CASE NO. 15-30162

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BOARD OF COMMISSIONERS OF THE SOUTHEAST LOUISIANA FLOOD PROTECTION AUTHORITY – EAST, INDIVIDUALLY AND AS THE BOARD GOVERNING THE ORLEANS LEVEE DISTRICT, THE LAKE BORGNE BASIN LEVEE DISTRICT, AND THE EAST JEFFERSON LEVEE DISTRICT,
Plaintiffs - Appellants

v.

TENNESSEE GAS PIPELINE COMPANY, L.L.C.; ALTA MESA SERVICES, L.P.; ANADARKO E&P ONSHORE, L.L.C.; APACHE CORPORATION; ATLANTIC RICHFIELD COMPANY; BEPCO, L.P.; BOARDWALK PIPELINE PARTNERS, L.P.; BOPCO, L.P.; BP AMERICA PRODUCTION COMPANY; BP OIL PIPELINE COMPANY; CALLON OFFSHORE PRODUCTION, INCORPORATED; CALLON PETROLEUM COMPANY; CASKIDS OPERATING COMPANY; CENTERPOINT ENERGY RESOURCES CORPORATION; CHEVRON PIPE LINE COMPANY; CHEVRON USA, INCORPORATED; CLAYTON WILLIAMS ENERGY, INCORPORATED; CLOVELLY OIL COMPANY, L.L.C.; COASTAL EXPLORATION AND PRODUCTION, L.L.C.; COLLINS PIPELINE COMPANY; CONOCOPHILLIPS COMPANY; CONTINENTAL OIL COMPANY; COX OPERATING, L.L.C.; CRAWFORD HUGHES OPERATING COMPANY; DALLAS EXPLORATION, INCORPORATED; DAVIS OIL COMPANY; DEVON ENERGY PRODUCTION COMPANY, L.P.; ENERGEN RESOURCES CORPORATION; ENTERPRISE INTRASTATE, L.L.C.; EOG RESOURCES, INCORPORATED; EP ENERGY MANAGEMENT, L.L.C.; EXXON MOBIL CORPORATION; EXXON MOBIL PIPELINE COMPANY; FLASH GAS & OIL NORTHEAST, INCORPORATED; GRAHAM ROYALTY, LIMITED; GREKA AM, INCORPORATED; GULF PRODUCTION COMPANY, INCORPORATED; GULF SOUTH PIPELINE COMPANY, L.P.; HARVEST OIL & GAS, L.L.C.; HELIS ENERGY, L.L.C.; HELIS OIL & GAS COMPANY, L.L.C.; HESS CORPORATION, A Delaware Corporation; HILLIARD OIL & GAS, INCORPORATED; HKN, INCORPORATED; INTEGRATED EXPLORATION & PRODUCTION,

L.L.C.; J.C. TRAHAN DRILLING CONTRACTOR, INCORPORATED; J.M. HUBER CORPORATION; KENMORE OIL COMPANY, INCORPORATED; KEWANEE INDUSTRIES, INCORPORATED; KOCH EXPLORATION CO., L.L.C.; KOCH INDUSTRIES, INCORPORATED; LIBERTY OIL & GAS CORPORATION; LLOG EXPLORATION COMPANY; MANTI OPERATING COMPANY; MARATHON OIL COMPANY; MCMORAN EXPLORATION COMPANY; MOEM PIPELINE, L.L.C.; MOSBACHER ENERGY COMPANY; NATURAL RESOURCES CORPORATION OF TEXAS; NEWFIELD EXPLORATION GULF COAST, L.L.C.; NOBLE ENERGY, INCORPORATED; O'MEARA, L.L.C.; P.R. RUTHERFORD; PLACID OIL COMPANY; PLAINS PIPELINE, L.P.; PXP PRODUCING COMPANY, L.L.C.; REPUBLIC MINERAL CORPORATION; RIPCO, L.L.C.; ROZEL OPERATING COMPANY; MURPHY EXPLORATION AND PRODUCTION COMPANY, USA; SENECA RESOURCES CORPORATION; SHELL OIL COMPANY; SOUTHERN BAY ENERGY, L.L.C., also known as HK Energy, L.L.C.; SOUTHERN NATURAL GAS COMPANY, L.L.C.; SUN OIL COMPANY; SUNDOWN ENERGY, L.P.; UNION OIL COMPANY OF CALIFORNIA; WHITING OIL & GAS CORPORATION; WILLIAMS EXPLORATION COMPANY; YUMA EXPLORATION AND PRODUCTION COMPANY, INCORPORATED; MERIDIAN RESOURCE & EXPLORATION, L.L.C.; PICKENS COMPANY, INCORPORATED; ESTATE OF WILLIAM G. HELIS; LOUISIANA LAND AND EXPLORATION COMPANY, L.L.C. MARYLAND; KAISER-FRANCIS OIL COMPANY; BP PIPELINES NORTH AMERICA, INCORPORATED; VINTAGE PETROLEUM, L.L.C, Delaware; ENLINK LIG, L.L.C.,
Defendants - Appellees

On Appeal from the Judgment of the United States District Court for the Eastern District of Louisiana in Civil Action No. 2:13-cv-05410, Honorable Nannette Jolivette Brown, Presiding

ORIGINAL BRIEF OF PLAINTIFFS-APPELLANTS BOARD OF COMMISSIONERS OF THE SOUTHEAST LOUISIANA FLOOD PROTECTION AUTHORITY – EAST, INDIVIDUALLY AND AS THE BOARD GOVERNING THE ORLEANS LEVEE DISTRICT, THE LAKE BORGNE BASIN LEVEE DISTRICT, AND THE EAST JEFFERSON LEVEE DISTRICT

GLADSTONE N. JONES, III (#22221)
BERNARD E. BOUDREAUX (#2219)
KEVIN E. HUDDELL (#26930)
EBERHARD D. GARRISON (#22058)
HARVEY S. BARTLETT III (#26795)
EMMA ELIZABETH ANTIN DASCHBACH (#27358)
Jones, Swanson, Huddell & Garrison, L.L.C.
601 Poydras St., Suite 2655
New Orleans, Louisiana 70130
Telephone: (504) 523-2500
Facsimile: (504) 523-2508

JAMES R. SWANSON (#18455)
BENJAMIN D. REICHARD (#31933)
Fishman Haygood, L.L.P.
201 St. Charles Ave. , Suite 4600
New Orleans, Louisiana 70170
Telephone: (504) 586-5252
Facsimile: (504) 586-5250

J. MICHAEL VERON (#7570)
J. ROCK PALERMO III (#21793)
ALONZO P. WILSON (#13547)
Veron, Bice, Palermo & Wilson, L.L.C.
721 Kirby St. (70601)
P.O. Box 2125
Lake Charles, Louisiana 70602
Telephone: (337) 310-1600
Facsimile: (337) 310-1601

Counsel For Plaintiffs-Appellants, Board of Commissioners of the Southeast Louisiana Flood Protection Authority – East, Individually and as the Board Governing the Orleans Levee District, the Lake Borgne Basin Levee District, and the East Jefferson Levee District

CERTIFICATE OF INTERESTED PERSONS

CASE NO. 15-30162

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BOARD OF COMMISSIONERS OF THE SOUTHEAST LOUISIANA FLOOD PROTECTION AUTHORITY – EAST, INDIVIDUALLY AND AS THE BOARD GOVERNING THE ORLEANS LEVEE DISTRICT, THE LAKE BORGNE BASIN LEVEE DISTRICT, AND THE EAST JEFFERSON LEVEE DISTRICT,
Plaintiffs - Appellants

v.

TENNESSEE GAS PIPELINE COMPANY, L.L.C.; ALTA MESA SERVICES, L.P.; ANADARKO E&P ONSHORE, L.L.C.; APACHE CORPORATION; ATLANTIC RICHFIELD COMPANY; BEPCO, L.P.; BOARDWALK PIPELINE PARTNERS, L.P.; BOPCO, L.P.; BP AMERICA PRODUCTION COMPANY; BP OIL PIPELINE COMPANY; CALLON OFFSHORE PRODUCTION, INCORPORATED; CALLON PETROLEUM COMPANY; CASKIDS OPERATING COMPANY; CENTERPOINT ENERGY RESOURCES CORPORATION; CHEVRON PIPE LINE COMPANY; CHEVRON USA, INCORPORATED; CLAYTON WILLIAMS ENERGY, INCORPORATED; CLOVELLY OIL COMPANY, L.L.C.; COASTAL EXPLORATION AND PRODUCTION, L.L.C.; COLLINS PIPELINE COMPANY; CONOCOPHILLIPS COMPANY; CONTINENTAL OIL COMPANY; COX OPERATING, L.L.C.; CRAWFORD HUGHES OPERATING COMPANY; DALLAS EXPLORATION, INCORPORATED; DAVIS OIL COMPANY; DEVON ENERGY PRODUCTION COMPANY, L.P.; ENERGEN RESOURCES CORPORATION; ENTERPRISE INTRASTATE, L.L.C.; EOG RESOURCES, INCORPORATED; EP ENERGY MANAGEMENT, L.L.C.; EXXON MOBIL CORPORATION; EXXON MOBIL PIPELINE COMPANY; FLASH GAS & OIL NORTHEAST, INCORPORATED; GRAHAM ROYALTY, LIMITED; GREKA AM, INCORPORATED; GULF PRODUCTION COMPANY, INCORPORATED; GULF SOUTH PIPELINE COMPANY, L.P.; HARVEST OIL & GAS, L.L.C.; HELIS ENERGY,

L.L.C.; HELIS OIL & GAS COMPANY, L.L.C.; HESS CORPORATION, A Delaware Corporation; HILLIARD OIL & GAS, INCORPORATED; HKN, INCORPORATED; INTEGRATED EXPLORATION & PRODUCTION, L.L.C.; J.C. TRAHAN DRILLING CONTRACTOR, INCORPORATED; J.M. HUBER CORPORATION; KENMORE OIL COMPANY, INCORPORATED; KEWANEE INDUSTRIES, INCORPORATED; KOCH EXPLORATION CO., L.L.C.; KOCH INDUSTRIES, INCORPORATED; LIBERTY OIL & GAS CORPORATION; LLOG EXPLORATION COMPANY; MANTI OPERATING COMPANY; MARATHON OIL COMPANY; MCMORAN EXPLORATION COMPANY; MOEM PIPELINE, L.L.C.; MOSBACHER ENERGY COMPANY; NATURAL RESOURCES CORPORATION OF TEXAS; NEWFIELD EXPLORATION GULF COAST, L.L.C.; NOBLE ENERGY, INCORPORATED; O'MEARA, L.L.C.; P.R. RUTHERFORD; PLACID OIL COMPANY; PLAINS PIPELINE, L.P.; PXP PRODUCING COMPANY, L.L.C.; REPUBLIC MINERAL CORPORATION; RIPCO, L.L.C.; ROZEL OPERATING COMPANY; MURPHY EXPLORATION AND PRODUCTION COMPANY, USA; SENECA RESOURCES CORPORATION; SHELL OIL COMPANY; SOUTHERN BAY ENERGY, L.L.C., also known as HK Energy, L.L.C.; SOUTHERN NATURAL GAS COMPANY, L.L.C.; SUN OIL COMPANY; SUNDOWN ENERGY, L.P.; UNION OIL COMPANY OF CALIFORNIA; WHITING OIL & GAS CORPORATION; WILLIAMS EXPLORATION COMPANY; YUMA EXPLORATION AND PRODUCTION COMPANY, INCORPORATED; MERIDIAN RESOURCE & EXPLORATION, L.L.C.; PICKENS COMPANY, INCORPORATED; ESTATE OF WILLIAM G. HELIS; LOUISIANA LAND AND EXPLORATION COMPANY, L.L.C. MARYLAND; KAISER-FRANCIS OIL COMPANY; BP PIPELINES NORTH AMERICA, INCORPORATED; VINTAGE PETROLEUM, L.L.C, Delaware; ENLINK LIG, L.L.C.,
Defendants - Appellees

The undersigned counsel of record certifies that the following listed persons and entities as described in United States Court of Appeals for the Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Plaintiffs-Appellants

- The Board of Commissioners of the Southeast Louisiana Flood Protection Authority – East, Individually and as the Board Governing the Orleans Levee District, the Lake Borgne Basin Levee District, and the East Jefferson Levee District is a constitutionally and statutorily created Board established to govern the Southeast Louisiana Flood Protection Authority – East and its constituent levee districts, which are independent political subdivisions of the State of Louisiana.

2. Counsel for Plaintiffs-Appellants

- Gladstone N. Jones, III, Bernard E. Boudreaux, Kevin E. Huddell, Eberhard D. Garrison, Harvey S. Bartlett III, Emma Elizabeth Antin Daschbach, JONES, SWANSON, HUDDELL & GARRISON
- James R. Swanson, Benjamin D. Reichard, FISHMAN HAYGOOD, L.L.P.
- J. Michael Veron, J. Rock Palermo III, Alonzo P. Wilson, VERON, BICE, PALERMO & WILSON, L.L.C.

3. Defendants-Appellees

- Tennessee Gas Pipeline Company, L.L.C.
- Alta Mesa Services, L.P.
- Anadarko E&P Onshore, L.L.C.
- Apache Corporation
- Atlantic Richfield Company
- BEPCO, L.P.
- Boardwalk Pipeline Partners, L.P.
- BOPCO, L.P.
- BP America Production Company
- BP Oil Pipeline Company
- BP Pipelines North America, Inc.
- Callon Offshore Production, Inc.
- Callon Petroleum Company
- Caskids Operating Company
- Centerpoint Energy Resources Corporation
- Chevron Pipe Line Company
- Chevron USA, Inc.

- Clayton Williams Energy, Inc.
- Clovelly Oil Company, L.L.C.
- Coastal Exploration and Production, L.L.C.
- Collins Pipeline Company
- ConocoPhillips Company
- Continental Oil Company
- Cox Operating, L.L.C.
- Crawford Hughes Operating Company
- Dallas Exploration, Inc.
- Davis Oil Company
- Devon Energy Production Company, L.P.
- Energen Resources Corporation
- Enlink LIG, L.L.C.
- Enterprise Intrastate, L.L.C.
- EOG Resources, Inc.
- EP Energy Management, L.L.C.
- Estate of William G. Helis
- Exxon Mobil Corporation
- Exxon Mobil Pipeline Company
- Flash Gas & Oil Northeast, Inc.
- Graham Royalty, Limited
- Greka AM, Inc.
- Gulf Production Company, Inc.
- Gulf South Pipeline Company, L.P.
- Harvest Oil & Gas, L.L.C.
- Helis Energy, L.L.C.
- Helis Oil & Gas Company, L.L.C.
- Hess Corporation, A Delaware Corporation
- Hilliard Oil & Gas, Inc.
- HKN, Inc.
- Integrated Exploration & Production, L.L.C.
- J.C. Trahan Drilling Contractor, Inc.
- J.M. Huber Corporation
- Kaiser-Francis Oil Company
- Kenmore Oil Company, Inc.
- Kewanee Industries, Inc.
- Koch Exploration Co., L.L.C.

