ENVIRONMENTAL LAW

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

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 2012 through June 2013.[1]

I. CLEAN AIR ACT

A. Association of Taxicab Operators USA v. City of Dallas

In *Association of Taxicab Operators USA v. City of Dallas*, taxicab operators argued that the Clean Air Act (CAA)[2] preempted a Dallas ordinance that gave a head-of-the-line privilege at municipally operated Love Field to taxicabs that ran on compressed natural gas (CNG).[3] On a motion for summary judgment, the Northern District court held that the CAA neither expressly nor

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

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

2. 42 U.S.C. §§ 7401–7543 (2006).

3. Ass'n of Taxicab Operators USA v. City of Dall., 720 F.3d 534, 535 (5th Cir. June 2013).

impliedly preempted the ordinance.[4] The taxicab operators appealed, and the Fifth Circuit affirmed the district court.[5]

A federal law may expressly or impliedly preempt state law.[6] It expressly preempts state law when Congress explicitly provides for preemption.[7] It impliedly preempts state law when a state and federal law conflict or when the federal law exclusively occupies the field in which the state decides to legislate.[8] When courts could interpret the potentially preempted text either way, courts generally disfavor preemption.[9]

CAA § 209(a) prohibits state and local governments from enforcing "standard[s] relating to the control of emissions from new motor vehicles or new motor vehicle engines."[10] It also limits the reach of this provision.[11] CAA § 209(d) states that the Act does not preclude state and local governments from controlling, regulating, or restricting the "use, operation, or movement of registered or licensed motor vehicles."[12]

The taxicab operators argued that the ordinance established an impermissible "standard" of CNG-dedicated taxicabs.[13] In *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, however, the Supreme Court held that the standard in CAA § 209(a) referred to a mandatory, pollution-control related obligation.[14] Because the head-of-the-line privilege incentivized, but did not require, taxis to adopt pollution-control measures, the Fifth Circuit held that the ordinance did not create a standard as that term is used in CAA § 209(a), and therefore, it was not expressly preempted.[15]

The Fifth Circuit also confirmed that the CAA did not impliedly preempt the Dallas ordinance.[16] The taxicab operators argued that "the economic hardship wrought on traditional cabs at Love Field" is effectively a mandate to convert to CNG vehicles.[17] But because undisputed facts showed that only 7% of taxicabs in Dallas regularly operate at Love Field, and because the taxicab operators failed to show that they could not stay in business by finding fares elsewhere in the city, the Fifth Circuit held that the ordinance did not cause

4. *Id.*
5. *Id.*
6. *Id.* at 538 (citing Kurns v. R.R. Friction Prods. Corp., 132 S. Ct. 1261, 1265 (2012)).
7. *Id.*
8. *Id.*
9. *Id.* (citing Altria Grp., Inc. v. Good, 555 U.S. 70, 77 (2008)).
10. 42 U.S.C. § 7543(a) (2006).
11. *See id.* § 7543(d).
12. *Id.*
13. *See Taxicab Operators*, 720 F.3d at 539.
14. *See* Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252–55 (2004).
15. *See Taxicab Operators*, 720 F.3d at 540.
16. *See id.* at 540–42.
17. *Id*. at 542.

such an acute, indirect economic effect that mandated a switch to CNG vehicles.[18]

B. Luminant Generation Co. v. United States Environmental Protection Agency[19]

In this case, the Fifth Circuit upheld the Environmental Protection Agency's (EPA) partial approval and partial disapproval of a Texas State Implementation Plan (SIP) revision that included an affirmative defense to civil penalties for emissions resulting from both planned and unplanned startup, shutdown, and maintenance/malfunction (SSM) events.[20]

1. Environmental Petitioners' Challenges

Environmental petitioners challenged the EPA's approval of the affirmative defense for unplanned SSM events, arguing that (1) the provision violated the CAA; (2) the provision was arbitrary and capricious in light of certain EPA policies and the alleged burden it would put on citizens enforcing the CAA; and (3) the EPA's interpretation of the affirmative defense provision impermissibly altered the meaning of the SIP by applying it in citizen suits, when the SIP stated that it would not alter citizens' rights under the CAA.[21] The court rejected each argument.[22]

The environmental petitioners argued that the affirmative defense provision for unplanned SSM events violated the CAA's requirement that the State, the EPA, and citizens be able to assess civil penalties for noncompliance with emissions limits.[23] The EPA countered that § 7413 of the CAA, which allows a court to consider whether an event was avoidable when deciding whether to assess a penalty, provides authority for a narrowly tailored

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18. *Id.* (citing New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 668 (1995)).

19. *See* Luminant Generation Co. v. U.S. EPA (*Luminant*), 714 F.3d 841, 845 (5th Cir. Mar. 2013). The Fifth Circuit withdrew and replaced the opinion in this case twice. *See* Luminant Generation Co. v. EPA (*Luminant I*), No. 10–60934, 2012 WL 3065315 (5th Cir. July 30, 2012), *opinion withdrawn and superseded by* Luminant Generation Co. v. U.S. EPA (*Luminant II*), 699 F.3d 427 (5th Cir. Oct. 2012), *opinion withdrawn and superseded by Luminant*, 714 F.3d 84. In its first and second opinions, the court included an additional basis for accepting the EPA's disapproval of the affirmative defense provision for planned SSM events. *See Luminant II*, 699 F.3d at 447–48. In those opinions, the court deferred to an EPA interpretation of the defense that greatly decreased the elements that a defendant would be required to meet to be eligible for the planned SSM affirmative defense. *See id.* In *Luminant II*, the court added a more in-depth analysis of the EPA's decision under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which was also included in its final opinion. *See Luminant*, 714 F.3d at 852–54; *Luminant II*, 699 F.3d at 439–40.

