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LEGISLATIVE UPDATE
1999 LEGISLATIVE SESSION: EFFECTS ON ENVIRONMENTAL LAWS & REGULATIONS

The Louisiana Legislature dealt with numerous environmental issues during the 1999 Regular Session, ranging from waste disposal, hazardous materials regulation and transport, and environmental cleanup, to air and water quality, departmental structure and organization, and enforcement of environmental laws and regulations. The following is a summary of some of the major environmental bills of the session, some of which have become law and some of which failed to pass through the legislature.

Attention !

In an effort to reduce printing costs and publication delays, the Section on Environmental Law will begin distributing the Louisiana Environmental Lawyer (LEL) newsletter by E-mail. Please help the Section by submitting your E-mail addresses to Jim Wilkins at sglegal@lsu.edu. We will, of course, continue to make the newsletter available to those section members who cannot furnish an E-mail address.

Air Quality

After years of debate, discussion, and rejection of a federal mandate requiring the implementation of an enhanced automobile inspection and maintenance ("I/M") program for the five-parish "serious" ozone nonattainment area, including the Baton Rouge metropolitan area, the legislature finally agreed to a compromise with the federal government for a "low-enhanced" I/M program. Act 576, which became effective on June 30, 1999, requires motorists in the parishes of Ascension, East Baton Rouge, Iberville, Livingston, and West Baton Rouge (the parishes listed by the Environmental Protection Agency (EPA) as "serious" or worse for ozone nonattainment) to obtain an extra inspection during their annual vehicle safety inspection and to pay an additional three dollars for such inspection. The new inspection consists of a gas cap integrity test and a fuel inlet pressure test, both of which are scheduled to begin on January 1, 2000. However, motorists in the five-parish area began paying the increased fee on July 1, 1999, in order to help inspection stations pay for the costly equipment required for the new inspections. Although the legislature was philosophically opposed to imposing this burden on drivers in the five-parish area, the members approved the measure in order to avoid federal sanctions which would have threatened federal highway funds in the nonattainment area.

In another measure addressing air quality in Baton Rouge, Senator Cleo Fields introduced Senate Concurrent Resolution 44, which urges and requests DEQ to prohibit Rhodia, Inc., located in North Baton Rouge, from importing, off-loading, and burning napalm unless certain conditions are met, including the following:

1. A risk management plan ("RMP") consistent with federal law is conducted with public input through hearings and written or oral testimony or comments.
2. Chemical specific air monitors are installed at Southern University's campus, in the potentially affected community, and at the smoke stacks and storage and transfer stations and the fence line at Rhodia Incorporated's facility to monitor the air quality of the area.
3. A Community Alert System is installed to provide siren and loudspeaker warnings of chemical accidents.
4. An evacuation program is established for Southern University.

Senator Fields also proposed an air quality bill which would have authorized continuous monitoring of toxic air pollutants at times and places deemed appropriate by DEQ, but the bill

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Features

Newsletter Editor: **James G. Wilkins**--*Associate Editor*: **Anne J. Crochet**--*Design/Layout*: **V.R.Admal**

was amended in the House Environment Committee to authorize such monitoring on a "continuous or periodic" basis, thereby limiting the intended effect of the bill. (Act 780, effective August 15, 1999)

While many legislators were addressing problems with air quality in the state, Senator Lynn Dean introduced a measure asserting that Louisiana's and the nation's air quality is just fine. Senate Concurrent Resolution 69 would have memorialized the United States Congress to refuse to ratify the Kyoto Protocol on global warming, declaring that global warming is a "myth." Apparently, the House Environment Committee disagreed with Senator Dean's assertions in the resolution and refused to send it to the House Floor for a vote.

DEQ Continuation & Organization

This session, the legislature had to decide whether or not to recreate the Louisiana Department of Environmental Quality, and with only one nay vote from the entire legislature, Act No. 187 sailed through the legislature, recreating DEQ for three more years, until July 1, 2002.

In addition, DEQ is attempting to become more efficient, effective, and "consumer friendly" by reorganizing its structure according to functions rather than media. This reorganization has been accomplished by the provisions of Act 303 (effective June 14, 1999), which retains and expands the scope of the office of the secretary but abolishes the offices of air quality and radiation, waste services, and water resources, replacing them with the offices of environmental assessment, environmental compliance, and environmental services. The reorganization streamlines the department, providing "one stop" shopping. For example, applicants seeking various permits from DEQ will be able to work with a "team" from the department that will cover all media involved, from air and water to solid and hazardous waste.

Enforcement

DEQ enforcement mechanisms, both civil and criminal, were addressed this year in an effort to improve the department's success in curbing violations and catching violators. A couple of enforcement measures focused on recovery of cleanup costs, protections for and restrictions on whistle-blowers, limitations of liability, and categorizing environmental violations.

First, hoping to pursue the recovery of state dollars expended for cleanups when the attorney general chooses not to do so, the department-backed Act 505 allows DEQ attorneys to act in lieu of and with the permission of the attorney general in actions to recoup state monies expended for cleaning up hazardous waste sites. The measure expands the enforcement efforts of the department, allowing pursuit of state monies if the attorney general assents. Act 505 became effective on June 29, 1999.

On the topic of whistle-blowers, Act 1172 addressed damages allowed to employees who suffer retaliation for reporting environmental violations. The measure clarifies that "triple damages" allowed under current law are limited to the actual period of damage, not to exceed three years, and are to include lost wages and lost anticipated wages from a lost wage increase or lost promotion, lost property from lost wages, lost benefits, and any physical or emotional damages resulting from the retaliation. The new law further provides that if the actual period of damage exceeds three years,the employee is entitled to actual damages only, not triple damages. This limitation on damages took effect on August 15, 1999.

Another whistle-blower measure addressed the ongoing problem of waste tires in the state. Representative Guillory sponsored Act 1049, effective August 15, 1999, which establishes incentives, including financial rewards, for the reporting of incidences of unauthorized disposal of waste tires. However, a similar measure that would have established an Environmental Watchdog Program, which would have included rewards and incentives to individuals for providing information used in detecting and combating such illegal disposal of hazardous waste, died in the Senate Environmental Quality Committee.

Liability limitations were the end result of Act 1333, also effective August 15, 1999, which protects from liability any operator of monitoring equipment operating such equipment on behalf of the department for damages to third parties resulting from the data or information obtained or failed to be obtained. The measure also protects DEQ from liability for damages stemming from the operation or failure to operate monitoring equipment owned by the department but located on another person's property and operated by someone other than a department employee.

Continuing on the enforcement front, Act 351, effective June 16, 1999, authorizes the DEQ secretary, by rule, to establish classifications or levels of violations of environmental laws, regulations, or permits, and to provide appropriate enforcement responses. Current law merely authorizes the assessment of either civil or criminal penalties but does not delineate or categorize particular offenses. This new law permits the secretary to categorize offenses based upon seriousness to public health and the environment in order to assist in prioritizing the department's enforcement efforts.