- Koch Industries, Inc.
- Liberty Oil & Gas Corporation
- LLOG Exploration Company
- Louisiana Land and Exploration Company, L.L.C. Maryland
- Manti Operating Company
- Marathon Oil Company
- McMoRan Exploration Company
- Meridian Resources & Exploration, L.L.C.
- Moem Pipeline, L.L.C.
- Mosbacher Energy Company
- Natural Resources Corporation of Texas
- Newfield Exploration Gulf Coast, L.L.C.
- Noble Energy, Inc.
- O'Meara, L.L.C.
- Pickens Company, Inc.
- Placid Oil Company
- Plains Pipeline, L.P.
- PXP Producing Company, L.L.C.
- Republic Mineral Corporation
- Ripco, L.L.C.
- Rozel Operating Company
- Murphy Exploration and Production Company, USA
- Seneca Resources Corporation
- Shell Oil Company
- Southern Bay Energy, L.L.C., also known as HK Energy, L.L.C.
- Southern Natural Gas Company, L.L.C.
- Sun Oil Company
- Sundown Energy, L.P.
- Union Oil Company of California
- Whiting Oil & Gas Corporation
- Williams Exploration Company
- Yuma Exploration and Production Company, Inc.

4. Counsel for Defendants-Appellees

- ADAMS & REESE, L.L.P.: Francis V. Liantonio, Jr., Thomas Gordon O'Brien, Martin A. Stern, Jeffrey Edward Richardson
- ARNOLD & PORTER, L.L.P.: Matthew T. Heartney, Nancy Gordon Milburn

- BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, P.C.: Nancy Scott Degan, Roy C. Cheatwood, Kerry J. Miller
- LAW OFFICE OF STEPHEN D. BAKER: Stephen D. Baker
- BALDWIN HASPEL BURKE & MAYER, L.L.C.: Beverly Klundt Baudoin, David Louis Carrigee
- BIENVENU, BONNECAZE, FOCO, VIATOR & HOLINGA, A.P.L.L.C.: Erin Percy Tadie
- BRADLEY, MURCHISON, KELLY & SHEA, L.L.C.: Stephen Christopher Fortson, Darryl Joseph Foster, Anna W. O'Neal
- CARVER, DARDEN, KORETZKY, TESSIER, FINN, BLOSSMAN & AREAUX, L.L.C.: Taylor Darden
- CURRY & FRIEND, P.L.C.: Mary Margaret Steele, Christopher C. Friend, Meghan Elizabeth Smith
- DEUTSCH, KERRIGAN & STILES, L.L.P.: Isaac H. Ryan
- FOWLER RODRIGUEZ VALDES-FAULI: John Anthony Scialdone, Michael James Thompson, Jr.
- GIEGER, LABORDE & LAPEROUSE, L.L.C.: Andrew A. Braun, Caitlin Jean Hill
- GORDON, ARATA, MCCOLLAM, DUPLANTIS & EAGAN, L.L.C.: Ewell Elton Eagan, Jr., Terence Kent Knister, James Douglas Rhorer
- GRAY REED & MCGRAW, P.C.: James Joseph Ormiston, Michael Antoine Ackal, III, Julia M. Palmer
- GUGLIELMO, LOPEZ, TUTTLE, HUNTER & JARRELL: James Thomas Guglielmo
- DANIEL HUGHES, A.P.L.C.: Daniel C. Hughes
- JONES WALKER LLP: Douglas J. Longman, Jr., Carmen Marie Rodriguez, Carl David Rosenblum, Alida C. Hainkel,Lauren Courtney Mastio, Joshua A. Norris, William D. Lampton, William Thomas McCall, Jr., Glenn G. Goodier
- KEAN MILLER, L.L.P.: Leonard Louis Kilgore, III, Brett Patrick Fenasci, Esteban Herrera, Jr., Tyler Ann Moore Kostal, Mark Andrew Marionneaux, Richard Dean McConnell, Richard Stuart Pabst, Victor Jacob Suane, Jr., Louis Victor Gregoire, Jr., Pamela Roman Mascari,Charles Simon McCowan, III, Michael Raudon Phillips, Bradley Joseph Schlotterer, Dylan T. Thriffiley
- KEOUGH, COX & WILSON, LIMITED: John Powers Wolff, III, Nancy B. Gilbert, Richard W. Wolff
- KING & SPALDING, L.L.P.: Ashley Charles Parrish, Jeremiah Johnson Anderson, Robert Ellison Meadows

- KUCHLER, POLK, SCHELL, WEINER & RICHESON, L.L.C.: Leigh Ann Schell, Deborah DeRoche Kuchler
- LAPEYRE & LAPEYRE, L.L.P.: Etienne C. Lapeyre, F. Henri Lapeyre, Jr.
- LARZELERE PICOU WELLS SIMPSON LONERO, L.L.C.: Morgan Joseph Wells, Jr., Evan J. Godofsky
- LISKOW & LEWIS: George Arceneaux, III, Joe B. Norman, Robert Beattie McNeal, Michael P. Cash, Jamie Duayne Rhymes, Jonathan Andrew Hunter, Elizabeth S. Wheeler, Russell Keith Jarrett, Kelly Bechtel Becker, George Hardy Robinson, Jr.
- LLOG EXPLORATION COMPANY, L.L.C.: George M. Gilly
- MAYHALL & BLAIZE: Charles G. Blaize
- MCGUIREWOODS, L.L.P.: Angela M. Spivey, Richard Trent Taylor
- MONTGOMERY BARNETT, L.L.P.: John Y. Pearce, Edward Louis Fenasci
- NEUNERPATE: Brandon Wade Letulier, Cliff A. LaCour, Ben Louis Mayeaux, Francis X. Neuner
- OTTINGER HEBERT, L.L.C.: Paul J. Hebert
- PHELPS DUNBAR, L.L.P.: Steven Jay Levine, John Bechtold Shortess, Kevin William Welsh
- PREIS, P.L.C.: Robert Michael Kallam, Jennifer Anne Wells
- QUINN EMANUEL URQUHART & SULLIVAN, L.L.P.: Michael J. Lyle
- David William Rusch
- SCHONEKAS, EVANS, MCGOEY & MCEACHIN, L.L.C.: Kyle D. Schonekas, William P. Gibbens
- SHIPLEY SNELL MONTGOMERY, L.L.P.: George T. Shipley, Amy Louise Snell
- SLATTERY, MARINO & ROBERTS, P.L.C.: Emile Joseph Dreuil, III, David Stephen Landry, Gerald F. Slattery, Jr.
- STONE PIGMAN WALTHER WITTMANN, L.L.C.: John Pratt Farnsworth, Barry W. Ashe
- STRONG PIPKIN BISSELL & LEDYARD, L.L.P.: Michael M. Hendryx, Jason Christopher McLaurin
- TAYLOR, PORTER, BROOKS & PHILLIPS, L.L.P.: Edward Daniel Hughes, John Michael Parker
- VAN NESS FELDMAN, L.L.P.: Lawrence Gene Acker
- WALL, BULLINGTON & COOK, L.L.C.: Guy Earl Wall

Dated: May 20, 2015

/s/ Harvey S. Bartlett III
Harvey S. Bartlett III

Counsel for Plaintiffs-Appellants, Board of Commissioners of the Southeast Louisiana Flood Protection Authority – East, Individually and as the Board Governing the Orleans Levee District, the Lake Borgne Basin Levee District, and the East Jefferson Levee District

STATEMENT REGARDING ORAL ARGUMENT

The Plaintiffs-Appellants—the Board of Commissioners of the Southeast Louisiana Flood Protection Authority-East, individually ("SLFPA-E"), and as the board governing the Orleans Levee District, Lake Borgne Basin Levee District, and East Jefferson Levee District ("the Levee Districts"; with SLFPA-E, "the Authority")—respectfully request oral argument of this appeal. Oral argument will assist this Court in addressing, first, the district court's subject-matter jurisdiction determination on the Authority's motion to remand, that the state law claims raised by the Authority "necessarily raise a federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing the congressionally approved balance of federal and state judicial responsibilities,"[1] under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg*., 545 U.S. 308, 314 (2005); and second, that the Authority has failed to state Louisiana state law claims for negligence, strict liability, natural servitude of drain, and nuisance, arising from the defendants' actions in the wetlands "Buffer Zone" hydrologically

[1] Order and Reasons, *Board of Commissioners of the Southeast Louisiana Flood Protection Authority – East v. Tenn. Gas Pipeline Co., LLC*, No. 13-5410 (E.D. La. June 27, 2014), at ROA.2368.

adjacent to the levee system controlled and operated by the Authority.[2] The importance of the jurisdictional issue surrounding *Grable*, particularly as it touches on the balance of federal and state powers, and the intricacies of the duty and proximity analyses that permeate the district court's treatment of the state law claims, will be served by oral argument.

[2] Order, *Board of Commissioners of the Southeast Louisiana Flood Protection Authority – East v. Tenn. Gas Pipeline Co., LLC*, No. 13-5410 (E.D. La. Feb. 13, 2015), at ROA.4644-4668. The Authority also asserted a cause of action for breach of a stipulation *pour autrui* under Louisiana contract law, based on permits under which the defendants operated. The district court determined such claims fall under federal common law because "[a]t least some of the dredging permits" were issued by federal agencies, and held that the Authority failed to state a claim under federal common law. ROA.4668-4671; *see also* ROA.2359. The Authority does not appeal the dismissal of that cause of action.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES, RULES, & REGULATIONS

OTHER AUTHORITIES

I. STATEMENT OF JURISDICTION

The Plaintiffs-Appellants—the Board of Commissioners of the Southeast Louisiana Flood Protection Authority-East, individually ("SLFPA-E"), and as the board governing the Orleans Levee District, Lake Borgne Basin Levee District, and East Jefferson Levee District ("the Levee Districts"; with SLFPA-E, "the Authority")—filed its Petition for Damages and Injunctive Relief ("Petition") on July 24, 2013; the Petition was removed on August 13, 2013 on the basis of federal question jurisdiction under 28 U.S.C. § 1331.[3] After denying the Authority's motion to remand,[4] the district court granted defendants' Rule 12(b)(6) motion to dismiss and issued final judgment.[5] This Court's jurisdiction attaches under 28 U.S.C. § 1291; the final judgment issued February 13, 2015, which also ripened appeal over the denial of the motion to remand.[6] The Authority filed its Notice of Appeal on February 20, 2015.[7]

II. STATEMENT OF ISSUES

1. Whether the district court erred in denying the motion to remand by finding the Authority's state law claims "necessarily raise a federal

[3] ROA.139.

[4] ROA.2286.

[5] ROA.4623, ROA.4672.

[6] *Harden v. Field Memorial Community Hosp.*, 265 Fed. App'x 405, 406 n.2 (5th Cir. 2008).

[7] ROA.4673.

issue, actually disputed and substantial, which a federal forum may entertain without disturbing the congressionally approved balance of federal and state judicial responsibilities,"[8] under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg*., 545 U.S. 308 (2005).

2. Whether the district court erred in holding the Authority failed to state a claim for negligence because the defendants did not have a duty under Louisiana law to avoid impairing the usefulness of the Authority's levees through coastal erosion caused by the defendants' conduct.[9]

3. Whether the district court erred in dismissing the Authority's strict liability claim on the basis that the defendants had no duty to the Authority under Louisiana law.[10]

4. Whether the district court erred in holding the Authority failed to state a claim for natural servitude of drain because the district court lacked "guidance" as to the protection from the burden of increased storm surge and wave action.[11]

---

[8] ROA.2368.

[9] ROA.4644-4654.

[10] ROA.4654-4657.

[11] ROA.4657-4663.

5. Whether the district court erred in holding the Authority failed to state a claim for nuisance because the Authority's flood protection systems are not in sufficient proximity to the defendants' operations.[12]

III. STATEMENT OF THE CASE

A. The Authority's Allegations

On July 24, 2013, the Authority filed its Petition—24 pages of allegations incorporating 120 pages of tables and maps as exhibits specifying each defendant's activities—in the Civil District Court for the Parish of Orleans.[13] The Petition was filed by the Authority on behalf of both SLFPA-E and the Levee Districts.[14] The Authority is charged with operating and maintaining a flood and hurricane protection system that guards millions of people and billions of dollars in property in the metropolitan New Orleans area, primarily in Orleans Parish, St. Bernard Parish, and portions of Jefferson and Plaquemines parishes on the east bank of the Mississippi River.[15]

[12] ROA.4663-4668.

[13] ROA.173.

[14] Petition, ROA.176 (¶¶ 1.1, 1.2). The Legislature granted the Authority the unqualified capacity to bring suit. La. R.S. § 38:309(B).

[15] In addition to a map of the Authority's jurisdiction at Petition Exhibit B, the Petition details the miles and number of federal levees, non-federal levees, federal floodwalls, non-federal floodwalls, drainage structures, pump stations, and floodgates under each Levee District's control. Petition, ROA.178 (¶¶ 4.5-4.5.3.3).

The Authority is mandated to "devise and adopt rules and regulations for the carrying into effect and perfecting of a comprehensive levee system, having for its object the protection of the entire territory of the authority from overflow."[16] It carries out this duty recognizing that "[t]he coastal landscapes and levee systems … work in harmony, with the former acting as a natural first line of defense in abating the flood threat, and the latter serving as the last line of defense against the widespread inundation of inhabited areas."[17]

The Authority alleges that conduct of each of the oil, gas, and pipeline defendants caused the loss of coastal lands in a defined "Buffer Zone" adjacent to the levees and hurricane protection system operated and maintained by the Authority, increasing the storm surge burden against that system. The Buffer Zone, mapped in Petition Exhibit C, is defined in terms of discrete, identifiable hydrological bodies "extend[ing] from East of the Mississippi River through the Breton Sound Basin, the Biloxi Marsh, and the coastal wetlands of eastern New Orleans and up to Lake St. Catherine."[18] The Petition alleges that, "[a]s coastal land loss spirals towards a point of no return and the Buffer Zone dwindles, it will become increasingly difficult to build levees high and strong enough to protect the

[16] Petition, ROA.177 (¶ 4.3), quoting La. R.S. § 38:330.2(G).

