THE LOUISIANA ENVIRONMENTAL LAWYER

Volume 6, Number 2 - Summer 2000

NEGLIGENCE AND RESPONDEAT SUPERIOR AS ENVIRONMENTAL CRIMES[1]

By Pauline Hardin and Stan Millan

General

Many prosecutors have extended their push in the environmental crimes area by criminalizing business conduct which historically would have been characterized as civil negligence. An important trend continues to gain ground which reduces the prosecutor's burden of proving "guilty mind" and instead, makes a simple employee mistake that a higher company official has the mere authority to correct, criminal misconduct. Although some law enforcers and fair prosecutors publicly disavow prosecuting negligence only as a crime, evidence from behind closed doors and at the bargaining table as well as in court decisions suggests this direction is no myth.

Individuals are the chief targets of environmental prosecutions today.[2] In 1997, U.S. attorneys declined to prosecute 70 percent of the 206 businesses they investigated for water, air and waste disposal abuses. In contrast, they declined to prosecute only 55 percent of the 288 individuals suspected of such crimes. This discrepancy also applied to those suspected of violating wildlife laws intended to protect endangered species. U.S. attorneys declined to prosecute two-thirds of the 39 businesses investigated for these crimes, but declined to prosecute only 38 percent of the 338 individuals targeted. Thus, although the U.S. attorneys are prosecuting companies for environmental crimes, they are targeting the individuals responsible for the crimes or managers or officers who had the ability to prevent the crime, but did not do so, a trend that is expected to continue.

The criminalization of civil infractions in the environmental area like in many other public welfare regulatory spheres has escalated in the last few years. Courts confront very complex issues in environmental criminal cases, as regulations implementing the environmental statutes are normally very complex. Therefore, courts and prosecutors face the issue of balancing the rights of individuals or companies accused of crimes against that of the public and the environment. What has given way has been the element of intent or "guilty mind." Too broad of a standard may constitute a denial of due process or eliminate the requirement of mens rea. Too strict a requirement may make it virtually impossible to obtain criminal convictions for the most serious violations of complex environmental law. This balancing of what does "knowledge" mean in a potential public welfare crime, which most circuits style environmental violations,[3] has led to reduced standards for prosecuting negligence and the "responsible corporate officer" for such negligence.

NEGLIGENCE

In United States v. Hanousek,[4] the court affirmed the ordinary negligence standard as being a violation of the Clean Water Act. In the case, Edward Hanousek was employed by Pacific and Arctic as a road master.[4] One of the special projects under Hanousek's supervision was a rock quarrying project. The project site was alongside a railroad referred to as "six mile", located on an embankment two hundred feet above a river. Pacific and Arctic hired Huntz & Huntz, a contracting company, to provide the equipment and labor required for the project.

At six mile, a high pressure petroleum products pipeline was owned by a sister company, Pacific and Arctic Pipeline, Inc. The pipeline ran parallel to the railroad at or above the ground level within a few feet of the tracks. To protect the pipeline during the project, a work platform of sand and gravel was constructed on which a backhoe operated to load rocks over the pipeline and into railroad cars. The location of the work platform changed as the location of the work progressed along the railroad tracks. When work initially began in April, 1994, Huntz & Huntz covered an approximately three hundred foot section of the pipeline with railroad ties,

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

Features

Newsletter Editor: **James G. Wilkins**--*Associate Editor*: **Anne J. Crochet**--*Design/Layout*: **Dustin Westphal**

sand and ballast material to protect the pipeline. This was customary. When Hanousek took over the responsibility for the project a month later in May, 1994, no further sections of the pipeline along the 1,000 foot work site were protected, with the exception of the movable backhoe work platform. In October, 1994, a Huntz & Huntz backhoe operator used a backhoe on the work platform to load a train with rocks. After the train departed, the operator noticed that some fallen rocks had caught the plow train as it departed and then was located just off of the tracks in the vicinity of the unprotected pipeline. At this location, the site had been graded to finish grade and the pipeline was covered with a few inches of soil. While using the backhoe bucket to sweep the rocks from the tracks, he struck the pipeline, causing a rupture. Hanousek was not present at that time. The pipeline was carrying heating oil.