On the civil enforcement front, Senate Bill 402 was an attempt to remove the current restriction on DEQ, in the enforcement of environmental laws, of imposing only civil fines and penalties, including any cleanup costs incurred due to a violation, in the civil settlement process. The department-sponsored bill would have expanded DEQ's authority in civil penalty assessments, authorizing the secretary to allow the performance of "environmentally beneficial projects" in lieu of or in addition to civil penalties when settling civil penalty assessments. The secretary would have to promulgate rules and regulations in accordance with the Administrative Procedure Act to define the parameters of such projects and to include environmental mitigation as an aspect thereof. Additionally, the secre-

tary would have to report to the Senate Environmental Quality Committee and the House Environment Committee by March 1st of each year regarding any environmentally beneficial projects allowed during the year.

The bill was never scheduled for a hearing in the House Environment Committee, but the provisions of Senate Bill 402 were included in an amendment to House Bill 2262 by Representative Damico, which also deals with enforcement by DEQ. House Bill 2262 amends current law relative to procedures for issuance by the secretary of cease and desist orders to clarify that the department may issue such orders in cases where a pending violation is threatening "significant" damage to public health or the environment. The measure, which includes the environmentally beneficial projects provisions, was signed into law as Act 1184 and became effective on July 9, 1999.

Another measure addressing civil enforcement of environmental violations was Act 791, effective August 15, 1999, which, in its original form, would have doubled the criminal penalties for the illegal discharge, emission, or disposal of substances harmful to human life or health, but the bill was amended in the Senate Environmental Quality Committee to delete the references to criminal penalties and to increase the civil penalties from $25,000 per violation to $27,500 in accordance with federal civil penalty provisions.

Addressing criminal enforcement, Senate Bill 987 by Senator Landry would have created the crime of environmental fraud by state employees, which would consist of any intentional action, inaction, omission, or falsification of environmental documents or reports by a state employee that causes or will cause damage to life or health of a person, or any action of a state employee which causes the concealment of environmental data that contributes to or will contribute to damage to life or health of a person, or any action of a state employee which causes the concealment of environmental data that contributes to or will contribute to damage to life or health of a person. The bill would have imposed a fined of between $5,000 and $50,000, imprisonment with or without hard labor for no more than five years, or both, against any person who commits the crime of environmental fraud. The measure would also have obligated any state employee with knowledge of the commission of an environmental fraud to report such offense to the local D.A. and would have authorized a citizen suit in the event the D.A. did not prosecute the matter. Touted as a "criminal law" bill, the measure proceeded through the Senate Criminal Law (Judiciary C) Committee and past the full Senate until it was permanently halted by the House Administration of Criminal Justice Committee. One might expect this issue to appear again in the next general session, maybe next time as an "environmental law" bill.

Environmental Cleanup

Insuring the complete and proper cleanup of hazardous waste spills in Louisiana is always a top priority of the legislature, as was apparent by at least two measures that were enacted into law this year. One was Act No. 209, effective August 15, 1999, which requires payment for emergency medical services, including standby services, provided in hazardous substance emergencies. Current law requires the persons responsible for a hazardous substance or materials spill to pay all cleanup costs, but the law was not clear whether such cleanup costs include EMS services provided at the request of state police or firefighters who actually perform the cleanup of the site. This new law clarifies that when an emergency medical services provider is called to the site of a spill by an emergency responder, even if called there solely to provide "standby" services, such EMS provider is entitled to recover the costs of its services from the party responsible for the spill.

Another measure aimed at hazardous waste cleanups and control was Act 383, effective June 16, 1999, which requires any owner, operator, or other responsible person who obtains information that indicates hazardous waste or hazardous waste constituents are leaching, spilling, discharging, or otherwise moving into or onto the land, subsurface strata, air, or water, to report such information to DEQ in accordance with regulations to be adopted by the department. This obligation would not apply when the incident has previously been reported.

Fees

As of August 15, 1999, the propane gas industry no longer has to pay chemical accident prevention program fees. ACT 839 prohibits DEQ from imposing fees pursuant to the chemical accident prevention program against storers of liquefied petroleum gas whose facilities are permitted or inspected by the Louisiana Liquefied Petroleum Gas Commission or who use liquefied petroleum gas as fuel in an agricultural process, but such storers still must submit a risk management plan to DEQ in accordance with the chemical accident prevention program provisions.

Hazardous Materials

Addressing concerns regarding the location of rail cars containing hazardous materials in residential communities, Senate Bill 551 by Senator C. Fields would have prohibited the storage of hazardous materials in rail freight cars, freight containers, cargo tank cars, or portable tank cars located within 1,000 feet of a residence, would have imposed a civil penalty of up to $100,000 per day of violation plus any response costs necessitated by any spill, and would have imposed a criminal penalty upon a showing that the stored materials or substance would endanger human life or health, of not less than $1,000,000 plus the costs of prosecution, or imprisoned at hard labor for not more than ten years, or both. The bill was considered and killed by the Senate Environmental Quality Committee on the grounds that such measure would violate the Interstate Commerce Clause of the United States Constitution.

A similar measure, House Bill 396 by Representative Guillory, would have prohibited the storage of hazardous materials in rail cars in railroad

switching yards for more than twelve hours. This bill also died in committee based on the Interstate Commerce Clause arguments. However, Representative Guillory authored a companion resolution, House Concurrent Resolution 134, which memorializes Congress to enact legislation allowing Louisiana to impose more stringent requirements on the storage and transport of hazardous materials by rail car, attempting thereby to solve any constitutional problems with his proposed bill in future legislative sessions. This issue has been addressed several times in prior sessions and will likely come up again in the next general session.

Hazardous Materials/ Right-to-Know

Urging that state law is too stringent, Senator Barham proposed Senate Bill 358, which would have revised reporting requirements under the Right-to-Know Law to conform with federal reporting requirements. Currently, state reporting requirements are more onerous than federal reporting requirements, and this bill would have equated state requirements with federal requirements. The House Environment Committee obviously disagreed with Senator Barham and killed his bill.

On the other hand, both houses agreed to Act 1166, effective July 9, 1999, which provides inventory reporting exemptions for certain gasoline and diesel stations that have complied with all applicable underground storage tank requirements during the previous calendar year. The new law exempts any retail gas station at which gasoline has been stored underground in tanks with no more than a 75,000-gallon capacity and any retail gas station at which diesel fuel has been stored underground in tanks with no more than a 100,000-gallon capacity from the inventory reporting requirements of existing law. This exemption will take effect on March 1, 2001, for the year 2000 reporting requirements. The measure requires, however, that any reports that retail gas stations do submit to DEQ must also be provided to the Department of Public Safety and Corrections, office of state police, and to local emergency planning committees.