20. *See Luminant*, 714 F.3d at 845.

21. *See id.* at 851–55.

22. *See id.*

23. *See id.* at 851 (citing 42 U.S.C. §§ 7413(b) (2006), *held unconstitutional by* Tenn. Valley Auth. v. Whitman, 336 F.3d 1236 (11th Cir. 2003), 7604(a) (2006)).

affirmative defense.[24] The EPA further maintained that the Texas Commission on Environmental Quality's (TCEQ) affirmative defense for unplanned SSM events, which included criteria designed to demonstrate that the unauthorized emissions were both unavoidable and did not contribute to a condition of air pollution, the exceedance of National Ambient Air Quality Standards (NAAQS), or Prevention of Significant Deterioration of Quality (PSD) increment, was narrowly tailored to address unavoidable emissions, consistent with § 7413 of the CAA.[25] The court held that this was a permissible interpretation of the CAA, warranting deference under *Chevron*.[26]

Next, the environmental petitioners argued that the EPA's approval was arbitrary and capricious in light of (1) an EPA policy that affirmative defenses should not be available if a small group of sources could lead to the exceedance of a NAAQS; (2) precedent indicating that civil penalties should encourage compliance with the CAA; and (3) the burden that the affirmative defense would place on citizen-enforcers.[27] The court rejected the first argument, holding that the affirmative defense provision was consistent with the EPA's policy because it required one to show that its unauthorized emissions did not cause or contribute to an exceedance of the NAAQS.[28] The court rejected the second argument, finding that the provision's strict criteria encouraged permit holders to take preventative measures and develop technologies and management practices to avoid excess emissions and, therefore, were also consistent with EPA policy.[29] Finally, finding no evidence that the affirmative defense required defendants to make only a "prima facie showing" before shifting the burden of proof to plaintiffs, the court agreed with the EPA that the provision did not place an unreasonable burden on citizen–plaintiffs.[30]

Likewise, the court found the environmental petitioners' third argument—that the EPA's interpretation of the SIP, which held that the affirmative defense provision applied equally in citizen suits, impermissibly altered the meaning of the SIP in light of the TCEQ's stated policy not to interfere with citizens' rights under the CAA—was without merit.[31] Because the affirmative defense provisions did not preclude citizen suits and did not apply to other important CAA remedies, such as injunctive relief, the court agreed with the EPA that its interpretation "did not alter the meaning of the SIP or broaden its application beyond what Texas intended."[32]

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24. *See id.* at 852–53 (citing 42 U.S.C. § 7413).
25. *See id.* at 853.
26. *Id.* (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984)).
27. *See id.* at 854.
28. *See id.*
29. *See id.*
30. *Id.* at 854–55 (internal quotation marks omitted).
31. *See id.* at 855.
32. *See id.*

2. Industry Petitioners' Challenges

Industry petitioners challenged the EPA's disapproval of the affirmative defense provisions for planned SSM events.[33] They argued that (1) the provision complied with the CAA, and thus, should have been approved; and (2) the EPA's disapproval was arbitrary and capricious.[34] In the alternative, industry petitioners argued that the EPA "should have severed and approved the affirmative defense for planned startup and shutdown activity, even if it had determined that there should be no affirmative defense for planned maintenance activity."[35] The court also rejected industry petitioners' arguments.[36]

Industry petitioners argued that the affirmative defense provision for planned SSM events, like that for unplanned events, complied with the CAA.[37] The EPA disagreed.[38] Acknowledging that sources may not be able to meet emissions limitations during an unplanned event, the EPA reasoned that a source should be able to meet such limitations during a planned event.[39] Therefore, the EPA argued that the affirmative defense for planned SSM events did not comport with § 7413 of the CAA, which addressed only unavoidable emissions.[40] Finding that the EPA's reasonable interpretation of the CAA warranted deference, the court rejected industry petitioners' first argument.[41]

Next, industry petitioners urged that the EPA's disapproval was arbitrary and capricious.[42] But the court also rejected these arguments.[43] First, petitioners noted that the EPA had approved an exemption for planned maintenance events in a previous Texas SIP.[44] The EPA later publicly conceded that its approval was erroneous.[45] The court agreed with the EPA that the agency was not bound to follow a prior incorrect interpretation of its policy.[46] Second, petitioners argued that, in rejecting only part of the SIP, the EPA impermissibly made the SIP more stringent than Texas had intended because there was no longer any accommodation for planned SSM events.[47] But the court held that the EPA's disapproval of the affirmative defense for planned events "[did] not affect the stringency of the defense being approved for periods of excess emissions during unplanned activities" and, therefore, did

33. *Id.* at 850.
34. *Id.* at 856–57.
35. *Id.* at 859.
36. *Id.* at 857–59.
37. *Id.* at 855–56.
38. *Id.* at 857.
39. *Id.*
40. *Id.* at 856–57.
41. *Id.* at 857.
42. *Id.* at 855–59.
43. *Id.*
44. *Id.* 857.
45. *Id.*
46. *Id.* at 857–58.
47. *Id.* at 858.

