

INSTITUTE FOR ENERGY LAW
1st National Young Energy Professionals' Law Conference
March 31 - April 1, 2017
New Orleans, Louisiana

Coastal Erosion Litigation in Louisiana

Laura S. Brown, Liskow & Lewis
Jennifer Ferratt, Chevron

The Big Picture: Louisiana's Coast and the Challenge of Erosion

Welcome to New Orleans! While you attend this session of the first National Young Energy Professional's Law Conference, you will be located approximately half of one mile from the Mississippi River, the longest river in the continent of North America, which touches ten U.S. states and drains from thirty-one. You are approximately twenty-five miles from the open waters of the Gulf of Mexico, a breeding ground for storms and hurricanes. And while you are more precisely within New Orleans' beautiful and historic French Quarter, you are squarely within Louisiana's coastal zone.

When you leave this session and step onto the street, look for a Louisiana license plate and you'll see the motto, "Sportsman's Paradise." Louisiana's coast contains 40-45% of the nation's wetlands, and the millions who live in or visit the coast engage in sporting by hunting, boating, wildlife watching, and fishing. In fact, if you have any seafood during this conference, you likely consumed some of the one billion pounds of the annual commercial fishing landings from Louisiana—the second highest in the United States. Commercial fishing is one part of Louisiana's robust "working coast." The coast's strategic location between significant water bodies also helps make Louisiana the #1 export state in the nation. According to the State's Master Plan for Coastal Restoration and Protection, the coast annually sends more than \$120 billion in goods and services to the rest of the United States and exports \$36.2 billion internationally.¹ And speaking of license plates (or cars), note that Louisiana's coast supports infrastructure that supplies 90% of the United States' outer continental shelf oil and gas. As the Master Plan succinctly puts it, "Louisiana is at the heart of the U.S. petrochemical industry." It states:

We are the largest producer of crude oil, the second-largest producer of natural gas, the third-largest producer of petroleum, and the third-leading state in petroleum refining. Our Outer Continental Shelf houses 88% of U.S. offshore oil rigs. Louisiana's 15 natural gas storage facilities have a processing capacity of 18.5 billion cubic feet per day, enabling our coast to provide 20% of all domestic natural

¹ As of the date of this paper, the draft of the 2017 Master Plan is available to view at <http://coastal.la.gov/a-common-vision/2017-draft-coastal-master-plan/>.

gas production. Our six refineries process more than 2.9 million barrels of gasoline per day, the second largest capacity in the United States. Of the annual \$747 billion in national refined petroleum production, \$71 billion (9.5% of all national production) is attributable to coastal Louisiana. Louisiana also produces 25% of the nation's petrochemicals, with a total value of chemical shipments at more than \$14 billion a year, and is home to half of the U.S. Strategic Petroleum Reserves, the largest emergency fuel storage of oil in the world.

This level of industry has employed generations of families; funded Louisiana coffers through taxes and royalties, and created untold direct and indirect economic benefits for the State.

Louisiana's unique and valuable coast is also experiencing sustainability challenges due to wetlands submergence and loss. The causes of this land loss are varied and complex. We know that constraining the Mississippi River has starved the wetlands of sediment once deposited from the thirty-one states that the river drains. We know that storms have a devastating impact. In the four years from 2004 to 2008 alone, Hurricanes Katrina, Rita, Gustav, and Ike claimed more than 300 square miles of marshland. For more than a century, human enterprise has affected the coastal landscape. Globally, sea levels are rising. And, perhaps most significantly, far below the earth's surface, deep natural geologic processes occur and the earth's plates shift.

Against this backdrop, over the past three and a half years, a handful of powerful plaintiffs' firms have initiated a wave of complex litigation against the energy industry, filing dozens of lawsuits against hundreds of oil and gas and pipeline companies. These lawsuits arguably represent the biggest threat to ongoing efforts by those with a genuine interest in coastal sustainability. To better understand the specifics of this prolific litigation, we will explore the types of suits filed, the plaintiffs and their claims, and the procedural status of these lawsuits.