An estimated one to five thousand gallons of oil were discharged over a period of many days into the adjacent river, a navigable water of the United States. Hanousek, the road master, was charged with negligent violation of the Clean Water Act, among other violations, and also an officer, Mr. Paul Taylor, of Pacific and Arctic and the sister pipeline company, was charged with negligently discharging a harmful quantity of oil into the navigable water and failing to report and making false statements. At trial, the officer, Taylor, was acquitted of all charges except making false statements, but Hanousek was convicted of negligently discharging a harmful quantity of oil into a navigable water of the United States.

The main issue on appeal was what standard of negligence was criminal under the Clean Water Act. Hanousek argued that it was a gross deviation from the standard of care a reasonable person would observe in a situation. The government argued that simple negligence was all that was required and that Hanousek failed to use reasonable care.

The two sections of the Clean Water Act at issue were 33 U.S.C. §§ 1319 and 1321. Section 1319(c)(1)(A) provides that any person who negligently violates the Act shall be punished by a fine or imprisonment or both.[6] Section 1321(b)(3) proscribes, without even mentioning negligence, the actual discharge of oil in harmful quantities in navigable waters of the United States, adjoining shorelines, or waters of a contiguous zone, as well as other specified activity. The court noted that neither section defined the term negligence, nor is the term defined elsewhere in the Clean Water Act. The court started with the ordinary meaning of negligence as a failure to use such care as a reasonably prudent and careful person would use under similar circumstances. The court felt if Congress intended a heightened standard of negligence, it could have explicitly done so by using the phrases gross negligence or willful misconduct, as it did in other sections of the Clean Water Act. Therefore, the court concluded from the plain language of the Clean Water Act, that a person who acts with ordinary negligence may be subject to criminal penalties.

The court further found that the Clean Water Act was a public welfare act and that it was well established that a public welfare act may subject a person to criminal liability for his or her ordinary negligence without violating due process.[7] Thus, although Hanousek was not personally a water pollution permittee under the Clean Water Act, he did not dispute that he was aware that a high pressure petroleum products pipeline owned by Pacific and Arctic and its sister pipeline company ran close to the surface next to the railroad tracks at six mile. He further did not argue that he was unaware of the dangers a break or puncture of the pipeline by a piece of heavy machinery would pose. The court concluded that Hanousek should have been alerted to the possibility of strict regulation of his negligent misconduct.

The court further concluded that Hanousek was correct that he could only be convicted on the basis of his own negligent conduct and not on the basis of the negligence of others (in this case a contractor) working at six mile point. To repeat, the government had presented evidence at trial that: Hanousek was responsible for the rock quarry project at six mile point; the project involved the use of heavy equipment and machinery, along the one thousand foot work site; Hanousek directed the activities of Huntz & Huntz employees and equipment; and it was customary to protect the pipeline with railroad ties and fill when using heavy equipment in the vicinity of the pipeline. Before Hanousek took over, Huntz & Huntz covered an approximate three hundred foot section of the pipeline with railroad ties, sand, and ballast material to protect the pipeline. After Hanousek took over responsibility, no further sections of pipeline along the work site were protected. The section of the pipeline where the rupture occurred was not protected with railroad ties, sand or ballast. Although the rock quarry work had been completed in the location of the rupture, rocks would sometimes fall off the loaded railroad cars as they proceeded through the completed section of the work site. No policy prohibited the use of backhoes off the work platform for other activities. The backhoe operator ruptured the protected pipeline while using a backhoe to remove a rock from the railroad tracks. A harmful quantity of oil was discharged into the river thereafter.

Thus, this case establishes the proposition that a supervisor of a project can be responsible for mere negligence, even in his absence. In this case, his failure to have his contractor continue to follow custom, which the contractor had applied earlier, was causally related to the spill in the river. The corporate officer over Hanousek, Taylor, while charged and tried was not similarly convicted for negligence. But perhaps he was just lucky as the government did not argue the "responsible corporate officer" doctrine (discussed next) in this case.