[17] Petition, ROA.179 (¶ 5.3). For a comprehensive review of the historical background of oil and gas activities and the attendant coastal loss issues, *see* Oliver A. Houck, "The Reckoning: Oil and Gas Development in the Louisiana Coastal Zone," 28 Tul. Envtl. L.J. 185 (Summer 2015).

[18] Petition, ROA.179 (¶ 5.3).

communities inside those levees …. [T]he levees will be rendered *de facto* sea walls, a stress that the levee system was not designed to withstand."[19]

The Authority named 149 original entities under the control of 97 defendants.[20] The Petition alleges that the conduct of each defendant—in dredging and thereafter failing to maintain a network of access and pipeline canals through the Buffer Zone, causing saltwater intrusion into those coastal wetlands and leading to vegetation die-off, sedimentation inhibition, erosion, and submergence—"comprises a highly effective system of coastal landscape degradation."[21] The Petition alleges that additional harmful conduct by the defendants in the Buffer Zone—leading to alteration of the natural hydrological patterns, subsidence, and resulting coastal wetlands loss—consists of road dumps, ring levees, drilling activities, fluid withdrawal, seismic surveys, marsh buggies, spoil disposal and dispersal, watercraft navigation, impoundments, and propwashing and maintenance dredging.[22] Detailing the activities upon which each defendant's liability is based, the Petition incorporates a 66-page spreadsheet listing wells (by serial number and name) operated by the defendants in the Buffer

[19] Petition, ROA.180 (¶ 5.10).

[20] Petition, ROA.197-206 (Exh. A). Twelve defendants have been voluntarily dismissed from this lawsuit: S. Parish Oil Company, Inc., BHP Billiton Petroleum (KCS Resources) LLC, Statoil Exploration (US), Inc., ORX Resources, LLC, Castex Energy, Inc., Vintage Petroleum, LLC, Kilroy Company of Texas, Inc., Cemex, Inc., P.R. Rutherford, White Oak Operating, LLC, Chroma Operating, Inc., and Source Petroleum, Inc.

[21] Petition, ROA.181-183 (¶¶ 6.3-6.7.4, 6.12).

[22] Petition, ROA.182-183 (¶¶ 6.8-6.9, 6.13).

Zone, including each well's operator, field name, and where available the township, range, and section[23]; a 32-page spreadsheet listing defendants' pipelines in the Buffer Zone by number, company, product, pipe size, origination, and destination, as well as corresponding map[24]; a 19-page spreadsheet listing permits for defendants' dredging in the Buffer Zone by date, permittee, permit number, field, water body, well number, and location[25]; and a three-page spreadsheet listing defendants' rights-of-way in the Buffer Zone, organized by date, grantee, location, water body, and permit number.[26]

The Authority's damages include the cost of abatement and restoration of coastal land loss; increased costs for operation, maintenance, repair, rehabilitation, and replacement of the Hurricane and Storm Damage Risk Reduction System under the control of the Authority; mandatory levee certification costs; and additional flood protection expenses; as well as injunctive relief.[27] The Petition alleges the acts of the defendants "have been, and continue to be, a substantial factor in the[se] costs."[28]

[23] Petition, ROA.183 (¶ 6.11.1.1, incorporating Petition Exh. D).

[24] *Id.* (¶ 6.11.1.2, incorporating Petition Exh. E, filed under seal).

[25] *Id.* (¶ 6.11.1.3, incorporating Petition Exh. F).

[26] *Id.* (¶ 6.11.1.4, incorporating Petition Exh. G).

[27] Petition, ROA.184-187 (¶¶ 7.2-7.5.2).

[28] Petition, ROA.187 (¶ 7.6).

The Authority brought state law claims of negligence, strict liability, breach of the natural servitude of drain, public and private nuisance under Louisiana Civil Code articles 667, and breach of contract as a third party beneficiary to the defendants' permits and rights of way.

The Petition alleges the Authority's Louisiana law claims are buttressed by an extensive state and federal regulatory framework governing the defendants' conduct in the Buffer Zone and "specifically aimed at protecting against the deleterious effects of dredging activities."[29] The Petition cites as examples of this framework regulations related to rights-of-way administered by the Louisiana Office of State Lands, "Louisiana coastal zone regulations bearing directly on oil and gas activities," and provisions of the Rivers and Harbors Act of 1899 ("RHA"), the Clean Water Act of 1972 ("CWA"), and the Coastal Zone Management Act of 1972 ("CZMA"),[30] alleging this regulatory and statutory framework and the state and federal permits issued pursuant thereto "establish[] a standard of care under Louisiana law that Defendants owed and knowingly undertook when they engaged in oil and gas activities …, and which Defendants have breached."[31]

[29] Petition, ROA.188 (¶¶ 8-9).

[30] Petition, ROA.188-189 (¶¶ 9.1-9.4).

[31] Petition, ROA.189 (¶ 10).

B. The Removal, and the District Court's Denial of Remand

Chevron U.S.A., Inc.'s Notice of Removal asserted numerous grounds for removal, including that the Authority's claims necessarily depend on disputed issues of federal law under the Supreme Court's analysis in *Grable*, 545 U.S. at 314.[32] The Authority moved to remand on September 10, 2013.[33] The district court denied remand on June 27, 2014.[34] The district court rejected all of the defendants' asserted grounds for removal except for the *Grable*-based grounds, concluding the Authority's state law claims "necessarily raise a federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing the congressionally approved balance of federal and state judicial responsibilities."[35]

C. The District Court's Rule 12(b)(6) Dismissal

On September 5, 2014, eleven motions to dismiss were filed by various defendants, including a motion to dismiss the plaintiffs' claims for failure to state a claim on which relief may be granted, pursuant to Rule 12(b)(6). Defendants also moved to dismiss on standing, preemption, and justiciability grounds, but the district court bypassed those to address only the Rule 12(b)(6) motion, finding

[32] ROA.149-155.

[33] ROA.996.

[34] ROA.2286.

[35] ROA.2368.

under Louisiana law that the Petition failed to state a claim on which relief could be granted.

IV. SUMMARY OF THE ARGUMENT

While correctly recognizing the Authority's state law claims are neither created nor preempted by federal law, the district court nevertheless held three of the claims necessarily raise a disputed and substantial issue of federal law. This holding was incorrect for four reasons: **(1)** Because the claims can be resolved without resort to federal law, no issue of federal law is necessarily raised; **(2)** if the claims raise federal laws, the meaning of those laws is not actually disputed; **(3)** if the claims raise federal law issues, those issues are not substantial because they merely provide background rules of conduct and do not require interpretation of or challenge to the validity of federal laws or actions; and **(4)** divesting the state court's jurisdiction over traditional state law tort and contract claims threatens the balance of federal and state judicial responsibilities.

If this Court holds that the district court erred in exercising jurisdiction over the Authority's claims, then the district court's dismissal should be vacated and this matter remanded to state court. However, if this Court holds to the contrary regarding jurisdiction, then it should reverse the district court's dismissal of the state law claims as erroneous. The Petition alleges plausible claims for negligence,

strict liability, breach of the natural servitude of drain, and nuisance. The Petition alleges the defendants have a duty under Louisiana law to not violate the standard of care of a reasonable operator in the Buffer Zone, with that standard of care defined by more than a century of state and federal statutory, regulatory, and permit provisions specific to not impairing the usefulness of the levees and to avoiding coastal land loss. This duty satisfies elements of the negligence and strict liability claims; further, the Petition alleges the Authority and its constituent Levee Districts are the proprietors of levees that are immediately adjacent to the Buffer Zone where the defendants operated, plausibly alleging (1) the Plaintiffs are directly within the ease of association and scope of protection of the defendants' duty for purposes of the negligence claim, (2) the burden of the increased water flow upon the levees results from breach of the natural servitude, and (3) there is a causal proximity between the defendants' conduct and the Plaintiff's harm for purposes of the nuisance claims. The district court side-stepped these allegations of the Petition by treating *Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676 (E.D. La. 2006), as articulating a *per se* rule that oil and gas operators owe no Louisiana law duties to avoid wetlands loss. *Barasich* is a vastly different case, and its no-duty determination was limited to the attenuation between the plaintiffs and defendants there.

Essentially, the district court held that the entity expressly charged with flood protection and operation of the levees on the east bank of the Mississippi River in Southeast Louisiana was ***not*** within the scope of the defendants' state law duty to abide by a standard of care that required those defendants to not impair the usefulness of the levees or cause increased flooding risks through degradation of the wetlands. Where those defendants' conduct occurred in a defined hydrological basin immediately adjacent to the Authority's flood control structures, this dismissal is not supportable under Louisiana law.

V. ARGUMENT

Because jurisdictional questions must be resolved before turning to the merits, the Authority addresses first the denial of its motion to remand.

A. District Court Erred by Failing to Remand to State Court

1. Standard of Review

The denial of a motion to remand to state court is reviewed *de novo*. *Davoodi v. Austin Indep. Sch. Dist.*, 755 F.3d 307, 309 (5th Cir. 2014); *see also Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 722 (5th Cir. 2002).

2. Subject Matter Jurisdiction

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute. It is to be presumed that a cause lies

outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Energy Mgmt. Servs., LLC v. City of Alexandria,* 739 F.3d 255, 257 (5th Cir. 2014) (internal citations and quotation marks omitted). The removal provision under 28 U.S.C. § 1441 "is to be strictly construed." *Id. at* 258 (citing *Syngenta Crop Prot., Inc. v. Henson,* 537 U.S. 28, 32 (2002)). "Under the plain terms of § 1441(a) … petitioners must demonstrate that original subject-matter jurisdiction lies in the federal courts." *Syngenta,* 537 U.S. at 32.

"A federal district court may exercise original jurisdiction over any civil action that … arises under the federal constitution, statutes, or treaties—commonly referred to as 'federal question' jurisdiction." *Energy Mgmt.,* 739 F.3d at 258. "A federal question exists 'only [in] those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.'" *Singh v. Duane Morris LLP,* 538 F.3d 334, 337-38 (5th Cir. 2008) (citing *Franchise Tax Bd. v. Constr. Laborers Vacation Trust,* 463 U.S. 1, 27–28 (1983)). The "vast bulk of suits" that arise under federal law for purposes of federal question jurisdiction involve a cause of action created by federal law. *Gunn v. Minton,* 133 S. Ct. 1059, 1064 (2013) ("[T]his 'creation' test admits of only extremely rare exceptions and accounts for the vast bulk of suits that arise under

federal law.") (internal citations omitted). The "extremely rare exceptions" are a "special and small category" of cases, *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 699 (2006), in which a state law claim "necessarily raises a federal question." *Singh*, 538 F.3d at 338.

This Court has admonished that "[t]he fact that a substantial federal question is necessary to the resolution of a state-law claim is not sufficient to permit federal jurisdiction," and that "'the presence of a disputed federal issue … [is] never necessarily dispositive.'" *Id*. (citing *Merrell Dow Pharms. Inc. v. Thompson,* 478 U.S. 804, 813 (1986); quoting *Grable*, 545 U.S. at 314). Citing *Grable*, this Court articulated a four-part test for whether a state-law claim is among the "extremely rare exceptions" providing a basis for federal question jurisdiction:

> [F]ederal question jurisdiction exists where (1) resolving a federal issue is necessary to resolution of the state-law claim; (2) the federal issue is actually disputed; (3) the federal issue is substantial; and (4) federal jurisdiction will not disturb the balance of federal and state judicial responsibilities.

Id.

3. None Of The Four *Grable/Singh* Factors Apply

The district court erred in holding the Authority's Louisiana law claims trigger federal question jurisdiction. To reach that conclusion, each of the four *Grable/Singh* factors must be present. *Am. Airlines, Inc. v. Sabre, Inc*., 694 F.3d 539, 544 (5th Cir. 2012) ("Because [defendant] failed to satisfy the first prong of

the Grable test … we do not address the remaining prongs."). Here, none of the factors are met.

a. The Authority's State Law Claims Do Not Require Resolution of a Federal Issue

The district court agreed the Petition raises no federally created claims. Nonetheless, the district court concluded the Authority's claims for negligence and public nuisance necessarily raise an issue of federal law, reasoning those claims "turn[] to federal law to establish the standard of care."[36] This holding is erroneous. Although the Authority's state law claims *could* turn to federal law for support, federal law is not *necessary* for their resolution. As explained in section V.B.2.a, *infra*, the references in the Petition to federal statutes such as the RHA, CWA, and CZMA are among numerous sources of law—including sources that are solely Louisiana-based—the Authority may use to establish defendants' standard of care under the Louisiana law duty to act reasonably. Where state law may be relied on to establish liability, additional allegations that a defendant violated federal law will not create jurisdiction.

This Court's holding in *MSOF Corp. v. Exxon Corp.*, 295 F.3d 485 (5th Cir. 2002), is instructive. The *MSOF* complaint alleged negligence and strict liability under Louisiana law against defendants for contaminating land. *Id*. at 488. The district court denied remand, finding the plaintiffs' claims arose under the federal

[36] ROA.2352.

Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") because the plaintiffs' right to relief depended on construction of CERCLA. *Id*. at 489-90. This Court reversed because the complaint's "only reference to federal law is an allegation that the [defendants'] facility was maintained in violation of federal regulations *as well as* in violation of state and local regulations. That, however, does not suffice to render the action one arising under federal law." *Id*. at 490 (emphasis in original). This Court concluded: "'[T]he mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction.' The vindication of these plaintiffs' rights does not turn on resolution of a federal question." *Id*. (quoting *Merrell Dow*, 478 U.S. at 813).

