# NOTES

## *Healthy Gulf v. U.S. Army Corps of Engineers*: Fifth Circuit Overrides Mitigation Hierarchy in Favor of Permittee-Responsible Techniques



## I. OVERVIEW

Driftwood LNG and Driftwood Pipeline (jointly Driftwood) wanted to convert natural gas into liquified natural gas (LNG) in order to export it to international markets.[1] In order to accomplish such a goal, an LNG production and export terminal had to be constructed along with a pipeline to connect it to the existing systems.[2] Driftwood planned on building a terminal on the Calcasieu River in Southwest Louisiana.[3] The process of building an LNG facility on wetland habitats required approval and

1. Healthy Gulf v. U.S. Army Corps of Eng'rs, 81 F.4th 510, 516 (5th Cir. 2023).
2. *Id.*
3. *Id.*

permits from numerous state and federal agencies, including the U.S. Army Corps of Engineers (the Corps).[4] Petitioners Healthy Gulf and Sierra Club (collectively Healthy Gulf and petitioners) petitioned for review of the Corps' permit, claiming that the decision to issue the permit to Driftwood violated federal statutes, and was arbitrary and capricious.[5] Here, the U.S. Court of Appeals for the Fifth Circuit *held* that the Corps' issuance of a permit to Driftwood did not violate any applicable federal statutes, nor was it arbitrary or capricious. *Healthy Gulf v. U.S. Army Corps of Eng'rs*, 81 F.4th 510 (5th Cir. 2023).

## II. BACKGROUND

### *A. Regulatory Framework and the Role of the U.S. Army Corps of Engineers*

The Natural Gas Act gives the Federal Energy Regulatory Commission (FERC) the authority over the approval process for permits required for LNG terminals and pipelines.[6] FERC acts as "the lead agency for the purposes of coordinating all applicable Federal authorizations and for the purposes of complying with the National Environmental Policy Act of 1969" (NEPA).[7] In addition, state and federal agencies including the Corps must cooperate with FERC.[8] The Corps is responsible for ensuring compliance with the Clean Water Act (CWA), which prohibits the "discharge of any pollutant," including any dredged material, into the navigable waters of the United States without a permit.[9] Some areas of water, including wetlands, have been labeled as "special aquatic sites" due to their unique ecological characteristics and importance to the environmental health of the region's ecosystem.[10] The CWA enables the Corps to "issue permits, after notice and opportunity for public hearings[,] for the discharge of dredged or fill material into the navigable waters at specified disposal sites."[11]

The CWA mandates certain regulations to ensure compliance in the selection of LNG sites and the approval of permits called the Section 404(b)(1) Guidelines (Guidelines).[12] The Guidelines' general principle is

4. *Id.*
5. *Id.*
6. 15 U.S.C. §717b(e)(1) (2024).
7. 15 U.S.C. § 717n(b)(1).
8. 15 U.S.C. § 717n(b)(2).
9. Healthy Gulf v. U.S. Army Corps of Eng'rs, 81 F.4th at 517.
10. 40 C.F.R. § 230.3(q)(1).
11. 33 U.S.C. § 1344(a).
12. *Healthy Gulf*, 81 F.4th at 517.

that "no discharge of dredged or fill material" is permitted where it would "cause or contribute to significant degradation of the waters of the United States."[13] The Corps' ultimate goal is "no overall net loss to wetlands."[14] As such, the Corps must perform a three-staged analysis of avoidance, minimization, and compensatory mitigation of wetland facilities.[15]

For avoidance, "no discharge of dredged or fill material shall be permitted if there is a practicable alternative . . . which would have less adverse impact . . . so long as the alternative does not have other significant adverse environmental consequences."[16] In other words, the Corps is tasked with finding the least environmentally damaging practicable alternative (LEDPA).[17] An alternative will be considered practicable if it is available and feasible after considering "cost, existing technology, and logistics in light of overall project purposes."[18] For facilities located on special aquatic sites, practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise."[19] For minimization, the permittees must take "appropriate and practicable steps" to minimize the damaging effects of the discharged material on the surrounding aquatic environment.[20] Finally, for compensatory mitigation, "appropriate and practicable compensatory mitigation is required for unavoidable adverse impacts which remain" after avoidance and mitigation measures have been taken.[21] For aquatic ecosystems, compensatory mitigation may include the "restoration, enhancement, establishment, and . . . preservation."[22]

The Corps is to consider three methods of mitigation in the "following order."[23] First are mitigation bank credits, which are established and operated by "permitted, public or private sponsors to restore, establish, enhance, and/or preserve aquatic resources."[24] Credits may be purchased, which transfers the mitigation obligation from the

13. 40 C.F.R. § 230.10(c).