Hazardous Materials Transit

Prompted by concerns arising from the transportation of hazardous materials near schools and residential areas, Senator Bean authored Act 829, which provides a hazardous materials transportation route around Shreveport-Bossier City and prohibits the transportation of hazardous materials within 300 yards of an elementary or secondary school in those cities. The measure provides exceptions for carriers making local deliveries or pickups or carriers using the route to reach maintenance or service facilities within the parish. Act 829 became effective August 15, 1999.

Due to difficulties in identifying hazardous materials that are being transported on commercial vessels on the navigable waters of the state, Representative Ansardi introduced House Concurrent Resolution 15, which memorializes federal and state authorities, including the United States Departments of Commerce and Transportation, the National Transportation Safety Board, the Environmental Protection Agency, the Louisiana Departments of Economic Development, Transportation and Development, Environmental Quality, and Public Safety and Corrections, the Governor's Office of Maritime Advisor, and the Offshore Terminal Authority, to require all barges, cargo ships, and commercial vessels transporting hazardous materials on navigable waters of the state to identify such materials by utilizing a placarding system recognized by the United Nations or the North American Placarding System.

Oil & Gas

Disposal of "nonhazardous" oilfield waste, now commonly referred to as "exploration and production" or "E & P" waste, was once again a hot topic of the legislative session. Senate Bill 533 by Senator Robichaux would have prohibited land disposal or treatment of certain "associated wastes" derived from exploration and production of oil and gas except in compliance with Louisiana's Hazardous Waste Control Law and regulations adopted pursuant thereto. Prohibited oilfield wastes would have included drilling, workover, and completion fluids, production pit sludges, production storage tank sludges, production oily sand and solids, natural gas plant processing waste which is or may be commingled with produced formation water, waste from approved salvage oil operators who only receive oil from oil and gas leases, and crude oil spill cleanup waste. As was the fate of similar measures in previous sessions that attempted to place restrictions on the oil and gas industry, this bill was deferred by the Senate Environmental Quality Committee.

Permits

Fearing continued environmental problems by the establishment of a hazardous waste incinerator in South Louisiana, Senator Robichaux and Representative Baudoin sponsored duplicate resolutions that would have requested DEQ to place a moratorium on the issuance, renewal, major modification, or transfer of permits authorizing the incineration of hazardous waste. Senate Concurrent Resolution 13 by Senator Robichaux and House Concurrent Resolution 100 by Representative Baudoin were prompted by DEQ's issuance of a permit to GTX, Inc. in Amelia, Louisiana authorizing the facility, which is located at the old Marine Shale Processors site, to incinerate hazardous waste. The Senate Concurrent Resolution was reported unfavorably by the Senate Environmental Quality Committee and failed an attempt to pull it from the calendar for final passage, and the House Concurrent Resolution died in the House Environment Committee.

On a similar front, Representative Morrell introduced House Concurrent Resolution 4, a measure which would have requested DEQ to impose a five-year moratorium on the construction of new chemical plants in Louisiana. While the resolution died in the House Environment Committee, it was an ex-

ample of what could become a trend of the future to impose more stringent requirements on the permitting of new facilities in the state.

Sewerage Treatment

In an effort to address sewerage problems in the state, Representative Fontenot introduced House Bill 1403, which would have increased the sewage tag fee on individual sewerage treatment systems from $50 to $100, with 30% of the fees collected to be used solely for enforcement of the Sanitary Code and 20% to be remitted to a newly-created Sanitary Code Enforcement for the Indigent Fund, such fund to be used solely for purposes of repairing, maintaining, and replacing individual mechanical sewerage plants for indigent citizens of the state. After a lengthy debate in the Senate Environmental Quality Committee, the bill was deferred due to a reluctance of the members to increase yet another fee imposed on the citizens of Louisiana.

Act 399, effective August 15, 1999, was also aimed at sewerage problems, particularly addressing privately owned sewage treatment facilities. Currently, some communities have been faced with the problem of operators of such facilities failing to maintain them or effectively abandoning them, creating a threat to public health, welfare, or the environment. The measure requires all applicants for or transferees of a permit to discharge effluent from a privately owned sewage treatment facility regulated by the Public Service Commission to provide and maintain a bond or other acceptable financial security, payable to DEQ and conditioned upon satisfactory compliance with Louisiana's Water Control Laws. The new law further authorizes the secretary to issue an order forfeiting such bond or security upon a determination that:

(1) The continued operation or lack thereof of the facility represents a threat to public health, welfare, or the environment.
(2) Reasonable and practical efforts have been made to obtain corrective action by the permittee.
(3) It does not appear that corrective actions can or will be taken.

The proceeds of any forfeiture are to be utilized to address or correct the deficiencies at the facility or to maintain and operate the system.

Solid/Hazardous Waste Disposal

During the 1999 Regular Session, the Louisiana Legislature learned that facilities that collect, transfer, or transport used oil in this state are virtually unregulated by DEQ. In an attempt to address this "problem" of underregulation of such facilities, Senator Wilson Fields introduced a bill, Senate Bill 720, that would have required used oil collection centers, transfer facilities, and transporters to obtain hazardous waste licenses or permits authorizing such facilities to handle used oil. The bill was amended on the Senate Floor to eliminate the requirement that such facilities obtain the more stringent hazardous waste permit, requiring instead that such facilities obtain a newly-created, less onerous permit authorizing their operation. Despite this attempt to make the bill more palatable to all parties, the bill was killed in the House Environment Committee.

However, the provisions of SB 720 were revived by an amendment added to House Bill 1592 by Representative Damico on the Senate Floor. House Bill 1592 was a department-sponsored bill authorizing DEQ to charge participation fees of up to $500 per application for approval of an investigation plan and fees of up to $500 per application for approval of a remedial action plan relative to DEQ's voluntary investigation and remedial action program. As the House bill left the Senate, the provisions of Senate Bill 720 were included by a Senate floor amendment, but the House quickly rejected the Senate amendments, sending the bill to conference committee, where it would have died had the conferees not agreed to a compromise amendment that limited the permit requirement for used oil facilities to any such facilities located only in St. Helena Parish. The end result was Act 1296, which became effective July 12, 1999.

Act 1015 of the 1999 Regular Session, which became effective on July 9, 1999, amends the waste tire program to include therein tires from off-road vehicles. The new law defines, for purposes of the Solid Waste Recycling and Reduction Law, "off-road vehicle" as construction, farming, industrial, mining, and other vehicles not normally operated on the roads of the state, and defines "tire" as a continuous rubber covering encircling the wheel of a motor vehicle or off-road vehicle, thereby including such tires in the program. The measure also amends current law to tie the amount of the new tire fee to the size of the tire, providing that the existing two dollar fee will apply to tires weighing 100 pounds or less, and that a one dollar per 20 pounds fee will apply to tires weighing 100 pounds or less and that a one dollar per 20 pounds fee will apply to tires weighing more than 100 pounds.

Tax Exemptions

Representative Holden would have eliminated the industrial tax exemption for hazardous waste incinerators after December 31, 1999, imposing a significant impact on state revenues over the next ten years. However, House Bill 559, which was a constitutional amendment, died on the House Floor.