In the Supreme Court's denial of certiorari of the Hanousek case,[8] Justice Thomas and Justice O'Connor filed a dissent. Justice Thomas noted that Hanousek was off-duty at home when the accident occurred. He also noted that courts are divided on whether the Clean Water Act is properly classified as a public welfare statute or not. Nevertheless, Justice Thomas felt it was er-

roneous to rely even in small part on the notion that the Clean Water Act is a public welfare statute. Justice Thomas felt that although the Clean Water Act regulates certain dangerous substances, the hallmark of a public welfare statute, it also imposes criminal liability for persons using standard equipment to engage in a broad range of ordinary industrial and commercial activities. He felt that fact militates against concluding that the public welfare doctrine applies. Justice Thomas also said he felt "...we should be hesitant to expose countless numbers of construction workers and contractors to heightened criminal liability for using ordinary devices to engage in normal industrial practices".[9] Justice Thomas also felt the seriousness of the penalties counsels against concluding that the Clean Water Act can be actually classified as a public welfare statute. Normally, he felt that the public welfare statutes have penalties that are commonly very small and that a conviction does not result in grave injustice to an offender's reputation.

In our opinion, the case does not completely define the statutorily undefined word "negligently". The court's equation of negligence with a failure to use such care as a reasonably prudent and careful person would use under the circumstances, misses that a duty or obligation first owed to a plaintiff must be breached and cause loss or damages before negligence is actionable.[10] Does the CWA silently but impliedly create such a duty? Hanosek may, thus, have been negligent in not seeing to it that his contractor followed a custom, but unless he owed a duty to the United States to follow that custom, his negligence arguably should not have been criminally actionable. The case and CWA do not expressly address any duty. The court also perhaps mistakenly equates the subjective actions of "a reasonable man" [or person] with the objective test of "the reasonable man" [or person] in a criminal setting.[11] This man/woman is a personification of a community (or industry) ideal, including occasional but tolerable shortcomings and weaknesses.[12] Custom is relevant, but an unusual action is not conclusively negligence itself.[13]

RESPONSIBLE CORPORATE OFFICER

However, the next case, United States v. Inverson,[14] shows that Mr. Taylor's acquittal on some counts may have been a mere fluke in the Hanousek case. Thomas Inverson was also convicted of violating the Clean Water Act. He was president of a company and also served as chairman of the board. The company blended chemicals to create numerous products, including acid cleaners and heavy-duty alkaline compounds. The company shipped the blended chemicals to its customers in drums. The company asked its customers to return the drums so that it could re-use them. Although the customers complied, they often did not clean the drums sufficiently. The drums still contained the chemical residue. The company had to remove the residue before it could re-use the drums. Therefore, it instituted a drum-cleaning operation in the early to mid-1980's. During that period, both the defendant, Inverson, and the general manager of the company made several attempts to convince a sewer authority to accept their waste water, but it refused because the company did not meet the sewer authority's pollution parameters. Beginning in 1985, defendant personally discharged the waste water and ordered the employees of his company to discharge the waste water into three places, namely: the plant property, through a sewer drain in an apartment complex defendant owned, and through a sewage drain at defendant's home. The plant did not have sewer access. These discharges continued until 1988.

In 1988, the company hired Mr. Brady. Brady paid a waste disposal company to dispose of waste water, which cost thousands of dollars each month. The company stopped its drum cleaning operation, and shipped the drums to a professional outside contractor for cleaning. In 1992, the company fired Brady. At that time, defendant bought a warehouse. The warehouse had sewer access. After the purchase, the company restarted its drum-cleaning operation at the warehouse and disposed of its waste water through the sewer. The company neither had a permit nor permission to make these discharges. The drum-cleaning operation continued until 1995.

A few months before the company restarted its drum-cleaning services in 1992, defendant retired from the company. However, he continued to make money from the company, to conduct business at the company's facility and to give the order to employees. The company continued to list him as its president in documents it filed with the State. The employee who was responsible for running the day-to-day aspects of drum-cleaning operation testified he reported to defendant. During the four years of operation at the warehouse, defendant was sometimes present when the drums were cleaned. During those times, the defendant was close enough to see and smell the waste. In some instances, defendant informed employees that he obtained a permit for the drum-cleaning operation. At other times, defendant told employees that if they got caught, the company would receive a slap on the wrist.

With respect to the "responsible corporate officer" concept in the Clean Water Act, defendant argued that a corporate officer is only responsible when the officer in fact exercises control over the activity, causing the discharge or has an express corporate duty to oversee the activity.[15] The court noted that the Clean Water Act does not define the "responsible corporate officer" for a violation of the Act. The court held that using the ordinary common meaning of "corporate officer" means one who is answerable or accountable for unlawful discharges under the Clean Water Act. The court traced the history of the responsible corporate officer concept through case law, and held that a directing head of a corporation which is engaged in an unlawful business may be held criminally liable for the acts of subordinates done in the normal course of business, regardless of whether or not these directing heads personally supervised the particular act done, or were personally present at the time and place of the com-

mission of these acts.[16] The court said because Congress used a similar definition of the term "person" in the Clean Water Act, it would presume that Congress intended that the principles of Dotterweich to be applied under the Clean Water Act.

