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Federal court orders expedited schedule for clean-up of Louisiana waters

by Eric E. Huber

Earthjustice Legal Defense Fund, Inc.

On October 1, 1999, Judge Mary Ann Vial Lemmon of the U.S. District Court for the Eastern District, in New Orleans, Louisiana, entered an Order with far-reaching consequences for the future of water quality in Louisiana. In *Sierra Club v. Clifford*, 49 E.R.C. 1788 (E.D. La. 1999), she set an eight-year schedule for the U.S. Environmental Protection Agency (EPA) to establish Total Maximum Daily Loads (TMDLs) of pollutants for nearly 300 of Louisiana's rivers, streams, bayous, lakes, and estuaries. She further ordered EPA to review the State's NPDES permit renewals and permits for new or increased discharges into the impaired waters, and ordered that the TMDLs be achieved by the lesser of three years from any permit revision to incorporate a TMDL or six years from the establishment of the TMDL.

Briefly, the TMDL process involves: (1) identifying all heavily polluted waters within the State and the pollutants causing those waters not to meet State ambient water quality standards; (2) prioritizing

those waters; (3) determining the maximum amount of pollution which can be discharged without causing the quality of the receiving water to fall below water quality standards, i.e., determine the TMDL for the pollutant causing the violation of water quality standards; and (4) allocating from the established total load permissible pollutant loads for every polluter on the waterbody. CWA § 303(d), 33 U.S.C. § 1313(d). TMDLs are notable in that they must account for seasonal variations and include a margin of safety to account for any lack of knowledge, and in that they must be set at levels to achieve water quality standards.

The schedule for the TMDLs is as follows:

a) By December 31, 1999, for all of the waters in Mermentau and Vermillion/Teche basins.

b) By December 31, 2001, for all of the waters in the Calcasieu and Ouachita basins.

c) By December 31, 2003, for all of the waters in the Barataria and Terrebonne basins.

d) By December 31, 2005, for all of the waters in the Red and Sabine basins.

e) By December 31, 2006, for all of the waters in the Pontchartrain basin.

f) By December 31, 2007, for all of the waters in the Mississippi, Atchafalaya, and Pearl basins.

Judge Lemmon's order also vacated as inadequate the list of impaired waters that the State had prepared and which EPA had approved. The Court found that EPA's approval of the State's list was arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law. The Court ordered EPA to prepare its own list of impaired waters statewide, and to include specifically all of the waters impaired by nonpoint sources of pollution. The above will ensure that the TMDL program for Louisiana will be a comprehensive one and that it addresses all sources of pollution causing the waters to be unfishable and unswimmable.

Judge Lemmon's order was the remedy for an earlier finding of

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liability against EPA. *Sierra Club v. Clifford*, 47 E.R.C. 1417 (E.D. La. 1998). The liability decision was based on the fact that the State had failed for nearly 20 years to establish the TMDLs that are required under §303(d) of the Clean Water Act, 33 U.S.C. § 1313(d). Because of the State's chronic failure to establish the TMDLs, EPA had a mandatory duty under § 303(d) to step into the State's shoes and develop the TMDLs itself.

Since the October 1, 1999 Order was issued, Louisiana DEQ has complained bitterly in the press that the schedule is not realistic and that the State cannot meet it. That misses the fact that EPA, not the State, has been ordered to establish the loads and that it was the State's inability to prepare TMDLs in a timely fashion that necessitated EPA intervention in the first place. Indeed, at the rate EPA and the State argued was adequate, TMDLs for Louisiana would not have been established for at least 340 years. Only after the suit was filed did they devise a 12-14 year schedule, but that was rejected by the Court as unreasonably long and back-loaded.

By comparison to other States, for example, Louisiana's schedule was interminably slow. Georgia has a 7.5-year schedule, Alabama has a 5-year schedule, and Mississippi a 10-year schedule. By further comparison, Mississippi's schedule addresses over twice the number of impaired waters than Louisiana faces, and in the first 5 years Mississippi will do approximately 1.5 times the number of waters Louisiana wants 12 years to do. Already Mississippi has prepared all of the TMDLs for the Pascagoula basin, including several rivers that flow into Louisiana, such as the Tangipahoa, while even under the Court-ordered schedule Louisiana will not get around to those until 2006.

In any event, the newly ordered TMDL schedule gives the State another chance. The State can submit TMDLs before any particular EPA deadline, and EPA must merely backstop the State and prepare the TMDLs itself in 60 days of any State deadline. The State recently gave public notice of TMDLs for the Mermentau and Vermillion/Teche basins, although it did not do

all the TMDLs required, and EPA has until February 29, 2000 to prepare the balance of the TMDLs for the basins. This includes setting the TMDLs for a plethora of pollutants. Eventually, permits must be ratcheted down accordingly. See in this regard, 40 C.F.R. 130.7(a) (TMDLs must be incorporated into the State's NPDES permits). Furthermore, the TMDLs should ensure that no further damage is done to the impaired waters in those basins. See 40 C.F.R. 122.4(i) (no new sources of discharge are allowed into a waterbody where that would cause an exceedance of a TMDL). While all of this may be problematic for dischargers who will have to review and revise their permits, this is decidedly good news for those of us who use Louisiana's waters for fishing, swimming and drinking. This may require significant changes in the way industries, cities, and even agricultural interests do business, but it is a positive and long overdue step toward meeting the goals of the Clean Water Act that all waters be fishable and swimmable.