Louisiana's Coastal Litigation

Coastal land loss litigation began in earnest in July 2013, when the Board of Commissioners of the Southeast Louisiana Flood Protection Authority—East, a local levee board with flood protection jurisdiction in Orleans, Jefferson, and St. Bernard Parishes, sued 97 oil and gas companies in the Civil District Court for Orleans Parish. On the heels of the Levee Board suit, in November 2013, two coastal parishes entered the coastal land loss litigation. The Parishes filed twenty-eight nearly-identical lawsuits on behalf of coastal parishes. Twenty-one of the suits were filed by Plaquemines Parish, and seven by Jefferson Parish.

Borrowing from the allegations of the Plaquemines and Jefferson Parish petitions, a handful of private landowners also filed suit in 2014. In 2016, an additional eleven lawsuits were filed by Cameron Parish, one lawsuit was filed in Vermilion Parish, and one lawsuit was filed by St. Bernard Parish. Collectively, the Parish lawsuits account for forty-one lawsuits, and name hundreds of defendants.

I. Southeast Louisiana Flood Protection Authority – East v. Tennessee Gas Pipeline Co.

In the late summer of 2013, the Southeast Louisiana Flood Protection Authority–East, a local levee board with flood protection jurisdiction in Orleans, Jefferson, and St. Bernard Parishes, sued 97 oil and gas companies in the Civil District Court for Orleans Parish. The suit attracted national attention, alleging that past and present operations of the oil and gas industry—most specifically, dredging of canals—contributed to land loss on a massive scale and rendered defendants liable for billions in damages and restoration costs.

The suit alleged state-law claims based on tort, contract, nuisance and property law. The plaintiff Levee Board’s premise was that the defendants’ operations caused land loss, land loss reduced the “buffer” of marshland between areas in the Board’s flood protection jurisdiction and the Gulf, that this reduced buffer allows storms to come ashore with more ferocity, which in turn places a greater strain on the levee systems for which the Board is responsible.

The suit was removed to federal court. Of the forty-six coastal lawsuits filed to date, the Levee Board is the only successful removal so far. Thirty-two cases have been removed and remanded from the Eastern District of Louisiana, and thirteen cases have been removed to the Western District with hearings on motions to remand temporarily stayed. Thus, the jurisdictional determination in the Levee Board suit merits attention.

A. Federal Question Jurisdiction in the Levee Board suit

Jurisdiction under 28 U.S.C. § 1331—also known as “federal question jurisdiction”—is proper “in all civil actions arising under the Constitution, laws, or treaties of the United States.” The existence of federal question jurisdiction *vel non* is generally governed by the well-pleaded complaint rule, which provides that jurisdiction is proper where federal law creates the cause of action.

After applying this test to the Levee Board’s petition, Judge Nannette Jolivette Brown of the Eastern District found that none of the six causes of action—(1) negligence, (2) strict liability, (3) natural servitude of drain, (4) public nuisance, (5) private nuisance, and (6) breach of contract – third party beneficiary—were created by federal law. Instead, the court found these claims were created by state law. Thus, the court found that the well-pleaded complaint rule was not satisfied. However, this finding did not end the subject matter jurisdiction inquiry because there are two recognized exceptions to the well-pleaded complaint rule.

The first exception is known as “complete preemption.” That is, where a federal statute occupies an area of law so pervasively, any state-law cause of action within that area of law is automatically considered a federal claim for purposes of federal question jurisdiction. Among other things, complete preemption requires that the federal statute contain a civil enforcement provision. The court found that the defendants did not identify a civil enforcement provision in the relevant federal statutes, and thus there was no complete preemption.

The second exception applies to a “special and small category of cases” in which a state-law claim raises a substantial question of federal law. The Supreme Court first articulated this

exception in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*. The *Grable* exception applies “if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress.” The court found that the causes of actions for negligence, public nuisance, and third-party beneficiary—breach of contract satisfied these requirements.

1. The “Necessarily Raised” Component of Federal Question Jurisdiction

A Louisiana negligence action requires the plaintiff to prove, among other things, that the defendant owed him a duty of care and that the defendant breached that duty. In this case, the Levee Board pled that the duty of care is established by three federal statutes: the Rivers and Harbors Act of 1899, the Clean Water Act of 1972, and the Coastal Zone Management Act of 1972. The court held that “by turning to federal law to establish the standard of care, [the Levee Board] ‘necessarily raises’ what duties these laws impose upon Defendants.”

