# APPENDIX

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**APPENDIX A**

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 22-40158

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BG GULF COAST LNG, L.L.C.; PHILLIPS 66 COMPANY,

*Plaintiffs-Appellants*,

v.

SABINE-NECHES NAVIGATION DISTRICT OF JEFFERSON COUNTY, TEXAS,

*Defendant-Appellee*.

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Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 1:21-CV-470

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Filed: September 14, 2022

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**OPINION**

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Before STEWART, ELROD, and GRAVES, *Circuit Judges*.

JENNIFER WALKER ELROD, *Circuit Judge*:

The Sabine–Neches Waterway is located in the southeastern-most parts of Texas and the southwestern-most parts of Louisiana, providing passage from the Gulf of Mexico to Port Arthur, Beaumont, and Orange, Texas, and beyond. It is vitally important to the local, state, and federal economies. Despite its importance, sixty years have gone by without much effort to maintain or otherwise improve it. The Sabine–Neches Navigation District set out to change that. The price tag on the proposed improvements totaled roughly $1.1 billion. After some bureaucratic wrangling, Congress covered most of the cost with the District left to cover the rest. The District planned to cover its share through port fees. But the same federal law that led to congressional funding also sets limits on how costs can be passed onto consumers by local entities. Two energy companies sued the District, claiming that the port fees exceeded those limits. The district court concluded that they failed to state plausible claims and dismissed the case. We AFFIRM.

I.

As waterways here in America go, the Sabine–Neches Waterway is one of our nation's most critical. Not only does it rank near the top in business and busyness, it is home to the U.S. military's largest strategic commercial seaport. But as ships became larger, the Sabine–Neches Waterway largely stayed the same. Its lack of depth and width poses a problem for many modern vessels.

To make the necessary improvements to the Waterway, the District needed funds. Congress opened up the federal purse for such projects through the Water Resources Development Act of 1986, 33

U.S.C. § 2201, *et seq.* In the years before the Act's passage, trying to improve waterways was a bureaucratic nightmare. *See New Orleans S.S. Ass'n v. Plaquemines Port, Harbor & Terminal Dist.,* 874 F.2d 1018, 1024–25 (5th Cir. 1989) (digesting the backstory of the Harbor Development and Navigation Improvement Act, which was passed as part of the Water Resources Development Act). It could take up to twenty-six years from first study to project completion, with as many as nineteen independent reviews along the way. *Id.* When Congress passed and President Reagan signed the Act, Congress had not approved a project in nearly two decades. *Id.* Through the Act, Congress streamlined the process and came up with a new way to finance waterway-construction and -improvement projects. *Id.* at 1025. Rather than rely only on the federal fisc, the federal government would shoulder some or most of the cost and would share the rest with state and local entities. *Id.* Plus, state and local entities had a greater practical interest in the waterway development, so they were more likely to get it done faster. *Id.*

The process begins with a feasibility study by the U.S. Army Corps of Engineers. Once that is done, it is published in the Federal Register and the Secretary of the Army gives it to Congress. Congress then reviews the study and the projected costs and puts it to a vote. If it prevails and the President signs it, Congress gives the local entities money to cover the first phase of the project (called "new start" funds). The local entities then enter into a cooperative agreement with the Army Corps of Engineers covering the project, which includes "provid[ing] to the Federal Government the non-Federal share of all other costs of construction of

[the] project." 33 U.S.C. § 2211(e)(3). *See also Air Liquid Am. Corp. v. U.S. Corps of Engineers,* 359 F.3d 358, 361 (5th Cir. 2004) (describing process).

The District prepared for years, but did not formally begin the Sabine–Neches Waterway Channel Improvement Project until 2011. The District worked with the Army Corps of Engineers, and the Corps completed its study in March of that year. The Corps concluded that Congress should fund the Project: deeper waterways means bigger ships which fit more cargo, which means fewer ships, which means less congestion. The Secretary of the Army transferred the Project to Congress, Congress passed it, *see* Water Resources Reform and Development Act of 2014, Pub. L. No. 113–121, 128 Stat. 1193, 1364, § 7002 (2014) ("WRDA-14"),[1] and President Obama signed it into law.[2] The Project's price tag was just over $1.1 billion, with the federal government covering around $748 million and the District just under $366 million. *Id.* Congress then appropriated "new start" funds for the Project to get the ball rolling in 2019. *See* Energy and Water, Legislative Branch, and Military Construction

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[1] Because each new project that goes through this process requires an act of Congress (literally), the parties refer to each new act as "WRDA" followed by a two-digit year, *e.g.,* "WRDA-14." They also refer to the 1986 Act (detailed above) as "WRDA-86." For ease of reference, we refer to the 1986 Act as "the Act" and otherwise refer to any other project-approval act as "WRDA-##."

[2] *See* David Hudson, *President Obama Signs the Water Resources Reform and Development Act, and Honors the "Borinqueneers,"* The White House (June 10, 2014), https://obamawhitehouse.archives.gov/blog/2014/06/10/president-obama-signs-waterresources-reform-and-development-act-and-honors-borinque.

and Veterans Affairs Appropriations Act, 2019, Pub. L. No. 115–244, 132 Stat. 2897, 2898–99 (2019). Those new-start funds would ultimately be used to complete the first part of the Project: the deepening of Anchorage Basin No. 1 from twenty feet to forty feet.

The District and the Corps then entered into the statutorily required agreement. *See* 33 U.S.C. § 2211(e)(3). The Agreement listed the projected cost at over $1.2 billion (up a bit from WRDA-14), with a $732 million/$488 million federal–District split (roughly 60%–40%). That number, of course, was a projection, and its fluidity becomes relevant later. The Agreement otherwise detailed the specifics on the deepening and widening of the Waterway and outlined the environmental effects of the Project.[3]

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[3] "[D]eepening the Sabine Neches Waterway (SNWW) from 40 to 48 feet and the offshore channel from 42 to 50 feet in depth from offshore to the Port of Beaumont Turning Basin; extending the 50-foot deep offshore channel by approximately 13.2 miles to deep water in the Gulf, increasing the total length of the channel from approximately 64 to 77 miles; tapering and marking the Sabine Bank Channel from 800 feet wide to 700 feet wide; deepening and widening the Taylor Bayou channels and turning basins; easing selected bends on the Sabine-Neches Canal and Neches River Channel; constructing new and enlarging/deepening existing turning and anchorage basins on the Neches River Channel; beneficial use of dredged material features consisting of the restoration of 2,853 acres of emergent marsh, improvement of 871 acres of shallow water habitat, and nourishment of 1,234 acres of existing marsh in Texas; mitigation measures consisting of the restoration of 2,783 acres of emergent marsh, improvement of 957 acres of shallow water habitat, and stabilization and nourishment of 4,355 acres of existing marsh; and post-construction monitoring and adaptive management of the beneficial use features and mitigation areas[.]"

So the District needed $488 million. The first $20 million in "new start" funds went to deepening Anchorage Basin No. 1—before it was twenty-feet deep, now it is forty-feet deep. Once that was done, the District proposed the User Fee. The User Fee would apply only to ships with drafts greater than twenty feet—in other words, ships that were too big to use the Basin before the deepening. The Fee could change based on certain (unrelated) conditions, but the basics are as follows:

| | **hydrocarbon cargo** | **non-hydrocarbon cargo** |
|---|---|---|
| *minimum* | $0.00 per short ton | $0.00 per short ton |
| *starting rate* | $0.20 per short ton | $0.02 per short ton |
| *maximum* | $0.35 per short ton | $0.035 per short ton |

Every short ton loaded onto a ship or unloaded from a ship is charged.[4] Key for our purposes, the ordinance says that the District would collect the Fee until the first of either (a) all construction costs are repaid, or (b) January 1, 2049.

Per the Act, the District published the proposed ordinance in the Federal Register and received public

[4] A "ton" in America and Canada is 2,000 lbs., while a "ton" in the United Kingdom is 2,240 lbs. To avoid confusion, "short ton" is used for something that is 2,000 lbs. and "long ton" for 2,240 lbs.

comment. 86 Fed. Reg. 7369-05 (Jan. 28, 2021).[5] After a hearing, the Commissioners of the District passed the Ordinance, and the District began levying the fee against the bigger ships on May 1, 2021.

BG Gulf Coast LNG and Phillips 66 Company are energy companies. BG Gulf Coast has already paid well into the six figures because of the Ordinance. As of the filing of the Complaint, Phillips 66 had not yet sent any of its cargo on bigger ships. But it planned to. They both sued, alleging that the Ordinance violated several provisions of the Act. The District moved to dismiss under Rule 12(b)(6). The district court granted the motion on each claim, concluding that the District satisfied all of the requirements of the Act, including the requirement that any fees must be imposed "on a fair and equitable basis."[6] The district court then dismissed the case with prejudice. The energy companies (hereinafter "BG Gulf Coast")

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[5] The District actually went through notice and comment twice. The first proposed ordinance set a flat $0.35/short ton for hydrocarbon cargo and no fee at all for the nonhydrocarbon cargo. 85 Fed. Reg. 37,634, 37,635 (June 23, 2020). After a hearing and talking with the Corps, the District revised the ordinance to what it is today. *Id.*

[6] Dictionaries at the time the Act was passed defined "fair" as "[h]aving the qualities of impartiality and honesty; free from prejudice, favoritism, and self-interest," *Fair,* Black's Law Dictionary 534 (5th ed. 1979), and "equitable" as "[j]ust; conformable to the principles of justice and right," *Equitable,* Black's Law Dictionary 482 (5th ed. 1979). *See also* Webster's Third New International Dictionary 815 (1971) ("equitable" means "characterized by equity"). The most recent edition of Black's Law Dictionary includes this example for the term "fair": "everyone thought Judge Reavley to be fair." *Fair,* Black's Law Dictionary 715 (11th ed. 2019).

appealed. We subsequently granted the District's motion to expedite the appeal.

II.

We review *de novo* the grant of a motion to dismiss under Rule 12(b)(6). *Residents of Gordon Plaza, Inc. v. Cantrell,* 25 F.4th 288, 295 (5th Cir. 2022). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* We accept all well-pleaded facts as true and draw all reasonable inferences in favor of the plaintiff. *Id.* But we do not presume that a complaint's legal conclusions are true, no matter how well they are pleaded. *Id.*

A.

Section 2236 of the Act sets limits on (among other things) how and when a non-federal interest can pass costs onto consumers vis-à-vis "[p]ort or harbor dues." One such condition is in § 2236(a)(1): "Port or harbor dues may be levied only in conjunction with a harbor navigation project whose construction is complete (including a usable increment of the project)[.]"

To BG Gulf Coast, this means that the District can only impose a fee for either (a) its share of the entire $1.1 billion project once it is completed, or (b) its share of a "usable increment" of the Project, provided that the fee is imposed for use of that usable increment. Put another way, the District cannot impose the User

Fee on vessels and cargo because of Anchorage Basin No. 1 to pay for any other part of the project, let alone (as the Ordinance says) the District's entire share of the project. According to BG Gulf Coast, this follows textually from the words "in conjunction with" in subsection (a)(1). As well as by contextual inference from other parts of § 2236 in which Congress only allows fees for incurred costs, not speculative future costs. BG Gulf Coast finds some further support in certain language from *Plaquemines,* language which, it says, makes this an open-and-shut issue. *See* 874 F.3d at 1025.

