THE
LOUISIANA ENVIRONMENTAL LAWYER

Volume 5, Number 4 - Winter 1999

LSU's InterCollege Environmental Co-Operative
By: Dr. Margaret A. Reams

Dr. Margaret A. Reams, Ph.D. is an assistant Professor with the Louisiana State University Institute for Environmental Studies and the Director of the InterCollege Environmental Co-operative.

Recognizing an increasing need for multi-disciplinary approaches to today's environmental problems, LSU has formed the InterCollege Environmental Cooperative. Created by Vice-Chancellor for Research and Graduate Studies Lynn Jelinski, the "Co-op" is a voluntary alliance of faculty from many academic colleges, departments and research units. Its objectives are: 1) to increase interaction among LSU faculty with relevant interests and skills; and 2) to improve the visibility of LSU programs among environmental stakeholders, decision-makers and research sponsors throughout the state, region and nation.

Colleges and research units participating include: the Colleges of Agriculture, Arts and Sciences, Basic Sciences, Education, and Engineering; the Schools of Law, Landscape Architecture, Mass Communication, and Veterinary Medicine; the Center for Coastal, Energy, and Environmental Resources; and the Sea Grant Development and Legal Programs.

The Environmental Cooperative is unique in that it tries to create a large-scale, multi-disciplinary organization for the study of a complex topic area without reorganizing the existing structure of the university. If it works, Vice-Chancellor Jelinski says the InterCollege Cooperative model may be useful for future LSU initiatives focused on other broad subject areas.

The central rationale for the Environmental Cooperative's creation is the awareness that many environmental problems spillover the traditional boundaries of academic disciplines. This recognition has implications for the way universities conduct academic research, design public outreach, and train students for environmental careers. There are several practical reasons why an exclusive reliance upon disciplinary divisions when considering some major environmental issues may be counterproductive.

First, major funding agencies for university research, including the National Science Foundation (NSF), the National Institute of Environmental Health Sciences (NIEHS), and the Environmental Protection Agency (EPA) increasingly call for research proposals requiring multi-disciplinary teams of investigators. Currently, for example, research on the social, economic, and health effects of Superfund sites is being requested. In addition, these organizations are calling for multi-disciplinary research on economic incentives as policy alternatives to traditional regulations and for environmental education for the general public.

Second, there is a consensus among government officials and researchers that environmental problems today are more complex. Thirty years ago, the focus was on improving environmental quality by simply limiting discharges of specific chemicals. Today's environmental problems are categorized as "second" and "third-generation" types. Second generation problems are those that are "one step removed" from their original sources, such as the discharge of a particular pollutant from a drainage pipe or smokestack. These problems are associated with careless disposal of dangerous chemicals and often involve the interaction of multiple contaminants, creating larger threats to ecosystems and human health. Second-generation environmental problems include leaking inactive and abandoned hazardous waste dumps, pollution from military installations, and Superfund sites throughout the nation. Third-generation problems are even further removed from the activities that created them. Examples of "third generation" environmental issues include global warming, ozone deple-

Published by the Section on Environmental Law, Louisiana State Bar Association, as a service to its members.

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

tion, and deforestation.

Third, these "generational" problems are much more difficult to deal with through traditional command-and-control types of regulations wherein the government sets and enforces specific limits on certain pollutants. Often, regulatory agencies face challenges in their efforts to encourage private landowners, manufacturing firms, and the general public to "do the right thing." Effective public policy responses to these issues often will require an understanding of incentives and behaviors that goes well beyond the exclusive domain of any one academic discipline.

Further, environmental researchers and educators increasingly conclude that courts, legislative bodies, and executive agencies -- the traditional institutions that have formulated environmental policies -- are not capable of solving the dominant sources of many of today's environmental conflicts. Thus, there is a important opportunity for LSU environmental researchers trained in the law, and social and natural sciences to help develop and test new techniques for environmental conflict resolution.

LSU's Environmental Co-op was inspired by an extensive review and analysis of environmental programs at LSU by a university-wide task force on the environment, chaired by Patrick Taylor Professor of Chemistry, Barry Dellinger. Among the principal findings of the task force were that faculty needed a vehicle to encourage collaborative relationships that span traditional college and disciplinary boundaries to enhance environmental research, teaching and public outreach.

The Cooperative is envisioned as a "virtual" school of the environment, yielding many of the benefits of a formal school or college without the potential disadvantages associated with creating an additional level of bureaucracy or enduring the disruption of a major reorganization. In addition, the Co-op hopes to create opportunities for graduate students from various Ph.D.-granting departments to pursue environmental interests through several new environmental minors. These minors areas of graduate study would most likely include, environmental health, environmental sciences, environmental policy and planning, and environmental technology. A "minor" in one of these areas would better prepare students for careers in environmental consulting, government, industry, or academia.