Laidlaw and the coming of the "anti-company"

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Overview

The United States Supreme Court on January 12, 2000, handed down a decision in *Friends of the Earth, Inc., et al. v. Laidlaw Environmental Services, Inc.*¹ that perhaps reverses the judicial trend of the last ten years of curtailing citizen public interest suits against companies, based on a narrow reading of the standing requirements in the U. S. Constitution.²

Constitutional standing is

the one tool courts use to make sure they are not overstepping the judicial bounds of separation of powers -- they want to make sure they are deciding cases rather than governing society.³ Standing in broad terms, means A cannot normally sue B for an injury B inflicts on C. Rather, A needs to be injured by B to sue B here. The difficulty in environmental cases is that A's injury is more aesthetic or intuitive than physical or economic, and it is more difficult for a court to measure.

Standing requires plaintiffs to present proof of their status, if challenged⁴, to include "injury in fact" -- real, concrete and particularized, and actual or imminent, and not just speculative or hypothetical; a "causal connection" between the plaintiff's harm and "fair traceability" to defendant's actions, rather than to actions of independent non-parties; and "redressibility" -- the injury must likely be redressed by a favorable court decision. When an organizational plaintiff is involved,

the organization must additionally show that its members would have standing to sue individually (as seen above), that it is seeking to protect interests that are germane to its purpose, and neither the claim asserted (e.g., property damages per se) nor the relief requested requires the organization's members to participate in the lawsuit (e.g., as a party, as opposed to a witness).⁵

Facts

The facts of the case involved Laidlaw's operation of a hazardous waste incineration facility in South Carolina. Laidlaw had a national pollution discharge elimination system (NPDES) water discharge permit authorizing discharge of waste water into a river. The permit's discharge limits included mercury. Laidlaw violated the mercury limits on 489 occasions between 1987 and 1995. As a result, Friends of the Earth filed a citizens suit against Laidlaw in 1992. Before the lawsuit was filed, Laidlaw allegedly struck a "sweetheart" deal with the South Carolina Department of Health and Environmental Control. Laidlaw settled for \$100,000.00 in penalties with the state in a speedy lawsuit for the discharge violations. A few days after this "settlement", Friends of the Earth filed its citizens suit (33 U.S.C. 1365) against Laidlaw under the Clean Water Act. That Act allows citizens to enforce the law against violators under certain conditions.⁶

After the complaint was filed but before the district court rendered judgment, Laidlaw had violated the mercury discharge limits in its permit thirteen additional times. The last recorded mercury discharge violation occurred in 1995, years after the complaint was filed, but two years before the dis-

trict court's judgment was rendered. Additionally, in late 1998, Laidlaw allegedly closed its incineration facility permanently, dismantled it and put it up for sale. All discharges from the facility allegedly permanently ceased before the U. S. Supreme Court granted certiorari in the case in 1999. The issues of mootness and standing were addressed by the Court's majority opinion authored by Justice Ginsberg. The main standing issue before the Court was whether the plaintiffs satisfied Article III's standing requirements of showing that they have suffered an "injury in fact". Plaintiffs had abandoned their injunctive relief before the district court, where they also sought over \$400,000.00 in penalties for the Laidlaw unauthorized discharges.

Laidlaw contended that plaintiffs lacked "injury in fact" because they could not show proof of harm to the environment from Laidlaw's mercury discharges. Significantly the Court said that it was *not injury* to the environment, but *injury to the plaintiff* that satisfies Article III's standing requirements. The Court said that to insist upon the former is to raise needlessly the hurdle for standing higher than necessary for showing success on the merits. Interestingly, the Court examined a number of affidavits submitted by plaintiffs to demonstrate their "injury in fact" in the case. All the affiants averred that they would use the affected area of the river but for the pollution. The Court stated they are persons for whom the aesthetic and recreational value of the area would be lessened by the challenged activity of Laidlaw.

Averments of "injury in fact"

The affidavits in *Laidlaw* included the following examples:

- Curtis lived a half a mile from the facility, stated that the river looked and smelled polluted, and stated that he would recreate three to fifteen miles downstream of the facility but for his *concerns* about pollution;

- Patterson attested that she lived two miles from the facility, that she had picnicked, walked, bird-watched and waded in the river, because of its natural beauty, but that she no longer engaged in these activities because she was *concerned* about harmful effects from discharged pollutants;

- Patterson also testified that she and her husband would like to buy a home near the river, but did not do so because of Laidlaw's discharges;

- Pruitt averred that she lived a quarter of a mile from the facility, would like to fish, hike and picnic along the river, but refrained from those activities because of the mercury discharges;

- Moore testified she lived twenty miles from the facility, would use the river south of the facility and land surrounding it for recreational purposes were she not *concerned* that the water contained harmful pollutants;

- Lee testified that her home, which was near Laidlaw's facility, had a lower value than similar homes located further from the facility and that she *believed* the pollutant discharges accounted for some of the price discrepancy; and

- Sharp averred that he had canoed forty miles downstream of the facility and would like to canoe in the river closer to Laidlaw's discharge point, but did not do so because he was concerned that the water *concerned* harmful pollutants.