MSOF compels the same result here. The district court acknowledged the Petition alleged violations of state laws and regulations in addition to alleging violations of federal laws and regulations.[37] Because the Authority's claims could be resolved with reference to state law, those claims do not *necessarily* raise issues of federal law. Numerous federal courts have addressed similar cases, in which a plaintiff invoked violations of federal law to support state law claims, and

[37] ROA.2352. The district court docked the Authority for failing to specify in its Petition the Louisiana statutes and regulations at issue (*id*.), but notice pleading does not demand such specificity. *Johnson v. City of Shelby*, 135 S. Ct. 346, 346 (2014) ("Federal pleading rules … do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted."). In any event, as demonstrated *infra*, numerous specific Louisiana statutory and regulatory provisions, and principles of Louisiana tort law, support the Authority's claims.

remanded such cases because they did not necessarily raise an issue of federal law.[38]

The district court also erred in determining the Authority's claim for stipulation *pour autrui* under Louisiana law necessarily raises an issue of federal law.[39] The district court analyzed "necessity" by examining whether federal common law displaced Louisiana law on the contract claims.[40] But federal common law does not displace Louisiana law here because there is no danger that

[38] *See, e.g., Chicago Tribune Co. v. Bd. of Trs. of Univ. of Ill.*, 680 F.3d 1001, 1004 (7th Cir. 2012) ("A state court therefore might rule in [the defendant's] favor wholly as a matter of state law—which suggests that the federal issue not only is not 'necessarily' presented, but may never be presented at all…."); *Broder v. Cablevision Sys. Corp.*, 418 F.3d 187, 194 (2d Cir. 2005) ("Where a federal issue is present as only one of multiple theories that could support a particular claim … this is insufficient to create federal jurisdiction."); *Mulcahey v. Columbia Organic Chem. Co.*, 29 F.3d 148, 154 (4th Cir. 1994) (no jurisdiction where "negligence *per se* under the federal environmental statutes is only one of the Plaintiffs' numerous theories of recovery"); *Stephens Cnty. v. Wilbros, LLC*, 2012 WL 4888425, at *2 (N.D. Ga. 10/6/2012) (remanded to state court because reference to CWA as a basis for liability was among many potential sources for resolving negligence claim and was not an issue "necessary" to resolution of the claims.); *DeLuca v. Tonawanda Coke Corp.*, 2011 WL 3799985 (W.D.N.Y. 8/26/2011) (where plaintiffs alleged state-law causes of action and referred to violations of federal statutes as the basis for some of their claims, the court remanded because "a fact finder could find negligence *per se* without determining whether Defendants violated federal law. … It is clear that where there are alternative, non-federal bases for liability on a state cause of action, there is no 'necessary' federal-law question permitting the exercise of federal jurisdiction."); *In re Reserve Fund Sec. and Derivative Litig.*, 2009 WL 3634085, *4 (S.D.N.Y. 11/3/2009) ("Courts in this Circuit have made clear that the exercise of federal jurisdiction is inappropriate where 'no cause of action … necessarily stands or falls based on a particular interpretation or application of federal law.'") (internal quotation marks omitted) .

[39] ROA.2354-2360. Appellant reiterates it does not challenge the dismissal of its third party beneficiary claim. Thus, the proceeding analysis is an aid to the jurisdictional inquiry but may be rendered academic if this Court determines the third party beneficiary claim is the only claim that creates federal jurisdiction.

[40] ROA.2356-2360. The district court's analysis arises from complete preemption jurisprudence. *See id.* (citing *Boyle v. United Technologies Corp.*, 487 U.S. 500, 506 (1988), which examined whether federal common law preempted state tort law). But the district court recognized it "does not have jurisdiction based on the complete preemption doctrine." ROA.2350.

the rights of the United States would be frustrated or threatened by the application of Louisiana law.

As a general matter, "'[t]here is no federal general common law.'" *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 83 (1994) (quoting *Erie R. Co. v. Tompkins,* 304 U.S. 64, 78 (1938)). However, "[i]n suits between private parties, federal common law exists in the *narrow class of cases* where federal rules are necessary to protect uniquely federal interests which the application of state law would frustrate." *Frank v. Bear Stearns & Co.*, 128 F.3d 919, 923 (5th Cir. 1997) (citing *Miree v. DeKalb County, Georgia,* 433 U.S. 25, 31 (1977)) (emphasis supplied). "According to the United States Supreme Court, these instances are 'few and restricted.'" *Id*. (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963)); *see also Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981).

In *Miree*, victims of an airline crash brought an action against the owner of an airport. 433 U.S. at 26. The plaintiffs argued they were third-party beneficiaries of a contract between the airport and the Federal Aviation Administration that obligated the airport to take certain precautions. *Id*. at 27. The Court held that whether the plaintiffs were third party beneficiaries was a matter of state law, not federal common law. *Id*. at 29–33. The Court noted that "[t]he litigation before us raises no question regarding the liability of the United States or the responsibilities of the United States…." The Court further reasoned federal common law should

not apply because "the litigation is between private parties and no substantial rights or duties of the United States hinge on its outcome." The Court acknowledged the federal interest in regulation of air safety, but found that interest insufficient to require application of federal common law. Critically, the Court noted the plaintiffs' claims "involve[] this federal interest only insofar as such lawsuits might be thought to advance federal aviation policy *by inducing compliance* with FAA safety provisions. However, … the issue of whether to displace state law on an issue such as this is primarily a decision for Congress." *Id.* at 32 (emphasis supplied).

Similarly, the United States is not involved in this lawsuit nor do the rights or duties of the United States hinge on its outcome. The district court identified nothing to indicate Congress intended to displace state law here. To the contrary, the federal permits at issue specifically reserve state law claims, which reservation suggests any federal interests are not "unique" to the federal government.[41] As in *Miree*, the Authority's claims "will have no direct effect upon the United States or its Treasury," and implicate federal interests "only insofar as such lawsuits might be thought to advance federal … policy by inducing compliance" with federal permit requirements. *Miree*, 433 U.S. at 29, 32; *cf. Boyle*, 487 U.S. at 509 (finding

[41] *See* ROA.1963 (quoting COE Permit issued to ARCO Oil & Gas Company (June 11, 1981), at 2 ("[This permit] does not authorize any injury to property or invasion of rights or any infringement of Federal, State, or local laws or regulations, nor does it obviate the requirement to obtain State or local assent required by law for the activity authorized herein.")).

a rare instance in which federal common law should displace state law, where "the state-imposed duty of care that is the asserted basis of the [defendant's] liability … is precisely contrary to the duty imposed by the Government contract"). Like the plaintiffs in *Miree*, the Authority alleges the defendants' *non-compliance* with federal laws and regulations to support its claims. Thus, the interests of the United States are squarely aligned with the Authority's claims. For these reasons, state law governs the issue whether the Authority may sue as a third-party beneficiary.

Therefore, the district court erred when it concluded that the Levee Authority's claims necessarily raise an issue of federal law.

b. The Authority's State Law Claims Do Not Raise an Actually Disputed Federal Issue

The second inquiry under the *Grable/Singh* test is whether "the federal issue is actually disputed." *Singh*, 538 F.3d at 338. Here, too, the district court erred, by failing to recognize that, to the extent any federal law issues do arise, those issues cannot actually be disputed.

The few courts that have scrutinized this element of *Grable* in contexts similar to this case have determined that it is not satisfied. In *Cooper v. Int'l Paper Co.*, the defendants sought to remove a case in which the plaintiffs asserted state-law claims that relied, in part, on the framework of federal environmental laws. 912 F. Supp. 2d 1307, 1313 (S.D. Ala. 2012). Granting remand, the court observed that "it cannot be argued that federal environmental law is not complex," but

rejected the defendant's argument that "properly resolving plaintiffs' allegations that defendants violated federal laws will entail interpreting the laws' meaning, scope, and effect" because "the plaintiffs' complaint … does not place in dispute the meaning of any provision of federal law." *Id.* at 1316. Instead, the court held the defendant "has not shown that a state court will be called upon to do more than apply a settled federal framework to the facts of this case," and deemed "speculative" the "harms conjured up by [defendants] regarding uniformity and state-court interpretation of federal law." *Id.* at 1317; *see also Caldwell v. Bristol Myers Squibb Sanofi Pharm. Holding P'ship*, 2012 WL 3862454, at *7 (W.D. La. 6/12/2012) ("Courts have been reluctant to find federal-question jurisdiction when it is alleged that a federal statute was violated but there is no dispute as to the meaning of the statute itself.").

Likewise, in *Oregon ex rel. Kroger v. Johnson & Johnson*, the defendants removed an action brought by the state of Oregon under the Oregon Unfair Trade Practices Act against a drug manufacturer and its subsidiaries, based on the defendants' alleged non-compliance with regulations established by the Food and Drug Administration ("FDA"). 832 F. Supp. 2d 1250 (D. Or. 2011). The court granted Oregon's motion to remand, reasoning that "whether Defendants complied with [FDA regulations] is primarily a factual inquiry—not a disputed legal question that could give rise to federal jurisdiction. … The interpretation or

application of the [FDA] regulations is not actually disputed in the present case, which means the presence of the [regulations] issue in Plaintiff's complaint does not support federal jurisdiction." *Id*. at 1256. Similarly here, whether the defendants breached the well-settled framework of federal laws and regulations that may inform the Authority's state law claims are factual questions relating to defendants' conduct, not legal issues relating to the meaning or interpretation of federal laws and regulations. There is no actual dispute in this case over the federal laws and regulations the Authority cites to support its state law claims.

c. The Authority's State Law Claims Do Not Raise a Substantial Federal Issue

The third inquiry under the *Grable/Singh* test is whether "the federal issue is substantial." *Singh*, 538 F.3d at 338. The Supreme Court has recently explained the substantiality inquiry:

> [I]t is not enough that the federal issue be significant to the particular parties in the immediate suit; that will ***always*** be true when the state claim "necessarily raise[s]" a disputed federal issue, as *Grable* separately requires. ***The substantiality inquiry under* Grable *looks instead to the importance of the issue to the federal system as a whole.***

Gunn, 133 S. Ct. at 1066 (emphasis supplied). The court in *Gunn* further explained that an issue is important to "the federal system as a whole" when the issue implicates the federal government's "direct interest in the availability of a federal

forum to vindicate its own administrative action" or when an issue requires the determination of "the constitutional validity of an act of Congress." *Id*.

In *Gunn*, the Court determined the federal issue (a question of federal patent law within a state malpractice action) "carries no such significance." *Id*. The Court accepted patent law as an important area of federal concern, but the Court also recognized there was no substantial issue at stake as to patent law because its application was ancillary to the plaintiff's state law claim. *Id*.[42] The Authority's claims are even further removed from federal law issues than the claims in *Gunn*. Here, there is no independent body of federal law—such as federal patent law—that must be applied to any of the state law claims. None of the claims question administrative action of a federal entity, nor do they demand an inquiry into the constitutionality of an Act of Congress. Nor is the Authority challenging the validity of federal law regarding coastal restoration, or the validity of federal

[42] *See also Haith ex rel. Accretive Health, Inc. v. Bronfman*, 928 F. Supp. 2d 964, 970 (N.D. Ill. 2013):

> Defendants suggest that the federal issues are substantial to the federal system as a whole because resolving Plaintiffs' state law claims will require the state courts to perform "the analysis and interpretation of dozens of regulatory provisions promulgated under these statutes, most or all of which have never previously been adjudicated." That may be so, but *Gunn* answers that argument: the state court's rulings will not bind the federal courts in future cases and will have no preclusive effect beyond the parties to the state litigation, and the possibility that the parties might be subjected to a state court's incorrect interpretation of federal law does not suffice to create "arising under" jurisdiction. *Gunn,* 133 S.Ct. at 1067, 1068.

regulations. Quite the contrary, to the extent federal law is at issue, the Authority's claims are consistent with the objectives set forth under federal law.

Even if the state court must compare defendants' conduct with the requirements contained in federal statutes and regulations to rule on the state law claims, *Gunn* answers that argument in favor of remand. *Gunn*, 133 S. Ct. at 1067, 1068. Alleged violations of federal statutes and regulations simply do not create a substantial issue sufficient to confer jurisdiction.[43]

The district court relied on the "very number of applicable [federal] statutes" concerning the defendants' conduct as evidence that the issues at stake are matters of "national concern" qualifying as substantial federal issues.[44] While a number of federal statutes govern the defendants' conduct, the inquiry is whether the Authority's state law claims necessarily raise substantial issues of federal law. They do not. The state law claims do not challenge any of the federal laws, they do not seek to change the terms of the federal permits cited in the Petition, they do not dispute the meaning of any federal regulations, and they do not seek to interpret any federal laws to create a private right of action. Instead, the state law claims, in the context of establishing a state law obligation, might—*but need not*—ask (for instance) whether defendant Chevron failed to "restore dredged or otherwise

[43] The same analysis applies to the third-party beneficiary claims *Municipality of Mayaguez v. Corporacion Para el Desarrollo del Oeste, Inc.*, 726 F.3d 8, 14 (1st Cir. 2013); *see also Broussard v. Basaldua*, 410 F. App'x 838, 839 (5th Cir. 2011).

[44] ROA.2364.

modified areas to their natural state upon completion of their use or their abandonment," as required under CWA regulations alleged in the Petition.[45] This is a fact-bound inquiry, not an overarching issue of federal law.

The district court also incorrectly characterized the Authority's claims as "a collateral attack on an entire regulatory scheme"[46] that is "premised on the notion that [the] regulatory framework provides inadequate protection for the residents of southeastern Louisiana."[47] The Authority cites that regulatory scheme to *support* the obligations created under state law. Nowhere has the Authority asserted that the federal regulatory scheme is inadequate; rather the Authority referred to that regulatory scheme to underscore that defendants' conduct was unreasonable in light of what that scheme required.

Finally, the district court cited a number of cases filed by the Parishes of Plaquemines and Jefferson related to coastal erosion and subsequently removed to federal court as evidence that a federal forum should entertain the Authority's case.[48] However, of the 28 cases the district court cites, 18 have been remanded to Louisiana state court and the other ten still have motions to remand pending.

[45] Petition, ROA.188 (¶ 9.2.2).

[46] ROA.2365.

[47] ROA.2366.

[48] *Id.*

d. Adjudicating Traditional State Law Claims Upsets the Federal-State Balance

The final *Grable/Singh* inquiry is whether federal jurisdiction will "disturb the balance of federal and state judicial responsibilities." *Singh*, 538 F.3d at 338. As the Supreme Court recognized in *Grable*, "[t]he violation of federal statutes and regulations is commonly given negligence per se effect in state tort proceedings." 545 U.S. at 318 (internal quotation marks and citations omitted). The Court recognized, "A general rule of exercising federal jurisdiction over state [tort] claims resting on federal … statutory violations would thus … herald [] a potentially enormous shift of traditionally state cases into federal courts." *Id*. at 319. Cases following *Grable* have remanded state-law tort actions that referred to a federal statutory or regulatory framework.[49]

In addition, the presence of a savings clause in a federal statute implicated in a state law claim supports remand:

> [T]he presence of savings clauses in many of the cited federal statutes further supports allowing the purely state-law claims to proceed in state court. Their inclusion by Congress, moreover, speaks to its decision regarding the "balance of federal and state judicial responsibilities [,]" which, as *Grable* teaches, is something "a federal forum [should not] disturb[.]"

