

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-60693  
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GULF PARK WATER COMPANY, INC. and  
JOHNSON PROPERTIES, INC.,

Plaintiffs-Appellants  
Cross-Appellees,

versus

MISSISSIPPI DEPARTMENT OF ENVIRONMENTAL  
QUALITY, ET AL.,

Defendants-Appellees

and

MISSISSIPPI PUBLIC SERVICE COMMISSION, CURT  
L. HERBERT, Individually, Etc., NEILSON H.  
COCHRAN, Individually, Etc., and BO ROBINSON,  
Individually, Etc.,

Defendants-Appellees  
Cross-Appellants.

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Appeal from the United States District Court for the  
Southern District of Mississippi

B 93 CV 468

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June 16, 1995

Before WISDOM, GARWOOD and DAVIS, Circuit Judges.\*

PER CURIAM:

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\* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

In their appeal, plaintiffs-appellants seem to concede, and correctly we believe, that their Fifth Amendment takings claims were properly dismissed without prejudice as premature, but assert that this doctrine of prematurity does not apply to their claims, based on essentially the same set of operative facts, for deprivation of property rights without procedural due process and in contravention of their substantive due process rights. Plaintiffs rely in this connection on *Sinaloa Lake Owners Association v. City of Simi Valley*, 882 F.2d 1398 (9th Cir. 1989), cert. denied, 110 S.Ct. 1317 (1990). Even if we were to accept this approach, which the Tenth Circuit apparently has not, see *Miller v. Campbell County*, 945 F.2d 348, 352 (10th Cir. 1991), cert. denied, 112 S.Ct. 1174 (1992); *Rocky Mountain Materials v. Board of County Commissioners*, 972 F.2d 309, 311 (10th Cir. 1992), nevertheless, it is apparent that even if all of plaintiffs' due process claims were not dismissable on this basis, any which were not should in any event have been dismissed on other grounds.

All the claims against the Mississippi Department of Environmental Quality, the Mississippi Commission on Environmental Quality, and the Mississippi Public Service Commission should have been dismissed on the basis of their Eleventh Amendment immunity, and also because none of such defendants are "persons" within the meaning of 42 U.S.C. § 1983, which formed the jurisdictional basis of this law suit. See *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989). This is also true with respect to all the claims against the Executive Director of the Mississippi Department of Environmental Quality in his official capacity and all the claims against the Commissioners of the Mississippi Public Service

Commission in their official capacities, except for the claims for injunctive and declaratory relief.

The claims against the aforesaid commissioners for declaratory and injunctive relief, and the claims against them in their individual capacities for damages, are all jurisdictionally barred under such authorities as *Hagerty v. Succession of Clement*, 749 F.2d 217, 220 (5th Cir. 1984); *Carborell v. La. Dept. of Health and Human Resources*, 772 F.2d 185, 188-89 (5th Cir. 1985); *Hale v. Harney*, 786 F.2d 688, 691 (5th Cir. 1986), because such claims are in essence an attempt to appeal and revise the August 25, 1993, judgment of the Chancery Court of Jackson County, Mississippi, rejecting the attacks of plaintiffs upon the complained of rulings of the Public Service Commission.

Nor has any claim been stated against the Executive Director of the Mississippi Department of Environmental Quality, in either his official or individual capacity. What plaintiffs complain of in this respect is the February 13, 1990, Water Pollution Control Draft Permit, its cancellation, and the failure to issue a full permit regarding the same subject matter. However, the issuance of the draft permit and the denial of the regular permit were actions of the Mississippi Environmental Quality Permit Board, a separate administrative body. See Miss. Code. Ann. §§ 49-17-28; 49-17-29(3)(a) & (4). Neither the said Permit Board nor any of its members were made parties to the suit. Moreover, on its face the draft permit does not grant property rights.

We further note with respect to the procedural due process claims that the Mississippi statutes and regulations governing the relevant proceedings of the Mississippi Public Service Commission

and of the Environmental Quality Permit Board provide for adequate due process and for judicial review to correct any failures of process, review which plaintiffs did not avail themselves of (except in the proceeding resulting in the said August 25, 1993, Chancery Court judgment). See *Myrick v. City of Dallas*, 810 F.2d 1382, 1387-1388 (5th Cir. 1987); *Pope v. Mississippi Real Estate Commission*, 872 F.2d 127, 132 (5th Cir. 1989).

As to the Mississippi Gulf Coast Regional Waste Water Authority and its directors in their official and individual capacities, plaintiffs' amended complaint does not allege any action on their part constituting a deprivation of any property rights of plaintiffs, even assuming, *arguendo* only, that the said Mississippi Gulf Coast Regional Waste Water Authority is not entitled to Eleventh Amendment immunity and is a "person" for purposes of section 1983.

We further note that plaintiffs' complaints as to inadequate rates or regulatory taking thereby are premature because the rate-fixing proceedings are not completed, and no final decision has been rendered therein.

Plaintiffs also complain of the district court's denial of their motion to further amend their complaint. We find no abuse of discretion in this respect. Plaintiffs had already filed an amended complaint, and did not move to further amend their complaint until after the district court had dismissed their suit, which had then been pending nearly a year. Moreover, plaintiffs did not serve with their motion to amend a proposed further amended complaint, and did not clearly show what they intended to allege therein that was materially different from their amended complaint

which the district court had dismissed. The district court also noted that allowing the filing would cause "further delay." The record will not support the conclusion that the district court abused its discretion in its said ruling.

Finally, the Mississippi Public Service Commission and its Commissioners have cross-appealed the district court's failure to grant and refusal to rule on their motion to dismiss and motion for summary judgment based, *inter alia*, on the Eleventh Amendment, the *Will* case, and the rule that, under decisions such as *Hagerty v. Succession of Clement*, and related cases cited above, the district court would not have jurisdiction to review the August 25, 1993, decree of the Chancery Court of Jackson County, Mississippi. For the reasons above stated, we believe that these jurisdictional and quasi-jurisdictional contentions were clearly established as meritorious and should have been ruled on by the district court, and accordingly we modify its judgment with respect to the Mississippi Public Service Commission and its Commissioners officially and individually to reflect that the judgment of dismissal as to said parties is on these grounds also.

JUDGMENT MODIFIED IN PART, AND AFFIRMED AS MODIFIED