"Injury in fact" and "redressibility" rulings

The Court reaffirmed its decision in *Lujan v. National Wildlife Federation*⁷, which held that a plaintiff could not survive a summary judgment motion merely by offering averments which state only that one of the organization members used *unspecified* portions of an *immense* tract of territory on some portion of which regulated activity (mining) has occurred or probably will occur by virtue of a government action. In contrast, the Court said the affiants in the instant case demonstrated a member's reasonable concern about the effects of discharges *directly* on their recreational, aesthetic and economic interests. The Court said these are not just *general* averments or *conclusory* allegations, nor were there conditional statements to be equated with *speculation* of "some day" intention to revisit an area held to be insufficient by the Court in *Lujan v. Defender of the Wildlife*.⁸ The Court said in response to the dissenters' equation of its standing holding to subjective apprehensions, that in contrast, it was undisputed that Laidlaw's unlawful conduct of discharging pollutants in excess of permit limits was occurring at the time the complaint was filed. The Court saw nothing improbable about the proposition that the company's *continuous* and *pervasive*, illegal discharges of pollutants into a river affected *nearby* recreational use of the waterway and subjected residents to other economic and aesthetic harms.¹⁰

Although the Court did not discuss the second prong of standing, "causation", it did discuss the third prong of standing, "redressibility". The dissenters asserted that by abandoning injunctive relief, plaintiffs could not "boot strap" themselves on standing based upon imposition of civil penalties, as the illegal conduct had ceased.

However, the majority felt that even though the penalties would be payable to the government, the civil penalties will have some deterrent effect on future Laidlaw violations. The Court said a sanction (like penalties) that effectively abates the plaintiff's concerned injury, prevents its recurrence and provides a form of redress.

The Court acknowledged that at some point the deterrent effect of civil penalties may become too insubstantial and remote to support a citizens suit. However, the Court did not address or define what the outer limits of that remoteness would be. The Court said simply that the civil penalties sought by Friends of the Earth carried with them a deterrent effect that made it *likely*, as opposed to *merely speculative*, that the penalties would redress their injuries by abating current violations and preventing future ones. The Court distinguished the recent *Steel Company* case which held that citizens lack standing to seek civil penalties for violations that have abated by the time of the suit.¹¹ In the instant case, the penalties were for violations that were ongoing at the time of the complaint and that could have continued into the future if undeterred.

Mootness and Separation of Powers

The Court also found that the citizens suit was not moot in the case, because the defendants did not bear the *heavy burden* of showing that it was *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur by Laidlaw. The Court said if there were circumstances in which the prospect that a defendant will resume in lawful conduct, that would not be too speculative to overcome a mootness defense. The Court re-

manded the case for a determination of this disputed factual issue, as the facility was allegedly closed and unlawful discharges had allegedly ceased.

Justice Kennedy, who concurred, expressed concern about whether the citizens were unconstitutionally fulfilling law enforcement responsibilities committed to the Executive by Article II of the Constitution. Justices Scalia and Thomas dissented, and although they generally concurred in the mootness finding, they felt that the facts alleged in the affidavits were too speculative and conclusory to support standing. They felt that there must be harm to the environment that harms plaintiff for "injury in fact". They felt that the Court made the "injury in fact" requirement a sham. They questioned the "redressibility" holding in that the penalties were too generalized. They also emphasized the Article II implications of the Supreme Court's decision and said that citizens suits for civil penalties under the Act carry great implications to democratic governments.¹²

The Missing Prong - "Causation"

The Court did not expressly deal with, as aforesaid, or analyze the "causation" (or "fairly traceable" to defendant's action) requirement of standing.¹³ However, several appellate courts seem to consider harm to the environment in the context of the causation element of standing. For instance, in *Friends of the Earth, Inc. v. Crown Central Petroleum Corp.*,¹⁴ the court noted that waterways covered by federal protection may be so large that the complainant should rightfully demonstrate a more specific geographic area or other nexus in order to satisfy the causation on standing. In that case,

plaintiffs only used a portion of a lake some eighteen miles downstream from a refinery allegedly polluting the waterways. The court simply felt that the waterway in that case was too large to infer causation solely from the use of some other portion of the waterway. The court said plaintiffs simply assuming that since water flows downstream, any upstream pollutants from a refinery would have some noticeable effect some eighteen miles downstream, was not sufficient. Therefore, the plaintiffs in that case lacked standing because they did not show any evidence linking the pollution to harm on their lake usage. It is unclear if *Laidlaw* affected this case law.

It is noted that the *Laidlaw* Court said one cannot link harm to the environment with harm to the plaintiffs to defeat standing, as that is confusing standing with the merits of the case. However, the Supreme Court's holding on this point solely was in the context of "injury in fact", not "causation".¹⁵ Thus, the focus shifts from plaintiff's harm to defendant's conduct. Also, the facts of the *Laidlaw* case involve plaintiffs who *live near* and use the water downstream of the facility that was not as immense perhaps as in the *Crown Central* case. Thus, it still seems like cases like *Crown Central* may still have merit on "causation" when the plaintiffs are alleging harm in the context of a geographically or temporally immense environmental problem (not involved in *Laidlaw*). Besides in those pollution cases wherein the plaintiff is isolated or distant, this problem may also occur with plaintiffs who allege injury because an agency failed to consider cumulative impacts on the environment from a given permit with other past, present and reasonably foreseeable future actions or permits, including

from conduct of independent third parties, not before the court, and who may not be controlled by defendant in the case.¹⁶ This could occur in the context of lawsuits involving federal or state "wetland" permits, impacts to public lands, The National Environmental Policy Act, the Louisiana "IT" doctrine, etc. If the geographic area or perhaps temporal span affected by the plaintiff's millennium arguments is great, even though plaintiff may have the requisite "injury in fact", they may not be able to meet the "causation" requirement of standing on some counts. It is, thus, important for plaintiffs to remain focused on their "injury in fact" from the defendant and not on some other or future actors.