Thus, the court concluded that under the Clean Water Act, a person is a "responsible corporate officer" if the person has authority to exercise control over the corporation's activity that is causing the discharges. There is no requirement that the officer in fact exercised such authority or that the corporation expressly vests a duty in that office to oversee the activities. (It must be remembered, however, that defendant, Inverson, was personally involved in the unlawful procedures that were being used to discharge pollutants from the warehouse into a waterway, even though he may not have supervised the day-to-day illegal discharges.)

What the legislature and courts have done here is to punish one for a status - as a responsible corporate office, rather than for the wrongdoings that officer might do. Irrebuttable presumptions or irrational limitations based upon status alone, violate due process.[17] That is, why should a white collar employee who has climbed the ladder of corporate success be doomed to irrebuttable criminal liability for every mistake of one of his or her employees (or contractors for that matter)? The violators should bear the criminal responsibility only for their own negligence.

ENVIRONMENTAL "PREVENTATIVE MAINTENANCE"

What can a company do to protect its "responsible corporate officers" from even negligent criminal violations? There are several models to choose from in orchestrating the preferred corporate behavior in combating the renewed prosecutorial "Anti-Company" syndrome.[18] The company should have established compliance standards and procedures to be followed by employees and other agents. There should be a specific individual within high level personnel of the organization with overall responsibility to oversee compliance with such standards and procedures. The organization should use due care and not delegate substantial discretionary authority to individuals whom the company knows or should know, through the exercise of due diligence, have a propensity to engage in any illegal activities. The organization should have taken steps to communicate effectively its standards and procedures to all employees and other agents. This can be accomplished by requiring participation in a training program or by disseminating publications that explain in a practical manner what is required. The organization should have taken reasonable steps to achieve compliance with those standards. This is accomplished by utilizing monitoring and auditing systems reasonably designed to detect criminal conduct by its employees and other agents. It can also have in place and publicize a reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution. The standards should be consistently enforced through appropriate disciplinary mechanisms. This would include, as appropriate, discipline of individuals responsible for failure to detect an offense. After an offense is detected, the organization should have taken all reasonable steps to respond appropriately to the offense and to prevent further similar offenses. This may have to be accomplished by modifying the company's programs to prevent and detect violations of law. A sample checklist is attached.

The essence of a program that could have avoided the issues in Hanousek, and Inverson, would have been basically a preventative maintenance program. A checklist on preventative maintenance would have obviously included the custom of protecting a pipeline or obtaining a permit. Upon reviewing the checklist, one would have seen within the company quite readily that a custom was not being followed or a permit was lacking. At least, if Taylor, the responsible corporate officer over Hanousek, had such a checklist, and Hanousek still did not comply, that responsible corporate officer would have likely not have been responsible anymore (if even the company was), and the entire burden would have been shouldered by Hanousek.

What other possibilities can be avoided akin to the scenarios in Hanousek and Inverson? The entire panoply of clean water violations are at hand here. Negligent failure to complete discharge monitoring reports, negligent failure to train employees to report an upset or bypass, negligent breakdown of pollution control equipment which could have been prevented by a preventative maintenance program, and negligently sidecasting dredged material in wetlands in otherwise exempt and routine ditch maintenance, are examples of calamities that can befall companies and their officers. In all these cases, besides the supervisors and managers who have the authority to control and prevent these negligent violations, the corporate officers to whom these negligent individuals report could also be responsible for their negligence through their employees.

CONCLUSION

Utilizing the responsible corporate officer doctrine in environmental cases to convict otherwise law abiding corporate officers based on their status, not their knowledge, is a disturbing trend which many courts are now accepting. Indeed, with a simple "negligence" approach, the whole concept of mens rea seems to be destroyed. Inconsistent with traditional notions of due process,[19] responsible corporate officers are being charged because of the negligence of others under their control and are being denied the basic opportunity to be heard. Normally, due process is required before one can be deprived of life, liberty or property. If a defendant is not entitled to notice prior to his or her conduct being declared illegal, because the responsible corporate officer concept is really an immutable status for the negligence of others, that person is denied due process. A public welfare statute that results in a minimal sanction may, on balance, not require the full panoply of due process, but most environmental statutes carry penalties

far in excess of a minimal sanction. Most carry jail terms, a draconian sentence for one who is convicted of a crime merely because of his status within a corporation.