Water Supply

Act 1203 (Senate Bill 441 by Senator Cox), in its original form, would have required annual testing of public water supplies for contaminants identified in the federal Safe Drinking Water Act. However, due to the extreme cost of annual testing of all public water supplies in the state, the bill was amended to require annual testing only in certain municipalities, including Lake Charles, Sulphur, Vinton, Westlake, and DeQuincy. Additionally, the bill was amended to rename the Lake Pontchartrain-Catherine Sewage and Water Management District as the Lake Catherine Sewage and Water District, to decrease the membership of the

board of commissioners of the district from eleven to nine members, and to revise the appointments of certain members of the commission. The new law becomes effective on August 15, 1999.

LAPA NEWS

Act No. 1332; effective 07/12/99: Provides that no governmental agency, public official or other person on behalf of any such agency or person is entitled to judicial review of an adjudication proceeding. See La.R.S. 49: 964(A) and 992(B)(3).

Act No. 175; effective 06/09/99; Provides that all filing of papers, including but not limited to applications, forms, reports, returns, statements, and filings of any kind with the state, its agencies, boards and commissions are timely filed if they are delivered or postmarked on or before the due date. If papers are received by mail on the first working day following the due date, there is a rebuttable presumption that they were timely filed. Where the presumption does not apply, proof of the timeliness of mailing can be established by official receipt or certificate from the U.S.Postal Service made at the time of mailing which indicates the date thereof. For the purpose of the act "by mail" applies only to the U.S.Postal Service. The act does not apply to the legislative or judicial branches, adjudications conducted pursuant to Chapter 13-B of Title 49 of the Revised Statutes, the Department of State, the Department of Revenue, or the Department of Elections and Registration. See La.R.S. 1:60.

INSIDE DEQ

DEQ REORGANIZED

As of June 14, 1999, the Louisiana Department of Environmental Quality has a new organizational structure. Act 303 of the 1999 Regular Legislative Session approved the reorganization, which was proposed by the Secretary of DEQ in conjunction with the "business process reengineering" that the agency has undertaken. As originally reported in the Summer 1998 issue of *The Louisiana Environmental Lawyer*, the new organization is based on functions, rather than on environmental media-specific programs. Thus, instead of the current Offices of Water Resources, Waste Services, and Air Quality and Radiation Protection, the proposed organization consists of the offices of Environmental Services (customer assistance and permitting), Environmental Compliance (surveillance and enforcement), Environmental Assessment (remediation, planning, evaluation, and technology), and Management and Finance. The former Office of Legal Affairs and Enforcement has been abolished. The Legal Affairs Division is now within the Office of the Secretary, and the Regulation Development Section is now in the Office of Environmental Assessment.

The high-level organization chart may be viewed on DEQ's internet web site, at *http://www.deq.state.la.us,* or obtained in hard copy from the Environmental Assistance Division Library (telephone: 225-765-0219).

RULE-MAKING UPDATE

Air Quality

AQ183 -Opacity of Smoke Emissions (*La. Register* vol. 23 #4; 4/20/99). Amends LAC 33:III.1105 to change the limitation on the shade or appearance of emissions from Number 1 on the Ringlemann Chart to 20 percent opacity. This rule applies to flares and other similar devices used for burning in connection with pressure valve releases for control over process upsets.

AQ185 - Additional Vapor Pressure Methods (*La. Register* vol. 23 #4; 4/20/99). Amends LAC 33:III.2103 to allow additional methods for the measurement of Reid vapor pressure. The allowed methods are ASTM D323, ASTM D4953, ASTM D5190, and ASTM D5191.

AQ184 - Revisions to Industrial Wastewater Rule (*La. Register* vol. 23 #5; 5/20/99). Amends LAC 33:III.2153. The required control efficiency for a biotreatment unit is increased from 85 percent to 90 percent. Methods are specified to demonstrate control efficiency and proper operation of the biotreatment unit. Junction boxes that have a pump or significant fluctuations in liquid level are now required to be controlled to 90 percent VOC removal. The phrase "point of generation" is replaced with "point of determination." Revisions to this rule are required so that it may be approved by EPA as part of the VOC RACT State Implementation Plan.

AQ186 - Requirements for VOC Storage Vessels (*La. Register* vol. 23 #5; 5/20/99). The wording in LAC 33:III.2103.A and B will be changed from "true vapor pressure" to "maximum true vapor pressure." This will correspond with federal NSPS and NESHAP regulations for volatile organic compound storage vessels. The requirement in LAC 33:III.2113.A.4 that the facility submit the housekeeping plan for the reduction or prevention of volatile organic compound emissions as part of the permit application will be omitted. The plan shall be kept on site, if practical, and shall be submitted to the Air Quality Division upon request. Federal regulations do not require that a housekeeping plan for volatile organic compounds be part of the permit application. It is adequate that the plan be on-site and available to the Air Quality Division upon request.

AQ181 - Update Ambient Air Standards of Toxic Air Pollutants (*La. Register* vol. 23 #7; 7/20/99). (LAC 33:III.5112). This proposed rule updates the ambient air standards (AASs) of 12 toxic air pollutants (TAPs) listed in Table 51.2 in LAC 33:III.5112. This proposed rule decreases the AASs of the following TAPs: acetaldehyde, acetonitrile, biphenyl, carbon disulfide,

chloroethane, cresol (all isomers), 1,4-dichlorobenzene, 2,4-dinitrotoluene, 2,6-dinitrotoluene, ethylene glycol, and manganese. These decreases will be effective January 1, 2002. The proposed rule increases the AAS of 1,1,1-trichlorethane. Also, the proposed rule corrects the Cas number of Glycol Ethers in Table 51.3. The basis and rationale for this proposed rule are to comply with LAC 33:III.5109.B.5, which requires the administrative authority to periodically, but no later than 12 months after December 20, 1991 and every 12 months thereafter, review and update the ambient air standards listed for each toxic air pollutant in Table 51.2. Changes in the data used to calculate ambient air standards indicate that 12 of the standards in Table 51.2 need to be updated to reflect more recently published values.

AQ189 - Organic Solvents (*La. Register* vol. 23 #7; 7/20/99). This proposed rule will clarify the wording of LAC 33:III.2123.B.1. LAC 33:III.2123.D.6 provides exemptions on emissions of volatile organic compounds for surface coating facilities in attainment and nonattainment areas of Louisiana and refers to LAC 33:III.2123.C.1-10 to determine emission limitations. This citation is corrected to include LAC 33:III.2123.C.11, also.

AQ191 - Standards of Performance for New Stationary Sources, Update Incorporation by Reference, 40 CFR Part 60 (LAC 33:III.3003) (*La. Register* vol. 23 #7; 7/20/99). This rule incorporates by reference Title 40 Code of Federal Regulations (CFR) Part 60 as revised July 1, 1998, into LAC 33:III.Chapter 30. Louisiana receives delegation of authority from the U.S. Environmental Protection Agency (EPA) for 40 CFR Part 60, Standards of Performance for New Stationary Sources (NSPS), by incorporating the federal regulations into the LAC. EPA's 105 Grant Objectives require incorporation by reference of new and revised NSPS regulations to be made annually. This rule-making meets that requirement.