not result in an interpretation that was more stringent than intended in the SIP.[48] Third, petitioners argued that the EPA's disapproval was arbitrary because it failed to demonstrate that the affirmative defense provision would interfere with NAAQS.[49] The court held that the EPA was only required to explain why the disapproved provision would interfere with an applicable requirement of the CAA.[50] Noting that it had already found that the EPA's reasoning that the provision was inconsistent with § 7413 of the CAA was not arbitrary or capricious, the court held that the EPA had met this burden.[51] Finally, petitioners argued that the affirmative defense provision was administratively necessary to Texas's transition to a permitting scheme.[52] Finding that since 2006, sources in Texas had been required to comply with applicable emissions limitations without the affirmative defense, the court also rejected this argument.[53]

In the alternative, industry petitioners argued that the EPA should have severed the affirmative defense provisions related to planned maintenance from those related to planned startup and shutdown events.[54] Noting that the EPA's reasoning that the affirmative defense provision was inconsistent with CAA § 7413 was equally applicable to planned startup, shutdown, and maintenance events, the court held that the EPA was not arbitrary or capricious when it disapproved the provision in its entirety.[55]

C. Texas v. United States Environmental Protection Agency

The Fifth Circuit vacated and remanded the EPA's disapproval of the Texas Flexible Permit Program, a revision to the CAA SIP, finding that the EPA was arbitrary and capricious and exceeded its statutory authority when it based its disapproval on language and program features that had no basis in the CAA or implementing regulations.[56]

In 1994, Texas submitted its Flexible Permit Program to the EPA for review as a revision to its SIP.[57] The Program revised the Texas SIP with regard to minor New Source Review (NSR) pre-construction permits.[58] Under the Texas program, a minor source may obtain a permit that allows it to modify the facility without additional regulatory review, so long as any additional resulting emissions do not cause the facility to exceed the aggregate limit

48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 858–59.
52. *Id.* at 859.
53. *Id.*
54. *Id.*
55. *Id.*
56. Texas v. U.S. EPA, 690 F.3d 670, 674 (5th Cir. Aug. 2012).
57. *Id.* at 676.
58. *Id.*

specified in the permit.[59] The program also allows the Texas Commission on Environmental Quality (TCEQ) to include monitoring, record-keeping, and recording (MRR) requirements that are designed "on a case-by-case basis, based on the size, needs, and type of facility" in facility permits, rather than describing the requirements in detail in the regulations implementing the SIP.[60]

The EPA rejected the Texas Flexible Permit SIP revision on three bases. First, it complained that major NSR sources would evade review because the Texas SIP revision did not contain an express statement that the program did not apply to major NSR sources.[61] The Fifth Circuit found that the CAA and its regulations, however, did not require such an express statement.[62] Holding that it need not defer to the EPA's interpretation of state law, the court rejected the EPA's interpretation of the Texas program.[63] Noting several instances in which the Flexible Permit Program expressly required compliance with major NSR, the court concluded that the "TCEQ has clear authority to prevent and deter" a permit holder from willfully disregarding major NSR requirements.[64]

Second, the EPA argued that the Flexible Permit Program contained inadequate MRR requirements.[65] The EPA complained that the program left too much discretion with the TCEQ and was not replicable.[66] The court rejected this complaint, finding no CAA requirement that MRR requirements be replicable or that a state's discretion be limited as the EPA demanded.[67] The EPA further argued that the Texas program's MRR requirements should be rejected because they were unlike the MRR requirements in the federal Plant-Wide Applicability Limits (PAL) program.[68] The court found that the CAA did not demand adherence to the control measures found in the PAL program.[69] The court noted that while the EPA is tasked with ensuring "that a state's SIP is adequately compliant with the CAA, [it] has no authority to condition approval of a SIP based simply on [its] preference . . . for a particular control measure."[70]

Finally, the EPA argued that the program's methodology for calculating an emissions cap was not sufficiently clear and replicable to enforce compliance with the permit.[71] The EPA asserted that the program lacked objective and replicable methodologies for establishing emissions caps, and that it was unclear whether the emissions cap in any given permit also applied to major

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59. *Id.*
60. *Id.* at 681.
61. *Id.* at 677.
62. *Id.* at 679.
63. *Id.* at 677–79.
64. *Id.* at 677–79, 681.
65. *Id.* at 681.
66. *Id.*
67. *Id.* at 682–83.
68. *Id.* at 684.
69. *Id.*
70. *Id.* (citing Virginia v. U.S. EPA, 108 F.3d 1397, 1406 (D.C. Cir. 1997), *modified on rehearing by* 116 F.3d 499 (D.C. Cir. 1997) (per curiam)).
71. *Id.*

sources.[72] The court rejected these arguments and noted that the Texas program clearly excluded major NSR sources from obtaining flexible permits, the CAA did not demand replicability, and the EPA failed to explain how the TCEQ's method for calculating emissions caps otherwise ran afoul of the CAA.[73]