[49] *See, e.g., Hampton v. R.J. Corman R.R. Switching Co.*, 683 F.3d 708, 712 (6th Cir. 2012) ("Finding a state-law negligence claim removable on the sole basis that the violation of a federal statute creates a presumption of negligence under state law would 'flout, or at least undermine, congressional intent,' *Merrell Dow*, 478 U.S. at 812, and would 'herald[ ] a potentially enormous shift of traditionally state cases into federal courts,' *Grable*, 545 U.S. at 319. That we will not do."); *see also Richard v. Life Source Servs., LLC*, 2011 WL 3423702 (M.D. La. 7/5/2011); *Hofbauer v. Northwestern Nat'l Bank of Rochester, Minn.*, 700 F.2d 1197 (8th Cir. 1983).

Cooper, 912 F. Supp. 2d at 1320 (citations omitted). Here, the CWA, CZMA, and RHA each contain a savings clause.[50] Moreover, the federal permits the Authority refers to expressly reserve state-law rights and obligations.[51] Because the federal laws cited here do not create private rights of action and because the statutes and permits contain savings clauses, allowing federal jurisdiction over the Authority's state law claims runs the risk of upsetting the federal-state balance of judicial responsibilities.

The district court, without addressing these factors, concluded the federal-state balance would not be upset because the Authority's claims "look to federal law to impose liability on an entire industry for the harm associated with coastal erosion."[52] This is an erroneous interpretation of the Authority's case; the Authority seeks to impose liability under state law upon discrete, identified entities that operated in a discrete, defined area of southeast Louisiana. This case, involving issues of state law, belongs in state court.

[50] 33 U.S.C. § 1365(e) (CWA); 33 U.S.C. § 1416(g) (RHA); 16 U.S.C. § 1456(e) (CZMA).

[51] *See, e.g.,* ROA.1963 (quoting COE Permit issued to ARCO Oil & Gas Company (June 11, 1981), at 2 ("[This permit] does not authorize any injury to property or invasion of rights or any infringement of Federal, State, or local laws or regulations, nor does it obviate the requirement to obtain State or local assent required by law for the activity authorized herein.")).

[52] ROA.2367.

B. District Court Erred by Dismissing the Authority's Claims Under Rule 12(b)(6)

Review of the Authority's Louisiana causes of action shows that the Petition sufficiently alleges claims for negligence, strict liability, breach of the natural servitude of drain, and nuisance.

1. Standard of Review

This Court "review[s] de novo a district court's grant or denial of a Rule 12(b)(6) motion to dismiss, accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff." *Hines v. Allredge*, 783 F.3d 197, 200-01 (5th Cir. 2015) (internal quotation marks omitted). "Motions to dismiss under Rule 12(b)(6) are viewed with disfavor and are rarely granted." *Lormand v. U.S. Unwired, Inc.*, 565 F.3d 228, 232 (5th Cir. 2009) (internal quotation marks omitted). "The complaint must be liberally construed[.]" *Cooper v. Hung*, 485 Fed. App'x 680, 683 (5th Cir. 2012). "The court's task is to determine whether the plaintiff has stated a legally cognizable claim that is plausible, not to evaluate the plaintiff's likelihood of success." *Lone Star Fund V, L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010). This plausibility requirement, articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), "concern[s] the *factual* allegations a complaint must contain to survive a motion to dismiss." *Johnson*, 135 S. Ct. at 347 (emphasis in original).

2. District Court Erred in Dismissing the Negligence Claim

The Authority brings its negligence claim pursuant to Louisiana Civil Code article 2315, which contains the foundational tort duty under Louisiana law: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." La. C.C. art. 2315(A); *see also* La. C.C. art. 2316 ("Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill.").

> Under the duty-risk analysis adopted by Louisiana courts to determine whether tort liability exists, a plaintiff must prove the following five elements: (1) the defendant had a duty to conform his or her conduct to a specific standard of care; (2) the defendant failed to conform his or her conduct to the appropriate standard of care; (3) the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries; (4) the defendant's substandard conduct was a legal cause of the plaintiff's injuries; and (5) actual damages.

Anderson v. Ill. C. R. Co., 475 F. App'x 30, 32 (5th Cir. 2012) (citing *Christy v. McCalla*, 79 So. 3d 293 (La. 2011)). As explained below, the Authority's Petition affirmatively and plausibly alleges each of these five elements:

- First, the defendants owed a duty to conform their oil, gas, and pipeline operations to a standard of care that can be established by state laws and regulations, federal laws and regulations, permit conditions, case law, and general principles of fault;
- Second, the defendants breached that duty by failing to adhere to the standard of care;

- Third, the defendants' failure to adhere to the standard of care, which resulted in land loss in the Buffer Zone, is a cause-in-fact of the impairment of the Authority's flood protection assets and capabilities;
- Fourth, the harm to the Authority—an entity designated for flood protection—is easily associated with the defendants' breaches of duty because the statutes, regulations, and permits underlying that duty specify protection of the wetlands as a defense against storm surge and a shield for the usefulness of the levees; and
- Fifth, the Authority has suffered actual damages as a result of the defendants' conduct.

Therefore, dismissal of the Authority's negligence claim was in error.

a. Defendants' Duty

"The threshold issue in any negligence action is whether the defendant owed the plaintiff a duty, and whether a duty is owed is a question of law." *Bufkin v. Felipe's La., LLC*, 2014 WL 5394087, *5 (La. 2014). "There is an almost universal duty on the part of the defendant in negligence cases to use reasonable care so as to avoid injury to another. In some cases, the duty is refined more specifically that the defendant must conform his or her conduct to some specially defined standard of behavior." *Boykin v. La. Transit Co.*, 707 So. 2d 1225, 1231 (La. 1998).

The Petition specifically alleges that the defendants each owed a duty here. First, the Petition incorporates an extensive and detailed sampling of specific permits and rights-of-way pursuant to which the defendants operated in the Buffer Zone.[53] Next, the Petition alleges that defendants' activities in the Buffer Zone are subject to a well-defined standard of care: "Defendants' dredging and maintenance activities at issue in this action are governed by a longstanding and extensive regulatory framework under both federal and state law specifically aimed at protecting against the deleterious effects of dredging activities."[54] The Petition provides specific examples of language from that statutory and regulatory framework,[55] and concludes, "This regulatory framework establishes a standard of care under Louisiana law that Defendants owed and knowingly undertook when they engaged in oil and gas activities as described herein[.]"[56] The Petition specifies that the defendants' standard of care is also embodied in "the express obligations and duties contained in the permit(s) and right(s)-of-way identified in the Exhibits[.]"[57]

The defendants' duty extends first from Civil Code article 2315, to comply with the standard of care—that is, "the standard of conduct of a reasonable person

[53] Petition, ROA.183 (¶¶ 6.11-6.11.1.4).

[54] Petition, ROA.188 (¶ 8).

[55] Petition, ROA.188-189 (¶¶ 9-9.4).

[56] Petition, ROA.189 (¶ 10).

[57] Petition, ROA.189 (¶ 13).

in like circumstance," *Everett v. State Farm Fire & Cas. Ins. Co.*, 37 So. 3d 456, 464 (La. App. 1 Cir. 2010). This standard may be delineated by any source, including by other statutes.

> … [I]n the decision of a case in tort or delict in Louisiana, the court first goes to that fountainhead of responsibility, Articles 2315 and 2316, and in applying those articles it goes to the many other articles in our Code ***as well as statutes and other laws which deal with the responsibility of certain persons, the responsibility in certain relationships, and the responsibility which arises due to certain types of activities***. Just as we have found in the Code many standards of conduct, many statutes and local ordinances also detail standards of conduct which courts may apply per se, impliedly or by analogy.

Langlois v. Allied Chem. Corp., 249 So. 2d 133, 137 (La. 1971) (emphasis added) (abrogated by statute on other grounds). The determination of the defendants' standard of care under a state law negligence claim can be by reliance on federal statutes, as recognized by this Court and by Louisiana state courts. *Lowe v. General Motors Corp.*, 624 F.2d 1373, 1378 (5th Cir. 1980) (collecting cases regarding various federal statutes, in applying federal Motor Vehicle Safety Act to find, "This Court has often held that violation of a Federal law or regulation can be evidence of negligence, and even evidence of negligence per se."); *Manchack v. Willamette Indus., Inc.*, 621 So. 2d 649, 652-53 (La. App. 2 Cir. 1993) (collecting cases and observing, "Louisiana courts have recognized that 'while statutory violations are not in and of themselves definitive of civil liability, they may be guidelines for the court in determining standards of negligence by which civil

liability is determined.' … Violations of the [federal OSHA] regulations are intuitively relevant[.]").

Here, the Authority alleges the statutory, regulatory, and permit-based sources of the defendants' standard of care stretch back more than a century, to the prohibitions in the RHA.[58] As alleged in ¶ 9.1, that statute provides, "It shall not be lawful for any person or persons to … in any manner whatever impair the usefulness of any sea wall, bulkhead, jetty, levee, wharf, pier, or other work built by the United States … to prevent floods."[59]

At ¶ 9.4 of the Petition, the Authority cites Louisiana coastal zone regulations directly applicable to oil and gas activities, as well as the CZMA. The Louisiana coastal zone statutes declare the state policy "[t]o support sustainable development in the coastal zone that accounts for potential impacts from hurricanes and other natural disasters and avoids environmental degradation resulting from damage to infrastructure caused by natural disasters." La. R.S. § 49:214.22(8). The Louisiana implementing regulations require all coastal uses be operated and maintained "to avoid to the maximum extent practicable significant … detrimental changes in existing salinity regimes; detrimental changes in littoral and sediment transport processes; adverse effect of cumulative impacts; … land

[58] Petition, ROA.188-189 (¶¶ 8-11).

[59] ROA.188 (citing 33 U.S.C. § 408); *see also* Petition, ROA.178, 184-186 (¶¶ 4.5 and 7.3, *et seq*.), detailing SLFPA-E's role with regard to the federal-built levees.

loss, erosion, and subsidence; [and] increases in the potential for flood, hurricane and other storm damage, or increases in the likelihood that damage will occur from such hazards[.]" 43 LAC § 701(G)(8), (9), (10), (19), (20). Additionally, the CZMA states the policy to provide for "the management of coastal development to minimize the loss of life and property caused by improper development in flood-prone, storm surge, geological hazard, and erosion-prone areas and in areas likely to be affected by or vulnerable to sea level rise, land subsidence, and saltwater intrusion, and by the destruction of natural protective features such as … wetlands[.]" 33 U.S.C. § 1452(2)(B).

The CWA, pursuant to which some of the permits were issued to the defendants, was intended by Congress specifically to "restore and maintain the … physical … integrity of the Nation's waters." 33 U.S.C. § 1251(A). Permits issued by the Corps of Engineers for the defendants' dredging and maintenance activities pursuant to the RHA and the CWA and the regulations promulgated by the Corps generally require defendants to maintain canals and other physical alterations as originally proposed; restore dredged or otherwise modified areas to their natural state upon completion of their use or their abandonment; and make all reasonable efforts to minimize the environmental impact of defendants' activities.[60] Regulations related to rights-of-way administered by the Louisiana Office of State

[60] Petition, ROA.188 (¶ 9.2, *et seq.*).

Lands require that grantees minimize the environmental effect of their activities.[61] These provisions set forth clear standards of care relevant to the defendants' conduct.

For example, any permit issued by Louisiana's Department of Natural Resources after about 1980 was subject to provisions regarding avoidance of land loss, requirements for coastal restoration, and related requirements under 43 LAC § 701.G.10, 12, 17, 19, and 20; 43 LAC § 705.I, J, and K; and 43 LAC § 719.D, J, and M. Further, by the mid-1970s, permits issued by the Corps required that the permittee "agrees to make every reasonable effort to prosecute the construction or work authorized herein in a manner so as to minimize any adverse impact of the construction or work on fish, wildlife and natural environmental values"; "maintain the structure or work authorized herein … in accordance with the plans and drawings attached"; and "restore the area to a condition satisfactory to the District Engineer."[62] Special conditions added later required that "the fill created by the discharge … be properly maintained to prevent erosion."[63] The language establishing this standard of care did not restrict the defendants' obligations to the governmental entities, as supposed by the district court, but extended those

[61] Petition, ROA.188-189 (¶ 9.3, *et seq.*).

[62] 33 C.F.R. § 209.120, App. C, Sec. I (1974) (d), (g), and (s).

[63] 33 C.F.R. § 325, App. A, Sec. II (1978), *Discharges of Dredged or Fill Material Into Waters of the United States* (c).

obligations to "any and all claims for damages and all costs and expenses arising out of or incidental to Grantee's exercise of the rights herein granted."[64]

This Court has recognized that the primary type of conduct alleged here—the widening of oilfield canals due to erosion and failure to maintain the canals used by oil, gas, and pipeline companies—implicates an article 2315-based duty:

> The Louisiana Supreme Court has summarized the continuing tort exception by explaining that a continuing tort "is occasioned by continual unlawful acts and for there to be a continuing tort there must be a continuing duty owed to the plaintiff and a continuing breach of that duty by the defendant." This formulation does not exclude the possibility that "unlawful acts" may include omissions that breach a duty. To the extent that aggravation of the servient estate might be found to have occurred as a result of such omissions or failures to act, ***a reasonable factfinder could determine that Koch and Columbia, by using the canals but failing to protect them against resulting breaches and widening, violated a duty and thus "acted" unlawfully.*** Indeed, summary-judgment evidence suggests that the defendants might be continuing to do so. If so, such conduct could be wrongful for purposes of a continuing-tort analysis.

Terrebonne Parish Sch. Bd. v. Columbia Gulf Transmission Co., 290 F.3d 303, 325 (5th Cir. 2002) (footnotes omitted) (emphasis added). Here, the district court found *Terrebonne* inapt because it concluded this Court was concerned with the specific duty owed by a pipeline company to a landowner due to suppletive property rules implicated by a servitude agreement between the two.[65] This Court conducted its above duty analysis, however, in a section of the *Terrebonne* opinion regarding

[64] *See, e.g.*, La. State Land Office Right-of-Way application form, ROW Grant #1550, May 7, 1975, ROA.3369.