AQ193 - NESHAP Update (*La. Register* vol. 23 #8; 8/20/99). Amends LAC 33:III.5116, 5122, and 5311 to incorporate by reference additional federal regulations in 40 CFR Parts 61 and 63, National Emission Standards for Hazardous Air Pollutants (NESHAP). These changes will expedite both the EPA approval process and the state implementation of delegation of authority for the NESHAP program.

Hazardous Waste

HW069 - Miscellaneous Corrections to Hazardous Waste Regulations (*La. Register* vol. 23 #8; 8/20/99). Amends LAC 33:V.517 & 519, regarding permit applications, and LAC 33:V.1109, regarding pre-transport requirements, to require that certain technical data be certified by a Louisiana registered professional engineer. The rule also amends the list, at LAC 33:V.4301.C, of persons exempt from the interim status requirements of Chapter 43. Added to that list are handlers and transporters of certain lamps and antifreeze, newly classified as "universal" hazardous wastes. LAC 33:V.3001 is also being amended to delete the term, "conditionally exempt" in reference to small quantity generators. That term is from federal regulations, and is not recognized by Louisiana's rules.

Office of the Secretary

OS026 - Civil Penalty Assessment (*La. Register* vol. 23 #4; 4/20/99). Adopts LAC 33:I.Chapter 7 to establish a consistent department-wide approach for the assessment of civil penalties, based upon the factors set forth in R.S. 30:2025(E), as mandated by R.S. 30:2050.3. The rule provides a method that begins with the classification of the violation as major, moderate, or minor, as to the violation-specific factors of (1) nature and gravity of the violation, and (2) the degree of risk or impact to human health or property. A matrix based on these classifications provides a penalty range; e.g., a violation classified as a "minor/minor" is assigned a penalty range of $100 -- $500; a "major/major" is assigned a range of $20,000 -- $25,000. This penalty range is then adjusted to account for the five violator-specific factors (e.g., compliance history, gross revenues). Finally, any monetary benefits realized by the violator through the noncompliance are added, as are any response costs incurred by DEQ.

OS029 - Permit Qualifications and Requirements (*La. Register* vol. 23 #4; 4/20/99). Referred to by some as the "bad actor" rule, this rule amends LAC 33:I.1701; III.501, 517, and 5111; V.515; VII.517 and 520; IX.2331, 2387, 2407, 2765, and 2769, to require that applicants for an environmental permit, or for transfer of ownership of a permit, meet certain criteria. These include: (1) having no history of environmental violations that demonstrates an unwillingness or inability to achieve and maintain compliance with the permit for which the application is being made; (2) if required, registering with the Louisiana Secretary of State; (3) owing no outstanding fees or final penalties to DEQ; and (4) if under a compliance schedule, making satisfactory progress toward meeting its conditions. The rule also requires that an applicant provide the department with a list of states where the applicant has similar or identical federal or state environmental permits. This rule is required by the Louisiana Environmental Quality Act, R.S. 30:2014.2.

OS028 - Records of Decision for Judicial Review (*La. Register* vol. 23 #5; 5/20/99). Adopts LAC 33:I.Chapter 20 to provide for the assembly, in a uniform and consistent order, of a record of decision of any DEQ action or decision which is the subject of an appeal to, or other request for judicial review by, a court of competent jurisdiction. This rule is required by R.S. 30:2050.20.

Water Quality

WP031 - Streamlined Procedures for Modifying Approved Pretreatment Programs (*La. Register* vol. 23 #6; 6/20/99). (LAC 33:IX.2715, 2721, and 2735). This rule corrects ty-

pographical errors and omissions made in WP030, which was a final rule in November 1998. These changes will equate Louisiana regulations for streamlined procedures for modifying approved pretreatment programs to the EPA federal regulations.

WP035E – Financial Security for Privately-Owned Sewage Treatment Facilities (*La. Register* vol. 23 #7; 7/20/99). This rule was issued on an emergency basis on July 1, 1999, as necessitated by Act 399 of the 1999 Legislative Session. That act requires the execution of a surety bond (or other acceptable financial security) for all privately-owned sewage treatment facilities that are regulated by the Public Service Commission, prior to receiving discharge authorization. Such security is to be payable to the DEQ, and conditioned upon compliance with the Water Control Law and any applicable permit. The secretary of DEQ may order forfeiture of the security upon determining that the continued operation, or lack thereof, of the facility represents a threat to public health, welfare or the environment because the permittee is unable or unwilling to adequately operate and maintain the facility, or has abandoned it. The proceeds of any forfeiture shall be used by the secretary to correct deficiencies or to maintain and operate the system. Act 399 applies to any issuance, renewal, modification, or transfer of such permits after July 1, 1999, and mandates that the Department establish by rule the acceptable forms of financial security and the amount of financial security required for the various types and sizes of facilities. This rule amends LAC 33:IX.2331, 2381, 2383, 2385, and 2769, and adopts LAC 33:IX.2801-2809, to fulfill that mandate.

WP032 - LPDES Adoption by Reference Update (*La. Register* vol. 23 #8; 8/20/99). This rule will update the incorporation by reference of federal regulations to refer to those regulations published in the July 1998 Code of Federal Regulations, unless otherwise noted. (LAC 33:IX.2301, 2531, and 2533).

Case Law Update

Penalty for Produced Water Discharges Overturned. *In the Matter of Summit Oil and Gas*, La. Dept. of Civil Service, Div. of Admin. Law docket #EQ-WP-98014 (Finnegan, ALJ). Summit Oil and Gas, LLC, operated an oil and gas production facility. Summit was authorized by DEQ permit to discharge produced water to Bayou Ferblanc, but the permit — consistent with federal effluent guidelines — required the cessation of that discharge on or before December 31, 1996. In December of 1996, DEQ amended its rules to allow continued produced water discharges for a limited time, under an approved schedule for terminating the discharges. The agency issued compliance orders in January 1997 to Summit and other permittees believed to be discharging in violation of the permit deadlines, ordering them to submit a proposed schedule, along with other information.

Summit responded to the compliance order with correspondence dated February 7, 1997, seeking approval under the new rule to continue discharging until other disposal methods could be arranged. Summit's letter included the statement that "Respondent discharges approximately 18 bbls/day (average) and 110 bbls/day (maximum) from the tank battery."

In response to this statement, DEQ assessed a civil penalty against Summit for discharging produced water after the December 31, 1996 deadline and without an approved discharge termination schedule.

At the adjudicatory hearing, Summit's consultant testified that, despite the company's statement on February 7, 1997 that "Respondent discharges" produced water daily, in fact the company had stopped discharging by January 1, 1997, and had been storing all produced water in tanks. DEQ offered no evidence to contradict this testimony (other than Respondent's February 7 letter). The ALJ held that DEQ had failed to carry its burden of proving that Respondent had discharged produced water, and dismissed the penalty.