With regard to the public nuisance claim, a plaintiff must demonstrate “an unreasonable interference with a right common to the general public.” The petition avers that by violating the standard of care established by the three federal statutes mentioned earlier, the Defendants have engaged in “unreasonable interference.” Again, by virtue of invoking the federal statutes, the court held the public nuisance claim necessarily raised an issue of federal law.

To support its third-party beneficiary claim for breach of contract, the petition avers the Levee Board is an intended beneficiary of certain permits and rights-of-way entered into between the federal government and the Defendants. The court held that a third-party beneficiary claim is governed by federal common law—and therefore necessarily raises a federal question—when (1) the contract implicates a federal interest, (2) the United States is a party to the contract, and (3) the contract is entered into pursuant to federal law. In this case, the court found that at least some of the dredging permits the petition identifies as contracts were entered into by the United States. Furthermore, according to the court, these permits “implicate important federal interests in coastal land management, sound energy policy, and developing natural resources.” Thus, the court concluded the third party beneficiary claim necessarily raises an issue of federal law.

2. The “Actually Disputed” Component of Federal Question Jurisdiction

The court did not need to spend much time on the “actually disputed” element of federal questions jurisdiction. It found the federal issues necessarily raised by the petition clearly in dispute between the parties.

3. The Substantiality Component of Federal Question Jurisdiction

The substantiality requirement demands that the federal issues necessarily raised by the petition be significant to the federal system as a whole. The court characterized those issues—coastal land management, national energy policy, and national economic policy—as “vital federal interests.” The large number of federal regulations implicated by the Levee Board’s suit also demonstrates that substantial federal issues are involved. Additionally, the court found that the text of the regulations themselves demonstrate “that these issues are of national concern.” Finally,

the court held that while the Levee Board “may not be expressly challenging a specific action of a federal agency, the breadth of [the Levee Board’s] claims amounts to a collateral attack on an entire regulatory scheme.”

4. The Federal-State Balance of Federal Question Jurisdiction

In determining whether federal jurisdiction would disturb the balance of federal and state judicial responsibilities, the court considered whether exercising jurisdiction would “herald an enormous shift of traditionally state cases into federal courts.” The court found that the claims asserted in the petition were not ordinary state-law claims. Instead, “the claims look to federal law to impose liability on an entire industry for the harms associated with coastal erosion.” The court further noted that federal courts are “particularly familiar” with the federal regulatory scheme implicated by the Levee Board’s lawsuit. Thus, the court maintained jurisdiction over the Levee Board suit on the basis of federal question jurisdiction.²

B. Merits Determination in the Levee Board Suit

With remand denied, the defendants filed motions to dismiss the suit on various legal grounds.³ Taking up the defendants’ motion to dismiss for failure to state a claim, the court examined the legal sufficiency of each claim as pled in the state-court petition, and dismissed the suit on a finding that the defendants owed no duty to the plaintiff.

1. Negligence

A plaintiff in a Louisiana negligence action must establish that the defendant owes him a duty to prevent the type of injury he suffered. Modified to fit this case, the court framed the inquiry as “whether a statute or rule of law imposes a duty on Defendants, for the benefit of [the Levee Board], to prevent the loss of coastal lands in the Buffer Zone, mitigate storm surge risk and/or prevent the attendant increased flood protection costs incurred by [the Levee Board].” The Levee

² The court chose to analyze—and ultimately reject—the other asserted bases for jurisdiction. The court found no maritime tort jurisdiction because the injury-causing activity at issue in this case, which the court described as “coastal erosion caused by dredging in navigable water,” did not have a potentially disruptive impact on maritime commerce. The court found no federal enclave jurisdiction because the defendants failed to identify any federal enclaves in which the alleged tortious conduct took place. The court found no jurisdiction under the Outer Continental Shelf Lands Act because (1) the activities that injured the Levee Board did not constitute an “operation conducted on the outer Continental Shelf,” and (2) the Levee Board’s alleged injuries would have occurred regardless of any of the defendants’ operations on the outer Continental Shelf. Finally, the court found no jurisdiction under the Class Action Fairness Act because the Levee Board was the only named plaintiff. Therefore, under *Mississippi ex. rel Hood v. AU Optronics, Inc.*, the “mass action” provision of CAFA did not apply.