The District says that BG Gulf Coast's reading of the statute stops too soon; the full condition reads: "in conjunction with a harbor navigation project whose construction is complete (including a usable increment of the project) and for the following purposes and in amounts not to exceed those necessary to carry out those purposes: (A)(i) to finance the non-Federal share of construction and operation and maintenance costs of a navigation project for a harbor under the requirements of [33 U.S.C. § 2211]." § 2236(a)(1). According to the District, this means that once a usable increment of the project is done, it may then "finance" its "share of construction and operation and maintenance costs of" the Project. In contrast to BG Gulf Coast's reading—which requires the non-federal interest to build first and pay later—this allows for the process under the Act to work like this: (1) Congress funds the first phase of the project; (2) the non-federal interest, after going through notice and comment, imposes a fee to build revenue to cover its share; (3) the fee raises funds to pay for the next

increment of the project; and (4) so on until the project is complete.

The district court agreed with the District. It concluded that BG Gulf Coast's approach was atextual, as it required reading that parenthetical "(including a usable increment of the project)" out of the statute. BG Gulf Coast's way around the parenthetical was to say that "harbor navigation project" in (a)(1) must mean the same thing as "navigation project for a harbor" under (a)(1)(A)(i), and thus a fee for "a usable increment of the project" in (a)(1) meant that a fee could only finance the same "usable increment." The district court concluded that, no, "a usable increment of the project" defines what it means for a project to be "complete," not what it means to be a harbor navigation project. As for *Plaquemines,* the district court concluded that it did not apply as it was purely about subsection (a)(2) and emergency-service fees.

We agree with the district court. BG Gulf Coast's interpretation of "in conjunction with" is far too cramped. To be sure, "conjunction" was defined at the time as a "simultaneous occurrence in space or time." *Conjunction,* American Heritage Dictionary 311 (2d College ed. 1982). BG Gulf Coast says that the User Fee is being levied "in conjunction with" the District's "***plan*** to construct the Project's remaining increments at some future date." But that argument fails because subsection (a)(1) allows fees for projects "whose construction is complete (including a usable increment of the project)." It also says that other subsections, like (a)(3)(B), contemplate using fees for "project features *constructed* under this subchapter," which shows that fees are only for "incurred costs."

But subsection (a)(1) refers to "usable increment[s]," not "project features," and it has no similar past-tense "constructed" language. *See Christiana Tr. v. Riddle,* 911 F.3d 799, 805 (5th Cir. 2018) ("When Congress includes particular language in one section of a statute but omits it in another, we presume[] that Congress intended a difference in meaning." (quotation omitted)). So if anything, that cuts against its argument because Congress presumptively treated "usable increments" of projects differently than "project features," and thus fees are allowed under different circumstances and require consideration of completely different factors.

BG Gulf Coast again tries to tie fees to the specific "usable increment of the project," so that fees may only be used after-the-fact to pay for that increment. But to do so, it has to argue that "(including a usable increment of the project)" modifies "a harbor navigation project," so that later when subsection (a)(1)(A)(i) says "a navigation project for a harbor," it means "a usable increment of the project." But it makes far more sense that this language means that once a usable increment of the project is complete, a fee may be levied, not that a fee may only be levied to finance a usable increment of the project. *Cf.* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 152–53 (2012) (the Nearest-Reasonable-Referent canon: "When the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent.").

At first blush, some language in *Plaquemines* supports BG Gulf Coast, but that case concerned an

entirely different provision of the Act. *Knight v. Kirby Offshore Marine Pac., L.L.C.,* 983 F.3d 172, 177 (5th Cir. 2020) ("A statement is dictum if it could have been deleted without seriously impairing the analytical foundations of the holding and[,] being peripheral, may not have received the full and careful consideration of the court that uttered it." (quoting *United States v. Segura,* 747 F.3d 323, 328–29 (5th Cir. 2014))). *Plaquemines* described § 2236(a)(1) as "forbid[ing] fees to finance harbor improvements until after the project is complete," but that case was actually about subsection (a)(2), and how the Act does not otherwise constrain a port's ability to assess a fee until a port "has undertaken a harbor improvement project." 874 F.2d at 1026, 1024–25. So *Plaquemines* is only relevant to the extent it holds that the Act applies once a project *begins,* not when it *ends,* and the fact that subsection (a)(1) was in no way raised or relevant to the bottom-line conclusion is dispositive. *See Knight,* 983 F.3d at 178 (dicta is "peripheral" and "may not have received [our] careful consideration").

BG Gulf Coast's theory of subsection (a)(1) fails at every turn. The statute, properly construed, allows the District to finance its share of the project once a usable increment of the project is completed. Because Anchorage Basin No. 1 has been completed, subsection (a)(1) permitted the District to pass the Ordinance containing the User Fee.

B.

As discussed, upon completion of a usable increment of the project, § 2236(a)(1)(A)(i) allows a non-federal interest to levy a harbor fee "in amounts not to exceed those necessary to carry out" the following purpose: "to finance the non-Federal share of construction and

operation and maintenance costs of a navigation project for a harbor under the requirements of [33 U.S.C. § 2211]." Section 2211(a)(1)(B) says that the non-federal interest "shall pay, during the period of construction of the project," 25% "of the cost of construction of the portion of the project which has a depth in excess of 20 feet but not in excess of 50 feet[.]"

BG Gulf Coast reads these provisions together to argue that "amounts not to exceed those necessary" means that the District may only use the fee to finance 25% of the Project, as (according to BG Gulf Coast) the District "voluntarily agreed to pay more than 25% of the Project's total cost[.]" The District agreed to cover around 40% of the project, but if the Project comes in under budget, BG Gulf Coast alleges that the District still plans to pay the amount it agreed to—in other words, it may end up covering 60%–80% of the Project. Because it voluntarily agreed to pay that much, "the additional amount above 25% is not a 'requirement' of [33 U.S.C. § 2211]," so the District has to cover anything above 25% with funds that do not come from the User Fee. Summing that up, BG Gulf Coast argues that § 2211(a)(1)(B) places a 25% cap on financing a non-federal interest's share of an improvement project because anything not "require[d]" by § 2211(a)(1)(B) is not "necessary."

The District responds with a different provision of § 2211. Subsection (e) says that before any construction begins on harbors, the Secretary of the Army and the non-federal interests "shall enter into a cooperative agreement" and that the non-federal interests "shall agree to" "provide to the Federal Government the non-Federal share of all other costs of construction" of the project. 33 U.S.C. § 2211(e)(4). So when § 2236(a)(1)

says "amounts not to exceed those necessary to carry out" the financing of the Project, the District says that the cooperative agreement was necessary to carry out the Project, and so the User Fee can be used to cover its contractual obligation.

The district court did not squarely address that argument because it held that the 25% "requirement" is a floor, not a ceiling or a set amount. As everyone agrees, the District may voluntarily assume more than 25% of the cost of the project, which necessarily means that 25% is not both a floor and a ceiling. *Shall* does not mean *shall only,* and the statute contains no "up to" or "at least" language either. BG Gulf Coast then must turn to § 2236(a)(1) which limits fees to the "amount not to exceed those necessary" under § 2211. The district court said that it "cannot be that Section 2211 imposes a cap for the fee-based non-Federal share but not the alternatively funded non-federal share because that reading would require an express statutory provision. Section 2236(a)(1)'s language—'amount not to exceed those necessary'—is not enough."

The question is what § 2236(a)(1)(A)(i) means when it says that fees must be "in amounts not to exceed those necessary to carry out" the purpose of "financ[ing]" the Project "under the requirements of" § 2211. BG Gulf Coast says that the "necessary" amount under § 2211 is the 25% requirement in subsection (a). The District says that the "necessary" amount under § 2211 is the amount that the District agreed to cover in the cooperative agreement with the federal government in subsection (e). Sadly, Congress did not say what subsection it was thinking of when it said "under the requirements of" § 2211, and the most

natural reading is that it meant all of its requirements.

The word "necessary" has been hard to pin down since *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 414 (1819). Black's Law Dictionary, before even getting to what the definition is, opens with this warning: "This word must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, or conducive to the end sought." *Necessary,* Black's Law Dictionary 928 (5th ed. 1979). And between the two, at least in the legal context, courts "rarely use 'necessary' in the latter sense." *Payne v. United States,* 289 F.3d 377, 389 (5th Cir. 2002) (Garza, J., dissenting in part). The term "necessary" here "does not exist in a vacuum," and its meaning "must be determined in the context in which [it] appear[s]." *Texas v. E.P.A.,* 983 F.3d 826, 837, 837 n.2 (5th Cir. 2020).

Section 2236(a)(1) is concerned with fees being levied "for the following purposes and in amounts not to exceed those necessary to carry out those purposes." The purpose relevant here is "to finance." And what can it finance? The District's share of the "construction and operation and maintenance costs" of the Project "under the requirements of" § 2211. Section 2211 has many requirements about costs under different specific circumstances, but if the purpose is "to finance" the District's share of the Project, the focus should be on what it had to do to secure financing. So it is true that paying 25% of the costs was necessary to secure financing vis-à-vis the

fees, but the District *also* had to secure an agreement with the federal government under § 2211(e).

As BG Gulf Coast concedes, the Act gives the District discretion to go beyond that 25% amount for costs; it only sets a maximum on what percentage the federal government can spend. *See* 33 U.S.C. § 2280. With that discretion, because the amount of fees must be necessary to secure financing, and because the District had discretion to vary upward on the percentage of costs it covers, the term "necessary" more likely accords with the more permissive definition of the term. *Texas,* 983 F.3d at 837. What follows is that "necessary" means something more like "convenient, useful, appropriate, suitable, or *conducive to the end sought."* Black's, *supra* at 928 (emphasis added). *Cf.* 33 U.S.C. § 2236(a)(1) ("*necessary to carry out those purposes"* (emphasis added)). In this light, while it may not be strictly necessary to cover 40% of the costs under § 2236(a)(1) and § 2211(a), it was convenient and conducive to financing the Project. Thus, the District did not violate the Act by pledging to cover the costs above 25% with the proceeds of the User Fee.

BG Gulf Coast's argument hinges on a strict reading of "necessary." But context is needed to determine whether "necessary" means "absolute physical necessity" or merely "conducive to the end sought." Under these circumstances, it is the latter. Thus, the District can cover more than 25% of the cost with the User Fee proceeds.

C.

BG Gulf Coast briefed several other arguments regarding the legality of the District's imposition of the User Fee. In its thorough and well-reasoned

opinion, the district court explained why those claims must be dismissed. We agree with the conclusions reached by the district court and thus we do not disturb its holdings on appeal.

* * *

Because the district court properly dismissed each of BG Gulf Coast's claims, we AFFIRM.