14. Army-EPA Memorandum of Understanding Concerning Mitigation Under Clean Water Act § 404(b)(1) Guidelines, *reprinted at* 55 Fed. Reg. 9210, 9211 (Mar. 12, 1990); *see* 33 U.S.C. § 1344 (r) (Environmental Impact).

15. *Healthy Gulf*, 81 F.4th at 517.

16. 40 C.F.R. § 230.10(a).

17. *Healthy Gulf*, 81F.4th at 517.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 518.

24. *Id.*

purchaser to the bank sponsor.[25] Second is in-lieu fee program credits.[26] Operating in a similar manner to mitigation banks, credits are not available until "specific environmental milestones have been met."[27] Third is permittee-responsible mitigation.[28] Under this method, the permittee directly implements mitigation efforts and is fully responsible for them.[29] The Corps has the authority to "override" this hierarchy "where appropriate," including instances where "a permittee-responsible project will restore an outstanding resource based on rigorous scientific and technical analysis." For example, in *Atchafalaya Basinkeeper v. U.S. Army Corps of Engineers*, the Fifth Circuit held that the Corps could depart from the hierarchy "where appropriate and when justified by reasoning documented in the administrative record."[30] The court noted that the Corps has "the discretion to modify the hierarchy in order to approve the use of the environmentally preferable compensatory mitigation."[31]

NEPA further requires that if a federal project is considered a "major Federal action" that "significantly affect[s] the quality of the human environment," then an agency must prepare an environmental impact statement (EIS) detailing the environmental impact, its adverse effects, and potential alternatives for the project.[32] Although the EIS may address a broader range of alternatives than those required under NEPA, the agency may also "not have considered the alternatives in sufficient detail to respond to the requirements of the Guidelines."[33]

### *B. The Standard for Upholding an Administrative Ruling*

A court will hold unlawful and set aside agency action that it deems to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[34] An agency can show its decision was not arbitrary or capricious by "examining and considering the relevant data and articulating a satisfactory explanation for its decision on

25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 526 (citing Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs, 894 F.3d 692, 700-01 (5th Cir. 2018)).
31. *Id.* at 527.
32. *Id.* at 518.
33. *Id.*
34. *Id.* at 520.

permitting."[35] The standard by which a court will make this determination is whether "the agency's path may reasonably be discerned."[36] The court may also not "substitute" its judgment for the agency's and gives extensive deference to the agency.[37]

Parties challenging an agency's compliance with federal regulation or law must "structure their participation so that it . . . alerts the agency" as to their "position and contentions," typically during a public commenting period.[38] As such, a court will "not consider arguments that [parties] failed to raise in timely fashion before an administrative agency."[39] Any objections must generally be raised during the public comment period, and untimely objections are "not generally available on judicial review."[40]

## III. COURT'S DECISION

In the noted case, the Fifth Circuit denied the petition for review of the permit issued by the Corps to Driftwood, and it concluded that the Corp's decision to depart from the default regulatory hierarchy on compensatory mitigation was "adequately explained."[41] The court concluded that the Corps met its statutory requirements by "examining and considering the relevant data and articulating a satisfactory explanation for its decision on permitting."[42] In doing so, the court rejected the petitioners' two grounds for challenging the issuance of a permit to Driftwood.