Although state law is not directly affected by Article III holdings, many states have standing requirement mirrored after federal decisions.¹⁷ The Supreme Court's relegating the "injury in fact" of standing to near speculation that a plaintiff will not use the resource allegedly damaged by pollution because they are *concerned*, could well expand in all courts the class of plaintiffs that can successfully *remain* in court in environmental cases.

Conclusions

Thus, we may have a new wave of citizens suit cases empowered by the *Laidlaw* decision. In this age of relaxed environmental enforcement by the agencies, the citizens' responsibility may have been reborn and this may spell the coming of a new era of the "anti-company" syndrome where government does not always support industry,¹⁸ where government may "overkill" when it does enforce the law, and where a reinvigorated citizenry will enforce the law when the government will not. Whether it is only

the Executive who may take care that laws may be enforced remains to be tested.

¹ 120 S.Ct. 693 (2000). Note: We are talking about statutory citizen suits based upon violations of environmental laws and not toxic tort suits which require plaintiff to show damages. Standing's "injury in fact" involves a much less showing than actual damages in the tort sense.

² See *Lujan v. National Wildlife Federation*, 497 U.S. 871, 110 S.Ct. 3177 (1990), for the beginning of this trend. See also *Millan, Lujan v. NWF: One Step Backward for Standing*, 21 BNA Environmental Reporter 1057 (1990).

³ Other tools involve the quintuple helix of finality, exhaustion of administrative remedies, ripeness, primary jurisdiction, and mootness.

⁴ See §26:8, *Louisiana Environmental Handbook* (West Group 1999). There are other prudential limitations to standing, like whether the injury is in the "zone of interest", or covered, by the statute alleged to be violated. *Id.*

⁵ *Id.* See also, *Meredith v. Ieyoub*, 700 So. 2d 478 (La. 1997), for this test.

⁶ See *Millan, Environmental Law: Fifth Circuit Decisions on Water, Waste, and States' Rights*, 44 Loy. Law. Rev. 415, 426-428 (1998).

⁷ 497 U.S. 871, 110 S.Ct. 317 (1990).

⁸ 504 U.S. 555, 112 S.Ct. 2130 (1992).

⁹ The Court had previously rejected that fear is covered by certain environmental statutes. *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 103 S.Ct. 1556 (1983).

¹⁰ Even Justice Scalia, in the dissent here, had also previously held that plaintiffs living "next door" to a polluting facility likely have standing. See 112 S.Ct. 2142, n. 7.

¹¹ *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003 (1998). Citizen suits, as opposed to government enforcement, generally

cannot be for wholly past violations. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 108 S. Ct. 376 (1987).

¹² A similar issue is presently being litigated in other contexts, e.g. Qui Tam litigation under False Claims Act. This case involved the citizen suit provisions of the Clean Water Act, 33 U.S.C. 1365.

¹³ See *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64 (3rd Cir. 1990), and *Sierra Club, Lone Star Chapter v. Cedar Point Oil Company*, 73 F.3d 546 (5th Cir. 1996).

¹⁴ 75 F.3d 358 (5th Cir. 1996).

¹⁵ Defendant apparently did not raise the "causation" element below. 120 S.Ct. at 701. See also, Brief of Respondent, 1998 U.S. Briefs 822 (BNA July 19, 1999). The Brief Amicus Curiae of the Washington Legal Foundation, did, 1998 U.S. Briefs 822 (BNA July 19, 1999). In the "injury in fact" context, the Court noted that Laidlaw's continuous and pervasive illegal discharges caused the nearby residents to curtail their recreational use of the waterway. 120 S.Ct. at 706.

¹⁶ See *Sierra Club v. Glickman*, 156 F.3d 606, 614-615 (5th Cir. 1998). Independent third party involvement can also relate to "redressibility".

¹⁷ See *Calcasieu League for Environmental Action NOW v. Thompson*, 661 So. 2d 143, 147-148 (La. App. 1st Cir. 1995), writ denied, 664 So. 2d 459 (La. 1995). See also Pastor, *Meredith v. Ieyoub: The Louisiana Supreme Court Limits the Power of the Attorney General by Applying the Separation of Powers Doctrine*, 72 Tul. Law Rev. 2239 (1998), for a discussion of broader "taxpayer standing" in Louisiana.

¹⁸ See Brief for the United States as Amicus Curiae supporting Petitioners, in *Laidlaw*, 1998 U.S. Briefs 822 (BNA May 17, 1999).

Inside DEQ

Agency gets new undersecretary

DEQ Undersecretary Tom Hagan retired on December 26, 1999, after 20 years of state service. Governor Foster appointed Thomas Bickham as his replacement on December 27, 1999.

Mr. Bickham began working in DEQ's Radiation Protection Division in 1993, after having obtained his B.S. degree in Nuclear Engineering from Mississippi State University. In 1997, he was tapped to lead one of the teams of employees working on DEQ's business process reengineering effort, and two years later, he was selected to coordinate implementation of all of the reengineered processes. He was also charged with overseeing DEQ's efforts to devise an integrated data management system for the agency's permitting, surveillance, and enforcement functions, and to convert DEQ's massive paper file system to electronic media.