Judge Higginbotham dissented from the opinion.[74] He rejected the majority opinion's premise that the court need not defer to the EPA's construction of the state regulations that make up the Flexible Permit Program.[75] Moreover, he shared the EPA's concern that the regulations could allow major sources to circumvent major NSR requirements.[76] Noting that the TCEQ has since revised the regulations at issue to further clarify that the program is limited to minor NSR and to address the EPA's concerns about the program's MRR requirements, he questioned the majority's bases for vacating the EPA's disapproval.[77]

II. DUTY TO DEFEND

A. Louisiana Generating L.L.C. v. Illinois Union Insurance Co.

This case involves an appeal of a grant of summary judgment in favor of Louisiana Generating L.L.C. (LaGen), in which the court found the duty to defend was triggered by the CAA and state environmental law violations brought by the EPA and the Louisiana Department of Environmental Quality (LDEQ) against LaGen.[78] The Fifth Circuit affirmed the district court.[79]

LaGen owns the coal-fired electric steam generating plant known as Big Cajun II (BCII), which is located in Louisiana.[80] The EPA issued Notices of Violation (NOV), alleging that major modifications were made to BCII without a permit, causing net emission increases that violated the CAA.[81] LaGen was insured by Illinois Union Insurance (ILU).[82]

The NOVs eventually led to a lawsuit in which the EPA asserted violations of the CAA and Louisiana environmental laws.[83] The LDEQ intervened and asserted identical claims.[84] The allegations stated that the extent of the modifications to BCII were major, increased emissions, required a

72. *Id.* at 685.
73. *Id.* at 685–86.
74. *Id.* at 686–91 (Higginbotham, dissenting).
75. *Id.* at 686.
76. *Id.* at 686–90.
77. *Id.* at 690.
78. La. Generating L.L.C. v. Ill. Union Ins. Co., 719 F.3d 328, 331 (5th Cir. May 2013).
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*

Prevention of Significant Deterioration of Quality permit (PSD permit), and failed to use the best available control technology (BACT) to limit emissions.[85] The complaint alleged that the BCII emitted excess amounts of regulated pollutants into the air and continued to operate without seeking the PSD permit for the modifications.[86]

ILU denied that the EPA's and LDEQ's causes of action could be potentially covered by the insurance policy and, thus, did not trigger the insurer's duty to defend the lawsuit.[87] LaGen, however, argued that its coverage was triggered by the EPA's and LDEQ's requests for LaGen to surrender allowances or credits to offset and mitigate illegal emissions; remedy, mitigate, and offset harm to the public health and environment; and for civil penalties.[88]

The district court bifurcated the trial between the duty to indemnify and the duty to defend.[89] It granted summary judgment in favor of LaGen and "held that ILU failed to prove that there was no possibility the claims in the underlying EPA suit would be covered and thus had a duty to defend."[90] The only question on appeal to the Fifth Circuit was "whether the district court correctly held that ILU ha[d] a duty to defend LaGen in the underlying suit filed by the EPA and LDEQ."[91] The court reviewed the matter de novo and applied New York law pursuant to the policy's choice of law provision.[92]

ILU denied that it had a duty to defend because the underlying suit did not seek relief that fell within the policy's coverage.[93] ILU further claimed that under the CAA, the EPA could only seek prospective relief, not compensatory damages.[94] In addition, the policy excluded injunctive relief.[95] LaGen argued "that the district court erred when it [held] that injunctive relief [was] excluded from . . . coverage."[96]

Under New York law, "whether there is a duty to defend is determined by comparing the allegations in the underlying complaint to the terms of the policy."[97] "An insurance policy must be read as a whole in order to determine 'its purpose and effect and the apparent intent of the parties.'"[98] Unambiguous terms of an insurance contract should be given their plain and ordinary

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85. *Id.*
86. *Id.*
87. *Id.* at 332.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 333.
92. *Id.*; Travelers Lloyds Ins. Co. v. Pac. Emp'rs Ins. Co., 602 F.3d 677, 681 (5th Cir. 2010).
93. *La. Generating L.L.C.*, 719 F.3d at 333.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* (quoting Murray Oil Prods., Inc. v. Royal Exch. Assurance Co., 235 N.E.2d 762, 764 (N.Y. 1968)).

meaning.[99] A mere suggestion of potential coverage within the pleadings will trigger an insurer's duty to defend under New York law.[100] "If any of the claims against the insured arguably arise from covered events, the insurer is required to defend the entire action."[101] LaGen's policy provided coverage for "[c]laims, remediation costs, and associated legal defense expenses . . . as a result of a pollution condition" at an insured location.[102]

The Fifth Circuit interpreted the relevant policy provisions to give rise to potentially covered claims in the underlying suit.[103] "Government agencies acting under the authority of environmental laws allege[d] that LaGen violated those laws, resulting in increased emissions of pollutants into the atmosphere, and [sought] to require LaGen to mitigate and remediate those emissions."[104] The lawsuit alleged a covered condition at the BCII for which the policy covered associated legal defense expenses.[105]

The court explained that two bases for coverage were (1) "claims," which included "government actions"; and (2) "remediation costs," whether they were sought as relief or incurred independent of a claim.[106] The broad definition of remediation costs included costs associated with investigating, mitigating, and abating pollution.[107] Therefore, there was potential coverage for the underlying lawsuit's prayers for relief seeking for "LaGen to mitigate, offset[,] and remediate the . . . past pollution."[108] The court found that "[b]ecause part of the suit is 'potentially within the protection purchased, the insurer is obligated to defend.'"[109]

The Fifth Circuit further stated "that injunctive relief [was not] excluded from coverage by the Fines and Penalties exclusion."[110] This exclusion applied to coverage of "[p]ayment of criminal fines, criminal penalties, punitive, exemplary or injunctive relief."[111] New York law provides that "policy exclusions are given a strict and narrow construction, with any ambiguity

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99. *Id.* (citing Teichman v. Cmty. Hosp. of W. Suffolk, 663 N.E.2d 628, 630 (N.Y. 1996)).