### *A. Petitioners Argued the Court Failed to Adequately Consider Site 6*

First, Healthy Gulf asserted that although the Corps incorporated FERC's EIS analyzing alternative sites to the Driftwood project, the agency did not specifically assess Alternative Site 6 ("Site 6").[43] As a result, the petitioners contended that the Corps did not determine whether the Driftwood site was the LEDPA.[44] The EIS conducted by FERC concluded that Site 6 "did not provide a significant environmental

35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 521 (footnote omitted).
39. *Id.* (citations omitted).
40. *Id.* at 522.
41. *Id.* at 530.
42. *Id.* at 520.
43. *See id.* at 518.
44. *Id.* at 521.

advantage to Driftwood's proposed site" and did not further evaluate it, despite concerns being raised by Kenneth Teague, a retired ecologist, over contaminated fill material.[45] Here, the court noted that a "reviewing court will not consider arguments that [parties] failed to raise in [a] timely fashion before an administrative agency."[46] The court clarified that the Corps provided the public an opportunity to comment on the proposal for the Driftwood site.[47] However, Teague's emails to FERC and the Corps—in which he expressed concern about possible contamination of the dredged material that Driftwood sought to reuse for beneficial purposes—were submitted months after the public comment period ended.[48] The court concluded that since Teague's comments were untimely, they could not be subject to judicial review.[49] Additionally, the court countered that Teague's comments do not mention Site 6 and merely focus on the potential contamination of dredged material from the Driftwood site.[50]

Healthy Gulf first excused Teague's late comments by arguing that the Corps made it "functionally impossible" for the concerns about Site 6 to be made during the comment period, as the Corps' public notice does not mention any particular alternative sites.[51] Consequently, Healthy Gulf contended that this omission made it impracticable for Teague to offer his expertise on Site 6.[52] The court rejected this excuse, noting that the public notice "thoroughly described the location and nature of the project" by noting the mile markers on the Calcasieu River and naming the four watersheds upon which the site would be located.[53]

Petitioners likened Teague's late comments to *Delaware Riverkeeper Network v. U.S. Army Corps of Engineers* in the Third Circuit.[54] In *Delaware Riverkeeper Network*, the petitioners objected to a CWA permit because "the Corps allegedly had failed to examine an alternative infrastructural system for an interstate pipeline project."[55] Specifically, an alternative site for the pipeline was presented in the initial

45. *Id.* at 519.
46. *Id.* at 521.
47. *Id.* at 522.
48. *Id.* at 525.
49. *Id.* at 525-26.
50. *Id.* at 525.
51. *Id.* at 522.
52. *Id.* at 522-23.
53. *Id.* at 523.
54. 869 F.3d 148 (3d Cir. 2017).
55. Healthy Gulf v. U.S. Army Corps of Eng'rs, 81 F.4th at 525 (citing Del. Riverkeeper Network v. U.S. Army Corps of Eng'rs, 869 F.3d at 151-52).

CWA permit application and addressed in FERC's EIS.[56] Yet, the Third Circuit concluded that "the Corps' process made it impracticable" for the public to raise any objections because "FERC did not publicly release its Environmental Assessment until . . . after the expiration of the Corps' comment period."[57] As a result, objections or deficiencies within the EIS could not have been raised to the Corps via public comment.[58]

However, the Fifth Circuit concluded that *Delaware Riverkeeper Network* is "inapposite" to the present case.[59] First, Site 6 was never mentioned in Driftwood's application nor was it mentioned as a possible alternative by anyone before the comment period closed.[60] Second, Site 6 was not an unforeseeable option but for FERC's EIS.[61] Finally, the petitioners did not mention Site 6 in their objections to the Corps.[62] As a result, the Fifth Circuit concluded that the public comment timeline did not prevent Healthy Gulf from putting the Corps on sufficient notice that Site 6 ought to be considered.[63]

Petitioners invoked the "obvious-flaw" exception as the basis for their second excuse for the untimely comment.[64] This exception applies in situations where an agency's reasoning is deficient in a manner that is "so obvious that there is no need for a commentator to point [it] out specifically in order to preserve its ability to challenge a proposed action."[65] Although the court never explicitly identified a specific standard, it nevertheless held that Healthy Gulf failed to meet it.[66] While the court conceded that FERC addressed Site 6 in their EIS, such discussion was merely a "comment on the draft EIS recommended an analysis" of the site.[67]

Additionally, Healthy Gulf justified Teague's tardiness because of the nature of his comments and the severity of its content.[68] Yet again, the court rejected this argument because neither Teague's comments nor Healthy Gulf's proclamations, both of which were "unsubstantiated,"