APPENDIX

Developments of compliance programs are industry specific, e.g., a candy shop may not have to worry about hazardous waste laws, but the following list can serve as a guide to drafting the ideal:

1.Does the company have a legal compliance program (not just business ethics)?

2.Has the Board of Directors approved the program?

3.Are high level corporate officer(s) the oversight official(s) for the program?

4.Is there a compliance committee? Is it briefed periodically on the program?

5. Do outside directors oversee the program's progress?

6 Are all company officials screened for legal compliance before being given discretionary authority over operations?

7.Are the program's guidelines and standards written and distributed to all employees (at least those who could cause legal exposure), including new hires and agents?

8.Do the program's recipients receive training annually and acknowledge receipt of the program's guidelines and standards?

9.Does the compliance officer develop and administer the training?

10.Does the company publicize the program several times a year to employees, such as with videos, articles, meetings, etc.?

11.Are employees tested on the compliance program?

12.Does the company have measures to measure compliance, e.g., independent audits, monitoring systems, etc.?

13.Does the compliance officer receive the audit's results?

14.Does the company have misconduct report systems, e.g., hotlines?

15.Are legal infractions subject to appropriate discipline?

16.Are legal violations corrected and responded to? Reported to the government?

17.Does the company follow "applicable industry practice" for every endeavor?

18.Is compliance rewarded, e.g., compensation and performance appraisal?

[1] Ms. Hardin has been a partner at Jones, Walker, specializing in the defense of white collar crimes, including environmental crimes for the last 14 years. She was a former Assistant District Attorney in the New Orleans District Attorney's Office and the former First Assistant and Chief of the Criminal Division in the United States Attorney's Office for the Eastern District of Louisiana. She has defended a number of federal and state prosecutions, involving hazardous waste, clean water, wetlands and endangered species matters. She is a member of the American College of Trial Lawyers. Stan Millan, S.J.D., is a special counsel at Jones, Walker, specializing in environmental compliance and defense for the past eight years. He formerly worked with the Corps of Engineers. He teaches environmental law at Loyola Law School and UNO. He has worked with Ms. Hardin on the defense of many environmental matters.

[2] See Foster, Company's Escape Air, Water Cases, Individuals Face More Prosecutions for Environmental Crime, National Law Journal, December 13, 1989, at B-1 and B-4.

[3] See cases at Chapter 29, Louisiana Environmental Handbook (West 1999).

[4] 176 F.3d 1116 (9th Cir. 1999), cert. denied, 120 S. Ct. 860 (2000).

[5] Under his contract, he was responsible for every detail of the safe and efficient maintenance and construction of track, structures and marine facilities on the entire railroad and was to assume similar duties with special projects.

[6] See La. R.S. 30:2076.2.A for a similar criminal proscription. The Clean Air Act also proscribes negligent conduct. See 42 U.S.C. §7413(c)(4).

[7] It is noteworthy that the Fifth Circuit does not automatically consider the Clean Water Act a public welfare offense. See United States v. Ahmad, 101 F.3d 386 (5th Cir. 1996), rehearing denied, 108 F.3d 335 (5th Cir. 1997). Since due process is a balancing act, with the extent of deprivation of liberty or property involved being the cutting edge of what process is due, the court's equation of the CWA with public welfare statutes misses the mark. The notice element of due process - proscribing criminal conduct before it can be legally actionable - is sacrosanct.

[8] 120 S.Ct. 860 (2000).

[9] Id.

[10] Prosser and Keeton, The Law of Torts, (5th Ed. 1984), §30, p. 164.

[11] Id. at §32, p. 174.

[12] Id.

[13] Id. at 195.

[14] 162 F.3d 1015 (9th Cir. 1998).

[15] See 33 U.S.C. §1319(c)(6). See also, La. R.S. 30:2076.2.F for Louisiana's state law counterpart. The Clean Air Act at 42 U.S.C. 7413(c)(6) also embodies this concept.