100. *Id.* at 333–34 (citing BP Air Conditioning Corp. v. One Beacon Ins. Grp., 871 N.E.2d 1128, 1131 (N.Y. 2007)).

101. *Id.* at 334 (quoting Frontier Insulation Contractors, Inc. v. Merchs. Mut. Ins. Co., 690 N.E.2d 866, 869 (N.Y. 1997)) (internal quotation marks omitted).

102. *Id.* (omission in original) (internal quotation marks omitted).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 335.

108. *Id.*

109. *Id.* (quoting BP Air Conditioning Corp. v. One Beacon Ins. Grp., 871 N.E.2d 1128, 1131 (N.Y. 2007)).

110. *Id.*

111. *Id.* (internal quotation marks omitted).

resolved against the insurer."[112] The insurer may not construe an exclusion that would nullify underlying coverage when it is expected to apply.[113]

The court found ILU failed to show its interpretation was the only reasonable construction and that coverage must be negated.[114] The court rejected ILU's interpretation that would include coverage for remedial costs unless the court ordered remediation.[115] The policy included coverage for "governmental, judicial or administrative orders . . . governing the liability or responsibilities of the insured with respect to pollution conditions."[116] The court found if the Fines and Penalties exclusion barred costs associated with injunctive relief, its effect could swallow the common and expected coverage provided under the policy.[117]

The court rejected ILU's claim that the duty to defend was not triggered because the claims were first made when the NOVs were issued, before the effective date of the policy.[118] LaGen included the NOVs on its Schedule of Known Conditions Endorsement, and the NOVs were deemed to have been first discovered during the policy period.[119]

Finding the issue of coverage for civil penalties was governed by New York law, the court "decline[d] to decide on interlocutory appeal whether New York law allows indemnification for CAA civil penalties."[120]

III. STANDING IN ENVIRONMENTAL CASES

A. Center for Biological Diversity, Inc. v. BP America Production Co.

The Fifth Circuit determined, with one exception, that the district court did not err in its dismissal of the Center for Biological Diversity, Inc.'s (the Center) claims as moot.[121] The court reversed the decision of the district court in part and affirmed in part, determining that the claim brought by the plaintiffs under the Emergency Planning and Community Right-to-Know Act (EPCRA)[122] remained a viable claim.[123]

In April 2010, an explosion occurred on a mobile offshore drilling unit known as "Deepwater Horizon."[124] BP America Production Co. and BP

112. *Id.* at 335–36 (quoting Belt Painting Corp. v. TIG Ins. Co., 795 N.E.2d 15, 17 (N.Y. 2003)) (internal quotation marks omitted).
113. *See id.* at 336.
114. *Id.*
115. *Id.* (quoting *Belt Painting Corp.*, 795 N.E.2d at 17).
116. *Id.* (alteration in original) (internal quotation marks omitted).
117. *Id.*
118. *Id.* at 337.
119. *Id.*
120. *Id.* at 338.
121. Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co., 704 F.3d 413, 432 (5th Cir. Jan. 2013).
122. 42 U.S.C. § 11046(a) (2006).
123. *Ctr. for Biological Diversity, Inc.*, 704 F.3d at 417–18.
124. *Id.* at 418.

Exploration & Production, Inc. (BP) leased that unit from Transocean, Ltd. to drill a well known as the "Macondo" well.[125] The explosion killed eleven people and spilled millions of gallons of oil into the Gulf.[126] The plaintiff in this case, the Center, was a non-profit organization with over 40,000 members, 3,500 of whom lived in the Gulf Coast region.[127] It took several months and the work of thousands of people to get the oil spill contained.[128] In July 2010, a permanent cap was placed on the well to stop the oil flow, and in September of that same year, the well was permanently "killed" when cement was pumped in.[129]

The Center filed suit against BP and Transocean, and a Multidistrict Litigation Panel transferred the complaints of the Center to the Eastern District of Louisiana (the MDL case).[130] The MDL case was made up of thousands of individual complainants.[131] In order to better manage the litigation, the district court established several pleading bundles in which claims of a similar nature were placed, and a Master Complaint was filed.[132] The Center's claims were placed into Pleading Bundle D1.[133] The D1 plaintiffs filed a Master Complaint in which they alleged violations of the Clean Water Act (CWA);[134] the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA);[135] and the EPCRA.[136] BP and Transocean moved to dismiss the D1 Master Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).[137]

The district court dismissed the claims of the D1 Master Complaint in its entirety.[138] The court took judicial notice that the Macondo well was permanently killed.[139] The district court found that the claims of the D1 plaintiffs could not be redressed because no injunction was necessary as there was no longer an ongoing release and because the cleanup activities were ongoing under the direction of various federal agencies.[140] The court additionally determined the D1 plaintiffs lacked standing and that their claims for injunctive relief were moot.[141] "Finally, the court held that CWA, CERCLA, and EPCRA require plaintiffs to show" that an ongoing violation