³ Defendants’ filings included a motion to dismiss because the plaintiffs’ claims were preempted by federal law and barred under state law, a motion to dismiss for failure to state a claim, and a motion to dismiss because the plaintiffs’ claims were non-justiciable and fell within the primary jurisdiction of federal and state agencies.

Board contended the three federal statutes discussed earlier—the Rivers and Harbors Act, the Clean Water Act, and the Coastal Zone Management Act—establish that duty. The court disagreed, holding the Levee Board was not an intended beneficiary under any of the statutes.

2. Strict Liability

Similarly, the court held that the Levee Board could not state a claim for “strict liability” under Articles 2317 and 2317.1 of the Louisiana Civil Code because causes of action arising under these articles are treated as ordinary negligence claims.

3. Natural Servitude of Drain

A natural servitude of drain is a type of predial servitude, which “is a charge on a servient estate for the benefit of a dominant estate.” Although the two estates need not be contiguous, they must be located “as to allow one to derive some benefit from the charge on the other.” In this case, the alleged charge on the servient estate is created by Articles 655 and 656 of the Louisiana Civil Code. Under Article 655, the servient estate is bound to receive surface water “that flows naturally from an estate situated above unless an act of man has created the flow.” Article 656 provides that the servient estate may not do anything to prevent the flow and that the dominant estate may not do anything to make the flow more burdensome.

The Levee Board alleged in its petition that the defendants interfered with a natural servitude of drain in violation of Article 656 of the Louisiana Civil Code. The court dismissed the servitude claim because the Levee Board failed to sufficiently allege the Defendants’ estates are “situated above” the Levee Board’s estate, as required by Article 655. Furthermore, the Levee Board failed to cite any law to support their argument “that a natural servitude of drain may exist between non-adjacent estates with respect to coastal storm surge.” If a servitude is to exist in these circumstances, the court held “such an undertaking must come from the legislature . . . not from a federal district court.”

4. Public and Private Nuisance

The Levee Board’s public and private nuisance claims derived from Article 667 of the Louisiana Civil Code, which generally prohibits an owner from using his property in a manner that causes damages to his neighbors. The court explained that prior to 1996, Louisiana courts interpreted Article 667 to impose strict liability for damages caused by “ultrahazardous” activity. The legislature amended Article 667 in 1996 to require a showing of negligence in claims for damages under Article 667 (except for damages caused by pile driving or blasting with explosives). With respect to any nuisance claims that accrued after the amendment, the court had no problem dismissing them based on its earlier finding that the Levee Board could not establish negligence. Additionally, the court found that any pre-amendment claims failed because the Levee Board did not sufficiently allege it was a “neighbor” to any property owned by the Defendants. The court explained that in order to be a neighbor, a plaintiff must have some interest in immovable property that is “near” the defendant’s immovable property or within “some level of physical proximity.” The court found the Levee Board failed to allege physical proximity between its own property and the defendants’ property. Accordingly, the court dismissed the nuisance claims.

5. Breach of Contract—Third Party Beneficiary

According to the court, “[a] plaintiff claiming to be an intended beneficiary of a government contract must show that he was intended to benefit from the contract and that third-party beneficiary claims are consistent with the terms of the contract and the policy underlying it.” The court held the Levee Board’s claim failed at the outset, because the dredging *permits* issued by the federal government did not constitute “contracts” for purposes of this claim. But even if the permits constituted contracts, the Levee Board’s claim failed for the additional reason that the Levee Board could not establish it was an intended third party beneficiary. The court noted the permits did not contain any language suggesting the Levee Board was intended to derive benefits from the permit. In fact, according to the court, “the permits indicate that they were issued for the purpose of complying with federal regulatory schemes.” For these reasons, the court dismissed the third party beneficiary claim.