**APPENDIX B**

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

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BG GULF COAST LNG, LLC, PHILLIPS 66 COMPANY,

*Plaintiffs*,

v.

SABINE-NECHES NAVIGATION DISTRICT OF JEFFERSON COUNTY, TEXAS,

*Defendant*.

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Civil Action No. 1:21-cv-00470

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Signed 02/24/2022

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**ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND DENYING AS MOOT PARTIES' JOINT MOTION FOR PROTECTIVE ORDERS**

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MICHAEL J. TRUNCALE, United States District Judge

Plaintiffs BG Gulf Coast LNG ("BG") and Phillips 66 Company ("Phillips"), two major energy companies, bring suit against Defendant Sabine Neches

Navigation District ("SSND"), a political subdivision of the State of Texas responsible for the construction and maintenance of ports and harbors in southeast Texas. Defendant began levying a fee against users of the Sabine-Neches Waterway ("Waterway") to fund construction improvements made to the Waterway. Plaintiffs contest this fee. Before the Court are Defendant's Motion to Dismiss, [Dkt. 5], and the Parties' Joint Motion for Protective Orders. [Dkt. 34]. For the following reasons, Defendant's Motion to Dismiss is **GRANTED.** Parties' Joint Motion for Protective Orders is **DENIED AS MOOT.**

## I. BACKGROUND

Before the Court rests not only a matter of first impression but also a matter of utmost importance to this region, this nation, and the global economy. Defendant SSND, a political subdivision of the State of Texas responsible for southeast Texas' ports and harbors, is spearheading a $1.2 billion infrastructure project ("Project") to modernize the Waterway. The Waterway feeds the Ports of Beaumont, Port Arthur, and Orange, Texas. It is the country's third largest waterway by total shipping tonnage and critical to national security.

Like much of the nation's water infrastructure, the Waterway has not been improved since the 1960s. Ships have become larger, and technology has advanced, but growth of the Waterway has lagged. At only forty feet in depth, it is unable to accommodate many modern, larger vessels.

To remedy this, Defendant partnered with the United States Army Corps of Engineers ("USACE") to improve the Waterway through a process proscribed

by the Water Resources Development Act of 1986, 33 U.S.C. § 2201 *et seq.* ("WRDA-86").[1] Congress passed the WRDA-86 in the mid-1980s to revamp the arduous process of updating the nation's ports and harbors. Prior to the WRDA-86, "[e]very project underwent nineteen independent reviews, with an average of twenty-six years passing between the first study of a project and the project's completion." *New Orleans S.S. Ass'n v. Plaquemines Port, Harbor & Terminal Dist.,* 874 F.2d 1018, 1024–25 (5th Cir.), *opinion amended on denial of reh'g*, 891 F.2d 1153 (5th Cir. 1989). Furthermore, given the serious financial burden these projects imposed, Congress did not have enough funding for the projects that needed it most. 132 Cong. Rec. S3402 (1986). The length of time for approving and the difficulty in financing these projects hampered their implementation. In fact, "[n]o new project was authorized between 1970 until shortly before passage of the [WRDA-86]. Federal spending on harbor construction declined 78% after the 1960's [sic]; mounting pressures on the federal budget made increased appropriations for projects unlikely." *Id.*

In response, the WRDA-86 overhauled the system for financing both new construction and improvement projects for America's ports and harbors. Instead of relying solely on federal funding, the WRDA-86 split the costs of construction with state and local entities ("non-Federal interests"). By involving non-Federal

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[1] Although the process is proscribed in WRDA-86, Congress approves new projects and provides cost projections for those projects in subsequent WRDA enactments. *See, e.g.,* Water Resources Reform and Development Act of 2014, Pub. L. No. 113-121, 128 Stat. 1193, 1364 (2014).

interests, Congress intended to boost local investment and hasten project completion.

The process prescribed by the WRDA-86 begins with a feasibility study performed by the USACE. 33 U.S.C. §§ 2215, 2282. This study is published in the Federal Register, then transferred to Congress by the Secretary of the Army. *Id.; see also Air Liquide Am. Corp. v. U.S. Army Corps of Eng'rs*, 359 F.3d 358, 365 (5th Cir. 2004) (describing the process for harbor-restoration projects under the WRDA-86 and subsequent legislation authorizing new projects under the Water Resources Development Act of 1996, Pub. L. No. 104–303, 110 Stat. 3658 (1996)). Upon congressional approval, which includes projected costs, Congress allocates funding ("New Start funding") to initiate the first phase of the project. *See Air Liquide,* 359 F.3d at 365. The USACE and the non-Federal interest then enter into a partnership agreement covering the project. 33 U.S.C. § 2211(e). This agreement must provide the federal government with the non-Federal share of costs.

The Project has complied with these requirements. The USACE produced its feasibility study in March 2011. The study recommended that Congress allocate funding for the Project because it benefits the hydrocarbon industry and the United States Military. [Dkt. 5-3 at 3, 7, 12–14]. Namely, the Project would ease congestion and allow the Waterway to accommodate larger ships. The Secretary of the Army then transferred the study to Congress, which approved the Project in 2014. Water Resources Reform and Development Act of 2014, Pub. L. No. 113-121, 128 Stat. 1193, 1364 (2014) ("WRDA-14"). The WRDA-14 listed the projected costs as $1.1 billion,

with the federal government funding $748 million and Defendant footing the remaining $365 million. *Id.* In 2019, Congress allocated New Start funding for the Project. Energy and Water, Legislative Branch, and Military Construction and Veterans Affairs Appropriations Act, 2019, Pub. L. No. 115-244, 132 Stat. 2897, 2898–99 (2019). This New Start funding, approximately $20 million, funded the first portion of the Project, Anchorage Basin No. 1. [Dkt. 1 at ¶¶ 31, 50]. In July 2019, the USACE and Defendant entered into a Partnership Agreement ("Partnership Agreement"), which lists a projected $1.2 billion construction cost,[2] with $732 million coming from federal coffers and the remaining $488 million coming from Defendant. Defendant's projected share of costs amounts to forty percent of the total cost of construction.

Pursuant to the Partnership Agreement, the Project will update many features of the Waterway, including:

> [D]eepening the Sabine Neches Waterway (SNWW) from 40 to 48 feet and the offshore channel from 42 to 50 feet in depth from offshore to the Port of Beaumont Turning Basin; extending the 50-foot deep offshore channel by approximately 13.2 miles to deep water in the Gulf, increasing the total length of the channel from approximately 64 to 77 miles; tapering and marking the Sabine Bank Channel from 800 feet wide to 700 feet wide; deepening and widening the Taylor Bayou

[2] This is a projected cost. Plaintiffs have proffered evidence that the actual cost of this Project will be significantly lower.

> channels and turning basins; easing selected bends on the Sabine-Neches Canal and Neches River Channel; constructing new and enlarging/deepening existing turning and anchorage basins on the Neches River Channel; beneficial use of dredged material features consisting of the restoration of 2,853 acres of emergent marsh, improvement of 871 acres of shallow water habitat, and nourishment of 1,234 acres of existing marsh in Texas; mitigation measures consisting of the restoration of 2,783 acres of emergent marsh, improvement of 957 acres of shallow water habitat, and stabilization and nourishment of 4,355 acres of existing marsh; and postconstruction monitoring and adaptive management of the beneficial use features and mitigation areas[.]

[Dkt. 5-7 at 1–2]. Construction on the first portion of the Project, Anchorage Basin No. 1, has been completed. This portion of the Project deepened Anchorage Basin No. 1 from twenty feet to forty feet.

To fund its share of Project costs, SSND passed a User Fee Ordinance ("Ordinance") in April 2021, which charges a User Fee ("Fee") on ships with drafts in excess of twenty feet. [Dkt. 1-1]. Prior to enacting the Ordinance, SSND published it in the Federal Register in January 2021 and received public comment. SNND User Fee Notice, 86 Fed. Reg. 7369-05 (Jan. 28, 2021). The Fee collects between $0.02–$0.035 per short ton of non-hydrocarbon cargo and $0.20–$0.35 per short ton of hydrocarbon cargo. The Fee may be adjusted to as low as $0.00 for all types of cargo. [Dkt. 1 at ¶ 38(g)]. SSND will collect the Fee

until either all construction costs are repaid or January 1, 2049, whichever comes first. *Id.* SSND began levying the Fee upon completion of Anchorage Basin No. 1 on May 1, 2021. *Id.* at ¶ 37.

Plaintiffs' ships make extensive use of the Waterway.[3] Attached to the Complaint is a list of BG ships that have been subject to the Fee, each with a fully laden forward and aft sailing draft between thirty-six and thirty-nine feet. [Dkt. 1-2]. At the time of filing, BG incurred $326,983.70 in Fees. Although Phillips has not yet paid the Fee, it has executed contracts which will subject it to the Fee in the immediate future. [Dkt. 1 at ¶ 43].

## II. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In reviewing a Rule 12(b)(6) motion, the Court "accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *Sonnier v. State Farm Mut. Auto. Ins. Co.,* 509 F.3d 673, 675 (5th Cir. 2007). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions [and] . . . Rule 8 does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Ashcroft v. Iqbal,* 556 U.S. 662, 678–79, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

To defeat a Rule 12(b)(6) motion to dismiss, a plaintiff must "nudge their claims across the line from conceivable to plausible" by pleading "enough facts to

[3] The ships themselves are not owned by Plaintiffs, rather it is their cargo that frequently traverses the Waterway.

state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). In other words, a plaintiff must establish "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft,* 556 U.S. at 678, 129 S.Ct. 1937. Determining whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679, 129 S.Ct. 1937.

In evaluating a motion to dismiss, courts may need to engage in statutory interpretation. In analyzing the text, this Court undertakes "the traditional means of statutory interpretation, which include the text itself, its history, and its purpose." *Bellum v. PCE Constructors, Inc.,* 407 F.3d 734, 739 (5th Cir. 2005). The Supreme Court and Fifth Circuit prefer the statute's plain meaning unless doing so leads to an absurd result. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.,* 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000); *Bellum,* 407 F.3d at 739. With that, the Court turns to the merits of Plaintiffs' claims.