[65] ROA.4653.

torts, separate from its analysis concerning conventional servitude claims under contract law. 290 F.3d at 318-19. Therefore, this Court's explication of a duty to prevent the erosion of canals recognizes a tort duty under Louisiana law. While the standard of care involved there may have been defined in part by the servitude agreement between the parties, here it is alleged to arise from an extensive permit, statutory, and regulatory framework. The existence of the duty is not changed just because the specific parameters of the standard of care may derive from a different source.[66]

In addition, the duties of oil, gas, and pipeline operators have other sources under Louisiana law. For example, while finding that particular lease language did not support a contract-based wetlands restoration claim, the Louisiana Supreme

---

[66] Louisiana courts have long recognized the difference between the legal question of the existence of a duty and the fact-bound question of the scope of protection under that duty:

> [W]e note that a "no duty" defense in a negligence case is seldom appropriate. As former Justice Lemmon explained:
>
> > [A] "no duty" defense generally applies when there is a categorical rule excluding liability as to whole categories of claimants or of claims under any circumstances. In the usual case where the duty owed depends upon the circumstances of the particular case, analysis of the defendant's conduct should be done in terms of "no liability" or "no breach of duty."
>
> *Pitre v. Louisiana Tech University*, 95–1466 (La.5/10/96), 673 So. 2d 585, 597 (Lemmon, J., concurring). Thus, resolution of a negligence case based on a finding that a defendant has "no duty" should be reserved for the exceptional situation in which there is "'a rule of law of enough breadth and clarity to permit the trial judge in most cases raising the problem to dismiss the complaint or award summary judgment for defendant on the basis of the rule.'" *Id.* (quoting Professor David W. Robertson, *et al., Cases and Materials on Torts* 161 (1989)).

Zimko v. Am. Cyanamid, 905 So. 2d 465, 482-83 (La. App. 4 Cir. 2005).

Court in *Terrebonne Parish Sch. Bd. v. Castex Energy, Inc.*, recognized that operators nonetheless maintained a "duty to act as a reasonably prudent operator" under Louisiana Mineral Code article 122. 893 So. 2d 789, 797 (La. 2005); *see also Marin v. Exxon Mobil Corp.*, 48 So. 3d 234, 259-60 & n.21 (La. 2010). "A mineral lessee is obliged to repair the damage caused any other person by the lessee's faulty acts in mineral operations. Fault in this context … may also consist of a failure to observe a standard of conduct derived by analogy from relevant civil code and statutory principles." *Butler v. Baber*, 529 So. 2d 374, 382 (La. 1988) (Dennis, J., concurring) (citing La. C.C. art. 2315; Stone, Tort Doctrine in Louisiana, 17 Tul. L. Rev. 159 (1942)), *holding modified on other grounds by Inabnet v. Exxon Corp.*, 642 So. 2d 1243 (La. 1994).

Accordingly, the Petition's multiple, detailed, and specific allegations of a duty on the part of the defendants, and the delineation of the sources of the standard of care encompassed within that duty, plausibly allege a duty under Louisiana law, for 12(b)(6) purposes.

b. Defendants' Breach of Standard of Care

The Authority alleges the "Defendants' ongoing failure to maintain this [canal] network or restore the ecosystem to its natural state"[67]; "the failure of the oil and gas production and pipeline companies to maintain the existing canal work

[67] Petition, ROA.181 (¶ 6.7).

and the canal banks, by not preventing erosion"[68]; the defendants' "ongoing failure to comply with their obligations throughout the oil and gas fields"[69]; that the "Defendants have breached" the regulatory framework[70]; and the defendants' conduct is "in violation of the standard of care as prescribed in the regulatory framework … and, more particularly, the express obligations and duties contained in the permit(s) and right(s)-of-way identified in the Exhibits[.]"[71] The district court, correctly, did not find the Petition failed to meet the second element of a Louisiana negligence claim—allegation of the breach of the standard of care.

c. Cause-in-Fact

As with breach of standard of care, the district court did not find fault with the Petition's allegations of the cause-in-fact element of the Authority's negligence claim. There is no question that the Petition's allegations plausibly state that each defendant's conduct is a cause-in-fact of the Authority's Damages. The Petition details first the interdependent nature of the levee system and the wetlands in the immediately adjacent Buffer Zone.[72] It then alleges the cause of wetlands loss in terms of the defendants' specific activities.[73] Petition ¶¶ 6.11-6.13 specify that the

[68] Petition, ROA.182 (¶ 6.7.4).

[69] Petition, ROA.183 (¶ 6.10).

[70] Petition, ROA.189 (¶ 10).

[71] *Id.* (¶ 13).

[72] Petition, ROA.178-180 (¶¶ 5.1-5.11).

[73] Petition, ROA.180-184 (¶¶ 6.1-6.14).

defendants' conduct referenced in the permit, pipeline, and right-of-way exhibits are the factual cause of the coastal land loss that has "in turn created markedly increased storm surge risk, attendant flood protection costs, and, thus, damages to Plaintiff."[74]

d. Legal Cause/Ease of Association

The next element that must be plausibly alleged is "legal cause," which is the question of whether the plaintiff's harms are within the scope of protection of the defendants' duty. "In the classic duty-risk analysis, one of the inquiries the court must answer is: What, if any, duties were owed by the respective parties?" *Cormier v. T.H.E. Ins. Co.*, 745 So. 2d 1, 7 (La. 1999).

> The same policy considerations which would motivate a legislative body to impose duties to protect from certain risks are applied by the court in making its determination. Courts consider various policy factors that the legislature might consider, such as whether the imposition of a duty would result in an unmanageable flow of litigation; ease of association between the plaintiff's harm and a defendant's conduct; economic, social, and moral implications on similarly situated parties; the nature of defendant's activity; the direction in which society and its institutions are evolving; and precedent.

Id. (internal citations omitted); *see also Berg v. Zummo*, 786 So. 2d 708, 716 (La. 2001) (finding a duty imposed on a bar to not sell alcohol to minors, then holding that the plaintiff's harm was within the scope of that duty where the minor who

[74] Petition, ROA.183 (¶ 6.12).

was served by the bar subsequently beat up the plaintiff and ran over him with his truck).[75]

Regarding the "ease of association" between a defendant's duty and standard of care and the plaintiff's harm, this Court has quoted the Louisiana Supreme Court's decision in *Roberts v. Benoit*, 605 So. 2d 1032, 1054 (La. 1991): "The critical test in Louisiana, however, is phrased in terms of 'the ease of association' which melds policy and foreseeability into one inquiry: Is the harm which befell the plaintiff easily associated with the type of conduct engaged in by the defendant?" Quoted in *Wiltz v. Bayer CropScience, Ltd.*, 645 F.3d 690, 698 (5th Cir. 2011).[76] For example, in *Berg*, the Louisiana Supreme Court recognized that a

[75] Notably, no decisions impose the additional requirement seemingly applied by the district court here, that the source of the duty—be it statutory or otherwise—expressly designate the particular plaintiff as the recipient of that duty. The district court's reliance on *Audler v. CBC Innovis Inc.*, 519 F.3d 239 (5th Cir. 2008), does not alter the analysis. The *Audler* court examined the National Flood Insurance Act and determined it was intended to protect the lender and the federal government from increased financial risk of uninsured homes in flood zones, rather than homeowners. *Id*. at 252. As discussed herein, however, the state and federal statutes and regulations here have the purpose of protecting the usefulness of the levees and the storm-surge-dampening qualities of the buffering wetlands (benefitting the Authority, the entity charged with owning and operating the levees and engaging in flood control and storm protection).

[76] Proof of foreseeability is a fact not at issue at the 12(b)(6) stage, but ample proof of industry knowledge of the harm its conduct was inflicting on coastal wetlands goes back decades. In the state government's "Louisiana's Comprehensive Master Plan for a Sustainable Coast" (2012), promulgated by the Louisiana Coastal Protection and Restoration Authority under La. R.S. § 49:214.5.3 (and on whose "Framework Development Team" and "Oil and Gas Focus Group" numerous representatives of the defendants-appellees are members), the Master Plan notes, "Dredging canals for oil and gas exploration and pipelines provided our nation with critical energy supplies, but these activities also took a toll on the landscape, weakening marshes and allowing salt water to spread higher into coastal basins." *See* http://coastal.la.gov/a-common-vision/2012-coastal-master-plan/ (last visited May 19, 2015), at vi, vii, 18.

bar's duty to not serve a minor had an ease of association with the harm suffered by a plaintiff who was later beat up and run over by the minor served at the bar, several actors removed from the entity that held the duty. 786 So. 2d at 716.

Here, where the duty derives from the obligation to not impair the usefulness of the levees, there is a clear "ease of association" between that duty and the entity that operates and maintains those levees. *See U.S. and City of Dallas v. City of Irving*, 482 F. Supp. 393, 396 (N.D. Tex. 1979) ("Dallas, as the owner and operator or levees built by the United States to prevent floods, is a member of the class for whose benefit [RHA] Section 408 was enacted."). Under Louisiana law, the particular relationship between the respective roles and duties of the parties is a prime indicator of the existence of the ease of association. *Joseph v. Dickerson*, 754 So. 2d 912, 916 (La. 2000) ("Whether a legal duty exists, and the extent of that duty, depends on the facts and circumstances of the case, and the relationship of the parties.") (citing *Socorro v. City of New Orleans*, 579 So. 2d 931, 938 (La. 1991)).

Cormier provides that courts analyze duties regarding "the respective parties" by looking to statutes and by "economic, social, and moral implications on similarly situated parties; … [and] the direction in which society and its institutions are evolving." 745 So. 2d at 7; *see also Posecai v. Wal-Mart Stores, Inc.*, 752 So. 2d 762, 766 (La. 1999) ("In deciding whether to impose a duty in a particular case,

the court must make a policy decision in light of the unique facts and circumstances presented."). The Authority's statutory charge arises under La. R.S. §§ 38:330.1-330.13. The Authority is empowered with "regional coordination of flood protection[,]" La. R.S. § 38:330.1(F)(2)(a); and to establish "erosion control measures, marsh management, coastal restoration, and other flood control works as such activities, facilities, and improvements relate to tidewater flooding, hurricane protection, and saltwater intrusion." La. R.S. § 38:330.2(A)(2)(a). These mandates established by the Legislature are the hand that fits firmly in the glove of the defendants' duty and statutory, regulatory, and permit-driven standard of care.

Indeed, while the standard of care to not impair the usefulness of the levees stretches back at least to the RHA in 1899, the plaintiff-appellant Levee Districts that control those levees were created even before that. The Orleans Levee District was created in 1890, and levee districts for the remainder of the territory were created soon thereafter. La. Act 93 of 1890 (creating the Orleans Levee District, "invested with the control and maintenance of all levees in said Orleans district, whether on river, lake, canal, or elsewhere, and shall proceed as rapidly and effectually as possible to put the same in such state as to amply protect the property within the district [.]"); La. Act 95 of 1890 (creating the Pontchartrain Levee District, originally encompassing the territory of the East Jefferson Levee District); La. Act 14 of 1892 (creating the Lake Borgne Basin Levee District). Extension of

the defendants' duty to the Levee Districts and the Authority, measured by a standard of care that extends back to at least 1899, does not result in "an unmanageable flow of litigation," *Cormier*, 745 So. 2d at 7, as so few entities have the express statutory charge specifically regarding the levees and the coastal erosion and marsh management issues that are the subject of the defendants' duty.[77]

The ease of association between particular parties is not limited to the scope of any contractual relationship involved. For example, in *Cleco Corp. v. Johnson*, a utility company sued a trucking company for reimbursement of damages paid to the utility's customers sustained when a driver of a dump truck struck a utility pole. 795 So. 2d 302, 303-04 (La 2001). Assuming the utility was subrogated to the customers' claims, the Court analyzed what claims the customers had against the trucking company. *Id.* at 305. The trucking company argued there was no ease of association. *Id.* The Court disagreed:

> There is no "indeterminate class" in this case. [The utility] alleges that it compensated one hundred eighty-seven customers for the direct physical damage to the customers' equipment as a result of the power

[77] Courts finding an ease of association under Louisiana law where petrochemical interests are involved rarely face such an express relationship between a plaintiff's legislatively created mission and the defendants' standard of care. *See, e.g., MSOF*, 295 F.3d at 490-92 (finding ease of association between plaintiff landowner and waste disposal facility several miles away); *Simmons v. CTL Distribution*, 868 So. 2d 918, 924 (La. App. 5 Cir. 2004) ("Clearly, in this case, the Defendant had a duty to the public that might be affected by the spilling of hazardous material in their neighborhoods."); *S. C. Bell Tel. Co. v. Texaco*, 418 So. 2d 531 (La. 1982) (ease of association between owner of leaking underground storage tanks telephone company with underground cables affected by the plume).

> surge caused by defendants' actions. A trier of fact may find that there is an ease of association between a person who damages an electrical pole, causing a power surge and the damage to electrical equipment in the homes and businesses supplied with power by the damaged electrical pole. Defendants' action was not an indirect cause of damage to the equipment; rather, defendants' action was the direct cause.

Id. at 306-07 (citing *Istre v. Fidelity Fire & Casualty Ins. Co.*, 628 So. 2d 1229 (La. App. 3 Cir. 1993)) (finding ease of association between construction company and victim of auto accident caused when company's employee ran a backhoe into a utility pole, causing a power outage leading to a traffic signal malfunction four miles away).