Having determined the Levee Board failed to state any claims upon which relief could be granted, the court dismissed the case in its entirety. The court entered final judgment the same day.

C. The Fifth Circuit’s Ruling

The case was appealed to the Fifth Circuit. On appeal, the Levee Board argued that both the court’s jurisdictional determination and that its subsequent dismissal were erroneous. The Fifth Circuit heard oral argument on February 29, 2016, and rendered a decision affirming the trial court on March 3, 2017. In a unanimous decision, the Fifth Circuit affirmed Judge Brown’s jurisdictional exercise and dismissal on the merits. The Fifth Circuit agreed that the Board’s state law tort claims necessarily raised federal issues insofar as each claim drew upon federal laws (the Rivers and Harbors Act and the Clean Water Act) to ostensibly create the requisite standard of care that the Board claimed that the oil and gas defendants had breached.

The court then affirmed dismissal of the plaintiff’s tort claims (negligence and strict liability) on the basis that defendants owed no duty to this particular plaintiff. The court recognized that in determining whether such a duty exists, Louisiana courts consider whether there is an ease of association between the plaintiff’s harm and a defendant’s conduct. The court determined that neither federal law nor Louisiana law creates a duty for oil and gas companies to protect SLFPA-E from increased flood protection costs arising out of the damage allegedly caused by the defendants. In other words, the principal purpose of the Clean Water Act and the Rivers and Harbors Act was not to protect a local levee board. The court affirmed dismissal of the Board’s other state law claims (that defendants had impaired the “natural servitude of drain” under the Louisiana Civil Code, on the basis that the board did not establish that it owned a servient estate; and nuisance, on the basis that the Board did not sufficiently allege in its complaint that it is a “neighbor” of any of defendants’ property).

To date, the Levee Board case is the only one of the coastal cases to have proceeded to final judgment.

II. Parish and State Lawsuits under the State and Local Coastal Resources Management Act of 1978 (the “Parish suits”)

The forty-one lawsuits filed by the Parishes took an approach different from the general tort and other claims asserted by the Levee Board. Instead of relying on general tort law, the Parishes filed nearly identical “permit enforcement” actions.

The lawsuits share the same premise. The suits are (1) by a coastal parish (2) against oil and gas companies (3) within a specific “operational area,” (4) based on alleged violations of Louisiana’s coastal zone management laws. Louisiana’s coastal management statute is called the State and Local Coastal Resources Management Act of 1978 (“SLCRMA”), La. R.S. § 49:214.21 *et seq.* The plaintiff Parishes base their Petitions on provisions of SLCRMA and its companion regulations, which are located in the Louisiana Administrative Code.

Under Louisiana law, certain activities carried out in the coastal zone will require a coastal use permit (“CUP”), and the activity must adhere to the terms and conditions of the CUP. Essentially, the Parishes argue that when defendants conducted their oil and gas operations, they either failed to obtain a CUP when required, or failed to abide by the terms of their CUPs. Most of the Petitions’ factual allegations pertain to pit use, dredging, or waste disposal/contamination. The lawsuits allege that the Defendants’ activities have caused contamination and coastal erosion, and seek money damages and actual restoration of the coastal zone.

A. Plaintiffs in the Parish Suits

Originally, the sole plaintiffs were individual Parishes—Plaquemines Parish, Jefferson Parish, or Cameron Parish. The parishes asserted claims in their own behalf and on behalf of the State. In March 2016, the Attorney General intervened in all pending CZM suits on behalf of the State of Louisiana. Shortly afterwards, at the Governor’s direction, the Louisiana Department of Natural Resources also intervened—separately—on behalf of the State.

However, the Attorney General’s initial interventions were different in scope than the Parish’s, and indeed, included a claim to “supersede” the Parish. The Attorney General has not yet actively pursued his claims of supersession. The Attorney General also later amended his interventions to encompass all the same claims as the Parish, and in most cases, the Attorney General and LDNR have presented their arguments in unified pleadings.