## III. DISCUSSION

Plaintiffs contend that the Fee enacted by the Ordinance violates the WRDA-86 in the following ways:

a. WRDA permits a non-Federal sponsor to levy fees only in conjunction with a harbor navigation project "whose construction is complete (including a usable increment of the project)." 33 U.S.C. § 2236(a). The Ordinance violates WRDA because it permits SNND to prospectively collect User

Fees for incomplete, unusable increments of the Project.

b. WRDA contemplates that a project may include multiple navigational features—such as channel deepening features or anchorage basin features—and requires that fees be levied on a feature-by-feature basis. Moreover, some vessels are exempt from paying fees for certain navigational features. For deepening features, WRDA prohibits assessing a fee against any vessel that, based on its design draft, could have used the waterway before construction of the project. 33 U.S.C. § 2236(a)(3). And as to certain other specific project features enumerated in the statute, "only vessels at least comparable in size to those used to justify these features may be charged" the fee. *Id.* The Project at issue here includes multiple navigational features. But, the Ordinance fails to levy the User Fee on a feature-by-feature basis and improperly levies fees against exempt vessels.

c. WRDA caps the total amount of fees the non-Federal sponsor may levy in two respects. First, the fee must be limited to the non-Federal share of construction costs (as opposed to total construction costs). Second, the fee must be limited to 25% of total construction costs. The Ordinance fails to impose these statutorily-required limits because: (i) the Ordinance contemplates collecting User Fees for "all" construction costs "associated with the Project" and not

merely the non-Federal share; and (ii) even if such a limit existed, the Ordinance further fails to limit the amount of User Fees to 25% or less of the total construction costs.

d. WRDA requires non-Federal sponsors to levy fees on a "fair and equitable" basis. The Ordinance, however, improperly levies User Fees on vessels carrying hydrocarbon cargo at a rate at least 1000% greater than the rate for vessels carrying non-hydrocarbon cargo.

[Dkt. 1 at ¶ 8]. Plaintiffs request monetary damages in the amount of the Fee already paid by BG as well as injunctive and declaratory relief. The Court evaluates each of these contentions in turn and concludes that Plaintiffs do not state a claim for which relief can be granted.

**i. Count I**

The Court dismisses Count I of the Complaint because it rests on a fundamental misunderstanding of the WRDA-86. Plaintiffs contend that Defendant's Fee is unlawful because it funds incomplete portions of the Project in violation of 33 U.S.C. § 2236. This statute permits the non-Federal interest, Defendant, to levy harbor fees to finance construction:

> Port or harbor dues may be levied only in conjunction with a harbor navigation project whose construction is complete (including a usable increment of the project) and for the following purposes and in amounts not to exceed those necessary to carry out those purposes:

> (A)(i) to finance the non-Federal share of construction and operation and maintenance costs of a navigation project for a harbor under the requirements of section 2211 of this title.

§ 2236(a)(1). Defendant contends that this language permits it to charge the Fee for the entire Project upon completion of a usable increment. Plaintiffs assert that Defendant may only charge the Fee for "(a) a project whose construction is complete; or (b) for a usable increment of a project whose construction is complete." [Dkt. 1 at ¶ 47 (internal quotations omitted)].

Plaintiffs' reading requires the Court to add language to the statute and is therefore incorrect. Section 2236(a) treats the completion of a usable increment in the same manner as the completion of the entire project; therefore, the non-Federal interest may charge fees for the whole project upon completion of one usable increment. The term "usable increment of the project" defines when a project is considered complete, which in turn triggers the ability to charge a fee. Critically, a usable increment is not synonymous with a harbor navigation project, but a *completed* harbor navigation project. In this regard, the placement of the parenthetical involving usable increments is instructive. If Congress intended to define "harbor navigation project" as a "usable increment of the project," then it would have placed the parenthetical next to "harbor navigation project" rather than "complete." Furthermore, the lack of the term "usable increment" in Subsection (A)(i) demonstrates the futility of Plaintiffs' approach. Congress did not add a similar parenthetical in

Subsection (A)(i) and, therefore, made clear that harbor fees may finance the "navigation project" as a whole and not merely "a usable increment." Even if "usable increment" and "harbor navigation project" were synonymous in Subsection (a)(1), this does not transform the meaning of "navigation project for a harbor" in Subsection (a)(1)(A)(i). Thus, upon completion of a usable increment, Defendant may charge the Fee to fund the entire Project. In addition, other portions of Section 2236 discuss levying fees based on the characteristics of individual project features. *See* § 2236(a)(3); *see also infra* Part II.ii. The Court concludes that the distinction between "project feature" and "usable increment" was intentional, in part, because Congress chose to discuss project features in more depth in a different part of the same section.

Plaintiffs also rely on *New Orleans Steamship Association v. Plaquemines Port, Harbor and Terminal District* for the propositions that Defendant may only charge the Fee on a feature-by-feature basis and for features that have already been completed. 874 F.2d 1018 (5th Cir. 1989). In *Plaquemines,* a group of ship owners sued a local harbor district for charging emergency-service fees because they believed the fees violated, among other provisions, the WRDA. The Fifth Circuit found that Section 2236 "applies when a port has undertaken a harbor improvement project and not otherwise." *Id.* at 1024. However, nothing in the statute prohibited port and harbor authorities from charging an emergency-service fee for regular use of the harbor. *Id.* at 1027. Therefore, that fee did not violate the WRDA.

Although *Plaquemines* dealt primarily with Section 2236(a)(2), part of the opinion discusses Section 2236(a)(1). This is the opinion's strongest language in support of Plaintiffs' argument:

> Section 2236(a)(1) forbids fees to finance harbor improvements until after the project is complete. Obviously, this prevents nonfederal ports from fraudulently charging for projects that are mere speculation or that suffer from undue delays while under construction. More to the point, it ensures that the fees will be paid by ships that benefit directly from improvements[.]

*Id.* at 1025.[4]

This—and other language regarding Section 2236(a)(1)—is dicta. "A statement is dictum if it could have been deleted without seriously impairing the analytical foundations of the holding and being peripheral, may not have received the full and careful consideration of the court that uttered it." *Int'l Truck & Engine Corp. v. Bray,* 372 F.3d 717, 721 (5th Cir. 2004). But "if the statement is 'necessary to the result or constitutes an explication of the governing rules of law,' it is not dictum." *U.S. Bank Nat'l Ass'n v. Verizon Commc'ns., Inc.,* 761 F.3d 409, 427–28 (5th Cir. 2014) (quoting *Int'l Truck & Engine Corp.,* 372 F.3d at 721).

*Plaquemines's* discussion of Section 2236(a)(1) is not critical to its holding. First, the Fifth Circuit found that Section 2236 did not apply because the emergency-service fees were not assessed with a harbor improvement project. *Plaquemines,* 874 F.2d

[4] Plaintiffs cite to other language, but this is the strongest. Regardless, all Plaintiffs' references to *Plaquemines* are dicta.

at 1024. Whether the non-Federal interest could charge fees after the project's completion is irrelevant to the holding.

Even if the Fifth Circuit's discussion of Section 2236(a)(1) were precedential, it would not necessarily favor Plaintiff. Although the opinion states that fees are only permissible after construction is complete, the court does not specify whether it is completion of the entire project or simply a usable increment. The statement that "fees will be paid by ships that benefit directly from improvements," *Id.* at 1026, is similarly unclear. While Plaintiffs contend that the direct beneficiary language requires Defendant to charge on a feature-by-feature basis, [5] the Fifth Circuit's language is vague as to whether ships must benefit from the specific feature of the project or from the project as a whole. Thus, the *Plaquemines* dicta does not provide Plaintiffs' claims with enough support to withstand Defendant's Motion to Dismiss.

**ii. Count II**

In Count II, Plaintiffs assert that the Project should assess the Fee on a feature-by-feature basis. [6] Plaintiffs principally rely on 33 U.S.C. § 2236(a)(3):

> a. Port or harbor dues may not be levied under this section in conjunction with a deepening feature of a navigation improvement project on any vessel if that vessel, based on its design draft, could have utilized the project

[5] Charging on a feature-by-feature basis would only permit Fees for those features that Plaintiffs actually use, rather than a single Fee for using any portion of the Project.

[6] While there may be situation in which certain vessels are exempt from Harbor Fees, this is not one of them.

> at mean low water before construction. In the case of project features which solely—
>
> i. widen channels or harbors,
>
> ii. create or enlarge bend easings, turning basins or anchorage areas, or provide protected areas, or
>
> iii. remove obstructions to navigation,
>
> only vessels at least comparable in size to those used to justify these features may be charged under this section.

The Court distills this provision into two limitations: (1) the Design Draft Limitation; and (2) the Size Limitation.

*(A) The Design Draft Limitation*

First, Section 2236(a)(3) limits the fees that may be assessed for a "deepening feature of a navigation project":

> Port or harbor dues may not be levied under this section in conjunction with a deepening feature of a navigation improvement project on any vessel if that vessel, based on its design draft, could have utilized the project at mean low water before construction.

§ 2236(a)(3)(A). Plaintiffs assert that Defendant may only charge ships for *features* that they would not be able to use but for the Project's improvements. Accordingly, Plaintiffs believe that Defendant's Fee violates the statute because it charges all vessels with a design draft in excess of twenty feet for *all* Project features.

This reading ignores the statute's plain meaning: a vessel must be able to utilize the *entire project* before

construction to avoid post-construction fees. Courts assume that the legislature intended different meanings when "the legislature uses certain language in one part of the statute and different language in another[.]" *Sosa v. Alvarez-Machain,* 542 U.S. 692, 711 n.9, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004) (internal quotation marks omitted). Here, the statute requires that the vessel be able to use the "project" prior to construction. § 2236(a)(3)(A). The Court interprets this language to mean that a ship must be able to use every feature of the project prior to construction to avoid paying the fees associated with project improvements. It is immaterial that a vessel can use certain features before the project but not others—"features" is specific to a project's subparts, while "project" refers to the entire project. If Congress intended to charge harbor fees on a feature-by-feature basis, it could have used the term "deepening feature" in lieu of "project." Indeed, Congress used the term "project features" in the next sentence of the statute ("In the case of project features . . . ."). *Id.* Because Congress used the term "project features" in a different part of the same statute, the Court infers that this distinction was intentional. At least one other court has similarly found that the exemption only applies to "any vessel that could have utilized the *harbor* without the improvement." *Maher Terminals, LLC v. Port Auth. of N.Y. and N.J.,* No. 2:12-6090, 2014 WL 3590142, at *11 (D.N.J. July 21, 2014), *aff'd*, 805 F.3d 98 (3d. Cir. 2015) (emphasis added).

Here, Plaintiffs' ships could not have utilized the whole Waterway prior to construction. For example, before the Project, Anchorage Basin No. 1 had a draft above twenty feet, meaning that it was fewer than

twenty feet deep. [Dkt. 5 at 2]. Plaintiffs' ships subject to the Fee have design drafts in excess of twenty feet. [Dkt. 1-2]. A ship cannot make port or sail in water that is shallower than its design draft. Therefore, Plaintiffs' vessels could not have used the entire Waterway prior to construction. Plaintiffs' ships are subject to the Fee.[7]

As they do in Count I, Plaintiffs rely on *Plaquemines* for the proposition that only those ships that actually benefit from the improvements may be charged for those improvements. *Plaquemines,* 874 F.2d at 1026 ("[the statute] ensures that the fees will be paid by ships that benefit directly from improvements"). As explained, this is dicta. And, even if precedential, this proposition does not provide Plaintiffs with the level of support they believe it does. The Fifth Circuit did not claim that the ships subject to the fee needed to benefit from every single element of the improvement project. Rather, the Fifth Circuit required that the ships obtain some direct benefit from the project. This Project is multifaceted. It is immaterial that Plaintiffs' ships do not benefit from *every* feature.