125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 419.
131. *Id.*
132. *Id.*
133. *Id.*
134. 33 U.S.C. § 1365(a)(1) (2006).
135. 42 U.S.C. § 9659(a) (2006).
136. *Ctr. for Biological Diversity, Inc.*, 704 F.3d at 420.
137. *Id.*
138. *Id.* at 421.
139. *Id.* at 420.
140. *Id.*
141. *Id.* at 420–21.

was reasonably likely, and that because there was no longer a viable facility, there was no probability of a future release.[142]

After the district court's written order, the Center filed a motion for clarification under Federal Rule of Civil Procedure 59(e), asking the district court to make explicit that the order that dismissed "the D1 Master Complaint was a final judgment that also dismissed the Center's underlying individual complaints."[143] The district court's order addressed the Center's claims for injunctive relief and not the claims for civil penalties.[144] After several requests from the Center to the district court for this clarification, the "district court then entered a final judgment 'for the reasons stated in the Court's Order Dismissing the Bundle D1 Master Complaint . . . as that Order relates to [the Center's individual complaints].'"[145] The Center appealed the district court's dismissal of its claims.[146]

1. Judicial Notice

The Fifth Circuit determined "there was no error in the district court's taking of judicial notice" of the status of the Macondo well.[147] Under "Federal Rule of Evidence 201, a court is entitled to take judicial notice of adjudicative facts from reliable sources whose accuracy cannot reasonably be questioned."[148] The court determined the Center had an opportunity to be heard when BP argued that the capping and well killing were judicially noticeable facts and were on the motions to dismiss.[149] Finally, the court explained that the Center could have moved for reconsideration, but failed to do so.[150] The court found that the killing of the well occurred as required by the federal government under the powers delegated to the federal government to oversee and direct emergency response, and the well was effectively dead.[151] The court explained that it must consider the case by asking whether the citizen suit plaintiff had proven that despite the corrective action mandated by the government, violations in the complaint would continue.[152]

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142. *Id.* at 421.
143. *Id.*
144. *Id.*
145. *Id.* (alterations in original).
146. *Id.*
147. *Id.* at 424.
148. *Id.* at 422 (quoting Sosebee v. Steadfast Ins. Co., 701 F.3d 1012, 1018 n.1 (5th Cir. Nov. 2012)) (internal quotation marks omitted).
149. *Id.*
150. *Id.* at 424.
151. *Id.* at 425–26.
152. *Id.* at 426.

2. Mootness

The court analyzed the case under the "realistic prospect standard," considering whether the plaintiff had proven "'that there is a realistic prospect that the violations alleged in its complaint will continue notwithstanding' government-mandated corrective action."[153]

The Fifth Circuit found that the district court correctly determined that the Center's requests for declaratory and injunctive relief were moot.[154] The record showed the Macondo well had been killed and cemented shut, and therefore, there was no possibility that further discharges would occur and no meaningful relief could be awarded under the statutes.[155]

The court found the Center's arguments that its claims for civil penalties prevented mootness unpersuasive.[156] It explained that while it is true that even when potential injunctive relief has become moot, the potential deterrent effect of civil penalties may prevent mootness in some cases.[157] The Center, however, took no action to ensure its civil penalty claims remained alive, and the Center acted at its own peril.[158] The court explained that "[t]he district court's order dismissing the D1 Master Complaint did not address civil penalties," and the district court's opinion noted the D1 plaintiffs were limited to claims for injunctive relief.[159] In relying on a statement from the Seventh Circuit, the court explained, "if plaintiff loses on A and abandons B in order to make the judgment final and thus obtain immediate review, the court will consider A, but B is lost forever."[160] Additionally, the court found the Center's request to sample and arrange for sampling was rendered moot because the well was no longer operational.[161]

The court next considered the Center's request that BP and Transocean be ordered to provide copies of reports submitted to regulatory authorities for a period of five years.[162] The court relied on the Supreme Court's decision in *Steel Co. v. Citizens for a Better Environment*[163] in reaching its decision.[164] In *Steel Co.*, the Court explained that in order for standing to exist under Article III, there must be the prospect of continuing violations.[165] Even though the Center argued that BP and Transocean were likely to continue to fail to report

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153. *Id.* (quoting Envtl. Conservation Org. v. City of Dall., 529 F.3d 519, 528 (5th Cir. 2008)).
154. *Id.*
155. *Id.*
156. *Id.* at 426–27.
157. *Id.* at 427.
158. *Id.*
159. *Id.*
160. *Id.* (quoting Fairley v. Andrews, 578 F.3d 518, 522 (7th Cir. 2009)) (internal quotation marks omitted).
161. *Id.*
162. *Id.* at 427–28.
163. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998).
164. *Ctr. for Biological Diversity, Inc.*, 704 F.3d at 428.
165. *Id.* (citing *Steel Co.*, 523 U.S. at 108).

future discharges in violation of EPCRA, the court explained that the Macondo well was no longer operational and there was no competent evidence of continued discharges from the well.[166] Therefore, because there was no basis for the Center to request future reports of BP and Transocean, the relief requested became moot.[167]