With a similar result, in *Underwriters at Lloyd's London v. OSCA, Inc*., applying Louisiana law, this Court considered the ease of association of oil and gas activities and affirmed a jury verdict against Chevron for damages caused by a petroleum blowout hundreds of miles offshore. 2006 WL 941794, *15 (5th Cir. 4/12/2006). The plaintiffs were not in privity with Chevron, yet the court found that a duty was owed to the plaintiffs because "surely a sophisticated oil industry services provider could foresee that negligent operations could cause a blowout of petroleum products, and that where this occurred in the Gulf, a network of pipelines would quite likely be involved." *Id.*

Similarly, here, the Petition alleges the Authority's flood protection structures are adjacent to the Buffer Zone, and that the defendants' conduct in

degrading the storm surge-dampening qualities of the Buffer Zone was a direct breach of their standard of care. Where the statutory, regulatory, and permit-driven definition of that standard of care specifies protection of the wetlands as a first-line barrier against storm surge and to protect the usefulness of the levees, the damage to the usefulness of the levees falls within the ease of association. The district court bemoaned the lack of language in the statutes and regulations expressly "impos[ing] a standard of care upon Defendants ***for the benefit of a levee board***,"[78] but such specificity is not required under the ease of association analysis. Here, the Petition plainly meets the rigors of that analysis. Accordingly, the district court's dismissal of the Authority's negligence claim should be reversed.

e. Actual Damages

The district court did not find any defect in the Authority's pleading of the final negligence element, actual damages. Petition ¶¶ 7.1 through 7.6.6 detail and itemize specific damages faced by the Authority as a result of the defendants' conduct.[79]

f. *Barasich* Does Not Require a Different Result

The Petition sufficiently alleges each of the necessary elements of the Authority's negligence claim. The district court erred by short-circuiting the negligence analysis upon a determination—first in its order denying remand, then

[78] ROA.4651 (emphasis added).

[79] ROA.184-187

permeating its dismissal analysis—that the single, un-appealed, district court decision in *Barasich* articulated a *per se* rule that "oil and gas companies do not have a duty under Louisiana law to protect members of the public 'from the results of coastal erosion allegedly caused by [pipeline] operators that were physically and proximately remote from plaintiffs or their property.'"[80] *Barasich*, however, does not compel dismissal of the Authority's claims.

While the *Barasich* court found the defendants in that case were too "physically and proximately remote from plaintiffs or their property," it recognized that, given the proper relationship between parties, a duty could exist:

> By all accounts, coastal erosion is a serious problem in south Louisiana. If plaintiffs are right about the defendants' contribution to this development, perhaps a more focused, less ambitious lawsuit between parties who are proximate in time and space, with a less attenuated connection between the defendant's conduct and the plaintiff's loss, would be the way to test their theory.

497 F. Supp. 2d at 695. The Authority's case is that "more focused" lawsuit for which the *Barasich* court left room.

That this case is more focused than *Barasich* is apparent in two critical aspects:

- *Barasich* was a class action on behalf of a putative class that was broadly defined to include "[a]ll persons and/or entities who/which have sustained

[80] ROA.2352-2353 (quoting *Barasich*, 467 F. Supp. 2d at 693); repeated at ROA.4645, 4653.

injuries, loss and/or damages [in seventeen parishes]."[81] Here, the plaintiff is one public entity with a limited geographic footprint and with a single charge: flood protection.[82] The wide variance that existed among the interests of, and damages suffered by, hundreds of thousands of private and public individuals and entities across seventeen parishes does not exist here.

- As to defendants, rather than identifying any particular defendants (much less specifying conduct), the *Barasich* complaints named *two defendant classes* consisting of "[a]ll oil and gas pipeline companies which dredged pipeline canals in the marshes of South Louisiana" and "[a]ll oil and gas exploration and production companies which drilled for oil and gas in the marshes of South Louisiana."[83] Here, the Authority did not allege defendant classes but named a finite number of defendants,[84] identifying each defendant's conduct by well, pipeline, permit, and/or right-of-way.[85] Rather than encompassing defendant actions generically across all of "the marshes

[81] Second Amended Complaint, *Barasich*, 2:05-cv-4161-SSV-DEK (E.D. La. 3/2/2006), at 2; ROA.3869.

[82] *Barasich*, 467 F. Supp. 2d at 694. The Authority provided the district court with a map displaying the difference between the wide-ranging territory of the plaintiff class in *Barasich* and the single plaintiff here. ROA.3864.

[83] Original Complaint, *Barasich*, (E.D. La. 9/13/2005), at 2-3, ROA.3873-3874.

[84] Petition, ROA.197-206 (Exh. A).

[85] Petition, ROA.209-297 (Exhs. D, E, F, & G).

of South Louisiana," the Authority identified a discrete hydrological basin, the "Buffer Zone," adjacent to the Authority's flood protection structures.[86]

Stated otherwise, for example, the *Barasich* lawsuit sought to group together the claims of an individual in Livingston Parish, a large corporation in Orleans Parish, and small business in Plaquemines Parish against an oil company that operated hundreds of miles away in Cameron Parish near the Texas state line, troubling the court because the attenuation of duty exceeded any traditional notion of the reach of Louisiana tort liability. The Authority here, however, has offered a much narrower formulation of the plaintiff-defendant relationship, tailored to traditional tort principles: fix the damage you caused to the persons whom you could foresee your conduct would damage.

The Authority's claims do not fall within *Barasich*'s ambit, and the district court should not have treated *Barasisch* as automatically foreclosing the question of the existence of a duty under Louisiana law. Instead, the Court should turn to a standard analysis of duty, scope of protection, and ease of association under Louisiana law negligence concepts. As discussed above, under this analysis, the Petition's allegations are sufficient.

[86] Petition, ROA.207-208 (Exhs. B & C).

3. District Court Erred in Dismissing the Strict Liability Claim

The Authority's strict liability claim, pursuant to Louisiana Civil Code articles 2317 and 2317.1, is premised on the defendants' custody and *garde* over the canals in the Buffer Zone, and their failure to exercise reasonable care to ensure no damage resulted from the erosion and other defects they knew or reasonably should have known would result from those canals.[87] The district court found that, under the 1996 amendments to Louisiana's strict liability regime, the existence of a legal duty became an element of a strict liability claim. Because the district court had found there was no duty in its analysis of the negligence claim, under *Barasich*, it therefore also dismissed the strict liability claim.[88] As discussed above, however, the district court's duty analysis was in error.

The district court failed to analyze the law applicable to claims of strict liability arising from the defendants' conduct prior to 1996. Those claims remain governed by the pre-amendment statute; therefore, the district court's dismissal based on the 1996 amendments should be reversed, regardless of this Court's holding as to the existence of a duty, as to the Authority's claims that arose from conduct prior to 1996. *Dupree v. City of New Orleans*, 765 So. 2d 1002, 1007 n.5 (La. 2000) (holding 1996 amendments not retroactive).

[87] Petition, ROA.190 (¶¶ 16-18).

[88] ROA.4655-4657.

Furthermore, the distinction between negligence and strict liability claims addressed in the 1996 amendments was not the element of duty, but the element of actual or constructive knowledge of the defect. *Dupree*, 765 So. 2d at 1007 n.5. The district court never found deficiency in the Authority's allegations that the defendants knew or should have known of the defect in the canals.[89] The Authority's strict liability claims should be allowed to proceed.

4. District Court Erred in Dismissing the Natural Servitude of Drain Claim

The natural servitude of drain is provided under Louisiana Civil Code articles 655 and 656. Article 655 provides, "An estate situated below is bound to receive the surface waters that flow naturally from an estate situated above unless an act of man has created the flow." La. C.C. art. 655. Article 656 provides, in pertinent part, "The owner of the dominant estate may not do anything to render the servitude more burdensome." La. C.C. art. 656.

As a bedrock Civil Code principle of predial servitudes, which includes natural and conventional servitudes of drain, "[n]either contiguity nor proximity of the two estates is necessary for the existence of a predial servitude. It suffices that the two estates be so located as to allow one to derive some benefit from the charge on the other." La. C.C. art. 648. Hence, the lands need not be adjacent for a servitude of drain to exist. The district court unequivocally—and correctly—

[89] Petition, ROA.184, 190 (¶¶ 6.14, 18).

prefaced its natural servitude of drain analysis with the holding that, "[a]dditionally, in general, the two immovables that constitute the two estates need not be contiguous or within any given proximity."[90]

Regarding these elements, the Petition alleges:

- "Defendants have possessed or possess temporary rights of ownership in the lands that they dredged to create the canal network at issue in this action. These lands, which constitute 'dominant estates' under the Civil Code, have carried a natural servitude of drain over Plaintiff's property, the 'servient estate,' by which water naturally flows from the dominant estate onto the servient estate." (Petition, ¶ 22; ROA.191).

- "… [T]he Defendants' activities in Louisiana's coastal lands … have changed not only the topography of the coastal lands, but the location, flow and natural pulsing patterns of the waters moving through those lands[.]" (Petition, ¶ 23; ROA.191-192).

- "Defendants' acts and/or omissions have directly altered and continue to alter the natural course, flow, and volume of water from the dominant estates to the servient estate by causing the loss of coastal lands in the Buffer Zone." (Petition, ¶ 24; ROA.192).

[90] ROA.4657-4658 & n.196 (citing *Roberts v. Cardinal Serv., Inc.*, 266 F.3d 368, 385 (5th Cir. 2001) (in turn citing La. C.C. art. 648). Inexplicably, after making this holding, the district court then spent a page and a half analyzing two of the cases cited by the Authority illustrating this Civil Code concept. The district court suggested that the two cases—*Young v. Int'l Paper Co.*, 179 La. 803, 805 (1934), and *Maddox v. Int'l Paper Co.*, 47 F. Supp. 829, 831 (W.D. La. 1942)—are distinguishable because no question existed as to the relative position of the dominant and servient estates in those cases, while here "it is unclear." While the relative position of the estates is a fact question not susceptible to Rule 12(b)(6) disposition, as discussed below the position of the estates is alleged in detail in the Petition and its exhibits. The district court also observed *Young* and *Maddox* may be distinguishable because the plaintiffs there sought direct economic damages while the Authority's harm is indirect. The Authority alleges direct harm to the usefulness of its levees, seeking direct economic damages or injunctive relief.

The wealth of specificity in Exhibits B-G to the Petition shows the Petition does not suffer from a lack of detail as to the locations of the estates at issue here.

While these specific allegations refer to the alteration of "the topography of the coastal lands, [and] the location, flow and natural pulsing patterns of the waters moving through those lands," the district court focused on a more simplified formulation from the introductory section of the Petition: "the violent wave action and storm surge that tropical storms and hurricanes transmit from the Gulf of Mexico."[91] Regardless which formulation is used, the Civil Code articles establishing the servitude do not specify the source of the "surface waters" subject to the servitude, but only that they "flow naturally." La. C.C. art. 655. No legal authority supports the premise that a restriction may be read into the law to exclude tidally influenced or storm-influenced flows of water. The district court expressed concern that the Authority seeks an expansion of the law—but it is the district court's result that rewrites the law applicable to the servitude.[92]

[91] ROA.4662 (quoting Petition, at 2).

[92] The district court opined that *Poole v. Guste*, 262 So. 2d 339 (La. 1972), is unhelpful because it may involve a conventional rather than a natural servitude of drain. Even if true, this distinction is inconsequential because both are governed by C.C. art. 648. Moreover, the *Poole* majority found a servitude existed on tidal lands. 262 So. 2d at 344. The dissent showed that storm-surge was at issue when it opined that "the coastal regions of Louisiana can never be protected against the frequent surges of hurricanes." *Id.* at 348 (Summers, J.,

Whether the natural flows of water have been altered, whether the estates of the Authority and the defendants are situated to constitute dominant and servient estates, and whether the defendants' actions caused an increased burden on the Authority's estate, are fact questions. As the district court itself held, "The question of whether an estate is dominant or servient is one of fact and can be established by all means of evidence, including expert testimony."[93] Accordingly, the only issue ripe for Rule 12(b)(6) disposition is whether the detailed allegations in the Petition set forth a plausible claim of the existence and breach of the natural servitude of drain. Here, they do, and the district court's dismissal of that claim should be reversed.

5. District Court Erred in Dismissing the Nuisance Claims

The district court found the Authority's nuisance claims under Louisiana Civil Code article 667 should be dismissed because, under the 1996 amendment to that article, a showing of negligence on the part of the defendant is required, which issue the district court found it had disposed of in its negligence analysis.[94] For the reasons discussed above, this conclusion is incorrect, and the dismissal of the nuisance claims on this basis should be reversed.

---

dissenting). Of course, the Legislature ignored this dissent in charging the Authority with such a mandate to protect.

[93] ROA.4659 & n.204 (citing A.N. Yiannopoulos, 4 La. Civ. L. Treatise: Predial Servitudes, § 2:2.).

[94] ROA.4664-4666.

The district court also held the Authority's nuisance claims should be dismissed, including those accruing prior to 1996, under the lack of "neighbor" status under article 667, as found similarly by the *Barasich* court.[95] As discussed above, *Barasich* is patently distinguishable.

Moreover, as with the natural servitude of drain, the servitude established under Civil Code article 667 is a predial servitude and therefore subject to article 648's provision that contiguity and proximity are not required. *Roberts*, 266 F.3d at 385. The *Barasich* decision was not based on a strict, physically proximal reading of "neighbor," which would run afoul of article 648, but on the specific facts there, where the class of plaintiffs was spread over seventeen Louisiana parishes and the class of defendants was even more widespread across the coast. The *Barasich* court observed it was "not aware of[] any generally prevailing meaning of 'neighbor' that could possibly apply to a relationship between a homeowner in Iberia Parish and an exploration company that dug a canal near the mouth of the Mississippi River." 467 F. Supp. 2d at 690. Here, a single plaintiff has made specific allegations regarding the location of defendants' property interests and conduct, and restricted those allegations to the effects of that conduct within a hydrologically discrete "Buffer Zone" adjacent to the flood control assets.

[95] ROA.4666-4667.

Louisiana courts have long recognized that the "neighbor" requirement in article 667 depends on the ability of one proprietor's actions to affect another proprietor's property, not on a bright-line test dependent on physical proximity:

> We are of the opinion that the obligation imposed upon land owners by Article 667, is an obligation owed to an indefinite Class of persons and is therefore not a special obligation to particular persons[.] … We are of the further opinion that the word "neighbor" as used in Article 667 is indefinite and refers to any land owner whose property may be damaged ***irrespective of the distance his property may be from that of the proprietor whose work caused the damage***.

Gulf Ins. Co. v. Employers Liab. Assurance Corp., 170 So. 2d 125, 129 (La. App. 4 Cir. 1964) (emphasis added). This Court has quoted this language with approval. *Roberts*, 266 F.3d at 386; *see also Craig v. Montelepre Co.*, 211 So. 2d 627, 631 n.3 (La. 1968); *Brister v. Gulf C. Pipeline Co.*, 684 F. Supp. 1373, 1385 (W.D. La. 1988).