*(B) The Size Limitation*

Section 2236(a)(3) imposes fee limitations for certain features of harbor improvement projects. However,

[7] It is possible that a ship may not have been able to use the usable increment, such as Anchorage Basin No. 1, either before or after the improvement. But to avoid the fee, the statute only requires that the ship be able to use the entire project before construction. The Court takes no opinion on an improvement that only improves portions of a harbor that a ship could not use both before and after construction.

these limitations are inapplicable to Plaintiffs. The statute provides that:

> In the case of project features which solely—
>
> i. widen channels or harbors,
>
> ii. create or enlarge bend easings, turning basins or anchorage areas, or provide protected areas, or
>
> iii. remove obstructions to navigation,
>
> only vessels at least comparable in size to those used to justify these features may be charged under this section.

§ 2236(a)(3). Plaintiffs complain that numerous features of the Project incorporate the above limitations:

> The Project involves several navigational features, including: (i) deepening the Waterway from 40 to 48 feet; (ii) deepening the offshore channel portion of the Waterway (up to the Port of Beaumont Turning Basin) from 42 to 50 feet, (iii) extending the 50-foot deep offshore channel by approximately 13.2 miles to deep water in the Gulf, increasing the total length of channel from approximately 64 to 77 miles, (iv) tapering and marking the Sabine Bank Channel from 800 feet wide to 700 feet wide, (v) deepening and widening the Taylor Bayou channels and turning basins, (vi) easing selected bends on the Sabine-Neches Canal and Neches River Channel, and (vii) constructing new and enlarging/deepening existing turning and

> anchorage basins on the Neches River Channel.[8]

[Dkt. 1 at ¶ 26]. Only one of these features "solely" conforms to the limitations of Section 2236(a)(3): feature (vi). However, Plaintiffs assert that many features meet Section 2236(a)(3)(A)'s criteria. This is because Plaintiffs improperly define "solely."

Plaintiffs argue that it is inappropriate to group improvements to the same portion of the Project together. Instead, Plaintiffs contend that *each* improvement to *each* portion of the Project should be assessed individually. [9] This ignores the plain meaning of the statute, which requires the Court to evaluate each *feature* and all the improvements made *to that feature.* Therefore, only those project features that *solely* "widen," "create or enlarge," or "remove obstructions" can be considered. *See* § 2236(a)(3). Plaintiffs' reading would render the word "solely" meaningless, which violates the cannon against surplusage—"the presumption that each word Congress uses is there for a reason." *Advoc. Health Care Network v. Stapleton,* —— U.S. ——, 137 S. Ct. 1652, 1659, 198 L.Ed.2d 96 (2017); *see also Williams v. Taylor,* 529 U.S. 362, 404, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) ("we must give effect, if possible, to every clause and word of a statute.") (internal

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[8] This language is derived from the Project Partnership Agreement. [Dkt. 5-7 at 1–2].

[9] For example, instead of evaluating feature (v) as both "deepening and widening the Taylor Bayou channels and turning basins" Plaintiffs' reading would have the Court separate (v) into deepening the Taylor Bayou channels and turning basins, and also widening the same. When taken separately, Plaintiffs claim the feature solely engages in widening a channel or harbor.

citations omitted). The word "solely" indicates that Congress intended for each project feature to be evaluated in light of all the improvements performed on that feature. Therefore, the Court must evaluate every feature to determine whether the feature solely engaged in any of the activities enumerated in Section 2236(a)(3)(A). Features (i)–(iii) only engage in deepening. Feature (iv) narrows, rather than widens, the channel. Feature (v) deepens *and* widens certain channels and basins. Feature (vii) *deepens* turning basins and anchorage areas, in addition to creating and enlarging them.[10]

This leads the Court to feature (vi), which solely engages in creating or enlarging bend easing and turning basins. Because this feature meets the first prong of the Size Limitation, the Court must determine whether Plaintiffs' ships are "at least comparable in size to those used to justify these features[.]" § 2236(a)(3). Courts have broad discretion when comparing boats' sizes, which is evidenced by the statute's plain meaning. The statute only requires that the boats subject to the fee be "*at least* comparable in size." § 2236(a)(3)(A) (emphasis added). By using the term "at least," Congress clarified that this is not an exacting inquiry. The boats subject to the fee need not be the *same* size or even within a few

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[10] To deepen is not to enlarge. However, the statute uses "deepening" in the Draft Limitation. By using "deepening" in one part of the statute and "enlarge" in another, Congress intentionally distinguished the meaning of these words. *See Sosa,* 542 U.S. at 711 n.9, 124 S.Ct. 2739 ("when the legislature uses certain language in one part of the statute and different language in another, the court assumes the different meanings were intended.").

feet of the ship used to "justify" the project features (the "design ship"). Rather, they need only be at least comparable in size to be subject to the fee for that feature. Furthermore, courts may consider numerous additional factors under Section 2236(a)(3)(B), such as: elapsed time of passage; safety of passage; vessel economy of scale; under-keel clearance; vessel draft; vessel squat; vessel speed; sinkage; and trim. § 2236(a)(3)(B). Congress further expanded the district courts' discretion by allowing them to evaluate these additional factors beyond a ship's basic dimensions.

In its Motion to Dismiss, [Dkt. 5], Defendant asserts that the design ship is a 158,000 DWT Suez Supermax Tanker, which is the ship that the USACE used in its feasibility study. [Dkt. 5-10 at 12].[11] This is not so. The design ship is the ship that the project was meant to benefit: any ship with a design draft in excess of twenty feet. Fees may only be levied on "vessels at least comparable in size to those used to *justify* these features[.]" § 2236(a)(3)(A) (emphasis added). The Court's reading of this provision turns on the word "justify," which Merriam-Webster dictionary defines as "to provide or be a good reason for (something)." *Justify, Merriam Webster Dictionary,* https://www.merriam-webster.com/dictionary/ justify (last visited February 23, 2022). This definition necessarily looks to the benefits created by someone or something. In the context of the Size Limitation, this Court must look to the benefits the features create and to whom

[11] The Court takes judicial notice of the feasibility study prepared by the USACE. *See* Fed. R. Evid. 201(b); *see also Funk v. Stryker Corp.,* 631 F.3d 777, 783 (5th Cir. 2011) (permitting judicial notice of documents produced by a federal agency).

those benefits were designed to inure. This is because the beneficiaries of a harbor improvement project should bear the brunt of its costs.

The Project was designed to benefit ships with design drafts in excess of twenty feet. Although the USACE design ship may be helpful in determining certain characteristics for the Project, the Project itself was not meant to exclusively benefit Suez Supermax Tankers. As the Ordinance asserts: "a User Fee as set out below reflects the benefits provided by the Project to vessels whose design draft exceeds 20 feet." [Dkt. 1-1 at 3]. Therefore, any ship with a design draft in excess of 20 feet may be considered "at least comparable in size to those used to justify these features" and therefore "may be charged under this section." *See* § 2236(a)(3).[12]

The Court already possesses sufficient legal and evidentiary support that the Fee complies with the Size Limitation. Even so, the Court finds it significant that Defendant, as the non-Federal interest, determined that ships with design drafts in excess of twenty feet justified the Project features. [*See* Dkt. 1-1 at 3]. The statute delegates authority to non-Federal interests in determining which ships are "at least comparable in size to those used to justify these features." § 2236(a)(3). Section 2236(a)(3)(B) reads: "In developing port or harbor dues that may be charged under this section on vessels for project features constructed under this subchapter, the *non-*

[12] Even if the design ship were a 158,000 DWT Suezmax Tanker ("Suezmax Design Ship"), the Court's decision would not change. Plaintiffs' ships that have thus far been subject to the fee are comparable in size to the Suezmax Design Ship. *See* [Dkt. 5-10 at 12].

*Federal interest may consider* such criteria as . . . ." § 2236(a)(3)(B) (emphasis added). By delegating authority to the non-Federal interest in crafting the fee, Congress intended to give broad discretion in determining the size of the ship used to justify project features and which vessels are "at least" comparable in size.

The statutory scheme of the WRDA is a prime example of the cooperative federalism that permeates the administrative state. Enlarging federal programs requires investment and execution by state and local actors. However, this increased cooperation leaves courts grappling with whether to afford deference to state agency interpretations of federal law. With scarce precedent, the Court finds *Voigt v. Coyote Creek Mining Co., LLC* influential. 999 F.3d 555 (8th Cir. 2021). In *Voigt,* the Eighth Circuit grappled with whether to afford deference to a state agency given permitting authority under the Clean Air Act, 42 U.S.C. § 7401, *et seq.* On its first appeal, the court determined that the state agency's permitting decision should be afforded deference. *Voigt v. Coyote Creek Mining Co., LLC,* 980 F.3d 1191 (8th Cir. 2020), *aff'd on reh'g on other grounds,* 999 F.3d 555 (8th Cir. 2021). However, on rehearing, the court sidestepped the issue, finding for the defendant on alternate grounds. *Voigt,* 999 F.3d at 562. While the court did not explicitly rule on whether deference was appropriate, it found that the state agency's "permitting decision [was] a useful guide in reaching

[its] decision regarding the most reasonable interpretation of the regulations[.]"[13] *Id.*

Public policy supports applying the Eighth Circuit's logic here: granting the non-Federal interest some leeway will provide future vessel and cargo owners with a manageable standard for determining whether their vessels will be subject to the fee, so they will not need to petition the Court for guidance. Such frequent, individualized determinations would be unworkable and kill any harbor construction project. Accordingly, the Court treats Defendant's decision to charge vessels with design drafts in excess of twenty feet as a significant but non-dispositive factor when deciding whether Plaintiffs' ships are comparable in size. To clarify, non-Federal interests do not have *carte blanche* to levy harbor fees. The Court merely finds significance in SSND's, the non-Federal interest's, determination that a certain size ship was used to justify the Project, and SSND has broad discretion in determining which ships "are at least comparable in size[.]" § 2236(a)(3)(A).

**iii. Count III**

Count III rests on a misinterpretation of the Ordinance and is not ripe for adjudication. It contends that the Ordinance enacting the Fee is unlawful because it allows Defendant to use the Fee to fund construction costs for the entire Project, rather than

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[13] Although the Eighth Circuit did not give deference to the state agency's decision, it did not rule out the possibility of affording such deference. The court appeared to apply prior Supreme Court rulings, and the factors therein, regarding deference to *federal* agency decisions to the decisions of the state agency. Regardless, it is not within the providence of this Court to create doctrine.

for only the non-Federal share. Plaintiffs read the Ordinance improperly. But, even if their reading of the Ordinance was correct, their claim is not yet ripe.

The Ordinance reads: "User Fee authorized by this ordinance will expire on January 1, 2049, or upon final payment of *all* construction and construction financing costs associated with the Project, whichever comes first." [Dkt. 1 at ¶ 65; Dkt. 1-1 at 6 (emphasis added)]. By setting the expiration of the Fee after "all" construction costs are paid, Plaintiffs assert that the Ordinance permits levying the Fee for costs related to both the federal and non-Federal shares of the Project, in violation Section 2236(a)(1)(A)(i). The statute permits fees only "to finance the non-Federal share of construction and operation and maintenance costs of a navigation project for a harbor under the requirements of section 2211 of this title[.]" § 2236(a)(1)(A)(i). The complained-of portion of the Ordinance imposes a temporal limitation on Defendant's ability to charge the Fee. It does not, and indeed cannot, mandate that ships subject to the Fee finance the federal portion of Project costs.