[16] See, e.g., United States v. Dotterweich, 320 U.S. 277, 64 S.Ct. 134 (1943); and United States v. Park, 421 U.S. 658, 95 S.Ct. 1903 (1975).

[17] Bellotti v. Baird, 428 U.S. 132, 146, 96 S.Ct. 2857, 2865 (1977); and TXO Production Corp. v. Alliance Resources, 509 U.S. 443, 457, 113 S.Ct. 2711, 2720 (1993).

[18] See, e.g., Organization Sentencing Guidelines at 18 U.S.C. App. §8.A1.2(k). See also, Chapter 28 of the Louisiana Environmental Handbook (West 1999); DOJ policy guidance memorandum dated July 1, 1991, subject: Exercise of Criminal Prosecutorial Discretion for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator; and EPA Audit Policy and Environmental Management Protocols summarized at §§ 28.8 and 28.11-17, Louisiana Environmental Handbook (West 1999). See also, Corporate Compliance, (PLI 1999).

[19] See Matthews v. Eldridge, 424 U.S. 319 (1976).

Inside DEQ

by Chris Ratcliff

GUS VON BODUNGEN, FORMER DEQ ASSISTANT SECRETARY, DIES AFTER LONG ILLNESS

Gus Von Bodungen, former assistant secretary of the DEQ Office of Environmental Services, passed away on May 29 at the age of 68, after a lengthy battle with diabetes. Von Bodungen had retired from DEQ earlier this year after 29 years of leadership in air quality regulation with state agencies. His many accomplishments include the significant improvement of air quality in many areas, allowing the redesignation of more non-attainment areas than any other state.

BLISS HIGGINS APPOINTED NEW ASSISTANT SECRETARY OF ENVIRONMENTAL SERVICES

In February 2000, Governor Foster appointed Bliss Higgins as the new Assistant Secretary of Environmental Services. She replaced Gus Von Bodungen upon his retirement. In her new office, Higgins is responsible for all DEQ permits, as well as programs for litter and recycling, small business assistance, and community and industrial relations. Higgins previous work at DEQ has included development of Louisiana's air toxics program, as well as the air permitting program under Title V of the Clean Air Act. She also worked with EPA on the development of the federal air toxics program. Higgins serves as chair of the air toxics committee of the State and Territorial Air Pollution Program Administrators, with the Association of State Air Regulatory Agencies.

RULE-MAKING UPDATE

Air Quality

AQ197 - Repeal of Clean-Fuel Fleet Program (LAC 33:III.223 and 1951-1973) (*La. Register* vol. 26, #3; 3/20/00). The federal Clean Air Act Amendments of 1990 (CAAA) require implementation of a clean-fuel fleet program (CFFP) in ozone nonattainment areas classified as serious or above. Accordingly, DEQ submitted a State Implementation Plan (SIP) revision for a CFFP in October 1994, and the SIP was approved by the EPA on October 23, 1995. State regulations governing the CFFP are codified in LAC 33:III.1951-1973. The CFFP was to be phased in beginning in 1998 in the Baton Rouge ozone nonattainment area. In 1998 EPA granted affected areas a one-year extension to begin the program. At this time, DEQ and EPA initiated discussions regarding opt-out provisions contained in the CAAA. These provisions, found in section 182(c)(4)(B), allow subject areas to submit a SIP revision to EPA which demonstrates that there exists surplus emission reduction credits (above and beyond RACT requirements) that can be used to offset those reductions from a CFFP. DEQ submitted the required SIP revision to EPA, which was approved by direct final rule and became effective on September 17, 1999. As a result, DEQ is repealing the state CFFP (LAC 33:III.1951-1973) and applicable fee requirements in LAC 33:III.223. According to DEQ, the clean-fuel fleet program has been shown to provide only marginal emission reduction benefits in the Baton Rouge ozone nonattainment area and has high administrative, operational, and equipment costs associated with long-term implementation of the program. DEQ reports it is able to achieve equivalent or better emission reductions by substituting reductions obtained through the use of the existing VOC storage rule (LAC 33:II.2103) requirements.