Another goal of the Environmental Cooperative is to enable LSU faculty to conduct more meaningful community outreach and apply the expertise of LSU to real-world environmental problems. To that end, the Cooperative will sponsor community outreach and education projects over the next year, including a multi-disciplinary environmental conference during the spring. The topic of the conference will be selected in the next few weeks by the organization's steering committee in consultation with the external advisory board. The goal of the conference is to showcase some of the environmental work being conducted at LSU for environmental stakeholders around the state and region. Possible topics suggested for the conference include: environmental problems facing municipalities; wetlands loss; environmental justice; and selected water quality issues.

To date, about 100 faculty from throughout the university have joined the Cooperative. Their names and areas of expertise will be posted on a new web site in the next few weeks. The viewer of the web site will be able to search the list of participants by name, department or unit, specific key terms, or by broader environmental topic areas. The data base of environmental experts will help LSU researchers identify colleagues with whom they may conduct research, prepare research proposals for funding, and write academic papers for publication. The data base will also enable groups and individuals outside the university to identify specific faculty members and units with the environmental expertise they may need.

In the face of increasingly complex environmental concerns, many of which do not conform to traditional academic boundaries, the university must be able to harness its expertise to address these real-world public problems. Only time will tell if the InterCollege Environmental Cooperative will enable LSU to play an enhanced role in finding solutions to these complicated, second and third generation environmental problems, but the euthusiasm of the initial faculty participants is an optimistic sign for this innovative, unique, cooperative initiative.

HARMON INDUSTRIES, INC. V. BROWNER: FEDERAL COURTS LIMIT EPA "OVERFILING" UNDER RCRA

By: Estaban Herrera, Jr.

Estaban Herrera, Jr. is a partner in the law firm of Kean, Miller, Hawthorne, D'Armond, McCowan & Jarman, L.L.P. Estaban practices in the environmental regulatory and toxic tort areas.

The United States Environmental Protection Agency ("EPA") is no longer able to "overfile" an enforcement action under the Resource Conservation and Recovery Act ("RCRA"), at least for now. Overfiling can be described as the practice of EPA instituting an enforcement action against a person who is already subject to or has resolved a similar action by the state on the same grounds. Affirming a district court decision, on September 16, 1999, the United States Eighth Circuit Court of Appeal determined that EPA's civil and administrative enforcement authority under RCRA is substantially limited in RCRA-delegated states.[1] The decisions by these courts raise serious questions about EPA's ability to "overfile" under other environmental statutes. The purpose of this article is to review the *Harmon Industries, Inc. v. Browner* decision and some of its potential effects.

THE HARMON CASE

Factual and Procedural Background

From 1973 until December 1987, employees of Harmon Industries, Inc. ("Harmon") used organic solvents to clean equipment being assembled at Harmon's facility in Grain Valley, Missouri. Harmon employees would collect any remaining solvent residue in 3 to 5 gallon containers. Every few weeks, a Harmon employee would dispose of the solvent residues by throwing them out the back door of the assembly plant onto the ground. Harmon established that prior to November 1987, its management was unaware of this disposal practice.

During a routine safety inspection in November 1987, Harmon's personnel manager learned of the solvent disposal practice. Immediately thereafter, Harmon's management stopped the practice and hired a consultant to investigate any potential soil and/or groundwater contamination at the facility caused by the practice. In May, 1988, the consultant determined that various solvent constituents were present in the soil. On June 27, 1988, Harmon met with the Missouri Department of Natural Resources ("MDNR") to report the disposal practice and the results of Harmon's investigation. After that meeting, Harmon implemented a cleanup plan with oversight by MDNR. In September, 1991, and after several months of negotiations, Harmon received a first draft of a consent decree from Missouri's Attorney General's Office. The consent decree was ultimately signed by Harmon in November 1992 and by the MDNR in January 1993. On March 5, 1993, Missouri filed suit in state court against Harmon, alleging various violations associated with its solvent disposal practice and requesting that the proposed consent decree be entered by the court. The proposed consent decree waived all penalties provided Harmon complied with its terms. The decree was approved by the state court judge that same day.