Plaintiffs have also not overcome the presumption of regularity that attaches to government actions. Courts presume that government actors act lawfully and do not violate their own regulations. *Sealed Appellee 1 v. Sealed Appellant 1,* 767 F.3d 418, 423 (5th Cir. 2013). While this presumption may be overcome, Plaintiffs' "assertion amounts to nothing more than speculation that the Government may intend to violate its own regulations, which we normally do not assume." *Id.*

Additionally, Plaintiffs' claims regarding Count III are speculative and therefore not ripe. "Ripeness is a

justiciability doctrine 'drawn from both Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.' " *Watkins v. City of Arlington,* No. 4:14-CV-381-O, 2015 WL 12733395, at *3 (N.D. Tex. Jan. 8, 2015) (citing *Reno v. Catholic Soc. Servs., Inc.,* 509 U.S. 43, 57 n.18, 113 S.Ct. 2485, 125 L.Ed.2d 38 (1993)). It "separates those matters that are premature because the injury is speculative and may never occur from those that are appropriate for judicial review," *United Transp. Union v. Foster,* 205 F.3d 851, 857 (5th Cir. 2000), and stops courts "from entangling themselves in abstract disagreements over administrative policies . . . ." *Abbott Labs. v. Gardner,* 387 U.S. 136, 148–49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), *abrogated on other grounds by Califano v. Sanders,* 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977). "A court should dismiss a case for lack of 'ripeness' when the case is abstract or hypothetical." *Monk v. Huston,* 340 F.3d 279, 282 (5th Cir. 2003).

When assessing ripeness, courts examine: "(1) the fitness of the issues for judicial resolution, and (2) the potential hardship to the parties caused by declining court consideration." *Lopez v. City of Hous.,* 617 F.3d 336, 341 (5th Cir. 2010) (citing *Texas v. United States,* 497 F.3d 491, 498 (5th Cir. 2007), *cert. denied,* 555 U.S. 811, 129 S.Ct. 32, 172 L.Ed.2d 18 (2008)). When declaratory judgment is sought, courts also determine, (3) whether the case "presents sufficient adversity and concreteness by examining whether an 'actual controversy' exists between the parties." *Bear Creek Bible Church v. EEOC,* No. 4:18-cv-00824-O, 571 F.Supp.3d 571, 597 (N.D. Tex. 2021) (citing *Orix*

*Credit Alliance, Inc. v. Wolfe,* 212 F.3d 891, 896 (5th Cir. 2000)).

First, "[a] case is generally ripe" and fit for review "if any remaining questions are purely legal ones." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans,* 833 F.2d 583, 587 (5th Cir. 1987). However, a case may still be unfit for adjudication even if the legal issues are clear:

> [T]he question of fitness does not pivot solely on whether a court is capable of resolving a claim intelligently, but also involves an assessment of whether it is appropriate for the court to undertake the task. Federal courts cannot—and should not—spend their scarce resources on what amounts to shadow boxing. Thus, if a plaintiff's claim, though predominantly legal in character, depends on future events that may never come to pass, or that may not occur in the form forecasted, then the claim is unripe.

*Ernst & Young v. Depositors Econ. Prot. Corp.,* 45 F.3d 530, 537 (1st Cir. 1995). This is the case here. Plaintiffs have not alleged that Defendant *is* using the Fee to fund the federal portion of construction costs, just that they *might* do so in the future. This is speculation, and Plaintiffs require further factual development to successfully lodge this claim. Furthermore, Plaintiffs have not demonstrated that they meet the "hardship" prong of the analysis. For example, Plaintiffs have not pled that Defendant has turned over the Fees to the federal government. Dismissal is warranted.

**iv. Count IV**

Count IV of Plaintiffs' Complaint must be dismissed because Section 2211 does not impose a cap on the non-Federal interest's spending. This Count alleges that Defendant is using the Fee to fund a larger portion of project costs than the statute permits. Section 2236(a)(1) permits non-Federal interests to levy fees in "*amounts not to exceed those necessary* . . . to finance the non-Federal share of construction and operation and maintenance costs of a navigation project for a harbor under the *requirements of section 2211*[.]" 33 U.S.C. § 2236(a)(1)(A)(i) (emphasis added). Pursuant to Section 2211:

> The non-Federal interests for a navigation project for a harbor . . . *shall pay,* during the period of construction of the project, the following costs associated with general navigation features: . . . (B) 25 percent of the cost of construction of the portion of the project which has a depth in excess of 20 feet but not in excess of 50 feet[.]

33 U.S.C. § 2211(a)(1)(B) (emphasis added). By limiting the use of fees to "amounts not to exceed those necessary" to finance a harbor improvement project, Plaintiffs claim that Section 2211 imposes a cap on fee collection for non-Federal interests. Plaintiffs concede that non-Federal interests may contribute more than twenty-five percent of the cost of construction. [Dkt. 23 at 24–25]. However, they claim Defendant may not use port fees to fund any voluntary additional cost sharing.

Plaintiffs' reading is incorrect. The language of limitation in Section 2236 does not transform the percentages of Section 2211 into a cap on non-Federal

funding. Rather, it limits what the fee may fund to construction, operation, and maintenance costs. Plaintiffs are not exempt from paying their share of costs through a user fee merely because the non-Federal interest assumes a larger percentage of project costs. And Plaintiffs' concession that Defendant may voluntarily assume a greater portion of the Project's costs undermines their argument. It cannot be that Section 2211 imposes a cap for the fee-based non- Federal share but not for the alternatively funded non-Federal share because that reading would require an express statutory provision. Section 2236(a)(1)'s language—"amount not to exceed those necessary"—is not enough.

Even without Plaintiffs' concession, the law itself expressly permits non-Federal interests to assume a higher share of project costs. Under 33 U.S.C. § 2280, the projected costs listed in WRDA-14 form the maximum *federal* share of project costs. § 2280(a).[14] However, Section 2280(b) expressly permits "the Secretary [to] accept funds from a non-Federal interest for any authorized water resources development project that has exceeded its maximum cost under subsection (a), and use such funds to carry

[14] Although the statute was originally enacted in 1986, it expressly encompasses projected costs listed in any subsequent WRDA enactment: "In order to insure against cost overruns, each total cost set forth with respect to a project for water resources development and conservation and related purposes authorized to be carried out by the Secretary in this Act *or in a law enacted after the date of the enactment of this Act, including the Water Resources Development Act of 1988, or in an amendment made by this Act or any later law with respect to such a project* shall be the maximum cost of that project[.]" 33 U.S.C. § 2280(a) (emphasis added).

out such project, if the use of such funds does not increase the Federal share of the cost of such project." § 2280(b). This clear mandate permits non- Federal interests to contribute additional funds within their discretion.

Even without Section 2280(b)'s command, Plaintiffs' reading requires that the Court view the percentages listed in Section 2211 as a cap on the non-Federal share. However, nothing in the statute's text or legislative history suggests this. The term "shall pay" indicates that Section 2211 imposes either a spending floor or discretionary guidelines for cost sharing between federal and non-Federal interests. The Supreme Court has found that 'shall' can be mandatory or precatory. *See Maine Cmty. Health Options v. United States,* —— U.S. ——, 140 S. Ct. 1308, 1320, 206 L.Ed.2d 764 (2020) (holding that 'shall' indicates a mandatory requirement); *see also Cairo & F.R. Co. v. Hecht,* 95 U.S. 168, 170, 24 L.Ed. 423 (1877) (noting 'shall' means 'may' in certain contexts); *Gutierrez de Martinez v. Lamagno,* 515 U.S. 417, 429–30, 115 S.Ct. 2227, 132 L.Ed.2d 375 (1995); *Castle Rock v. Gonzales,* 545 U.S. 748, 760–62, 125 S.Ct. 2796, 162 L.Ed.2d 658 (2005) (concluding that the word "shall" should not be read as requiring the police to take action); *West Wis., Ry. Co., v. Foley,* 94 U.S. 100, 103, 24 L.Ed. 71 (1877).

The Court need not rule on whether the percentages in Section 2211 are mandatory or precatory because the result would be the same. Should Section 2211 be read as precatory, then non-Federal interests would be able to assume a larger or smaller portion of project costs. This variable cost structure would afford

discretion in determining the breakdown of project costs.

However, if the statute is read as mandatory, such percentages form a minimum contribution from non-Federal interests. It is clear from the statute's legislative history that Congress intended to increase the involvement of non-Federal interests in constructing and improving America's ports. Prior to the WRDA-86, Congress appropriated funds for only three to four projects every year. 132 Cong. Rec. S3402 (1986). Because of the fierce competition to secure funding, influence within the people's chamber became more important than need. *Id.* By requiring local investment, Congress incentivized only those non-Federal interests that actually needed harbor improvements to apply for the funding. *Id.* Given this motivation to involve non-Federal interests in "bidding" for congressional funding, it would be absurd to think that Section 2211 forms a ceiling because it would deprive local interests of the ability to demonstrate the need for congressional funds. A principal cosponsor of the statute, Representative Glenn Anderson, noted that "[n]ew cost-sharing rules have been implemented, which are nearly identical to those proposed by the administration, that require non-Federal interests to pay a much greater share of project costs." 132 Cong. Rec. 11561 (1986). It is unlikely that Congress desired the inclusion of non-Federal funds but imposed a cap on such funding. Rather, the twenty-five percent minimum assured that the non-Federal interest had a concrete stake in a project's success.

Furthermore, subsequent congressional enactments on cost sharing for harbor improvement projects

demonstrate that Section 2211 imposed minimum contribution levels. Where two statutes "deal with precisely the same subject matter," they may be read *in pari materia*. *United States v. Stewart,* 311 U.S. 60, 64, 61 S.Ct. 102, 85 L.Ed. 40 (1940). All statutes "*in pari materia* are to be taken together, as if they were one law." *Id.; see also Cope v. Cope,* 137 U.S. 682, 687–88, 11 S.Ct. 222, 34 L.Ed. 832 (1891); *United States v. Freeman,* 3 How. 556, 564, 11 L.Ed. 724 (1845). The WRDA-86 and the WRDA-14 are to be read *in pari materia*. Both statutes deal with harbor expansion projects and provide a cost breakdown for the federal and non-Federal share. For this Project, Congress provided a projected split of $748,070,00 in federal funding and $365,970,000 in non-Federal funding for the Project. These amounts, which exceed the percentages listed in Section 2211, reflect congressional intent to depart from the percentages in Section 2211.

**v. Count V**

Section 2236(a)(4) of WRDA-86 provides that "dues may be levied only on a vessel entering or departing from a harbor and its cargo on a fair and equitable basis." 33 U.S.C. § 2236(a)(4). Plaintiffs contend that the Fees are unlawful because SNND imposes a higher Fee on hydrocarbon cargo than non-hydrocarbon cargo with no "legitimate justification." [Dkt. 1 at ¶ 82]. The Court disagrees and finds that this discrepancy is reasonable.