AQ199 - Emission Reduction Credits Rule Correction (LAC 33:III.613 and 615) (*La. Register* vol. 26, #3; 3/20/00). Corrects the date from January 20, 1995 to February 20, 1995, for submittal of all applications for banking emission reduction credits. The rule requires six months for submittals to DEQ after promulgation of the rule; however, the actual date promulgated in AQ190, which was published in the September 1999 Louisiana Register, was only five months after promulgation.

AQ198 - Pulp and Paper Industry; Restore State Deadline in Incorporation by Reference (LAC 33:III.5122) (*La. Register* vol. 26, #4; 4/20/00). Restores a previously modified paragraph in 40 CFR 63.440(d)(1), which added a state deadline for compliance with National Emission Standards for Hazardous Air Pollutants from the pulp and paper industry, in accordance with R.S. 30:2060(N)(3). This modified paragraph was adopted in AQ177 on December 20, 1998, but was not included in an

update to the incorporation by reference in AQ193 on August 20, 1999.

Office of the Secretary

OS037E - Beneficial Environmental Projects (LAC 33:I.2501 – 2505) Effective 3/10/2000 (La. Register vol. 26, #3; 3/20/00). Defines criteria for beneficial environmental projects (BEPs) acceptable in settlement of civil penalties, under La. R.S. 30:2050.7(E). According to DEQ, immediate adoption of this rule is necessary to avoid delaying several proposed BEPs that will substantially benefit neighboring communities and reduce the load of pollutants discharged into the environment.

OS035E1 – Laboratory Accreditation Deadline Amendments (LAC 33:I.4719) (*La. Register* vol. 26, #4; 4/20/00). DEQ 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 is 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. A finding of imminent peril to public health, safety and welfare is based on the inability to accept and review analytical data. Furthermore, the environmental analytical laboratory industry could suffer a loss of jobs. 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 is a renewal of Emergency Rule OS035E, effective December 15, 1999, and published in the Louisiana Register on January 20, 2000. Rulemaking procedures have begun to promulgate this rule.

OS034 - RECAP Revision Package 1 (LAC 33:I.1305 and 1307, and LAC 33:VII.305) (*La. Register* vol. 26, #6; 6/20/00). Revises the Risk Evaluation/Corrective Action Program to provide clarification and corrections to text, tables, and figures. Clarifications of text will enhance the reader's understanding of the content of the document. Correction to errors in the document and movement of text will improve the RECAP document readability and help the regulated community understand the document. Some of these changes include: revisions to the Screening Option to determine if an area of concern requires further evaluation under a management option; upgrading the SIC codes to newly adopted NAICS codes; corrections to the RECAP standards tables; allowance of the SPLP method for the soil level protective of groundwater derivation for Management Options 1, 2, and 3; site investigation requirements expanded to provide more guidance to submitters; new RECAP submittal forms to enable both submitters and Department reviewers to find needed information more easily; and increased flexibility that may be granted by the Department in the submittal requirements for each screening or management option. The RECAP revisions will help ensure that a consistent method based on sound scientific principles is used and will continue to serve as a standard tool to assess impacts to soil, groundwater, surface water, and air.

Radiation Protection

NE022 - Recordkeeping Requirements for Specific Licensing of Radioactive Material (LAC 33:XV.325, 342, and 478) (*La. Register* vol. 26, #5; 5/20/00). Specifies records important to decommissioning; requires the transfer of records pertaining to decommissioning to the new licensee; and states that the license will not be terminated until the Nuclear Regulatory Commission (NRC) receives the required records. These amendments are necessary to maintain state compatibility with the NRC rules.

NE021 - NRC Packaging and Transportation Compatibility (LAC 33:XV.1503, 1505, 1506, 1508, 1509, 1510, 1511, 1512, 1513, 1514, 1515, 1516, and Apendix A) (*La. Register* vol. 26, #6; 6/20/00). Changes rules on packaging and transportation of radioactive material. Conforms state regulations with those of the Nuclear Regulatory Commission (NRC) and the International Atomic Energy Agency, and codifies criteria for packages used to transport plutonium by air. This action is necessary to ensure that state regulations reflect accepted NRC and international standards and comply with current federal legislative requirements.

Water Quality

WP035E2 (*La. Register* vol. 26 #3; 3/20/00) **and WP035E3– Financial Security for**

Privately- Owned Sewage Treatment Facilities. 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. **WP035E3**, signed and effective on June 26, 2000, includes amendments allowing for waiver and exemptions under certain circumstances, as provided by Act 93 of the 1st Extraordinary Session.