Currently, it is the position of the public body plaintiffs that co-enforcement of alleged permit violations by multiple state actors is permitted by a provision of Louisiana’s coastal management law which allows (i) the secretary of the Louisiana Department of Natural Resources (“LDNR”), (ii) the Attorney General, (iii) a district attorney, or (iv) a Parish government that has adopted a local coastal management program to “bring such injunctive, declaratory, or other actions as are necessary to ensure that no uses are made of the coastal zone for which a coastal use permit has not been issued when required or which are not in accordance with the terms and

conditions of a coastal use permit.”⁴ Defendants dispute that there is a right to multiple and overlapping enforcement actions by different public bodies.

In mid-September, the Governor of Louisiana reportedly issued letters instructing other coastal parishes to initiate similar lawsuits within thirty days, or else the LDNR would do so. Some Parishes have vocally opposed the Governor’s request to initiate coastal lawsuits. Others have hired counsel to investigate similar claims. Currently, there are sixteen coastal parishes that have not yet filed CZM lawsuits.⁵

B. Removal, Remand, and Subsequent State Court Proceedings

1. Removal in the Plaquemines and Jefferson Cases

A group of defendants removed all of the Parish cases to federal court. In the first suite of removals—the twenty-eight cases filed by Plaquemines and Jefferson Parishes in 2013—four grounds for federal jurisdiction came before the Eastern District on the Parish’s motion to remand: (1) diversity jurisdiction, (2) OCSLA jurisdiction, (3) general maritime jurisdiction, and (4) federal enclave jurisdiction.

The judges of the Eastern District agreed to allow Judge Zainey to issue a ruling in *The Parish of Plaquemines v. Total Petrochemicals, et al.*, before the other judges made a decision on remand. Judge Zainey granted the Parish’s motion to remand, and the rest of the judges followed suit. Eventually, all of the Plaquemines and Jefferson cases were remanded back to state court.⁶ Because the *Total* remand decision was the most comprehensive and other Eastern District judges expressly relied upon it, Judge Zainey’s decision is discussed in some detail below.

a. Diversity jurisdiction

The *Total* petition did not on its face assert complete diversity of citizenship between plaintiff and the named defendants since certain defendants were Louisiana citizens along, of course, with the Parish. Second, the Parish alleged claims on behalf of the State of Louisiana, but the State is not a “citizen” for purposes of diversity jurisdiction. Thus, the presence of the State as a party destroys diversity jurisdiction.

Defendants argued that the lack of complete diversity on the face of the petition did not preclude removal since the Parish had egregiously misjoined the claims asserted in the petition. Egregious misjoinder occurs when a plaintiff sues non-diverse defendants “with no real connection to the controversy at issue” solely for the purpose of preventing removal to federal court. The

⁴ La. R.S. § 49:214.36(D).

⁵ These sixteen coastal parishes are Ascension, Assumption, Calcasieu, Iberia, Lafourche, Livingston, Orleans, St. Bernard, St. Charles, St. James, St. John the Baptist, St. Martin, St. Mary, St. Tammany, Tangipahoa, and Terrebonne Parish.

⁶ Unlike the Levee Board suit, no federal permits are alleged to be at issue in the Parish suits. However, the question of whether maritime claims are now removable is an open issue in the Levee Board appeal, and that question is also presented in the Parish cases.

defendants' proposed remedy was to sever and remand the claims against the non-diverse defendants.

For purposes of the motion to remand, the court assumed (without deciding) that the egregious misjoinder doctrine applies in the Fifth Circuit and was available to the defendants. The court proceeded to find that even if the claims were misjoined, they were not *egregiously* misjoined. In other words, the court held there was no evidence the Parish sued the non-diverse defendants solely for the purpose of defeating diversity jurisdiction.