The court additionally found the Center's allegations that BP failed to report substances released under § 103 of CERCLA to be moot.[168] The court determined that BP notified the National Response Center that the explosion and subsequent oil spill occurred, which resulted in an immediate governmental response.[169]

The Fifth Circuit, however, reversed the district court's determination that the Center lacked standing to bring its EPCRA claim.[170] The district court held the Center lacked standing to bring its EPCRA claim because it was unclear how the data collected under EPCRA could remedy the injury alleged.[171] The Fifth Circuit explained that BP and Transocean's claim that the information was on the internet ignored the statutory duty to report the information, and it ignored the EPCRA requirement that reports provided by owners and operators be maintained by state emergency planning authorities and be made available to the public at an appointed location.[172] The court determined the specific information as required by EPCRA was not readily available, and the court could not decide the question on the record.[173] The court remanded the case to the district court on this point for further proceedings.[174]

The court affirmed the district court's determination that cleanup efforts by the government and defendants were underway, and there was no relief the court could order, which made the Center's request for injunctive relief moot.[175] The court explained that it would not second-guess the remediation decisions of the government.[176]

Finally, the court affirmed the district court's case management decision to create case bundles or to create separate claims, finding that decision was within the court's discretion.[177]

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166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.* at 428–29.
171. *Id.*
172. *Id.* at 430.
173. *Id.* at 430–31.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.* at 432.

B. In re Katrina Canal Breaches Litigation

In this case, the Fifth Circuit considered the district court's construction of immunity under the Flood Control Act[178] and the discretionary function exception to the Federal Tort Claims Act[179] in regard to damages caused by Hurricane Katrina in 2005.[180] The court reversed each judgment that was awarded by the district court in favor of each plaintiff, affirmed each district court judgment for the government, and denied the petition as moot.[181]

Decades ago, Congress requested the Army Corps of Engineers (the Corps) investigate how to make the Port of New Orleans more accessible for both military and maritime use.[182] It was that request that led to the authorization of the Mississippi River Gulf Outlet (MRGO).[183] To create MRGO, the Corps dredged virgin coastal wetlands to a depth that exposed a strata of soft clay known as "fat clay."[184] Even though the soil that composes fat clay is soft enough that it will move if required to bear a load, the Corps did not armor the MRGO's banks for many years because it determined the design modification was unwarranted under a cost–benefit ratio.[185] The Corps' failure to armor the banks left the banks vulnerable to erosion.[186]

After several years, the Corps reexamined its cost–benefit analysis and determined the costs were less than originally calculated.[187] Based on the new cost estimates, Congress instructed the Corps to use funds to protect the shore and wetlands and to minimize future costs of dredging.[188]

The court determined that the Corps's delay in armoring the MRGO allowed wave wash from ships to cause considerable erosion to the channel and destroy banks that would have greatly aided in levee protection during the hurricane.[189] Further, the court found that the MRGO's size and configuration greatly enhanced the damage caused by Hurricane Katrina to the City of New

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178. 33 U.S.C. § 702 (2006).

179. 28 U.S.C. § 2680(a) (2006).

180. Robinson v. United States (*In re* Katrina Canal Breaches Litig.), 696 F.3d 436, 444 (5th Cir. Sept. 2012), *cert. denied*, Lattimore v. United States, 133 S. Ct. 2855 (2013). The court withdrew its previous opinion in *Robinson v. United States* (*In re Katrina Canal Bridges Litig.*), 673 F.3d 381 (5th Cir. Mar. 2012), after treating the petition for rehearing en banc as a petition for panel rehearing. *Katrina Canal Breaches Litig.*, 696 F.3d at 436.

181. *Katrina Canal Breaches Litig*., 696 F.3d at 441.

182. *Id.*

183. *Id.*

184. *Id.* at 442.

185. *Id.* "[U]ntil the cost of providing foreshore protection proved to be less expensive than the continued need for dredging to maintain the channel's navigability, the Corps did not actively pursue funding for this protection." *Id.* (alteration in original) (quoting *In re* Katrina Canal Breaches Consol. Litig., 647 F. Supp. 2d 644, 717 (E.D. La. 2009), *aff'd in part, rev'd in part by Katrina Canal Breaches Litig*., 696 F.3d 436) (internal quotation marks omitted).

186. *Id.*

187. *Id.* at 443.

188. *Id.*

189. *Id.*

Orleans and its surrounding environs.[190] Simultaneous to the work on MRGO, the Corps implemented the Lake Pontchartrain and Vicinity Hurricane Protection Plan (LPV), and under that plan, the Corps constructed levees to protect various parts of the city.[191]

Hundreds of lawsuits were filed against the United States as a result of the flooding damage done by Hurricane Katrina.[192] The district court identified several categories of plaintiffs and bellwether plaintiffs to help manage the litigation, and it consolidated many of the suits.[193] The Fifth Circuit's opinion focused on three sets of plaintiffs: the Robinson plaintiffs, the Anderson plaintiffs, and the Armstrong plaintiffs.[194] Seven plaintiffs went to trial (the Robinson plaintiffs); three Robinson plaintiffs prevailed and four lost.[195] The district court found the government had immunity as to the second set of plaintiffs (the Anderson plaintiffs).[196] Finally, the third group of plaintiffs (the Armstrong plaintiffs) were preparing for trial against the government in their own cases.[197] The court analyzed the plaintiffs' claims under the Flood Control Act and the discretionary function exception to the Federal Tort Claims Act.[198]