The Undersecretary directs the functions of the DEQ Office of Management and Finance, and is responsible for accounting and budget control, procurement and con-

tract management, data processing, personnel management, and grants management for the department.

Rule-making update

Air Quality

AQ196 - Chemical Accident Prevention Program Revisions (La. Register vol. 24 #1; 1/20/00). Amends LAC 33:III.5901. Act 839 of the 1999 Regular Session enacted R.S. 30:2063(K), which exempts storers of liquefied petroleum gas from regulation by the department for purposes of the chemical accident prevention program. This rule recognizes the exemption from the chemical accident prevention program for storers of liquefied petroleum gas whose facilities are permitted through or inspected by the Louisiana Liquefied Petroleum Gas Commission of the Department of Public Safety and Corrections, and storers of liquefied petroleum gas who use such gas as a fuel in an agricultural process.

AQ195 - Air Fee Revisions - (La. Register vol. 24 #2, 2/20/00) (LAC 33:III.207, 209, 211, 223)

Incorporates fees for industry categories not previously in the Fee Schedule, but for which fees have previously been established under the negotiated fee procedures of the fee regulations. The rule change also includes changes in wording to make existing regulations easier to interpret. The changes will not increase any fee paid but should make the fee regulations easier to read and understand.

Hazardous Waste

HW068P - DuPont Dow Elastomers Delisting Petition (La. Register vol. 23 #12, 12/20/99) (LAC 33:V.Chapter 49.Appendix E) DuPont Dow Elastomers L.L.C. has petitioned to exclude from the hazardous waste regulations (delist) a derived-from hazardous waste, known as Dynawave Scrubber Effluent, resulting from the combustion of non-specific source (i.e., spent solvent) listed hazardous wastes in

a halogen acid furnace to produce aqueous hydrochloric acid. This waste stream is generated at DuPont's Ponchartrain Site in LaPlace, Louisiana. LAC 33:V.105.M allows a hazardous waste generator to petition the department for this kind of rulemaking when a listed hazardous waste does not meet any of the criteria that justified the original listing. DuPont, the generator of the waste stream, has demonstrated through extensive sampling and analyses that this material, the Dynawave Scrubber Effluent, does not exhibit the hazardous properties that originally justified its listing as a hazardous waste.

HW072 - RCRA IX Package (La. Register vol. 24 #2, 2/20/00) (LAC 33:V.Chapters 1, 3, 5, 15, 17, 22, 26, 33, 38, 41, and 43) Adopts rules in the RCRA IX package for authorization for portions of the RCRA C program. The specific topics include the following titles: Petroleum Refining Process Wastes; Land Disposal Restrictions Phase IV - Zinc Micronutrient Fertilizers, Administrative Stay; Emergency Revision of the Land Disposal Restrictions (LDR) Treatment Standards for Listed Hazardous Wastes from Carbamate Production; Land Disposal Restrictions Phase IV - Extension of Compliance date for Characteristic Slags; Land Disposal Restrictions - Treatment Standards for Spent Potliners from Primary Aluminum Reduction (K088); Post-Closure Requirements and Closure Process; HWIR-Media; Universal Waste Rule - Technical Amendments; Organic Air Emission Standards - Clarification and Technical Amendments; Petroleum Refining Process Wastes - Leachate Exemption; Land

Disposal Restrictions Phase IV - Technical Corrections and Clarifications to Treatment Standards; Organic Air Emission Standards - Clarification and Technical Amendments. The hazardous waste regulations for the state must be equivalent to the federal regulations in order for the state to be authorized for the new portions of the RCRA program.

Office of the Secretary

OS033 - Civil Penalty Revisions (La. Register vol. 23 #12, 12/20/99). Amends LAC 33:I.705 to reflect Act 791 of the 1999 Regular Session, which amended R.S. 30:2025(E)(1)(a) and changed the civil penalty maximum daily cap from \$25,000 to \$27,500.

OS035E - Laboratory Accreditation Deadline Amendment (La. Register vol. 24 #1; 1/20/00). The department relies on analytical data submitted both directly and indirectly to the department to determine compliance with both State and Federal regulations. As a result of deadlines established in current Louisiana regulations, the department was prohibited from accepting data from commercial laboratories that have not received accreditation by the department. Presently, no commercial laboratories have received departmental accreditation. This rule will extend the deadlines to December 31, 2000. The department relies on the analytical data to determine permit compliance, enforcement issues, and effectiveness of remediation of soils and groundwater. Permit issuance and compliance are effective means of determining the impact on human health and the environment. The department must have access to accurate, reliable, precise data in order to meet its mandate to protect human health

and the environment. This emergency rule is effective December 15, 1999, and shall remain in effect for the maximum of 120 days or until a final rule is promulgated, whichever occurs first.

Underground Storage Tanks

UT006 - Underground Storage Tank Late Fees (La. Register vol. 23 #12, 12/20/99) (LAC 33:XI.307) Act 349 of the 1999 Regular Session of the Louisiana Legislature amended R. S. 30:2195.3(A)(7) and (B), repealing a statutory late fee payment for new and used motor oil underground storage tanks and requiring that late fees be established by rule. This rule amends the UST fee schedule in LAC 33:XI, Chapter 3 to incorporate fees that were previously established by statute. This amendment will subject all annual UST fees to department late payment fees previously promulgated in accordance with the Environmental Quality Act and Administrative Procedure Act. This change does not add any new fees.

