from the Fund, a claimant must first present their claims to the responsible party, and then has the option of either bringing an action in court against the responsible party or presenting its claim to the Fund.[316] Only reasonable and necessary removal costs that adhere to the relevant statutory criteria for Fund payments will be reimbursed.[317] If the Fund has paid an OPA claimant directly, it can then recover the payment amount from other entities, including the responsible party.[318] Once a payment for a claim or obligation has been made, the United States Government acquires by subrogation all rights of the claimant to recover from the responsible party.[319]

---

307. *Id.* The two parties contracted to clean up the spill were Environmental Safety & Health Consulting Services, Inc. and United States Environmental Services. *Id.* at 421. ACL disputed some of the claims on the spill responders' invoices. *Id.* at 421–22.

308. *Id.* at 421–23.

309. *Id.*

310. *Id.* at 422. The district court granted the Government's Rule 12(b)(6) motion and stated that the proper manner to bring these claims would be under the APA's arbitrary and capricious standard. *Id.* at 424. ACL immediately appealed, stating that the OPA does not explicitly displace its federal common law and general maritime claims against the cleaning contractors. *Id.*

311. *Id.* at 422. The Clean Water Act, as amended by the Oil Pollution Act, is also known as the Federal Water Pollution Control Act (FWPCA). *See* 33 U.S.C. § 1321(d)(2)(C) (2012).

312. *Am. Commercial Lines, L.L.C.*, 759 F.3d at 422 (quoting 33 U.S.C. § 2701(32)).

313. *Id.*

314. *Id.* The Fund is administered by the Coast Guard's National Pollution Funds Center. *Id.*

315. *Id.*

316. *Id.*

317. *Id.* at 423.

318. *Id.*

319. *Id.*

In evaluating ACL's third-party claims, the Fifth Circuit held that ACL had no cause of action against the spill responders who acted within the confines of the OPA by seeking reimbursement from the Fund.[320] The court determined that the OPA is the exclusive source of law governing a responsible party's liability for OPA removal and cleanup costs.[321] Congress intended the OPA to create a single, comprehensive federal law to cover cleanup authority, penalties, and liability for oil pollution, as well as how to allocate responsibility among participants and prescribe reimbursement.[322] When Congress creates a statutory liability scheme, with specific remedies that are carefully calibrated, like the OPA's system, the statutory remedies are intended to be exclusive.[323] The court concluded that federal common law and general maritime law have been displaced and preempted by the OPA.[324] Therefore, there was no language in the OPA that supported allowing ACL, as a responsible party, to bring a third-party complaint against the spill responders.[325]

The Fifth Circuit also concluded that the OPA provides the opportunity for responsible parties to limit their liability, assert defenses, or establish "that the Fund's payments to the claimants were 'arbitrary and capricious.'"[326] Instead of bringing a third-party claim against the spill responders, the court stated that the ACL could seek to limit its reimbursement liability by asserting that the Fund's payments were arbitrary and capricious, and "were unnecessary, unreasonable, or not in compliance with the relevant statutory criteria for Fund payments."[327] As a matter of policy, if third-party claims, like ACL's, were allowed, the court stated that they could "frustrate the statutory scheme and its goal of . . . rapid cleanup and claim resolution."[328] Such claims would negatively impact the strict liability of responsible parties for cleanup and removal costs under the OPA.[329]

The court declined to apply the OPA's savings clause, which states that "[e]xcept as otherwise provided in this Act, this Act does not affect . . . admiralty and maritime law."[330] The "OPA provides a procedure for submission, consideration, and payment of cleanup expenses by the Fund when the responsible party fails to settle such claims within 90 days—the

320. *Id.* at 424.
321. *Id.*
322. *Id.*
323. *Id.* (citing United States v. M/V BIG SAM, 681 F.2d 432, 441 (5th Cir. 1982)).
324. *Id.* at 424–25 (discussing Fifth Circuit case law regarding statutory preemption).
325. *Id.* at 425.
326. *Id.* (quoting Buffalo Marine Servs., Inc. v. United States, 663 F.3d 750, 753 (5th Cir. 2011)).
327. *Id.* at 426.
328. *Id.* at 429.
329. *Id.* The court further stated that ACL could not seek indemnification from the spill responders because the United States had already acquired these rights by subrogation. *Id.*
330. *Id.* (quoting 33 U.S.C. § 2751(e) (2012)).

situation presented here."[331] The Fifth Circuit concluded that it could not supersede the OPA, without textual warrant, and interpreted the savings clause to cover ACL's claims.[332] Therefore, the court affirmed the dismissal of ACL's claims.[333]

331. *Id.* at 426.
332. *Id.*
333. *Id.*