However, prior to approval of the state consent decree, in May and October 1990, EPA Region VII sent letters to the MDNR requesting that the state penalize Harmon under the state's RCRA-approved hazardous waste program for the solvent disposal practice. MDNR never did. On September 30, 1991, EPA issued an administrative complaint against Harmon under RCRA initially seeking over $2.7 million in penalties. After holding administrative hearings, on December 12, 1994, an EPA administrative law judge assessed a $586,716 penalty against Harmon. On March 24, 1997, EPA's Environmental Appeals Board affirmed the ALJ's decision.

On August 25, 1998, and pursuant to Harmon's appeal, the district court reversed EPA's penalty assessment, holding that EPA could not institute the action in question under RCRA and that EPA's action was barred by res judicata.[2] On September 16, 1999, the Eighth Circuit affirmed.[3]

EPA's Ability to Overfile Under RCRA

The courts in *Harmon* held that EPA can institute an enforcement action in a RCRA- approved state only in two circumstances. First, if EPA believes the state's enforcement action against an alleged violator is inadequate, EPA can initiate a separate enforcement action only after withdrawing the state's authorization.[4] Second, EPA can initiate an enforcement action if the state fails to act against the violator, provided EPA notifies the state beforehand.[5] Absent these two circumstances, the courts concluded that RCRA prohibits EPA from initiating an enforcement action in a RCRA-approved state.

In so limiting EPA's enforcement authority, the courts in *Harmon* relied primarily on four sections of RCRA, namely 42 U.S.C. §§ 6926(b), 6926(d), 6928(a)(1) and 6928(a)(2). Section 6926(b) is the state authorization provision that provides such authorized state program operates "in lieu of" the federal program. Section 6926(b) also gives EPA the power to withdraw authorization.[6] Section 6926(d) states that "any action" taken by an authorized state "shall have the same force and effect" as action taken by EPA under RCRA.[7] Section 6928(a)(1) allows EPA to issue an administrative order or institute a civil action against a person alleged to be in violation of RCRA, "except as provided" in Section 6928(a)(2). Section 6928(a)(2) requires EPA to provide notice to the state at issue prior to instituting the actions allowed in Section 6928(a)(1) if the violation occurs in a RCRA-approved state.

In *Harmon*, EPA argued that it had the ability under Section 6928(a)(2) to overfile MDNR's enforcement action because that provision only required that EPA give notice to Missouri prior to initiating the action, which EPA did. EPA also argued that Section 6926 does not modify or alter the language of Section 6928(a)(1) or (2).

The Eighth Circuit rejected EPA's argument, finding that the statutory provisions at issue, when interpreted together and in context with the entire act, "manifests a Congressional intent to give the EPA a secondary enforcement right in those cases where a state has been authorized to act that is triggered only after state authorization is rescinded or if the state fails to initiate an enforcement action."[8] The Eighth Circuit rejected EPA's interpretation of the notice provision in Section 6928(a)(2), finding that that section instead "reinforces the primacy of a state's enforcement rights under RCRA" and "operates as a means to allow a state the first chance opportunity to initiate the statutorily permitted enforcement action."[9] The Eighth Circuit found that by this notice requirement, Congress gave authorized states "the lead role in enforcement under RCRA."[10]

The Eighth Circuit also found that the "same force and effect" language of Section 6926(d) supported the conclusion that authorized states have lead enforcement authority, rejecting EPA's argument that the language applied only to the effects of permits issued by authorized states, not state enforcement.[11] As mentioned above, Section 6926(d) states that "any action" taken by an authorized state "shall have the same force and effect" as action taken by EPA under RCRA.[12] The Eighth Circuit said the meaning of the phrase "any action" includes enforcement action taken by an authorized state. The court further said "it would be incongruous to conclude that RCRA authorizes states to implement and administer a hazardous waste program 'in lieu of' the federal

program where only the issuance of permits is accorded the same force and effect as an action taken by the federal government."[13]

The courts also found RCRA's legislative history to be supportive of the conclusions they reached about EPA's ability to overfile, citing several congressional reports. In addition, the Eighth Circuit found EPA's interpretation of RCRA to be inconsistent with "principles of comity and federalism so clearly embedded in the text and history" of RCRA.[14] The district court characterized EPA's interpretation more poignantly, calling it a "schizophrenic approach" that would result "in uncertainty in the public mind."[15]

Res Judicata Effects of the State Enforcement Action

In addition to finding that EPA was limited in its ability to initiate enforcement actions in authorized states, the courts also concluded that EPA's action in this case was barred by principles of res judicata.

Initially, the Eighth Circuit noted that it would be required to give preclusive effects to the state court consent decree between MDNR and Harmon if Missouri law would give the decree res judicata effects.[16] Citing a 1996 Missouri Supreme Court decision, the Eighth Circuit said Missouri's res judicata law requires "(1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of the persons and parties to the action; and (4) identity of the quality of the person for or against whom the claim is made."[17] The Eighth Circuit found all but the issue of whether the parties were identical to be undisputed.