District Court Remands GTX Permit to DEQ. *Coalition for a Good Environment, et al. v. Louisiana Dept. of Environmental Quality*, Docket #458, 998, consolidated with *Terrebonne Parish Consolidated Government and the City of Morgan City v. Louisiana Dept. of Environmental Quality*, Docket #459, 005, 19th J.D.C. (Downing, Judge). In the latest installment of the long-running saga of the hazardous waste incinerator formerly operated by Marine Shale Processors, Inc., a state district court has remanded to DEQ the permit issued to GTX Corporation for storage and incineration of hazardous waste.

GTX Corporation acquired an option to purchase the Amelia, Louisiana facility after Marine Shale Processors, Inc. was ordered to close it by the U. S. EPA, following rulings adverse to the company in a lawsuit filed by EPA and the Louisiana DEQ. DEQ issued a hazardous waste storage and incineration permit under its federally-authorized program in February. Permits for waste water discharges and air emissions were also issued. The plaintiffs, a trio of citizen groups paired with the Parish of Terrebonne and the City of Morgan City, appealed the permits to the district court.

On July 26, 1999, after consideration of the administrative record, DEQ's written reasons for decision, briefs, and oral argument, and without ruling on the validity of the permit, the court remanded the hazardous waste permit to DEQ. The agency was directed to reconsider the following issues: (1) whether the seven-foot, steel-reinforced concrete wall required by the permit, to be installed between the waste handling areas and Bayou Bouef, would be an adequate alternative for the 200-foot buffer zone that would otherwise be required by regulation; (2) whether an EPA risk assessment relied upon by DEQ was reliable, in light of technical criticisms leveled in an *amicus curiae* brief submitted by the Environmental Technology Council (a group of waste-treatment and -disposal industry representatives); and (3) whether DEQ has adequate rules on siting and design of hazardous waste facilities, as well as enforcement of per-

mits for such facilities. The court directed DEQ to accept additional evidence on these issues for fifteen days, and to issue new findings in no more than thirty days.

SCIENCE FOR LAWYERS:
A PRIMER ON NATURALLY OCCURRING RADIOACTIVE MATERIAL

The Environmental Law Section of the Louisiana State Bar Association ("LSBA/ELS") requested that Dr. L. Max Scott (Assistant Professor of Nuclear Science and System Radiation Safety Officer, Louisiana State University) and Robert L. Coco and Warren E. Byrd (Attorneys with Adams and Reese LLP) respond to the following questions in order to provide a general background relative to Naturally Occurring Radioactive Material ("NORM") and a basic understanding to attorneys who might be confronted with legal and factual issues in this arena.

LSBA/ELS: I've heard about naturally occurring radioactive material in the news. What exactly is it?

DR. SCOTT: Naturally occurring radioactive material, commonly referred to as NORM, is radioactive material which occurs throughout the earth's crust or which is produced by cosmic ray interaction with the atmosphere. The more common radioactive elements found in the earth's crust are uranium, thorium, radium and potassium. The most common radioisotopes produced by cosmic ray interactions are hydrogen-3, commonly called tritium, and carbon-14.

Tritium, being an isotope of hydrogen is found in water. Carbon-14 is assimilated, to a small degree, by all living organisms. You may have heard of the technique of "carbon dating" used to determine the age of fossils and other formerly living material. The radioisotope being measured is the carbon-14 accumulated while the material was alive.

LSBA/ELS: I understand that tritium and carbon-14 are continually being produced; however, since the earth is 4 or 5 billion years old, why haven't the other natural radioactive materials decayed away?

DR. SCOTT: That is a good question when you consider that some NORMs have half-lives from a second to a few days. For example, radon-222 has a half-life of 3.8 days. However, uranium-238 has a half-life of Ûreater than 4 billion years; thus, not enough time has elapsed to allow for all the uranium to decay. Due to the size of the nucleus and energy in the nucleus, any element above the atomic number 83 is radioactive and will decay through several elements until it becomes an element with an atomic number less than 84. This process of decay through several elements is called a decay chain.

For example, when a uranium-238 atom decays, it becomes thorium-234; after several more decays the atom will be radium-226, which then decays to radon-222. Thus, those atoms of radon gas which concern people living in certain areas of the country were once uranium-238.

Due to the randomness of the decay process, some of those atoms might have been uranium-238 when the pharaohs built the pyramids, while others may have been uranium-238 when the dinosaurs walked on earth. Radon gas atoms decay through several steps before becoming stable lead.

LSBA/ELS: What is the difference between background radiation and NORM?

DR. SCOTT: NORM is the source of a significant amount of background radiation; however, radiation from any source contributes to background radiation. Some of the more common sources around us, which do not emanate from NORM, are fallout from nuclear weapon tests, cosmic rays from the sun, medical x-ray and diagnostic radioisotopes.

LSBA/ELS: Since NORM has always been here, does it pose a health hazard of any consequence?

DR. SCOTT: In most cases, the NORM exposure levels have not been shown to cause health effects. However, anything done by man to concentrate NORM may result in a health hazard. Radon is a case in point. Humans have changed their living conditions by closing up their houses, and this allows for the buildup of radon-222. When people lived in essentially open shelters, the radon did not have the opportunity to build up.

In addition, our technological treatment of materials from the earth has, in some cases, resulted in the concentration of NORM. This concentrated NORM is called Technologically-Enhanced Natural Radioactive Material (TENR).

Usually, TENR is confined to the waste or by-products of the process; however, in some cases it can be entrapped in the final product.

LSBA/ELS: Could you describe some of the more common sources of TENR?

DR. SCOTT: Probably the source that has received the most publicity and interest is the waste from uranium milling. The uranium mill tailings contain several hundred pico curies ("pCi") of radium-226 per gram of tailings. Lesser amounts of thorium-230 are also present. Before the potential hazards of the material were recognized, it was used in the construction of homes, schools and sidewalks. Extensive reclamation of structures has been undertaken particularly in Grand Junction, Colorado.

The majority of the "tailing piles" are in New Mexico, Colorado and Utah. There is no indication that the "tailing piles" constitute a significant health hazard. There is some concern, though, regarding radon emissions and leaching into ground water.

Another source is phosphogypsum. This by-product, from the product of phosphate fertilizer, is similar to uranium mill tailings except that the radium-226 concentrations are only about 1/10 as much. The radon emanation from phosphogypsum piles is low enough that, most likely, it is not a potential health hazard.

LSBA/ELS: I've seen some articles mentioning a radiation hazard in the oil fields. Can oil be radioactive?

DR. SCOTT: A source of TENR

that has come to light in the past 2 or 3 years is scale and sediment resulting from crude oil production. Due to the geology and production techniques, production fluids (crude oil, saltwater and production water) may contain significant quantities of barium and sulfate. Under favorable chemical and physical conditions, they combine to form highly-insoluble barium sulfate which deposits on the inside of the production piping. We call this scale. It is not uncommon for scale to build up sufficiently so that the flow is restricted and/or its weight causes the piping to separate.