56. *Del. Riverkeeper Network*, 869 F.3d at 155-56.
57. *Id.* at 156.
58. *Id.*
59. *Healthy Gulf*, 81 F.4th at 523.
60. *Id.*
61. *Id.* at 523-24.
62. *Id.* at 524.
63. *Id.*
64. *Id.*
65. *Id.* (quoting Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 765 (2004)).
66. *Id.*
67. *Id.*
68. *Id.*

failed to assert that Site 6 was "obvious" because the petitioners offered nothing more than conclusory statements that Site 6 was a viable alternative.[69] According to the court, no evidence was offered to show that the Corps' failure to consider Site 6 was an obvious flaw.[70]

Finally, petitioners invoked the "independent knowledge" exception, which is applied where an agency had "independent knowledge of the very issue."[71] Although this exception has been recognized by other circuits, the Fifth Circuit has never recognized it.[72] Even if the Fifth Circuit recognized this exception, the court stated it would not apply because Teague's late comments were directed to FERC, despite the fact that the Corps "did collaborate with FERC."[73] Additionally, the court asserted that this exception would undermine the public comment period by "allowing the public to take advantage of other agencies' later public comment periods."[74]

### *B. Deviation from Mitigation Hierarchy*

Second, Healthy Gulf asserted that the Corps did not adequately justify its deviation from the statutory hierarchy.[75] Specifically, petitioners took issue with the Corps allowing Driftwood to use permittee-responsible mitigation instead of preferred methods, such as mitigation bank credits.[76] The court rejected this argument on the grounds that the Corps may divert from the hierarchy "where appropriate, [such] as . . . where . . . a permittee-responsible project will restore an outstanding resource based on rigorous scientific and technical analysis."[77] The court recalled that, in *Atchafalaya Basinkeeper*, it deferred to the Corps' deviation from the hierarchy "when justified by reasoning documented in the administrative record."[78] Here, the court identified two major justifications for deviating from the statutory hierarchy.

First, the court noted that Driftwood's proposed beneficial-use plan would restore about 650 acres of marshlands and 3,009 acres of coastal

69. Healthy Gulf v. U.S. Army Corps of Eng'rs, 81 F.4th at 524.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 525.
74. *Id.*
75. *Id.* at 526.
76. *Id.*
77. *Id.*
78. *Id.* (citing Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs, 894 F.3d 692, 700-01 (5th Cir. 2018).

marshlands.[79] This offset would exceed the restoration requirement by 185 acres. As a result, the Fifth Circuit concluded that this mitigation would "outweigh the traditional mitigation bank credit program."[80] Second, the proposed plan "complied with state law and furthered Louisiana's interest in restoring and protecting coastal wetlands."[81] The court justified this deviation because the administrative record is "over 24,000 pages and provides more than enough insight into the agencies' deliberations."[82]

Healthy Gulf argued that the Corps incorrectly stated that the mitigation strategy did not deviate from the hierarchy.[83] The court once again rebutted that Driftwood's mitigation scheme was "expected to outweigh traditional mitigation bank credit program," and concluded that this error "does not annihilate the numerous findings and explanations in the record."[84] Next, the petitioners claimed that the use of the Louisiana Wetland Rapid Assessment Method (LRAM) cannot justify any deviation from the mitigation hierarchy.[85] Here, the court deferred to the Corps' "expertise, the governing principles, and project-specific facts" to approve Driftwood's proposed mitigation strategies.[86] As such, it was proper to use the LRAM, since the "notion of making data-informed decisions is hardly *outré*."[87]

Furthermore, Healthy Gulf raised concerns that the dredged material deposition areas may never create functioning wetlands.[88] Under federal regulations, "all compensatory mitigation projects should provide a high level of functional capacity."[89] The court noted that the Corps is transitioning towards "functional and condition assessments to quantify credits and debits."[90] If a mitigation proposal "will take longer or is less likely to succeed, the Corps may require the permittee to restore more acres than it is affecting" in order to compensate for potential failures.[91]

79. Healthy Gulf v. U.S. Army Corps of Eng'rs, 81 F.4th at 526.
80. *Id.* at 526-27.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Healthy Gulf*, 81 F.4th at 527.
85. *Id.*
86. *Id.* at 527-28.
87. *Id.* at 528.
88. *Id.*
89. *Healthy Gulf*, 81 F.4th at 528 (citing Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. 19594, 19601 (Apr. 10, 2008)).
90. *Id.*
91. *Id.*