The Eighth Circuit said that for purposes of res judicata, "a party is identical when it is the same party that litigated a prior suit or when a new party is in privity with a party that litigated a prior suit."[18] The Court said "privity exists when two parties to two separate suits have 'a close relationship bordering on near identity.'"[19] The court said that because MDNR implements its state hazardous waste program "in lieu" of the federal RCRA program, and because any action taken by MDNR has "the same force and effect" as action taken by EPA under RCRA, both MDNR and EPA "stand in the same relationship to one another."[20]

EPA argued that it and the State of Missouri have enforcement interests that are "sufficiently distinct", and therefore the two must be found to be different parties.[21] The Eighth Circuit rejected this argument, finding that "the subjective interests of the individual parties" does not determine whether the two parties are in privity.[22] The court said that "privity under Missouri law is satisfied when the two parties represent the same legal right."[23] The court found that "the State of Missouri advanced the same legal right under the statute as the EPA did in its administrative action."[24]

The Eighth Circuit also rejected EPA's argument that sovereign immunity precluded the application of res judicata to EPA's enforcement action because EPA was not an actual party to the state proceeding, finding the argument precluded by the United States Supreme Court's decision in *Montana v. United States*.[25] The Eighth Circuit said of *Montana*:

In Montana, the Supreme Court held that "one who prosecutes or defends a suit in the name of another to establish and protect is own right is as much bound as he would be if he had been a party to the record . . . The Court found in Montana that although the United States was not a party to a prior suit, it "had a sufficient laboring oar in the conduct of the state court litigation to actuate principles of estoppel."[26]

Applying these principles to the case, the Eighth Circuit found that for purposes of RCRA cases, the "laboring oar" referred to in *Montana* occurs at the authorization stage where "the federal government authorizes the state to act in its place."[27] The court said that "after authorization, the state 'prosecutes' enforcement actions 'in lieu of' the federal government and operates as if it were the EPA."[28] Accordingly, the court said EPA was bound by the consent decree.

SOME POTENTIAL RAMIFICATIONS OF HARMON

Harmon raises questions about EPA ability to overfile under other environmental statutes. For example, the Safe Drinking Water Act's Underground Injection Control ("UIC")[29] program is similar to RCRA in that a state is delegated the program and has "primary enforcement responsibility."[30] The *Harmon* analysis may preclude EPA from overfiling a state enforcement action under an EPA-approved state UIC program. However, it is unclear whether *Harmon* would preclude EPA from overfilling with respect to statutory schemes that are not similar to RCRA's, specifically those that do not contain RCRA's "in lieu of" and "same force and effect" language.

Another question raised by *Harmon* in Louisiana is whether Louisiana's res judicata law would have the same effects as the Missouri law interpreted by the court in *Harmon*, so as to bar a subsequent EPA action. In Louisiana, the res judicata and collateral estoppel principles of La. R.S. 13:4231 apply if there is "identity of the parties."[31] Louisiana courts have said "identity of parties does not mean the parties must be the same physical or material parties, but they must appear in the suit in the same quality or capacity. . . The only requirement is that the parties be the same 'in the legal sense of the word.'"[32]

Louisiana's Department of Environmental Quality ("DEQ") has been delegated the basic RCRA program which is enforced by DEQ "in lieu of" the federal program. Furthermore, DEQ's enforcement actions have the "same force and effect" in Louisiana as if they were taken by EPA. Arguably, therefore, a final enforcement action by DEQ under its hazardous waste program would bar any further actions by EPA under RCRA because in such circumstances DEQ and EPA are the same parties "in the legal sense of the word."

CONCLUSION

Harmon signifies a significant change in how states and EPA enforce federal environmental laws in areas where states have been delegated authority to act for the EPA or where state programs have been approved by EPA. It remains to be seen how EPA will react to *Harmon* in other circumstances and how far *Harmon* will be applied to limit EPA action.

Citations

[1] See *Harmon Industries, Inc. v. Browner,* 1999 WL 718443, Docket No. 98 3775 (8th Cir. 1999); *Harmon Industries, Inc. v. Browner,* 19 F. Supp. 3d 988 (W.D. Mo. 1998).

[2] See *Harmon Industries, Inc. v. Browner,* 19 F. Supp. 3d 988 (W.D. Mo. 1998).

[3] At the time of preparing this article, EPA requested and was granted additional time to file a petition for rehearing en banc.