For many years, it had been the practice to clean the scale out of the pipe to prevent reduction in fluid flow or the separation of the pipe. Radium-226 is chemically similar to barium and will follow barium in most chemical reactions. Thus, if there is Radium-226 in the production fluids, it will deposit with the barium sulfate as radium sulfate. Sludge and saltwater pits may also be a source of radium-bearing sediments. The magnitude of this problem has not been defined, but radium-226, well in excess of 10,000 pCi per gram of scale, has been observed. A reasonable potential hazardous could result from such scale.

LSBA/ELS: That certainly seems to merit study. Are there any other sources of TENR?

DR. SCOTT: Other sources which are known to exist, but for which little data have been collected, include sludge from water treatment plants and waste from rare metal refining.

LSBA/ELS: What is an example of TENR that stays with the final product?

DR. SCOTT: In the production of phosphate fertilizer, lead-210, which is in the same decay chain as radium-226, remains in the phosphoric acid used to produce the fertilizer.

LSBA/ELS: Should we worry about the uptake of the lead-210 by edible plants grown in soil fertilized with phosphate fertilizer?

DR. SCOTT: I am not aware of any data that would indicate a need for concern; however, polonium-210, which follows lead-210 in the decay chain, is taken up by tobacco plants. When the tobacco is made into a cigarette and smoked, the polonium-210 is entrained in the tobacco smoke and taken into the smoker's body. It has been estimated that a 2-pack a day smoker receives a dose of 8 Rem per year to his/her bronchial epithelium. For comparison purposes, the dose from living in a house with radon concentrations of 4 pCi/1 of air (the level above which remedial action is recommended by the EPA) has been estimated to be 2 Rem per year.

LSBA/ELS: Would you summarize the hazards from NORM and TENR?

DR. SCOTT: I will not comment on radon since that has been well covered by the EPA and other publications. Although large piles of mill tailing and phosphogypsum exist, they probably do not constitute a significant hazard. As indicated above, though, the material should not be used for home and building construction. Pipe scale may pose a problem in some cases and, in those cases, it should be treated as radioactive waste. Polonium-210 is only one of several carcinogens in tobacco smoke and the hazards associated with smoking are well-publicized.

In general, the public should be aware that there is potential for concern in a variety of areas, and where needed, take appropriate actions as recommended by professional examination of the situation.

LSBA/ELS: Under Louisiana law, where can regulations regarding NORM be found?

MR. BYRD: Regulations regarding NORM can be found in the Environmental Regulatory Code, Title 33, Part XV. Radiation Protection, Chapter 14. Regulation and Licensing of Naturally Occurring Radioactive Material ("NORM") LAC 33:XV.1401 et seq.

LSBA/ELS: Do the NORM regulations apply to the mere presence of a radionuclide or is there an exemption for small concentrations or exposure rates?

MR. COCO: With regard to radium 226 and radium 228 which are some of the more common forms of radionuclides, the exempt levels for NORM, NORM waste and NORM contaminated materials are 5 pico curies per gram above background. For equipment contaminated with radium 226 and radium 228, the exempt level is less than 50 microentgens per hour at any accessible point.

Other exempt levels of radionuclides can be found in the NORM regulations.

LSBA/ELS: What are some of the options available for the treatment or disposal of NORM under the Louisiana NORM regulations?

MR. COCO: 1. Transfer of the NORM waste to a land disposal facility licensed to receive NORM waste.

2. Disposal of non-hazardous oilfield waste ("NOW") containing NORM not exceeding 30 picocuries of radium 226 or radium 228 by transfer for treatment to a NOW commercial facility regulated by the Department of Natural Resources. The NOW facility must be able to treat the NORM material ((5 picocuries per gram above background, screen incoming shipments to verify that the 30 picocurie per gram limit is not exceeded, and approval must be obtained from the Department of Natural Resources for disposal of the NORM waste at the NOW facility.

3. By treatment or disposal methods approved by the Louisiana Department of Environmental Quality. This method must be used to obtain approval for down hole disposal.

LSBA/ELS: What were some of the reasons for promulgation of the NORM regulations?

MR. BYRD: (A) Prevent the building of homes over NORM piles. Radon gas from the NORM decoy chain could enter into these homes.

(B) Establish NORM worker protection guidelines for workers in the Oil and Gas Industry.

(C) Prevent unrestricted transfer of NORM contaminated equipment so that it will not be used to construct playgrounds, worksheds, etc.

CASE LAW

In Eugene v. Marathon Oil Company, 99-61 (La.App. 5 Cir. 5/19/99), to be reported at 735 So.2d 933, two suits were filed as a result of an alleged release by defendant of a cloud of sulphur dioxide. The first suit was filed on June 10, 1997, prior to the effective date of La.C.C.P. Art. 592 (effective date July 1, 1997). The second suit, which was the subject of the opinion, was filed on June 8, 1998. Both suits were filed as class actions. On October 14, 1998, the defendant filed a motion to dismiss the second suit on account of the plaintiffs' failure to move for class certification as required by La.C.C.P. Art. 592. The trial court granted the motion dismissing the class action petition, but allowed the plaintiffs to continue their action individually and consolidated their individual claims with those in the first filed lawsuit. The court found that the trial court did not abuse its discretion in granting defendant's motion to dismiss. The court of appeals noted that plaintiffs made no showing of good cause why the class action petition should not be dismissed. The court disagreed with the proposition that plaintiffs' case should now be governed by the procedural posture of the first lawsuit following consolidation. The court noted, however, that plaintiffs could fall within the class definition in the first filed lawsuit, depending on how or if the class is certified.

In Hampton v. Illinois Central Railroad Company, 98-0430 (La.App. 1 Cir. 4/15/99) 730 So.2d 1091, the court found that the trial court committed manifest error in ordering that several consolidated suits be certified as a class action for trial purposes. The court was first careful to point out that it was not making a determination as to whether or not each individual plaintiff had a cause of action. The court noted that a class action would be a superior procedural vehicle in a case where noxious gas emitted from a single source caused injury to numerous persons, but the court found that manifest error was committed by the trial court in its determination that numerous individuals were injured as a result of the release at issue. The plaintiffs presented the depositions of six proposed class representatives allegedly exposed to the release. These depositions revealed that the plaintiffs had various minor physical and emotional problems which they associated with the release at issue, but their testimony concerning the manifestation of their injuries did not correspond with the time of the release. Plaintiffs presented no expert testimony at the certification hearing. The defendant presented two experts. The first modeled the dispersion of ammonia from the source to the locations identified by the plaintiffs and to the sampling locations identified by the Department of Environmental Quality. The second expert, a toxicologist, concluded that there were no concentrations sufficient to produce adverse health effects. The record further established that only one family in the area was ordered to evacuate and that none of the proposed class representatives sought medical assistance contemporaneously with the incident. The court also noted that law enforcement personnel who were at the scene and locations closer to the leak than the class representatives testified that they experienced no symptoms. The court found that the plaintiffs, on this evidence, failed to establish a sufficiently large number of persons aggrieved by the ammonia leak to establish numerosity sufficient to certify the case as a class action. The court also found that the trial court erred in failing to first determine the geographic boundaries of the proposed class prior to making a determination of the number of persons aggrieved by the ammonia leak.