The Parish claimed that diversity subject matter jurisdiction would be lacking even if the claims against the different defendants were severed because it was asserting claims in the case in which the State was the real party in interest. The court agreed, finding the State to be the real party in interest to certain of the Parish's claims, thereby eliminating the possibility of diversity subject matter jurisdiction.

b. OCSLA Jurisdiction

The court explained that OCSLA jurisdiction is proper when (1) the activities that allegedly caused the injuries constituted an "operation" conducted on the outer continental shelf, and (2) the case before the court "arises out of or in connection" with that operation. The court held jurisdiction was not proper under the first prong of this test. According to the court, "all of the oil and gas activities that give rise to the claims asserted in this action occurred in Plaquemines Parish—none of the operations that gave rise to the alleged violations of the CZM Laws occurred on the Outer Continental Shelf ("OCS"). Moreover, all of the resulting injury and damage was sustained in Plaquemines Parish, not on the OCS."

c. General Maritime Jurisdiction

Even if the claims alleged in the petition constituted maritime torts, the court held those claims were not removable to federal court. The court explained that maritime claims filed in state court under the "savings to suitors clause" of 28 U.S.C. § 1333 were historically not removable to federal court absent an independent basis of federal jurisdiction. The defendants argued the 2011 amendments to the federal removal statute eliminated this traditional requirement. The court disagreed, noting that every Eastern District court to consider the argument has rejected it.

d. Federal Enclave Jurisdiction (Federal Question Jurisdiction)

Federal enclave jurisdiction is a species of federal question jurisdiction. When the United States obtains exclusive jurisdiction over certain land (the "federal enclave"), any state-law causes of action based on that land are automatically transformed into federal causes of action for purposes of federal question jurisdiction. The Defendants argued that three fields identified in the petition are located in the Delta National Wildlife Refuge ("DNWR"), which they contend is a federal enclave.

In order to establish the DNWR is a federal enclave, the court held the Defendants must establish three elements: (1) "the United States acquired [the DNWR] for the purpose of erecting forts, magazines, arsenals, dock-yards, or other needful buildings, (2) the state legislature

consented to the jurisdiction of the federal government, and (3) . . . the United States affirmatively accepted exclusive jurisdiction in accordance with 40 U.S.C. § 3112 if [the DNWR] was acquired after 1949.”

The Court held the DNWR is not a federal enclave because “[c]learly, the United States did not acquire the land . . . for the purpose of erecting a fort, magazine, arsenal or dockyard, or any other type of building.” The court further held that a wildlife refuge such as the DNWR does not qualify as an “other needful building” under the case law.

2. Removals of Other Parish Cases

The Cameron and Vermilion Parish cases were removed by the major defendants on the basis of maritime jurisdiction and OCSLA jurisdiction. The Western District postponed hearings on the motions to remand the Cameron and Vermilion Parish cases until the Fifth Circuit issued a ruling in the Levee Board suit, possibly to see if the Fifth Circuit would weigh in on the removability of maritime claims—an issue that has divided district courts across the country. However, after the Fifth Circuit affirmed jurisdiction on federal question grounds, it did not reach the maritime jurisdictional issue. The Western District recently set a briefing schedule for the parties to brief the relevance of the Fifth Circuit’s opinion to the pending motions to remand in the Cameron Parish cases. The St. Bernard Parish case has also been removed to the Eastern District.

3. Initial Responsive Pleadings Filed in State Court

After remand of the Plaquemines and Jefferson cases from the Eastern District, the defendants asserted a number of exceptions to those suits in state court. By agreement of the parties, the first case that proceeded to argument was *Jefferson Parish v. Atlantic Richfield Co., et al.*, filed in Jefferson Parish before Judge Stephen Enright. The defendants filed exceptions raising the objections of No Right of Action, Vagueness, Improper Cumulation, and Prematurity.

In their exception of No Right of Action, the defendants argued that most oil and gas activities are not governed by the state coastal zone management laws, but instead are regulated by the Louisiana Office of Conservation. The limited oil and gas activities that state coastal zone management laws do regulate can only be enforced by the State (not local Parishes). After the State’s intervention, the defendants amended their exception to add that even if the Parish does have enforcement authority over such activities, then the Parish should lose its alleged right to co-enforce once the State intervened.

Raising the exception of vagueness, the defendants argued that the Parish failed to plead any defendant-specific activities. In all cases, the Parish attached a spreadsheet listing wells and permits, but did not identify any specific permit violations, or any instances in which a defendant should have acquired a permit but failed to do so.