Here, the court noted that the LRAM is an assessment that incorporated petitioners' concerns, which was ultimately used in the Corps' decision making process.[92] As a result, Driftwood was required to offset an additional 185 acres of wetlands that would be impacted.[93]

Finally, Healthy Gulf claimed that the Corps ignored the potential contamination from the dredged material which is adjacent to a contamination site, and that disposition could risk the spread of contamination to new ecosystems.[94] The court noted that the Corps and FERC communicated these concerns to Driftwood, which resulted in a "thorough analysis" as part of the EIS.[95] The EIS ultimately concluded that the Driftwood project "would not mobilize existing contaminated soils."[96] In addition, Driftwood is required by the Corps and the Louisiana Department of Natural Resources to ensure that contaminated dredged material will not be used as fill "to the best of [their] knowledge."[97] As a result, the court concluded that the Corps adequately addressed concerns over the contamination of dredged material.[98]

## IV. ANALYSIS

### *A. The Corps' Departure from the Statutory Hierarchy Was Justified*

In the present case, the court granted extensive deference to the Corps and other agencies in their permitting process, allowing the Corps to depart from the hierarchy. The court recalled that the Corps may modify the hierarchy "in order to approve the use of the environmentally preferable compensatory mitigation."[99] Here, the court properly departed from the mitigation hierarchy by permitting a site that would add wetland acreage by the use of dredged material.

First, Memorandums of Agreement to the Guidelines express that the Corps' ultimate goal is "no overall net loss" of wetlands.[100] Mitigation bank credits do not actually prevent the loss of wetland habitats. Rather, they are effectively a coupon allowing for their destruction.[101]

92. *Id.*
93. *Id.*
94. *Id.* at 529.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 527.
100. Army-EPA Memorandum of Understanding Concerning Mitigation Under Clean Water Act § 404(b)(1) Guidelines, *reprinted at* 55 Fed. Reg. 9210, 9211 (Mar. 12, 1990).
101. Healthy Gulf v. U.S. Army Corps of Eng'rs, 81 F.4th at 518.

If preventing the loss of wetlands is the Corps' primary concern, then it would seem natural to prioritize permittee-responsible mitigation techniques, such as the use of dredged material as fill for new wetlands. As highlighted by the court, Louisiana has a direct interest in protecting and *restoring* coastal wetlands.[102] These coastal habitats are vital habitats for wildlife and are an effective barrier against storm surge.[103] In addition to the mitigation bank credits, the restoration of wetlands using dredged fill material will result in Driftwood exceeding its restoration requirement by 185 acres.[104] Effectively, the court relies upon its deference to the Corps to determine what is considered the "environmentally preferable compensatory mitigation" method.[105]

However, the court offers a muddled explanation of the scientific data and evidence suggesting that the Corps properly exercised its judgment in determining whether the Driftwood site was the LEDPA. In the opinion, the court notes that the administrative record contains over 24,000 pages discussing the Corps' deliberations with other agencies.[106] In essence, the court appears to suggest that because the administrative record contains thousands of pages, it must be adequate. At first glance, this does little to prove that the Corps was able to point to "the relevant data and [articulate] a satisfactory explanation for its decision on permitting."[107] The fact that an administrative record contains thousands of pages is not "relevant data" articulating that the Corps' decision to issue a permit was not arbitrary or capricious and does not show that the Driftwood site was the LEDPA. Yet, the court does hint at the various environmental surveys showing that the Driftwood site was the LEDPA.[108]

First, the court relies upon the beneficial-use plan for using dredged material as fill, which included numerous environmental standards which must be met concerning the "target elevation, turbidity, tidal exchange, and vegetative plantings."[109] This plan also establishes that further mitigation strategies must be implemented if there are any deficiencies in meeting these targets.[110] The Fifth Circuit has previously relied upon

102. *Id.* at 527.

103. John Tibbetts, *Louisiana's Wetlands: A Lesson in Nature Appreciation*, 114 ENV'T HEALTH PERSP. (Jan. 1, 2006), https://ehp.niehs.nih.gov/doi/full/10.1289/ehp.114-a40.

104. *Healthy Gulf*, 81 F.4th at 527.

105. *Id.*

106. *Id.*

107. *Id.* at 520.

108. *Id.* at 528.