Water Quality

WP033 - Revisions to Surface Water Quality Standards (La. Register vol. 23 #12, 12/20/99). Amends LAC 33:IX.1105, 1111, 1113, 1115, 1117, 1121, and 1123. The water quality standards establish provisions for the protection of instream water quality and consist of policy statements, designated water uses, and numerical and narrative criteria, which set limits for various water quality parameters. This proposed revision to the current water quality standards includes: addition of new requirements for the use of clean or ultra clean techniques in some situations; revision of several numerical crite-

ria with current data; addition of updated and new references for biomonitoring; revision of numerical criteria and designated uses table; and addition of language to

clarify the links between dissolved oxygen and the designated uses for fish and wildlife propagation.

There were no significant decisions by courts or administrative tribunals, involving DEQ, since the last newsletter.

Case law update

Legislative update

Membership of legislative committees

The makeup of the committees that are primarily responsible for environmental issues has changed for the 2000-04 term. There is a new Chairman and Vice Chairman of the Senate Committee on Environmental Quality and a new Vice Chairman of the House Committee on Environment.

House Committee on Environment:

Representative N. J. Damico, D-Marrero, remains the Chairman of the House Committee on Environment, while Representative Tony Perkins, R-Baker is the new Vice Chairman.

Members of the committee who are returning include:

Rep. Clara Baudoin, D-Carencro; Rep. Erroll Romero, D-New Iberia; Rep. Melvin Holden, D-Baton Rouge; Rep. Wayne Waddel, R-Shreveport; Rep. Lelon Kenney, D-Columbia; Rep. Ernest Wooten, D-Belle Chasse; Rep. Dan Morrish, D-Jennings.

Members appointed to the committee for the new term are:

Rep. Donald Cazayoux, Jr., D-New Roads; Rep. B.L. Shaw, R-Shreveport; Rep. Jane H. Smith, R-Bossier City; Rep. Michael G. Strain, R-Covington.

Senate Committee on Environmental Quality:

The Senate Committee on Environmental Quality is now composed of Senator James David Cain, D-Dry Creek, Chairman and Senator Huelette Fontenot, R-Livingston, Vice Chairman. The members of the committee are:

Sen. Ron Bean, R-Shreveport; Sen. Joe McPherson, D-Woodworth; Sen. Lynn Dean, R-Braithwaite; Sen. Michael Robichaux M.D., D-Matthews; Sen. Max T. Malone, R-Shreveport.

Interim meeting

A joint meeting of the House Committee on Environment and the Senate Committee on Environmental Quality was held on February 15 and 16, 2000 in Lake Charles, La. The subject matter of the meetings included the storage of hazardous materials in railyards and the remediation of the Calcasieu Estuary.

The committees toured a railyard used to store hazardous materials during shipment on February 15. A public hearing on the issue was held at 7:30 p.m. that same evening. This meeting was in accordance with House Study Resolution 14, by Rep. Elcie Guillory, D-Lake Charles, which requests the House of Representative to study the health and environmental effects of the storage of hazardous chemicals in railyards on surrounding communities. Issues that were discussed at the committee hearing on HSR 14 included whether federal law, particularly the Federal Rail Safety Act and the Hazardous Materials Transportation Act, preempt the states from taking action affecting the storage of hazardous chemicals in railyards and to what extent.

On February 16, the committees toured the Calcasieu Estuary to view the effects of pollution in the estuary and the efforts being made to remediate those problems. A public hearing and update of those efforts will be conducted at 10:30 a.m. that day. The Calcasieu Estuary Community Task Force will present its initial plans for remediation of the estuary and its efforts to date.

Science for lawyers

Effective Use of Leak Detection and Repair Programs Can Help Minimize Enforcement Actions and Reduce Fugitive Emissions

by Omer Wolff, ERM-Southwest

Just as industry and government are reaching major milestones requiring them to quantify and reduce emissions from non-point or fugitive sources in accordance with the Clean Air Act Amendments (CAAA), additional scrutiny is being placed on the results of these efforts, and the regulations and programs that drive them. The findings of an investigation by the minority staff of the House of Government Reform Committee, which was initiated by Representative Henry Waxman (of *Waxman Report* fame), was released at the end of 1999 and suggested that petroleum refineries vastly underreport emission rates from fugitive sources.

Comparison findings of regulated facility reported values and field measurements collected by the U.S. Environmental Protection Agency's (EPA's) National Enforcement Investigation Center (NEIC) over the last several years were cited heavily in the report.

Although LDAR has been around since the 1980's, initially in a limited fashion, such programs have more recently been transformed to focus more on toxic and hazardous air pollutants. Some states, like Louisiana, have included refineries in their LDAR regulations prior to more recent prescriptive federal toxic air pollutant mandates, such as the Refinery MACT (Maximum Achievable Control Technology) standards that have brought all refineries into the fugitives arena. In other states that did not tightly regulate refineries under their regulations, many chemical facilities that have had programs in place for a longer period of time than the refineries have noticed gradual improvements in

leak rates and reduced emissions since inception. These improvements are a result of better management practices developed through experience with the program.