The Fee for hydrocarbon cargo is $0.20 per short ton with a maximum of $0.35 per short ton, and the Fee for non-hydrocarbon cargo is $0.02 per short ton with a maximum of $0.035 per short ton. [Dkt. 1-1 at 7]. This discrepancy is reasonable based on the Section

2236(a)(4) factors for the non-Federal interest to consider when formulating fees:

> a. the direct and indirect cost of construction, operations, and maintenance, and providing the facilities and services under [33 U.S.C. § 2236(a)(1)];
>
> b. the value of those facilities and services to the vessel and cargo;
>
> c. the public policy or interest served; and
>
> d. any other pertinent factors.

§ 2236(a)(4).

SNND reasonably decided to impose disparate Fees depending on the type of cargo so that: (1) the vessels and cargo benefitting the most from the improvements would fund the majority of the costs; (2) the Fee remains approximately equal when measured as a percentage of the cargo's value; and (3) the Fee furthers public policy by "funding improvements intended to secure the Waterway's position as America's leading import/export harbor for hydrocarbons." [Dkt. 5 at 31].

When calculating harbor fees, a non-Federal interest must consider "the value of" the facilities "to the vessel and cargo" pursuant to Section 2236(a)(4)(B). The Project itself was designed to benefit the hydrocarbon industry, and hydrocarbons make up a substantial percentage of the tonnage for both Beaumont and Port Arthur. [Dkt. 5-10 at 4, 8].[15]

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[15] Plaintiffs argue that the Court may not take judicial notice of Exhibit 9, [Dkt. 5-10], because it is from 2011; therefore, it cannot be used to determine the Waterway's hydrocarbon traffic in 2021 when the Ordinance was passed. But Defendant does not ask the Court to forward-model 2021 statistics from the

SNND determined it was proper to charge hydrocarbon carriers more because the improvements were largely geared to their benefit. [Dkt. 5 at 32]. Whether hydrocarbon carriers are the *only* vessels that would benefit from deeper channels is not dispositive. The same is true for whether *all* hydrocarbon cargoes are more valuable than all non-hydrocarbon cargoes. The only material question is whether SNND appropriately considered this factor when crystallizing the Project's plan. The Court finds that SNND did so. [16] Imposing higher fees on hydrocarbon carriers also comports with the statute because it better reflects the value that the facilities add to the vessel and cargo. This is because the value of hydrocarbon cargo per ton is generally much higher than the value of non-hydrocarbon cargo. [17]

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feasibility study, nor does the Court need to engage in this exercise. The feasibility study is cited and noted for the purpose of showing those factors that SNND considered when formulating the Project and its Fees. Furthermore, the Court may take judicial notice of "publicly-available documents and transcripts produced by [government agencies], which were matters of public record directly relevant to the issue at hand." *Funk v. Stryker Corp.,* 631 F.3d 777, 783 (5th Cir. 2011). Thus, the Court takes judicial notice of the Feasibility Report.

[16] SNND need not "draw the perfect line"—just a "rational line." *See Armour v. City of Indianapolis,* 566 U.S. 673, 685, 132 S.Ct. 2073, 182 L.Ed.2d 998 (2012).

[17] As Defendant explains in its Motion to Dismiss:

> By way of illustration, in April 2021—the month when the Ordinance was passed—statistics published by the U.S. Energy Information Administration indicated that the price of American LNG for export was about $5.92 per thousand cubic feet, or about $318 per short ton (given that 1 short ton is 53,682.56 cubic feet). *Natural Gas,* U.S. Energy Info. Admin. (Sept. 30, 2021),

Additionally, SSND and USACE created the Project, in part, to benefit the hydrocarbon industry. [Dkt. 5-3 at 3, 7, 12–14]. Thus, the Fee is equitable when considering the "value of those facilities and services to the vessel and cargo." § 2236(a)(4)(B).

Furthermore, a non-Federal interest must also consider public policy. § 2236(a)(4)(C). The Project itself is intended to benefit the hydrocarbon industry. [Dkt. 5-3 at 3, 7, 12–14]. The Ordinance itself expressly states that the Navigation District's Board of Commissioners considered the statutory factors like "the cost of construction, operations, [and] the value of the services to the vessel and cargo." [Dkt. 1-1 at 3]. Therefore, this Court concludes that SNND reasonably imposed a higher Fee for hydrocarbon carriers because it considered and applied the relevant statutory factors.

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> https://bit.ly/3l8RAag. A 20-cent harbor due on cargo worth $318 per ton equates to dues of about 0.063% based on the value of the cargo. The average price for of nonhydrocarbon cargo tends to be much lower, often around $30 per ton (e.g., $28 per ton for iron and steel slag, $29 per ton for peat, $33 per ton for pumice rock, and between $35 and $50 per ton for sand and gravel). *See* U.S. Dep't of Interior, U.S. Geological Survey, *Mineral Commodity Summaries 2020,* at 86, 118, 128, 142 (Jan. 2020), https://on.doi.gov/3D3Bh4S. A 2-cent harbor due on cargo worth $30 per ton equates to dues of 0.066% based on the value of the cargo—almost exactly the same as the dues for hydrocarbons.

[Dkt. 5 at 25 n.12]. The Court may take judicial notice of these government statistics because their accuracy and source cannot be questioned. Fed. R. Evid. 201(b); *Funk,* 631 F.3d at 783; *Victoria Cruises, Inc. v. Changjiang Cruise Overseas Travel Co.,* 630 F. Supp. 2d 255, 263 n.3 (E.D.N.Y. 2008).

**vi. Counts VI & VII**

Count VI seeks a declaratory judgment that Defendant's Fee violates the WRDA-86 and is therefore unenforceable. Count VII seeks an injunction barring SNND from implementing the Fee. Both are pendant upon Plaintiffs' previous allegations, Counts I through V. Because Counts I through V are dismissed, the Court also dismisses Counts VI and VII. *See Adams v. Nissan N. Am., Inc.,* 395 F. Supp. 3d 838, 856 (S.D. Tex. 2018) ("Defendant correctly contends that Plaintiffs' claims for declaratory and injunctive relief are derivative of their other claims, and if the other claims are dismissed, so too must the claims for declaratory and injunctive relief be dismissed.").

**vii. Leave to Amend**

A district court may deny leave to amend when "the proposed amendment would be futile because it could not survive a motion to dismiss." *Rio Grande Royalty Co. v. Energy Transfer Partners, L.P.,* 620 F.3d 465, 468 (5th Cir. 2010); *see also Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962) (holding that denying leave to amend is within the trial court's discretion so long as there is an appropriate reason given, including futility). An amended complaint is futile when the plaintiff has pled his or her best case, and there are no "additional facts that could be alleged in a second amended complaint that could not have been alleged in the [original complaint]." *Heck v. Orion Grp. Holdings, Inc.,* 468 F. Supp. 3d 828, 863 (S.D. Tex. 2020).

Here, there are no additional facts that Plaintiffs may plead that would change the outcome of this

Court's decision. This case rests on issues of law, and there is no reasonable possibility that a change in facts would lead to a change in outcome—any attempts at amendment are futile. Therefore, this case is dismissed with prejudice and leave to amend is not given.

## IV. CONCLUSION

After a careful review of all pleadings, facts, and applicable law, this Court reaches a decision on Defendant's Motion to Dismiss.

It is therefore **ORDERED** that Defendant's Motion to Dismiss, [Dkt. 5], is hereby **GRANTED.**

It is further **ORDERED** that Counts IVII of Plaintiffs' Complaint, [Dkt. 1], are hereby **DISMISSED WITH PREJUDICE.**

It is further **ORDERED** that Parties' Joint Motion for Protective Orders [Dkt. 34] is hereby **DENIED AS MOOT.**

**APPENDIX C**

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 22-40158

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BG GULF COAST LNG, L.L.C.; PHILLIPS 66 COMPANY,

*Plaintiffs-Appellants*,

v.

SABINE-NECHES NAVIGATION DISTRICT OF JEFFERSON COUNTY, TEXAS,

*Defendant-Appellee*.

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Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 1:21-CV-470

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Filed: October 25, 2022

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**ON PETITION FOR REHEARING AND REHEARING EN BANC**

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Before STEWART, ELROD, and GRAVES, *Circuit Judges.*

PER CURIAM:

The petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (Fed. R. App. P. 35 and 5th Cir. R. 35), the petition for rehearing en banc is DENIED.

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[*] Judge Carolyn Dineen King, Jacques L. Wiener, Jr., James L. Dennis, did not participate in the consideration of the rehearing en banc.

# APPENDIX D

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. **U.S. Const. art. 1, § 8, cls. 1, 3 provide in pertinent part:**

[1] The Congress shall have Power * * *

* * *

[3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

* * * * *

2. **U.S. Const. art. 1, § 10, cls. 2-3 provide:**

[2] No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

[3] No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

* * * * *

3. **33 U.S.C. § 2211 provides in pertinent part:**

**Harbors**

**(a) Construction**

**(1) Payments during construction**

The non-Federal interests for a navigation project for a harbor or inland harbor, or any separable element thereof, on which a contract for physical construction has not been awarded before June 10, 2014, shall pay, during the period of construction of the project, the following costs associated with general navigation features:

(A) 10 percent of the cost of construction of the portion of the project which has a depth not in excess of 20 feet; plus

(B) 25 percent of the cost of construction of the portion of the project which has a depth in excess of 20 feet but not in excess of 50 feet; plus

(C) 50 percent of the cost of construction of the portion of the project which has a depth in excess of 50 feet.

* * *

**(e) Agreement**

Before initiation of construction of a project to which this section applies, the Secretary and the non-Federal interests shall enter into a cooperative agreement according to the provisions of section 1962d–5b of title 42. The non-Federal interests shall agree to—

(1) provide to the Federal Government lands, easements, and rights-of-way, including those necessary for dredged material disposal facilities, and perform the necessary relocations required for

construction, operation, and maintenance of such project;

(2) hold and save the United States free from damages due to the construction or operation and maintenance of the project, except for damages due to the fault or negligence of the United States or its contractors;

(3) provide to the Federal Government the non-Federal share of all other costs of construction of such project; and

(4) in the case of a deep-draft harbor, be responsible for the non-Federal share of operation and maintenance required by subsection (b) of this section.

* * * * *

4. **33 U.S.C. § 2232 provides in pertinent part:**

**Construction of water resources development projects by non-Federal interests**

* * *

**(d) Credit or reimbursement**

**(1) General rule**

Subject to paragraph (3), a project or separable element of a project carried out by a non-Federal interest under this section shall be eligible for credit or reimbursement for the Federal share of work carried out on a project or separable element of a project if—

(A) before initiation of construction of the project or separable element—

(i) the Secretary approves the plans for construction of the project or separable

element of the project by the non-Federal interest;

(ii) the Secretary determines, before approval of the plans, that the project or separable element of the project is feasible; and

(iii) the non-Federal interest enters into a written agreement with the Secretary under section 1962d–5b of title 42, including an agreement to pay the non-Federal share, if any, of the cost of operation and maintenance of the project; and

(B) the Secretary determines that all Federal laws and regulations applicable to the construction of a water resources development project, and any conditions identified under subsection (b)(1)(B), were complied with by the non-Federal interest during construction of the project or separable element of the project.