109. *Id.*

110. *Id.*

studies concerning the environmental impact to vegetation in determining whether a Corps' permit was proper. For example, in *Shrimpers & Fishermen of the RGV v. U.S. Army Corps of Engineers*, the petitioners argued that herbaceous vegetation would struggle to grow when dredged material was used as fill.[111] In *Shrimpers*, the Fifth Circuit cited numerous studies showing that the ecological conditions would ensure revegetation within "one growing season."[112] In addition, the court highlighted the fact that such data is "based upon its evaluation of complex scientific data within its technical expertise" that is not within the realm of the court's knowledge.[113] In the present case, the court also bolsters its decision by relying upon the scientific conclusions of the LRAM to determine whether the mitigation methods proposed are the most environmentally friendly.[114] Here, the LRAM was used by the Corps to "determine the required compensatory mitigation amounts throughout its entire analysis."[115] As a result of the LRAM assessment, Driftwood was required to restore 650 acres of wetlands to offset the 185 acres.[116] Conveying such scientific data will enable the court to clarify its thoughts and clearly express the information justifying an agency's decision.

Ultimately, the court's decision reinforces the notion of agency deference and declines to substitute its own judgment for that of the Corps. From a policy perspective, this ensures that the agencies are able to apply their knowledge and expertise to subject areas that judges may or may not be familiar with. This enables the Corps and other involved agencies to freely operate and exercise their judgment, given their specialized knowledge of subject matter which judges are not necessarily privy to.

### *B. The Mitigation Hierarchy Is in Direct Conflict with the CWA Guidelines*

As previously noted, the Memorandums of Agreement to the CWA Guidelines express that the Corps' ultimate goal is "no overall net loss" of wetlands.[117] Yet, the Code of Federal Regulations provides that

111. 56 F.4th 992, 1000 (5th Cir. 2023).

112. *Id.*

113. *Id.* at 1001.

114. Healthy Gulf v. U.S. Army Corps of Eng'rs, 81 F.4th at 528.

115. *Id.* at 527.

116. *Id.* at 528.

117. Army-EPA Memorandum of Understanding Concerning Mitigation Under Clean Water Act § 404(b)(1) Guidelines, *reprinted at* 55 Fed. Reg. 9210, 9211 (Mar. 12, 1990).

mitigation bank credits are at the top of the mitigation hierarchy.[118] They do not increase the overall wetlands. Rather, they are effectively a credit that allows for a polluter to excuse wetlands they damage and "transfers the mitigation obligation from the credit purchaser to the bank sponsor."[119] In essence, mitigation bank credits are coupons allowing the depletion of wetlands.[120] Although the court properly deviated from the hierarchy to allow environmentally preferable mitigation, it does not change the fact that the current mitigation hierarchy appears to be at odds with the explicit language of the CWA. If the Corps' objective is ensuring that there is no overall net loss of wetlands when issuing permits, it would seem reasonable that environmentally preferable mitigation techniques would be of the highest priority.

### *C. The Court Rejects the Petitioners' Invocation of the Obvious Flaw Exception Without Justification*

The court shut down Healthy Gulf's contention that Teague's comments, which came months after the formal public comment period, need not be considered by the Corps.[121] This would enable the public to submit comments surrounding any Corps permit, "undermin[ing] the purpose of the Corps' public comment period by allowing the public to take advantage of other agencies' later public comment periods."[122] This concern is valid. If the public is allowed to comment past the formal period in which an agency solicits public input, it would inhibit an administrative system that already is too slow in the eyes of many. Even though the Corps was cooperating with FERC, the Corps was solely responsible for issuing the permit.[123] If comments submitted after the deadline had passed were to be considered, the Corps would be wrapped up in an endless web of reviews and petitions, and it would be less effective at issuing permits. In addition, the court highlights the fact that enabling the public to freely submit comments past the deadline would "create the risk of arbitrary line-drawing as to what the right [time] cutoff is."[124] By allowing comments to be submitted late under narrow circumstances, the court creates a more efficient administrative state. Although this concern is justifiably raised, the court in the present case

118. 33 C.F.R. § 332.3(b)(2).
119. *Healthy Gulf*, 81 F.4th at 518 (citing 33 C.F.R. § 332.2).
120. *See id.*
121. *Id.* at 525.
122. *Id.*
123. *Id.*
124. *Id.*

dismisses one of those narrow exceptions in which delayed comments may be raised without proper justification.