[4] 1999 WL 718443, at p. 6. This option could be unavailable to EPA under res judicata principles if the state's enforcement action becomes final prior to the state authorization being withdrawn. Indeed, 40 C.F.R. §271.23(c) provides that "withdrawal of authorization . . . does [not] affect the validity of actions by the State prior to withdrawal."

[5] *Id.*

[6] Section 6926(b) requires that EPA give notice to the state at least ninety days prior to withdrawing authorization. 42 U.S.C. §6926(b). The statute also requires that EPA hold a public hearing. Id. However, the EPA regulations contemplate a withdrawal process that is much longer than 90 days. Under 40 C.F.R. §271.23(b), the EPA Administrator must issue an order initiating withdrawal proceedings. The state has 30 days to answer the allegations in the order. The order will establish a date for an evidentiary hearing. The presiding officer to that hearing has to issue a proposed decision, give the parties 30 days to reply, and then issue a recommended decision. Once the record and the recommended decision are filed with the EPA Administrator, the parties have 20 days to file exceptions. The EPA administrator then has 60 days to make a decision. If he/she decides that the State has not administered the program in conformity with RCRA, he/she must list the deficiencies and give the state a "reasonable time," not to exceed 90 days, to take corrective action. If the state fails to do so, then the Administrator can issue a order withdrawing state approval. That order is subject to judicial review.

[7] 42 U.S.C. §6926(d).

[8] 1999 WL 718443, at p. 4.

[9] *Id.*

[10] *Id.*

[11] 1999 WL 718443, at p. 4.

[12] 42 U.S.C. §6926(d).

[13] 1999 WL 718443, at p. 5.

[14] Id., at p. 7.

[15] 19 F.Supp.2d at p. 996.

[16] 1999 WL 718443, at p.7.

[17] *Id.*

[18] *Id.*, at p. 8, citing *United States v. Gourley*, 43 F.3d 1188, 1197 (8th Cir. 1994), *cert. denied*, 516 U.S. 817, 116 S.Ct. 73, 133 L.Ed.2d 33 (1995).

[19] *Id.*

[20] *Id.*

[21] 1999 WL 718443, at p. 8.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] 440 U.S. 147, 99 S. Ct. 970, 59 L.Ed. 2d 210 (1979).

[26] 1999 WL 718443, at p.9 (citations omitted). It should be noted that the Supreme Court in *Montana* said this principal "falls under the rubric of collateral estoppel rather than res judicata because the latter doctrine presupposes identity between causes of action." 99 S.Ct. at 974, 440 U.S. at 154.

[27] *Id.*

[28] *Id.*

[29] 42 U.S.C. §300h-1, et seq.

[30] 42 U.S.C. §300h-1(b)(3).

[31] La. R.S. 13:4231; *Duffy v. SiSith Corp.*, 726 So.2d 438, 443 (La. App. 4th Cir. 1999), *writ denied*, 741 So.2d 14; *Morris V. Haas*, 659 So.2d 804, 810 (La. App. 5th Cir. 1995), *writ denied*, 664 So.2d 441.

[32] *Duffy, supra*, 726 So.2d at p. 443 (citations omitted).

Inside DEQ

By: Chris Ratcliff

RULE-MAKING UPDATE

Air Quality

AQ190 - Emissions Reduction Credits Banking (*La. Register* vol. 23 #9; 9/20/99). Amends LAC 33:III.603, 605, 607, 613, 615, and 621, to accommodate ozone nonattainment classifications resulting from the new ozone national ambient air quality standards (NAAQS), which were promulgated by EPA on July 18, 1998. It also corrects a typographical error for the date on which emission credits begin their 10-year life and clarifies the use for emission credits having a 10-year life.

AQ192 - Graphic Arts (Printing) by Rotogravure and Flexographic Processes (*La. Register* vol. 23 #10; 10/20/99). Makes a grammatical correction to LAC 33:III.2143.A.1 and clarifies the applicability exemption in LAC 33:III.2143.B regarding the control of volatile organic compounds for the rotogravure and flexographic processes.

AQ194 - Record Keeping Requirements (*La. Register* vol. 23 #10; 10/20/99). **(LAC 33:III.3003, 5116, and 5122)** This rule amends record keeping requirements found in the Standards of Performance for New Stationary Sources and in the National Emission Standards for Hazardous Air Pollutants. The rule incorporates revisions to 40 CFR Part 60, subparts A, D, Da, Db, Dc, Ea, J, CC, NN, XX, AAA, and SSS; Part 61, subparts A, L, and N; and Part 63, subpart A as published in the Federal Register, February 12, 1999, volume 64, number 29, pages 7457 and 7463-7467. Also, revisions are made to clarify the date of the revised standards incorporated by reference in Chapters 30 and 51.