1. The Flood Control Act

The Flood Control Act (the Act) was enacted in response to a 1927 flood in the Mississippi River Valley.[199] The Act includes § 702c, which provides the United States government with sovereign immunity from damages from floods or flood waters.[200]

The Fifth Circuit looked to a case in which it had previously determined liability under the Act, *Graci v. United States*.[201] In *Graci*, the court upheld the claims of the plaintiffs and determined that it was unreasonable for the government to have complete immunity when employees' acts were negligent or wrongful and when those acts were unconnected with flood control activities.[202]

The court additionally considered the *Central Green Co. v. United States* case.[203] In *Central Green Co.*, the United States Supreme Court determined the

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190. *Id.* at 441.
191. *Id.* at 442.
192. *Id.* at 443.
193. *Id.* at 441.
194. *Id.* at 443.
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.* at 444.
200. *Id.*
201. *Id.*; Graci v. United States, 456 F.2d 20, 21 (5th Cir. 1971).
202. *Katrina Canal Breaches Litig.*, 696 F.3d at 444 (quoting *Graci*, 456 F.2d at 26).
203. Cent. Green Co. v. United States, 531 U.S. 425, 427 (2001); *Katrina Canal Breaches Litig.*, 696 F.3d at 445–46.

scope of § 702c was not established by the character of the project, but rather, it was the character of the waters that caused the damage and the purpose behind the release of those waters that determined the scope.[204] The Court considered two cases in making its decision in *Central Green Co*.[205] In the first case, a plaintiff was injured when the Corps opened gates in a flood control project to release water that had reached flood stages; these were considered flood waters.[206] In the second case, the waters were released in a flood control project to produce hydroelectric power and were not considered to be flood waters.[207] The Fifth Circuit explained that the United States receives immunity under § 702c only when damages are from waters that are released in a flood control activity or negligence in that activity.[208]

For the first set of plaintiffs, in making the determination of whether the Act provided immunity to the government against the various plaintiffs, the court determined it must decide whether the Corps' decision to dredge the MRGO, rather than to implement foreshore protection, was a flood control activity under § 702c.[209] The Fifth Circuit determined that the Corps chose to dredge the MRGO to ensure its navigability, and that it took no action that could be determined to be flood control.[210] Therefore, the government could not claim § 702c immunity for the levee breach because the dredging of the MRGO was neither for a flood control activity, nor was it connected to the LPV.[211]

The court further determined that the district court's determination as to the Robinson plaintiffs was correct.[212] The court found that the Corps had no duty to build a surge-protection barrier and that the Robinson plaintiffs' injuries would have occurred even if the MRGO had remained at the width originally designed.[213]

Finally, the court determined that the government had § 702c immunity as to the Anderson plaintiffs because while the design and plan for the levees may not have been well-advised, it was approved by Congress.[214] In addition, the court explained that while the dredging may have been negligent, it was part of the LPV, and therefore, the Corps was immune.[215]

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204. *Katrina Canal Breaches Litig.*, 696 F.3d at 445 (quoting *Cent. Green Co.*, 531 U.S. at 434).

205. *Cent. Green Co.*, 531 U.S. at 436. *Compare* United States v. James, 478 U.S. 597, 599 (1986), *abrogated by Cent. Green Co*., 531 U.S. 425, *with* Henderson v. United States, 965 F.2d 1488, 1490 (8th Cir. 1992).

206. *Katrina Canal Breaches Litig.*, 696 F.3d at 446 (citing *James*, 478 U.S. at 600–01).

207. *Id.* (citing *Henderson*, 965 F.2d at 1490).

208. *Id.*

209. *Id.* at 447.

210. *Id.*

211. *Id.* at 448.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

2. The Federal Tort Claims Act, Discretionary Function Exception

The discretionary function exception prohibits suit on any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."[216]

The court considered the two-part test previously developed by the Supreme Court to determine whether the federal government's conduct equaled a duty or discretionary function.[217] "First, the conduct must involve 'an element of judgment or choice.'"[218] Second, the exception "protects only governmental actions and decisions based on considerations of public policy."[219]

The Fifth Circuit determined that the exception provided complete insulation to the government against all of the plaintiffs' claims.[220] Among the arguments raised by the plaintiffs against the exceptions' applicability, they claimed the impact-review requirement of the National Environmental Policy Act (NEPA) was a legal mandate that overrode the Corps's discretion.[221] In striking down all of the plaintiffs' arguments, the court first explained that an agency that complies with NEPA gives outside influences more information that can be used to place pressure on the agency, but the agency still retains decision-making power, which is explicitly immunized under the discretionary function exception.[222]

216. *Id.* at 448–49 (quoting 28 U.S.C. § 2680(a) (2006)) (internal quotation marks omitted).
217. *Id.* at 449 (citing Freeman v. United States, 556 F.3d 326, 336–37 (5th Cir. 2009)).
218. *Id.* (quoting *Freeman*, 556 F.3d at 337).
219. *Id.* (quoting *Freeman,* 556 F.3d at 337) (internal quotation marks omitted).
220. *Id.* at 454.
221. *Id.* at 449.
222. *Id.* at 450.