The significance of the findings of these recent investigations is that more detailed agency inspections and more aggressive enforcement actions are expected to be made an agency priority in the coming months. Such prioritization likely means major enforcement actions and heavy penalties for those on the receiving end of the inspections. However, through proper internal program reviews and more effective analysis of data already being generated, facilities can minimize the potential for unfavorable findings at their sites. It is important that facilities learn from the efforts of others as well as their own experiences in applying continuing improvement to their LDAR processes.

Regulatory Requirements for LDAR

As mentioned above, especially under the regulations resulting from the CAAA, petroleum refineries and most petrochemical plants fall under one or more of several regulatory programs which require the implementation of a very detailed LDAR program to control fugitive emissions. These programs include the aforementioned Refinery MACT, the Hazardous Organic National Emissions Standards for Hazardous Air Pollutants (HON), New Source Performance Standards (NSPS), and state implementation plans (SIP) to meet National Ambient Air Quality Standards (NAAQS).

Fugitive emissions, sometimes referred to as area sources, are

those emissions which are not emitted as specific point source (stack) emissions (i.e., not from a stack), and are generally more difficult to quantify because of their dispersed nature. Such emissions may occur from valves, connectors, flanges, open-ended lines, pumps, compressors, pressure relief valves, and other piping components. LDAR regulations require implementation of work practice standards designed to routinely detect and repair leaks from such components. While emissions from a single component are typically very small, large numbers of leaking components can give high cumulative emission rates for a given facility.

Given hundreds of components as potential leakers at a typical single facility with thousands or tens of thousands of components, these emissions can add up significantly, and have a negative impact on the air quality in an area. This is why the LDAR programs target good performance levels which define an acceptably low percentage of leaking components during a monitoring period.

A leaking component, or leaker, is also defined within each program as a specific leak rate expressed as a concentration in parts per million of volatile organic compounds (VOC's). Applicable regulations differ in definitions for leakers. For example, some leakers may be defined as low as 500 ppm under the HON rule, while other leakers may be defined as greater than 10,000 ppm as in the case of refinery valves under the Federal NSPS. The standard good performance level of leakers for a facility under most regulatory programs is usually a leak rate of less than 2%. Incentives are included in the vari-

ous programs which reward a facility for reaching a lower percentage of leakers by reducing monitoring frequencies as leak rates are decreased.

LDAR requirements consist of four major elements for all components: identification, monitoring, maintenance, and recordkeeping. A database is essential to routinely track the components in order to maintain the status of each at any given time. In addition, specific information regarding the repairs, monitoring frequencies, and measurements must also be recorded.

A schedule of periodic monitoring of all components within a facility to determine which components are leaking must be maintained, with a monitoring frequency most typically established at once every three months. Leakers must then be recorded and tagged, and a first attempt at repair made within 5 days. All leakers are required to be repaired no later than 15 days after discovery unless the associated unit would require a shut-down for the repair to take place.

As a final step, periodic reports must be provided to the EPA and state agencies as applicable, and must include specific information regarding the LDAR program. Louisiana has adopted a policy that consolidates the various fugitive emission programs into a hierarchy which allows facilities which fall under multiple regulatory LDAR programs to combine these reports and monitoring frequencies into one. However, this rule requires that the most stringent requirement of the applicable regulations be met and that this company-specific reporting method be pre-approved in advance of the consolidation by the Louisiana Department of Environmental Quality (LDEQ).

In addition to the primary objective of LDAR to reduce emissions by promptly repairing leaking components, the information obtained from the monitoring effort

provides the basis for estimating fugitive emissions for the facility. Emission leak factors based on EPA averages, industry studies, and/or site-specific studies are applied to specific measured leak rates to quantify fugitive emissions from a facility. The factors are also based on type of service such as light liquid, heavy liquid, and gas/vapor service; as well as specific component type. The fugitive emission estimates are used in obtaining air permits for such emissions, as well as for reporting these emissions annually for compliance purposes, such as emission inventory statements and Toxic Release Inventory (TRI) reports.

Compliance Issues Associated with LDAR

The recent NEIC comparisons based on their investigations have concluded that the average leak rate of 1.3% as reported by the 17 refineries inspected was dramatically lower than the EPA's measured average leak rate of 5% for these same facilities. Using agency assumptions in converting these leak rates to annualized emissions, EPA has suggested that fugitive emissions from these facilities could add more than 6000 tons per year (TPY) of VOC's than previously understood.

Because of this finding, EPA extrapolation of this data also suggested that there may be an additional 40,000 TPY of VOC's being emitted due to improper identification and maintenance programs under the LDAR requirements. The Waxman Report extrapolated even further by suggesting from this data that Louisiana is second only to Texas in states that are most affected by underreported fugitive emissions.

Compounding the perception of underreporting brought about by these findings is the fact that most LDAR regulations allow for reduced monitoring frequencies as good performance standards are

achieved, which shows financial incentive for reporting low leak rates. However, there are a number of possible technical reasons for the reported differences. For instance, one explanation for the differences in leak rates could be a result of improper monitoring methodologies. The accepted EPA Method 21 specifies the proper distance for monitoring of each component with a VOC analyzer as at the component surface interface (not including rotating shafts such as in pumps and compressors).