Hazardous Waste

HW062 - Land Disposal of Prohibited Waste by Deep Well Injection (*La. Register* vol. 23 #10; 10/20/99). **(LAC 33:V.517, 1529, 2201 - 2269, 2273, 4357, and 5120)** Implements La. R.S. 30:2193(G), which provides that if land disposal by deep well injection has been exempted by the US EPA from the land disposal prohibitions; a permit has been issued for the injection well by the Louisiana Office of Conservation; and the secretary of the

Department of Environmental Quality has made a determination that there are no economically reasonable and environmentally sound alternatives to the injection of such hazardous waste, then the land disposal restrictions (La. R.S. 30:2193) do not apply to the disposal of the hazardous waste by injection well. This rule provides requirements for petitions for determinations under La. R.S. 30:2193(G); administrative procedures and fees for processing such petitions; and termination of determinations that no alternatives to injection exist.

HW067 - 90-Day Tank Rule (*La. Register* vol. 23 #10; 10/20/99). **(LAC 33:V.1909.D)** Clarifies Louisiana's hazardous waste regulations on 90-day tanks, and reduces the risk of accidental releases of hazardous waste associated with opening and inspecting the tanks every 90 days.

HW070 - Commercial Hazardous Waste Incinerators - (*La. Register* vol. 23 #11; 11/20/99).**(LAC 33:V.529)** Clarifies which DEQ regulations apply to commercial hazardous waste incinerators. The rule requires that applications for new permits and substantial modifications of existing permits for commercial hazardous waste incinerators comply with certain existing provisions of the Hazardous Waste Regulations (LAC 33:Part V), Air Quality Regulations (LAC 33:Part III), and Water Quality Regulations (LAC 33:Part IX). The rule was adopted in response to a petition for rulemaking requesting that rules be adopted to comply with R.S. 30:2011(D)(24).

Inactive and Abandoned Sites

IA002 - Inactive and Abandoned Sites (*La. Register* vol. 23 #11; 11/20/99) **(LAC 33:VI.Chapters 1-9)** Provides the framework for the discovery, investigation, and remediation of inactive and abandoned hazardous waste or hazardous substance contaminated sites. It also provides for the limitation of liability to prospective landowners of contaminated sites. This rule implements R.S. 30:2226(H)(1), R.S. 30:2271 et seq., and R.S. 30:2285 et seq., which require the department to promulgate regulations for notification to the department of hazardous substance discharge and disposals, to identify locations at which a discharge or disposal of a hazardous substance has occurred in the past, to provide a mechanism to the department to insure that the costs of remedial actions are borne by those who contributed to the discharge or disposal, to allow the department to respond as quickly as possible to discharges while retaining the right to institute legal actions against those responsible for remedial costs, to provide for the opportunity for public meeting and, if requested, a public comment period, and to provide for the return of commercial and industrial sites to productive use after remediation by the limitation of liability to landowners who voluntarily clean up contaminated sites.

Office of the Secretary

OS032 - Regulatory Innovations Program (*La. Register* vol. 23 #11; 11/20/99). **(LAC 33:I.Chapter 37)** Establishes the procedures for participation in the Louisiana Environmental Regulatory Innovations Program (LERIP), as well as an Excellence and Leadership Program. The rule contains application requirements, department review conditions, a priority system for ranking demonstration projects, project amendment and renewal procedures, and project termination. Facility owners and operators, in conjunction with stakeholders, are encouraged to develop and implement effective pollution prevention and/or pollution reduction strategies to achieve levels below regulatorily-required levels. R.S. 30:2566 requires the department to promulgate regulations for the administration of the Louisiana Environmental Regulatory Innovations Programs, including the Excellence and Leadership Program.

Water Quality

WP035E1 – Financial Security for Privately-Owned Sewage Treatment Facilities (*La. Register* vol. 23 #11; 11/20/99). This rule reissues WP035E, which 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.

CASE LAW UPDATE

Sewage Operator's Appeal Goes Down the Drain. *In the Matter of Aucoin's Sewer Utility Service,* La. Dept. of Civil Service, Div. of Admin. Law docket #s EQ-WP-97034, EQWP-97049, EQ-WP-97050, EQ-WP-97051, EQ-WP-97052; 8/24/99 (Perrault, ALJ). Respondent Aucoin operates neighborhood sewage treatment facilities. The discharge of waste water from these facilities is regulated under permits issued by DEQ. DEQ issued compliance orders to Aucoin, citing inadequate operation and maintenance, violations of effluent limitations, and failures to sample waste water and report the results to DEQ as required by the permits, at four of Aucoin's facilities. The compliance orders also required Aucoin to correct the violations.