In Chamberlain v. Belle of New Orleans, 98-1740 (La.App. 4 Cir. 1999) 731 So.2d 1033, the court, affording "wide latitude" to the trial court in making its factual and policy determinations as to the appropriateness of a class, affirmed a trial court's determination that a class action should be maintained by residents against an establishment for exposure to noise levels which exceeded the decimal limits set forth in a city ordinance. The evidence established that every resident was exposed to constant noise levels in excess of the statutory limit for a period of approximately five months. It is unclear whether the decibel level was exceeded at the residents' location or at the source. The court found that the statute provided a basis to show that the specific harm suffered surpassed the level of mere inconvenience that is tolerated under Civil Code Article 667. The court further found the fact that the noise levels had since been abated by modification of the source was immaterial to plaintiffs' claims for damages. The trial court's dismissal of plaintiffs' claims for injunctive relief was not at issue, apparently because repairs to the source had abated the violation.

In Billieson, v. City of New Orleans, 98-1232 (La.App. 4 Cir. 3/3/99) 729 So.2d 146, the court found that the trial court abused its vast discretion in refusing to certify the matter as a class in a case brought by residents of public housing on behalf of children under six years of age who were exposed to lead-based paint. In determining numerosity, the court pointed to reports and surveys indicating that a large number of the dwellings were identified by the health department as "lead hazardous." The court further relied upon a lead survey which indicated that a large number of units contained lead that exceeded HUD's threshold. The court further noted that approximately 235 individual lawsuits had been filed in CDC claiming damages caused by lead poisoning in the defendant's buildings. The court found that the adequacy of representation requirement was met by the testimony of several mothers who indicated that their children had elevated levels of lead in their blood and described their children's behavioral disorders. These behavioral disorders were consistent with lead poisoning, according to plaintiffs'

medical expert. The plaintiffs presented various reports concerning violation of lead based paint standards by the defendant, including notices, reinspection notices and compliance notices sent to the defendant to establish commonality. Expert testimony opposing the class indicated that lead causes many different types of symptoms which may also be caused by things other than lead and that there were sources of lead in and around the residences, especially in the soils, which could also result in lead exposure to the children. Nevertheless, the court found that the trial court had abused its discretion in failing to certify the class. The court found that the common issues related to negligence, breach of contract, breach of law and regulations predominated over the individual issues of causation and damages. The court noted that the most important issue for all of the various plaintiffs was whether or not the housing authority executed its responsibility to abate lead-based paint hazards in the housing projects. The court further found that the substantive law applicable to the case would be advanced by the use of class action procedure. The court noted that the substantive policy underlying the claims made by the plaintiffs was to require the local public housing authority to properly abate lead-based paint hazards and that the policy behind the rules of lead abatement was to protect children from injuries caused by the ingestion of lead. The court found that judicial efficiency would be served, noting that some 235 cases had already been filed and that these numerous claims could be more efficiently handled as a class action. The court, noting that the same judge would otherwise have to decide each of the 235 cases that had been filed, stated that fairness to all parties would be better served by allowing all potential plaintiffs to pool their resources in an effort to prove the common issues, given the fact that the trial court would naturally be colored by the decision it reached in the first case.

In Shintech, matter of, 98-2024 (La.App. 1 Cir. 3/31/99) 734 So.2d 772, the court found that the district court committed legal error in determining that it had jurisdiction to decide whether or not the Department of Environmental Quality erred in refusing to recuse various department officials from the process of determining whether or not an air permit should be granted to the applicant. La. R.S. 30:2050.21(A) provides that "an aggrieved person may appeal devolutively a final permit action, final enforcement action or declaratory ruling only to the Nineteenth Judicial District Court." The court, in *dictum*, stated that a district court had subject matter jurisdiction to entertain an application for supervisory writs incident to its appellate jurisdiction over decisions by LDEQ, but the court found that the district court improperly exercised its supervisory jurisdiction on the facts presented. The court stated that the right to judicial scrutiny [on a supervisory basis] exists when there is a claim of deprivation of a constitutionally protected right or an assertion that an agency's action exceeds constitutional or legislative authority. Judge Shortess concurred only in the result. Judge Shortess opined that a permit action was not a civil matter and that the district court lacked original jurisdiction. Judge Shortess stated that the Department's refusal to recuse an administrative officer is not appealable because it is not a final permit action. Judge Shortess construed the Louisiana constitution to say that supervisory jurisdiction does not exist where a district court has appellate jurisdiction over the decision of an agency unless supervisory jurisdiction is specifically granted in the enabling statute. Finding none in the instant case, Judge Shortess would have found the district court in error on that basis. Judge Shortess opined that no adjudication occurs in the permit approval process until after a permit has been issued or denied and either the applicant or an aggrieved party requests an administrative adjudicatory hearing.

In Crump v. Sabine River Authority, 98-2326 (La. 6/29/99), the court held that the doctrine of continuing tort did not apply to plaintiff's claim filed in excess of one year after the illegal completion of a canal that diverted water from plaintiff's property and caused a creek bed to dry up. The plaintiff contended that the continued existence of the canal, coupled with the defendant's continued refusal to remove the canal, constituted a continuous tort. The court rejected plaintiff's argument. The court found that the theory of continuing tort required that the operating cause of the injury be a continuous one which results in continuous damages. It found that the act of excavating the canal was the operating cause of the injury and was not a continuous illegal act. The court found that the continued presence of the canal and the consequent continued diversion of water from plaintiff's property were simply continuing ill effects arising from the tortuous act, which had been completed in excess of one year prior to the suit. The court found that there must be a continued duty owed by the plaintiff and a continued breach of that duty for a continuing tort to result. The court assumed that the duty to refrain from diverting water away from plaintiff's property may be continuous, but that the breach of that duty was not.

In Baton Rouge Association v. East Baton Rouge Parish School Board, 98-0526 (La.App. 1 Cir. 4/1/99) 729 So.2d 1154, the court held that a petition filed by a punitive class member more than two years after the denial of class certification by the trial court does not relate back to the original petition, despite the fact that the claimant was known to the defendants and presented the same claims as the original plaintiffs.

Contributors

Legislative Update - Christy Barbier LAPA News - Anne Crochet
Inside DEQ - Chris Ratcliff Case Law Update - Joe Bailey
Science for Lawyers - Dr. L. Max Scott, Robert L. Coco and Warren E. Byrd

LOUISIANA STATE BAR ASSOCIATION
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New Orleans, LA 70130

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