In the exception of improper cumulation, the defendants urged that enforcement lawsuits should be brought separately on a defendant-by-defendant basis. Defendants posited that the permits at issue differed greatly in date of issuance, activities covered, location, *etc.* and lacked the requisite factual overlap necessary to support cumulation; the defendant also argued that it is

legally improper to cumulate permit enforcement actions, since every alleged permit violation depends on the terms of that specific permit.

The exception of prematurity for failure to exhaust administrative remedies contended that Louisiana's coastal laws require an administrative procedure before initiating a lawsuit over a CUP. This procedure includes issuance of cease and desist letters, suspension or revocation of CUPs, and an administrative penalty system; however, the Parish failed to take any of those preliminary steps and skipped directly to litigation.⁷

After the State's interventions, the defendants adopted and asserted their exceptions against the Parish against the State, as applicable. The State generally adopted and relied upon the Parish's briefing.

a. Procedural History of Exception of Prematurity for Failure to Exhaust Administrative Remedies

On August 9th, Judge Enright issued a ruling granting the defendants' exception of prematurity for failure to exhaust administrative remedies and dismissing Plaintiffs' claims without prejudice. He denied all of the other pending exceptions as moot.

After the ruling, the Attorney General released a statement that he would not appeal the judge's ruling; however, the LDNR and the Parish filed separate motions for new trial asking the trial court to reconsider his ruling. The motions for new trial were heard on October 26, 2016. Considering an affidavit offered by Secretary of LDNR Thomas Harris stating that LDNR lacked the resources to prosecute all of the violations alleged in the lawsuits, the court granted the motion for new trial and reversed its prior ruling. The Louisiana Fifth Circuit Court of Appeals denied defendants' application for supervisory review. In its writ denial, the Fifth Circuit opined that the lawsuit was not premature "irrespective of Mr. Harris's affidavit." Defendants subsequently sought supervisory review from the Louisiana Supreme Court, where the writ is pending.

b. Status of Other Parish Cases

By agreement, the parties proceeded with a hearing on exceptions in two of the twenty-one cases filed in Plaquemines Parish on March 1, 2017. The court heard the same exceptions of vagueness, failure to exhaust administrative remedies, and no right of action that were argued before Judge Enright in *Jefferson Parish v. Atlantic Richfield Co., et al.* All twenty-one cases are assigned to the same judge.

To date, none of the seven cases in Jefferson Parish other than *Jefferson Parish v. Atlantic Richfield Co.* have been set for hearing on exceptions. Judge Enright has yet to rule on the remaining exceptions in *Jefferson Parish v. Atlantic Richfield Co.* that are no longer moot given the reversal on failure to exhaust.

⁷ Additionally, defendants urged one exception of prematurity peculiar to Jefferson Parish on the basis that the Parish was required by local law to obtain the Attorney General's approval before retaining private counsel.

III. The Private Landowner Suits

Just under one year after the first wave of twenty-eight Parish suits were filed, the law firm representing the Levee Board suit filed four separate tort suits on behalf of private landowners in Plaquemines and Jefferson Parish. The plaintiffs allege that they own the land in or around the “operational areas” identified in the Parish’s petitions, and then repeat the Parishes’ allegations. The plaintiffs allege that the violations of permits and coastal zone laws identified by the Parishes constitute torts as to the private landowners. Plaintiffs also purported to be third party beneficiaries of the coastal use permits identified in the Parish suits, and claimed that they were entitled to bring an action for breach of those permits as third party beneficiaries. The private landowner cases were removed and subsequently remanded, with opinions on remand citing extensively from Judge Zainey’s ruling in the *Total* case.

After remand, defendants filed exceptions—principally vagueness, improper cumulation, and, no cause of action for breach of contract as a third party beneficiary. One of the four landowner cases, *Sandra Couvillon Borne, et al. v. Chevron U.S.A. Holdings Inc., et al.* proceeded to hearing on the exceptions on December 7, 2016.

Judge Sullivan of the 24th JDC granted Defendants’ Exception of Vagueness in the *Borne* case, and ordered plaintiffs to amend their petition within 90 days to cure vagueness by pleading material facts as to each specific defendant. Judge Sullivan deferred ruling on the other exceptions until after plaintiffs file an amended petition.