The obvious-flaw exception "applies where some deficiency in agency reasoning might be so obvious that there is no need for a commentator to point [it] out specifically in order to preserve its ability to challenge a proposed action."[125] Here, petitioners argue that Teague's late comments should be excused because it is obvious that Site 6 should have been considered as the site of the Driftwood facility.[126] However, the court fails to provide any standard for obviousness. According to the majority, "whatever the specific standard for obviousness may be, petitioners fail to meet it."[127] It seems odd to state that they fail to meet the standard without providing what that standard is. The dismissal of this exception is without justification, as they fail to identify any standard for obviousness. This is despite the fact that the Fifth Circuit has previously identified a potential avenue through which a party challenging an agency's action may show an omission meets this exception.

In *Shrimpers*, the Fifth Circuit posited that "raising the [proposed] alternative in the comments addressed to the agency" will suffice to show that the obvious-flaw exception ought to be applied.[128] There, the petitioners highlighted two public comments that brought to the Corps' attention two potential alternative sites.[129] However, these comments were in response to the originally permitted design rather than the modified permitted design.[130] As a result, the court ruled that these alternative sites were irrelevant because they were not "sufficiently similar" to the proposed facility "to give the issue meaningful consideration."[131]

Although Teague's comments concern Driftwood's most recent plan for the LNG terminal, the court reasoned that they failed to discuss Site 6 beyond the conclusory belief that such an omission was obvious.[132] However, the court fails to consider the fact that potential contamination of dredged material to be used as fill is obvious enough such that the Corps ought to consider other sites. If the Corps' Guidelines provide that the overarching goal is to prevent "no overall net loss of wetlands," then the fact that material which will be used to restore wetlands may pose a

125. *Id.* at 524.
126. *Id.*
127. *Id.*
128. Shrimpers & Fishermen of the RGV v. U.S. Army Corps of Eng'rs, 56 F.4th at 998.
129. *Id.*
130. *Id.*
131. *Id.*
132. Healthy Gulf v. U.S. Army Corps of Eng'rs, 81 F.4th at 524.

risk to Louisiana's coastal habitats may prohibit the Corps from achieving that goal. Such contamination could have damaging effects on the surrounding wetland habitats and result in greater loss of such ecosystems.

The court also contends that there will be no contaminated dredged material because Louisiana and the Corps imposed conditions to ensure that contaminated material would not be used "to the best of [Driftwood's] knowledge."[133] Although this includes potential response plans in the event that such contamination is discovered, it is not a reassuring statement for those concerned about Louisiana's wetlands. Driftwood could easily complete the bare minimum in terms of detecting contamination of dredged material. The court fails to identify the various restrictions to be imposed upon Driftwood to monitor contamination levels. In addition, there is no reference to any remedial actions which Driftwood must take upon the discovery of contamination. As a result, the use of this dredged material, although intended to grow coastal wetlands, could have a lasting impact that can easily be unnoticed.

## V. CONCLUSION

The Fifth Circuit's ruling, although flawed, exemplifies how permittee-responsible mitigation techniques can be used to extract Louisiana's natural resources in a manner that attempts to reduce the impact on the environment. However ironic that may sound, it is of vital importance that industry attempts to reduce the impact on the state's coastal wetlands so long as natural gas continues to be used. In Louisiana, where coastal wetlands are a necessary defense mechanism for the survival of the state, and especially our New Orleans community, every acre counts. The Fifth Circuit recognizes this reality and accordingly adjusts the mitigation hierarchy to that end. Further adding to the irony is the apparent incongruence between the Guidelines and the mitigation hierarchy. Although the Guidelines express that the ultimate goal is no loss of wetlands, the mitigation hierarchy has permittee-responsible

133. *Id.* at 529.

techniques at the bottom. Ultimately, the Fifth Circuit's ruling strikes a balance between industry and the environment, allowing Driftwood to use dredged material to add wetland acreage and construct its LNG terminal.

Grayson Bautz*

* © 2024 Grayson Bautz. J.D. Candidate 2025, Tulane University Law School; B.A. 2022, Political Science, College of the Holy Cross. The author would like to thank Professor Chris Dalbom for his guidance and feedback. The author would also like to thank the *Tulane Environmental Law Journal* editors for their support throughout the writing and editing process.