Aucoin did not contest the compliance orders, but the violations continued. DEQ assessed civil penalties totaling $139,180, and Aucoin requested an administrative hearing. Aucoin stipulated to DEQ's factual allegations, but contested the amount of the penalty. Aucoin argued that substantial improvements had been made in the operation and maintenance of the facilities, as well as in the quality of the effluent, but that the user fee rates allowed by the Louisiana Public Service Commission were insufficient to allow necessary capital improvements.

Held: DEQ's penalty assessments are upheld.

Penalty for Asbestos Handling is Abated. *In the Matter of Superior Service, Inc.,* La. Dept. of Civil Service, Div. of Admin. Law docket #s EQ-AP-99002; 8/27/99 (Perrault, ALJ). Superior Service, Inc. contracted with Sterling Sugars, Inc. to provide labor and materials to refurbish two boilers at Sterling's mill. After inspecting the boiler room, DEQ cited Superior — as an "operator of a ... renovation activity" — with: (1) failing to inspect the area for the presence of asbestos prior to the commencement of the renovation; (2) failing to remove all regulated asbestoscontaining material ("RACM") from the facility before beginning any activity that would break up, dislodge, or disturb the material; (3) failing to wet all exposed RACM; (4) failing to ensure that all RACM remained wet until collected and contained; and (5) failing to seal all asbestos-containing waste in containers for storage prior to disposal; all in violation of LAC 33:III.5151. DEQ assessed a civil penalty of $6,000 against Superior.

Superior did not contest the factual allegations, but argued that it is not an "operator" within the meaning of LAC 33:III.5151.B, and therefore not subject to the requirements of that rule. The ALJ rejected this argument, finding that Superior was in control of all aspects of the boiler refurbishing job.

Superior also argued that the application of LAC 33:III.5151.B to Superior is unconstitutional, because that regulatory definition is overly broad and vague. Superior pointed to the fact that the definition of "operator" includes any person who, among other things, "operates" the facility being renovated. The ALJ also rejected this argument, finding that since the definition also includes any person who "controls or supervises" the renovation, Superior was given adequate notice of the applicability of the regulatory requirements to it.

Despite concluding that Superior was legally responsible for the violations, the ALJ found that DEQ had not properly assessed the civil penalty. In its written penalty justification, DEQ addressed "the nature and gravity of the violation," as required by La. R.S. 30:2025(E)(3)(a)(ii), by referring to the health risks associated with asbestos exposure, and to the fact that the violations "could have resulted in the release of asbestos fibers to the atmosphere where they could be inhaled or ingested." The language used is The ALJ concluded that this statement reflected consideration of the nature, but not the gravity, of the violation. Case-specific facts must be discussed to justify the penalty, according to the ALJ. Similarly, DEQ addressed the "degree of risk to human health or property caused by the violation," as required by La. R.S. 30:2025(E)(3)(a)(vi), by discussing in greater detail the specific illnesses attributable to the improper handling of asbestos. Again, the ALJ found that DEQ had failed to describe the risks of the violation in this case.

DEQ also failed to properly address the monetary benefits of Superior's noncompliance, according to the ALJ. DEQ wrote that Superior benefitted monetarily by avoiding the expense of conducting the required asbestos inspection. The ALJ found that Superior could have profited by performing an inspection and charging Sterling Sugars, Inc. for that service. DEQ's analysis was also deficient because it failed to quantify the alleged monetary benefit, in the ALJ's opinion.

Lastly, the ALJ found that DEQ did not adequately explain its analysis of whether Superior attempted to mitigate the damages caused by its violations. DEQ failed to clearly state what damages were caused, nor did it quantify any reduction in the penalty amount attributable to mitigation, according to the ALJ.

Because he felt that the penalty was not assessed in compliance with La. R.S. 30:2025(E), the ALJ set it aside. He declined to remand the matter to DEQ for further consideration or explanation, stating that to do so would be unfair to Superior, since the company "may have already spent close to or above $6,000 defending itself."

Tanker Owner's Defense Comes Up

Empty. *Matter of S & A Plus, Inc.*, DAL #99-1549EQ; 9/16/99 (Finnegan, ALJ). DEQ assessed a civil penalty of $1,500 against the corporate owner/operator of a gasoline tanker truck for (1) unloading gasoline into storage tanks without using the facility's vapor recovery system, in violation of the Louisiana Air Quality Regulations, LAC 33:III.905, and (2) allowing gasoline to leak and accumulate near the tank, in violation of LAC 33:III.2131.B.1. When the DEQ inspector briefly left the truck to go speak to the station manager, the truck driver connected the vapor recovery system properly, and then tried to convince the inspector that his previous observations were incorrect.