One published report has found that monitoring a 500 ppm leaker as little as one centimeter from the component could result in more than halving the leak rate, therefore missing the opportunity to repair many leaking components. Improvements in LDAR practices are being implemented as practical lessons are learned in the field, as well as following review of the data being collected. Industry recognizes the ability to reduce fugitive emissions by up to 90% by detecting and repairing leakers in a timely manner. This provides a financial incentive to promptly repair leaking components, since lost product or raw materials cost the facility money.

Inspectors with NEIC or LDEQ usually inspect a facility with a three or four-person team for several days to spot-check a LDAR program. A representative sampling of about 20% of components from several units is usually all that time constraints will allow. Such inspections have revealed that one of the most common problems is missing plugs and caps from line ends. Solving this one problem alone can often make the difference between whether or not a facility will consistently achieve good performance levels within the LDAR limits. This is also one of the easiest areas of a facility's program to check for compliance, since missing caps and plugs can be identified visually, and are not subject to debate about

monitoring technique.

Inspectors have found that leakage rates progress from least likely to leak to most likely to leak starting with flanges and fittings, then hand valves, followed by automatic control valves, and rotating equipment seals. With this knowledge, it is no surprise that the agency's inspection efforts tend to focus in the suspected higher leakage areas of a facility and may therefore result in higher findings of leakers than those reported.

Numerous enforcement actions have resulted from several common violations, including:

- a) Failure to timely repair components.
- b) Failure to use required monitoring methodology.
- c) Failure to properly use caps and plugs on open-ended lines.
- d) Incorrect identification of component service which require monitoring.
- e) Improper record-keeping and reporting.

It has also generally been observed that dedicated, owner-operated monitoring and repair teams perform better than part-time teams and un-audited contractors, newer plants perform better than older plants, and certain valve types tend to perform better than others. Replacement of components with newer technology, although costly initially, can often save further compliance burdens for repeat leakers in problematic service in the long run.

Key Elements of a Good LDAR Program

While fugitive emissions accounted for about 20% of all non-refinery emissions identified in the 1996 TRI, such emissions accounted for over half of refinery TRI emissions during this same period. Given the latest conclusions by EPA as presented to Congress, it will be

important for industry, and especially refineries, to be diligent in their future efforts in monitoring and reporting of fugitive emissions. There is no doubt that the key to these efforts will be the ability to demonstrate improvements in the LDAR program designed to accomplish this task.

There are several aspects which tend to stand out when comparing facilities with the best programs; i.e., those which have demonstrated a progressively lower leak rate over time until a low leak rate floor has been established and maintained. A review of these aspects provide key elements essential to improving a LDAR program which will stand up to a rigorous agency inspection and thus avoid the disparities documented in such EPA investigations recently released.

Important elements identified by EPA and other studies which seem to improve reliability of LDAR programs and compliance include:

- a) Responsible and diligent LDAR Program Coordinators and monitoring personnel at a facility who are accountable and also have authority to get things done.
- b) Education programs for plant operators and maintenance personnel which stress the importance of LDAR and significant impacts on the facility for non-compliance.
- c) Broad use of first attempts to repair leakers (required within 5 days anyway) when discovered through use of simple maintenance activities such as tightening packing glands on valves and replacing missing or loose caps or plugs in piping.
- d) Utilization of a good database tracking system including ability for multiple users trained to download and retrieve information to keep current.
- e) Adoption of most strin-

gent leak definition (lower ppm level) during monitoring for all component services.

f) Establishment of periodic internal third party auditors who monitor results of regular LDAR personnel.

g) Consideration for monitoring at least certain components more frequently than required.

h) Analyzing data for highest repeat leakers in order to determine root cause correlations which may lead to component type replacements with newer technology or elimination of certain types or brands of components.

The benefits of maintaining a good LDAR program can not be understated. Based on stepped-up agency inspections as a result of previous findings, it is apparent that the cost of non-compliance issues associated with fugitive emissions will soon outweigh the cost of more proactive compliance.

While the costs for improvements to fugitive components in the capital structure of an existing facility remain high, other repair options offer feasible solutions. As facility experience increases with the LDAR program since inception, better management practices have become evident. It is necessary to share these experiences with those outside particular industry groups, so that the lessons learned might be implemented.

Effective use of such programs can not only assist in minimizing potential enforcement actions, but fugitive emission reductions will also be realized as a result. A significant start to renewing an existing LDAR program is to consider an independent internal audit of all aspects of the program. The results of such an activity would then be instrumental in identifying key areas for improvement and organizing a plan of action for implementation.

ANNOUNCEMENT:

This Annual Meeting and cocktail reception of the Environmental Law Section of the Louisiana State Bar Association:

Date: Thursday, April 13, 2000

Place: The Camelot Club
21st Floor - Bank One Centre
451 Florida Street
Baton Rouge, LA

Meeting Time and Guest: 4:00 p.m. until 5:00 p.m.
The Honorable J. Dale Givens, DEQ Secretary
Speakers: The Honorable Jack C. Caldwell, DNR Secretary
Chuck Sheehan, Deputy Regional Counsel for Enforcement
EPA Region VI

Reception: 5:00 p.m. until 7:00 p.m.

The cost of the reception is \$20.00 in advance and \$25.00 at the door. Reservations are definitely encouraged and should be made as follows:

Checks payable to: Environmental Law Section - LSBA

and mailed to: Daria Diaz (Treasurer)
Osborne, McComiskey & Diaz
337 Metairie Rd., Suite 301
Metairie, LA 70005



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