Therefore, there is no rule of law compelling "neighbor" to be interpreted as requiring a certain physical adjacency or proximity, which would be contrary to Civil Code article 648. Because the Authority has alleged the causal proximity required by the law—that the conduct on the property controlled by the defendants affects the Authority on the property it controls—the dismissal of the nuisance claims should be reversed.

VI. CONCLUSION

The Authority requests that this Court reverse the order denying the motion to remand this case to state court; alternatively, if remand to state court is not ordered, the Authority requests that this Court reverse the dismissal of their claims of negligence, strict liability, breach of the natural servitude of drain, and nuisance, and remand to the district court for further proceedings.

Respectfully submitted,

/s/ *Harvey S. Bartlett III*
GLADSTONE N. JONES, III (#22221)
BERNARD E. BOUDREAUX (#2019)
KEVIN E. HUDDELL (#26930)
EBERHARD D. GARRISON (#22058)
HARVEY S. BARTLETT III (#26795)
EMMA ELIZABETH ANTIN DASCHBACH (#27358)
Jones, Swanson, Huddell & Garrison, L.L.C.
601 Poydras St., Suite 2655
New Orleans, Louisiana 70130
Telephone: (504) 523-2500
Facsimile: (504) 523-2508

JAMES R. SWANSON (#18455)
BENJAMIN D. REICHARD (#31933)
Fishman Haygood, L.L.P.
201 St. Charles Ave. , Suite 4600
New Orleans, Louisiana 70170
Telephone: (504) 586-5252
Facsimile: (504) 586-5250

J. MICHAEL VERON (#7570)
J. ROCK PALERMO III (#21793)
ALONZO P. WILSON (#13547)
Veron, Bice, Palermo & Wilson, L.L.C.
721 Kirby St. (70601)

P.O. Box 2125
Lake Charles, Louisiana 70602
Telephone: (337) 310-1600
Facsimile: (337) 310-1601

Counsel For Plaintiffs-Appellants, Board of Commissioners of the Southeast Louisiana Flood Protection Authority – East, Individually and as the Board Governing the Orleans Levee District, the Lake Borgne Basin Levee District, and the East Jefferson Levee District

CERTIFICATE OF SERVICE

I, Harvey S. Bartlett, III, certify that the above Original Brief of Appellants was served on May 20, 2015, specifically upon

ADAMS & REESE, L.L.P.
Francis V. Liantonio, Jr.
Thomas Gordon O'Brien
Martin A. Stern
Jeffrey Edward Richardson
One Shell Square
701 Poydras St. Suite 4500
New Orleans, LA 70139

ARNOLD & PORTER, L.L.P.
Matthew T. Heartney
777 S. Figueroa St.
44th Floor
Los Angeles, CA 90017-5844

ARNOLD & PORTER, L.L.P.
Nancy Gordon Milburn
399 Park Ave.
New York, NY 10022-4690

BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, P.C.
Nancy Scott Degan
Roy C. Cheatwood
Kerry J. Miller
201 St. Charles Ave. Suite 3600
New Orleans, LA 70170

LAW OFFICE OF STEPHEN D. BAKER
Stephen D. Baker
412 W. University
Suite 101
Lafayette, LA 70506

BALDWIN HASPEL BURKE & MAYER, L.L.C.
Beverly Klundt Baudoin
David Louis Carrigee
Energy Center
1100 Poydras St., Suite 3600
New Orleans, LA 70163-220

BIENVENU, BONNECAZE, FOCO, VIATOR & HOLINGA, A.P.L.L.C.
Erin Percy Tadie
4210 Bluebonnet Blvd.
Baton Rouge, LA 70809

BRADLEY, MURCHISON, KELLY & SHEA, L.L.C.
Darryl Joseph Foster
1100 Poydras St. Suite 2700
New Orleans, LA 70163

BRADLEY, MURCHISON, KELLY & SHEA, L.L.C.
Stephen Christopher Fortson
Anna W. O'Neal
401 Edwards Street
Suite 1000
Shreveport, LA 71101

CARVER, DARDEN, KORETZKY, TESSIER, FINN, BLOSSMAN & AREAUX, L.L.C.
Taylor Darden
Energy Centre
1100 Poydras Street
Suite 3100
New Orleans, LA 70163

CURRY & FRIEND, P.L.C.
Mary Margaret Steele
Christopher C. Friend
Meghan Elizabeth Smith
Whitney Bank Bldg.
228 St. Charles Ave. Suite 1200
New Orleans, LA 70130

DEUTSCH, KERRIGAN & STILES, L.L.P.
Isaac H. Ryan
755 Magazine St.
New Orleans, LA 70130

FOWLER RODRIGUEZ VALDES-FAULI
John Anthony Scialdone
Michael James Thompson, Jr.
2505 14th Street, Suite 500
P. O. Box 4080
Gulfport, MS 39502

GIEGER, LABORDE & LAPEROUSE, L.L.C.
Andrew A. Braun
Caitlin Jean Hill
One Shell Square
701 Poydras St., Suite 4800
New Orleans, LA 70139-4800

GORDON, ARATA, MCCOLLAM, DUPLANTIS & EAGAN, L.L.C.
Ewell Elton Eagan, Jr.
Terence Kent Knister
James Douglas Rhorer
201 St. Charles Ave. Suite 4000
New Orleans, LA 70170-4000

GRAY REED & MCGRAW, P.C.
James Joseph Ormiston
Michael Antoine Ackal, III
Julia M. Palmer
Suite 2000
1300 Post Oak Boulevard
Houston, TX 77056

GUGLIELMO, LOPEZ, TUTTLE, HUNTER & JARRELL
James Thomas Guglielmo
306 E. North St.
P. O. Drawer 1329
Opelousas, LA 70571-1329

DANIEL HUGHES, A.P.L.C.
Daniel C. Hughes
126 Heymann Blvd.
P. O. Box 51595
Lafayette, LA 70505

JONES WALKER LLP
Carl David Rosenblum
Alida C. Hainkel
Lauren Courtney Mastio
Glenn G. Goodier
Place St. Charles
201 St. Charles Ave., Suite 5100
New Orleans, LA 70170-5100

JONES WALKER LLP
Douglas J. Longman, Jr.
Carmen Marie Rodriguez
600 Jefferson St. Suite 1600
P. O. Drawer 3408
Lafayette, LA 70501

JONES WALKER LLP
William D. Lampton
William Thomas McCall, Jr.
Four United Plaza
8555 United Plaza Blvd.
Baton Rouge, LA 70809

JONES WALKER LLP
Joshua A. Norris
1001 Fannin, Suite 2450
P. O. Drawer 3408
Houston, TX 77002

KEAN MILLER, L.L.P.
Brett Patrick Fenasci
Tyler Ann Moore Kostal
Richard Stuart Pabst
Charles Simon McCowan, III
Michael Raudon Phillips
Bradley Joseph Schlotterer
Dylan T. Thriffiley
First Bank & Trust Tower
909 Poydras Street
Suite 1400
New Orleans, LA 70112

KEAN MILLER, L.L.P.
Leonard Louis Kilgore, III
Esteban Herrera, Jr.
Mark Andrew Marionneaux
Richard Dean McConnell
Victor Jacob Suane, Jr.
Louis Victor Gregoire, Jr.
Pamela Roman Mascari
Charles Simon McCowan, III
II City Plaza
400 Convention St. Suite 700
Baton Rouge, LA 70802

KEOUGH, COX & WILSON, LIMITED
John Powers Wolff, III
Nancy B. Gilbert
Richard W. Wolff
P. O. Box 1151
701 Main St.
Baton Rouge, LA 70821

KING & SPALDING, L.L.P.
Ashley Charles Parrish
1700 Pennsylvania Ave., N.W. Suite 200
Washington, DC 20006-4706

KING & SPALDING, L.L.P.
Jeremiah Johnson Anderson
Robert Ellison Meadows
1100 Louisiana St., Suite 4000
Houston, TX 77002-5219

KUCHLER, POLK, SCHELL, WEINER & RICHESON, L.L.C.
Leigh Ann Schell
Deborah DeRoche Kuchler
1615 Poydras St. Suite 1300
New Orleans, LA 70112

LAPEYRE & LAPEYRE, L.L.P.
Etienne C. Lapeyre
F. Henri Lapeyre, Jr.
400 Magazine St., Suite 304
New Orleans, LA 70130-3277

LARZELERE PICOU WELLS SIMPSON LONERO, L.L.C.
Morgan Joseph Wells, Jr.
Evan J. Godofsky
Two Lakeway Center
3850 N. Causeway Blvd.
Suite 1100
Metairie, LA 70002

LISKOW & LEWIS
Joe B. Norman
Robert Beattie McNeal
Michael P. Cash
Jonathan Andrew Hunter
Elizabeth S. Wheeler
Russell Keith Jarrett
Kelly Bechtel Becker
One Shell Square
701 Poydras St. Suite 5000
New Orleans, LA 70139-5099

LISKOW & LEWIS
George Arceneaux, III
Michael P. Cash
Jamie Duayne Rhymes
George Hardy Robinson, Jr.
822 Harding Street
Lafayette, LA 70503

LISKOW & LEWIS
Michael P. Cash
1001 Fannin St. Suite 1800
Houston, TX 77002

LLOG EXPLORATION COMPANY, L.L.C.
George M. Gilly
1001 Ochsner Blvd., Suite 200
Covington, LA 70433

MAYHALL FONDREN BLAIZE
Charles G. Blaize
5800 One Perkins Place Dr., Suite 2-B
Baton Rouge, LA 70808

MCGUIREWOODS, L.L.P.
Angela M. Spivey
1230 Peachtree Street, NE Promenade II
Suite 2100
Atlanta, GA 30309-3534

MCGUIREWOODS, L.L.P.
Richard Trent Taylor
One James Center
901 E. Cary St.
Richmond, VA 23219-4130

MONTGOMERY BARNETT, L.L.P.
John Y. Pearce
Edward Louis Fenasci
Energy Centre
1100 Poydras St., Suite 3300
New Orleans, LA 70163-3200

NEUNERPATE
Brandon Wade Letulier
Cliff A. LaCour
Ben Louis Mayeaux
Francis X. Neuner
One Petroleum Center
P. O. Drawer 52828
1001 W. Pinhook Rd., Suite 200
Lafayette, LA 70503

OTTINGER HEBERT, L.L.C.
Paul J. Hebert
1313 W. Pinhook Road
P.O. Drawer 52606
Lafayette, LA 70505-2606

PHELPS DUNBAR, L.L.P.
Steven Jay Levine
John Bechtold Shortess
Kevin William Welsh
II City Plaza
400 Convention St., Suite 1100
P. O. Box 4412
Baton Rouge, LA 70821-4412

PREIS, P.L.C.
Robert Michael Kallam
Jennifer Anne Wells
Versailles Centre
102 Versailles Blvd., Suite 400
Lafayette, LA 70501

QUINN EMANUEL URQUHART & SULLIVAN, L.L.P.
Michael J. Lyle
1299 Pennsylvania Ave. NW, Suite 825
Washington, DC 20004

David William Rusch
1305 W. Causeway Approach
Suite 213
Mandeville, LA 70471

SCHONEKAS, EVANS, MCGOEY & MCEACHIN, L.L.C.
Kyle D. Schonekas
William P. Gibbens
909 Poydras Street
Suite 1600
New Orleans, LA 70112

SHIPLEY SNELL MONTGOMERY, L.L.P.
George T. Shipley
Amy Louise Snell
712 Main Street
Suite 1400
Houston, TX 77002

SLATTERY, MARINO & ROBERTS, P.L.C.
Emile Joseph Dreuil, III
David Stephen Landry
Gerald F. Slattery, Jr.
Energy Center
1100 Poydras St., Suite 1800
New Orleans, LA 70163-1800

STONE PIGMAN WALTHER WITTMANN, L.L.C.
John Pratt Farnsworth
Barry W. Ashe
546 Carondelet St.
New Orleans, LA 70130-3588

STRONG PIPKIN BISSELL & LEDYARD, L.L.P.
Michael M. Hendryx
Jason Christopher McLaurin
4900 Woodway Drive
Suite 1200
Houston, TX 77056

TAYLOR, PORTER, BROOKS & PHILLIPS, L.L.P.
Edward Daniel Hughes
John Michael Parker
451 Florida St.
8th Floor
P. O. Box 2471
Baton Rouge, LA 70821

VAN NESS FELDMAN, L.L.P.
Lawrence Gene Acker
1050 Thomas Jefferson St., N.W. Seventh Floor
Washington, DC 20007

WALL, BULLINGTON & COOK, L.L.C.:
Guy Earl Wall
540 Elmwood Park Blvd.
Harahan, LA 70123

This document was submitted via the CM/ECF Case Filing system. All counsel of record in this case are registered CM/ECF users. Filing and service were performed by direction of counsel.

/s/ Harvey S. Bartlett III

GLADSTONE N. JONES, III (#22221)
BERNARD E. BOUDREAUX (#2019)
KEVIN E. HUDDELL (#26930)
EBERHARD D. GARRISON (#22058)
HARVEY S. BARTLETT III (#26795)
EMMA ELIZABETH ANTIN DASCHBACH (#27358)
Jones, Swanson, Huddell & Garrison, L.L.C.
601 Poydras St., Suite 2655
New Orleans, Louisiana 70130
Telephone: (504) 523-2500
Facsimile: (504) 523-2508

JAMES R. SWANSON (#18455)
BENJAMIN D. REICHARD (#31933)
Fishman Haygood, L.L.P.
201 St. Charles Ave. , Suite 4600
New Orleans, Louisiana 70170
Telephone: (504) 586-5252
Facsimile: (504) 586-5250

J. MICHAEL VERON (#7570)
J. ROCK PALERMO III (#21793)
ALONZO P. WILSON (#13547)
Veron, Bice, Palermo & Wilson, L.L.C.

721 Kirby St. (70601)
P.O. Box 2125
Lake Charles, Louisiana 70602
Telephone: (337) 310-1600
Facsimile: (337) 310-1601

Counsel For Plaintiffs-Appellants, Board of Commissioners of the Southeast Louisiana Flood Protection Authority – East, Individually and as the Board Governing the Orleans Levee District, the Lake Borgne Basin Levee District, and the East Jefferson Levee District

Certificate of Compliance with Type-Volume Limitations, Typeface Requirements, and Type Style Requirements

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,887 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Professional Plus 2010, in 14-point Times New Roman font (with footnotes prepared in 12-point Times New Roman font).

Dated: May 20, 2015.

/s/ Harvey S. Bartlett III
Harvey S. Bartlett III