The respondent did not dispute DEQ's factual allegations, but argued that the penalty was excessive. Respondent offered evidence that it regularly trained its drivers on compliance with the regulations, and took other measures to ensure compliance. It also fired the driver involved in the incident at issue.

The administrative law judge held that the driver's conduct, including his attempt to conceal the violation, was imputable to the Respondent corporation, and found that the $1,500 penalty was not excessive under the circumstances.

ALJ Trashes DEQ Compliance Order. *Matter of Clyde Harris Unauthorized Dump,* DAL #EQ-SC-97063; 9/16/99 (Perrault, ALJ). DEQ issued a compliance order to Respondent, alleging that he was operating an unauthorized solid waste dump, and ordering him to clean up and close the site. Respondent argued that he is not responsible for the clean-up and closure of the site, since the waste was allegedly dumped by third parties without his knowledge or consent.

DEQ and Respondent stipulated that (1) the property was used as a dump by the City of Eunice for an undetermined time beginning ten years before Respondent's purchase of the tract; (2) at the time of Respondent's purchase of the property, solid waste was already present there; and (3) no permit or other authorization has ever been issued for the disposal of solid waste at the site.

Respondent relied upon La. R.S. 30:2156, which provides that "no landowner shall be held responsible, by an order of the secretary or the courts, for removal or the cost of removal of solid waste which has been disposed of on his land by the act of a third party without his knowledge or consent ...."

DEQ argued that the evidence showed that Respondent knew or should have known that the waste was present at the time of purchase, and that he did not do enough to prevent dumping by third parties subsequent to the purchase. Therefore, he was not covered by La. R.S. 30:2156.

The ALJ rejected DEQ's arguments. The ALJ found as fact that much of the waste present at the site at the time of purchase was not visible, being submerged in a pond, and that Respondent could not determine at that time that the City had used the property as a dump. He apparently found no significance in the testimony by Respondent that Respondent's uncle had been a bulldozer operator at the City dump, and had brought Respondent and the prior property owner together for negotiations on the possible sale of the property to Respondent.

The ALJ also found that Respondent had "tried everything he could afford," including erecting a "no dumping" sign and a ten-foot gate, and digging ditches, to stop the continued dumping at the site. These efforts, while reasonable, were thwarted by the City's installation of a street sign at Respondent's driveway proclaiming it "Dump Lane," without Respondent's knowledge or consent.

The ALJ ordered the compliance order recalled and vacated.

Landfill Must Close. *Matter of Ricca Construction and Demolition Debris Landfill,* DAL #990645-EQ; 9/3/99 (Perrault, ALJ). The Respondent, owner of a construction and demolition debris landfill, appealed an Order to Close issued by DEQ. That order was the culmination of more than five years of efforts by the DEQ to enforce a requirement in the Solid Waste Regulations, at LAC 33:VII.511, that Type III solid waste landfills must obtain permits to continue operation.

The permit requirement was promulgated in February of 1993. The following month, DEQ notified Respondent that it was subject to the new rule. In August, 1995, DEQ issued an Order to Upgrade, which included an order that Respondent submit a permit application. In February of 1996, Respondent received a reminder from DEQ and a 30-day extension of the permit deadline. During that 30-day period, the Respondent company's owner died.

Having received no application or any communication from Respondent, DEQ issued an Order to Close in June of 1998. This order was amended twice, then rescinded, and a new Order to Close was issued in October, 1998.

Respondent argued that the Order to Close should be dismissed because: (1) Respondent asked for assistance but DEQ ignored its letters; (2) The company owner died during the application period; (3) DEQ confused Respondent with technical errors in the initial Order to Close; and (4) DEQ accepted fees paid by Respondent in 1997 and 1998. The ALJ rejected each of these arguments, finding that "Respondent was given detailed instructions for the application and ample opportunity to apply for a permit." He upheld the order.

Announcement

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.

Contributors

Inside DEQ- Chris Ratcliff
LSU's Env. Cooperative- Dr. Margaret Reams
Harmon Industries- Estaban Herrera, Jr.

LOUISIANA STATE BAR ASSOCIATION
601 St. Charles Avenue
New Orleans, LA 70130

RETURN POSTAGE GUARANTEED
If undeliverable, please return to sender

Non-Profit Org.
U.S. Postage
PAID
New Orleans, LA
Permit No. 201