**(2) Application of credit**

The Secretary may apply credit toward—

(A) the non-Federal share of authorized separable elements of the same project; or

(B) subject to the requirements of this section and section 2223 of this title, at the request of the non-Federal interest, the non-Federal share of a different water resources development project.

**(3) Requirements**

The Secretary may only apply credit or provide reimbursement under paragraph (1) if—

(A) Congress has authorized construction of the project or separable element of the project;

(B) the Secretary certifies that the project has been constructed in accordance with—

(i) all applicable permits or approvals; and

(ii) this section; and

(C) in the case of reimbursement, appropriations are provided by Congress for such purpose.

**(4) Monitoring**

The Secretary shall regularly monitor and audit any water resources development project, or separable element of a water resources development project, constructed by a non-Federal interest under this section to ensure that—

(A) the construction is carried out in compliance with the requirements of this section; and

(B) the costs of the construction are reasonable.

**(5) Discrete segments**

**(A) In general**

The Secretary may authorize credit or reimbursement under this subsection for carrying out a discrete segment of a federally authorized water resources development project, or separable element thereof, before final completion of the project or separable element if—

(i) except as provided in clause (ii), the Secretary determines that the discrete segment satisfies the requirements of paragraphs (1) through (4) in the same manner as the project or separable element; and

(ii) notwithstanding paragraph (1)(A)(ii), the Secretary determines, before the approval of the plans under paragraph (1)(A)(i), that the discrete segment is technically feasible and environmentally acceptable.

**(B) Determination**

Credit or reimbursement may not be made available to a non-Federal interest pursuant to this paragraph until the Secretary determines that—

(i) the construction of the discrete segment for which credit or reimbursement is requested is complete; and

(ii) the construction is consistent with the authorization of the applicable water resources development project, or separable element thereof, and the plans approved under paragraph (1)(A)(i).

**(C) Written agreement**

**(i) In general**

As part of the written agreement required under paragraph (1)(A)(iii), a non-Federal interest to be eligible for credit or reimbursement under this paragraph shall—

(I) identify any discrete segment that the non-Federal interest may carry out; and

(II) agree to the completion of the water resources development project, or separable element thereof, with respect to which the discrete segment is a part and establish a timeframe for such completion.

**(ii) Remittance**

If a non-Federal interest fails to complete a water resources development project, or separable element thereof, that it agreed to complete under clause (i)(II), the non-Federal interest shall remit any reimbursements received under this paragraph for a discrete segment of such project or separable element.

**(D) Discrete segment defined**

In this paragraph, the term "discrete segment" means a physical portion of a water resources development project to be carried out, or separable element thereof—

(i) described by a non-Federal interest in a written agreement required under paragraph (1)(A)(iii); and

(ii) that the non-Federal interest can operate and maintain, independently and without creating a hazard, in advance of final completion of the water resources development project, or separable element thereof.

* * * * *

5. **33 U.S.C. § 2236 provides in pertinent part:**

**Port or harbor dues**

**(a) Consent of Congress**

Subject to the following conditions, a non-Federal interest may levy port or harbor dues (in the form of tonnage duties or fees) on a vessel engaged in trade entering or departing from a harbor and on cargo loaded on or unloaded from that vessel under clauses 2 and 3 of section 10, and under clause 3 of section 8, of Article 1 of the Constitution:

**(1) Purposes**

Port or harbor dues may be levied only in conjunction with a harbor navigation project whose construction is complete (including a usable increment of the project) and for the following purposes and in amounts not to exceed those necessary to carry out those purposes:

(A)(i) to finance the non-Federal share of construction and operation and maintenance costs of a navigation project for a harbor under the requirements of section 2211 of this title; or

(ii) to finance the cost of construction and operation and maintenance of a navigation project for a harbor under section 2232 or 2233 of this title; and

(B) provide emergency response services in the harbor, including contingency planning, necessary personnel training, and the procurement of equipment and facilities.

**(2) Limitation on port or harbor dues for emergency service**

Port or harbor dues may not be levied for the purposes described in paragraph (1)(B) of this subsection after the dues cease to be levied for the purposes described in paragraph (1)(A) of this subsection.

**(3) General limitations**

(A) Port or harbor dues may not be levied under this section in conjunction with a deepening feature of a navigation improvement project on any vessel if that vessel, based on its design draft, could have utilized the project at mean low water before construction. In the case of project features which solely—

(i) widen channels or harbors,

(ii) create or enlarge bend easings, turning basins or anchorage areas, or provide protected areas, or

(iii) remove obstructions to navigation,

only vessels at least comparable in size to those used to justify these features may be charged under this section.

(B) In developing port or harbor dues that may be charged under this section on vessels for project features constructed under this subchapter, the non-Federal interest may consider such criteria as: elapsed time of passage, safety of passage, vessel economy of scale, under keel clearance, vessel draft, vessel squat, vessel speed, sinkage, and trim.

(C) Port or harbor dues authorized by this section shall not be imposed on—

(i) vessels owned and operated by the United States Government, a foreign country, a State, or a political subdivision of a country or State, unless engaged in commercial services;

(ii) towing vessels, vessels engaged in dredging activities, or vessels engaged in intraport movements; or

(iii) vessels with design drafts of 20 feet or less when utilizing general cargo and deep-draft navigation projects.

**(4) Formulation of port or harbor dues**

Port or harbor dues may be levied only on a vessel entering or departing from a harbor and its cargo on a fair and equitable basis. In formulating port and harbor dues, the non-Federal interest shall consider—

(A) the direct and indirect cost of construction, operations, and maintenance, and providing the facilities and services under paragraph (1) of this subsection;

(B) the value of those facilities and services to the vessel and cargo;

(C) the public policy or interest served; and

(D) any other pertinent factors.

**(5) Notice and hearing**

(A) Before the initial levy of or subsequent modification to port or harbor dues under this section, a non-Federal interest shall transmit to the Secretary—

(i) the text of the proposed law, regulation, or ordinance that would establish the port or harbor dues, including provisions for their administration, collection, and enforcement;

(ii) the name, address, and telephone number of an official to whom comments on and requests for further information on the proposal are to be directed;

(iii) the date by which comments on the proposal are due and a date for a public hearing on the proposal at which any interested party may present a statement; however, the non-Federal interest may not set a hearing date earlier than 45 days after the date of publication of the notice in the Federal Register required by subparagraph (B) of this paragraph or set a deadline for receipt of comments earlier than 60 days after the date of publication; and

(iv) a written statement signed by an appropriate official that the non-Federal interest agrees to be governed by the provisions of this section.

(B) On receiving from a non-Federal interest the information required by subparagraph (A) of this paragraph, the Secretary shall transmit the material required by clauses (i) through (iii) of subparagraph (A) of this paragraph to the Federal Register for publication.

(C) Port or harbor dues may be imposed by a non-Federal interest only after meeting the conditions of this paragraph.

**(6) Requirements on non-Federal interest**

A non-Federal interest shall—

(A) file a schedule of any port or harbor dues levied under this subsection with the Secretary and the Federal Maritime Commission, which the Commission shall make available for public inspection;

(B) provide to the Comptroller General of the United States on request of the Comptroller General any records or other evidence that the Comptroller General considers to be necessary and appropriate to enable the Comptroller General to carry out the audit required under subsection (b) 1 of this section;

(C) designate an officer or authorized representative, including the Secretary of the Treasury acting on a cost-reimbursable basis, to receive tonnage certificates and cargo manifests from vessels which may be subject to the levy of port or harbor dues, export declarations from shippers, consignors, and terminal operators, and such other documents as the non-Federal interest may by law, regulation, or ordinance require for the imposition, computation, and collection of port or harbor dues; and (D) consent expressly to the exclusive exercise of Federal jurisdiction under subsection (c) of this section.

**APPENDIX E**

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**[COMPLAINT EXHIBIT B]**

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

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BG GULF COAST LNG, LLC AND PHILLIPS 66 COMPANY,

*Plaintiffs*,

v.

SABINE-NECHES NAVIGATION DISTRICT OF JEFFERSON COUNTY, TEXAS,

*Defendant*.

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Civil Action No. 1:21-cv-00470

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**User Fees Paid by BG Gulf Coast LNG, LLC**

| Load Date | Ship Name | User Fee Charged | Fully Laden Sailing Draft |
|---|---|---|---|
| 1-May-21 | Magdala | $15,887.00 | Fwd 37.40 / Aft 37.23 |
| 13-May-21 | Gaslog Gibraltar | $15,981.02 | Fwd 37.76 / Aft 37.76 |

| | | | |
|---|---|---|---|
| 20-May-21 | Pan Europe | $15,918.72 | Fwd 37.56 / Aft 37.76 |
| 21-May-21 | SCF Barents | $15,913.92 | Fwd 37.95 / Aft 38.05 |
| 26-May-21 | Castillo de Santisteban | $15,462.21 | Fwd 36.05 / Aft 37.76 |
| 31-May-21 | Gaslog Genoa | $16,357.03 | Fwd 38.35 / Aft 38.38 |
| 4-Jun-21 | Maran Gas Roxana | $15,888.87 | Fwd 37.76 / Aft 37.76 |
| 3-Jun-21 | FLEX COURAGEOUS | $15,531.92 | Fwd 37.40 / Aft 37.43 |
| 11-Jun-21 | Maran Gas Spetses | $15,843.64 | Fwd 36.08 / Aft 36.25 |
| 19-Jun-21 | Rias Baixas Knutsen | $16,251.29 | Fwd 37.76 / Aft 37.76 |
| 24-Jun-21 | Maran Gas Ulysses | $15,489.64 | Fwd 38.35 / Aft 38.38 |
| 28-Jun-21 | Maran Gas Olympias | $15,883.49 | Fwd 36.41 / Aft 36.41 |
| 5-Jul-21 | Minerva Psara | $16,138.92 | Fwd 37.69 / Aft 37.76 |
| 14-Jul-21 | LNGships Athena | $15,553.00 | Fwd 36.08 / Aft 36.97 |
| 23-Jul-21 | Maran Gas Achilles | $16,072.34 | Fwd 37.40 / Aft 37.43 |
| 28-Jul-21 | SCF MITRE | $15,808.09 | Fwd 37.76 / Aft 37.82 |
| 3-Aug-21 | Global Star | $15,574.72 | Fwd 37.76 / Aft 37.56 |

| | | | |
|---|---|---|---|
| 11-Aug-21 | Minerva Psara | $15,873.01 | Fwd 37.56 / Aft 37.53 |
| 17-Aug-21 | Sevilla Knutsen | $15,946.96 | Fwd 37.59 / Aft 37.76 |