WP038 - Secondary Containment for Oil Tanks; Correction of LAC 33:IX.1701 (LAC 33:IX.1701) (*La. Register* vol. 26, #6; 6/20/00). Replaces original language that was mistakenly omitted on the initial promulgation of the rule into the Louisiana Administrative Code. As corrected, the rule requires a dike or retaining wall around each permanent oil tank or battery of tanks that are located within the corporate limits of any city, town, or village or where such tanks are closer than 500 feet to any highway or inhabited dwelling or closer than 1,000 feet to any school or church, or where such tanks are so located as to be deemed a hazard by DEQ. An exception is made for tanks located in such areas where such dikes or retaining walls would be impossible such as in water areas. This will clarify the language and correct the grammatical structure of the affected sentence. It does not change the meaning or intent of the original rule. The public has pointed out to the department that the error was present and requested a change to return the language to its original content.

CASE LAW UPDATE

Court of Appeal Flushes Takings Claim by Sewage Company Shareholder. ***United States of America and State of Louisiana, Dept. of Environmental Quality v. Acadiana Treatment Systems, Inc.,*** **et al.,** #99-30476, U.S. Ct. App. 5 Cir. (5/3/00). As was reported in the Spring 1999 issue of the *Louisiana Environmental Lawyer*, DEQ and the U.S. won a judgment from the U.S. District Court for the Western Division of Louisiana (Lafayette section) transferring control over Johnson Properties, Inc. to a receiver, for the purpose of addressing chronic environmental violations at the company's sewage treatment systems. The defendants, including Johnson Properties, Inc., eighteen of its subsidiary corporations, and two individual members of the Johnson family, had failed to comply with a consent decree previously entered in the matter.

Michael Johnson, sole stockholder of the defendant corporations, appealed the judgment. In brief, Johnson argued that the judgment was a permanent physical occupation of his property by the governmental bodies, and therefore a taking of his property without just compensation, in violation of the federal and state constitutions. He also argued that the district court exceeded its authority by granting the receiver authority over subsidiary corporations that were not made defendants to the suit.

The court of appeal dismissed the appeal, holding that Michael Johnson had no standing to bring it. To establish standing under Article III, §2 of the Constitution, the court said, Johnson must show (1) an injury in fact (2) that is fairly traceable to the challenged act, and (3) that is likely to be redressed by the requested remedy. Johnson alleged he would be injured by the sale by the receiver of assets owned by some of JPI's subsidiaries. This was insufficient to confer standing, the court said, because the alleged injury actually inheres in the corporation, not in Michael Johnson, under the "well-established principle of corporate law that corporate assets belong to the corporation, not to the shareholder." Because JPI had filed for bankruptcy, the Chapter 11 trustee alone has standing to pursue a cause of action to enforce JPI's rights.

Johnson also argued that the non-Louisiana customers of JPI would be placed "at an undeserved risk of irreparable harm" because the receivership judgment gives the receiver control over non-Louisiana subsidiaries. Thus, he argued, the

non-Louisiana customers would be forced to pay for the repair and upgrade of Louisiana facilities. The court rejected this alleged injury as a basis for standing, saying that (1) the claim was neither concrete and particularized, nor actual or imminent, as required by law; and (2) Michael Johnson lacks standing to bring a claim on behalf of non-Louisiana customers.

Since the ruling by Court of Appeal, Michael Johnson has filed two lawsuits asserting the takings claim: one against the Louisiana DEQ in state district court, and another against the United States in the U.S. Court of Federal Claims. The state court suit has been removed to Bankruptcy Court, Middle District of Louisiana.

Progress on Permit for PVC Producer. ***In the Matter of Shintech, Inc.***, No. 466, 616 Div. N, 19th J.D.C. (6/19/00). Welch, Judge. In a judicial review proceeding filed by six individual residents of Iberville and West Baton Rouge Parishes, appellants sought the revocation of a preconstruction/Part 70 operating air permit issued by DEQ to Shintech, Inc., for the construction and operation of a new polyvinyl chloride manufacturing facility near Addis, Louisiana. Shintech applied for permits for the Addis project after its efforts to obtain permits for a much larger plant near Convent, Louisiana were delayed, amid controversy over "environmental justice" complaints.

Appellants in the current proceeding argued that Shintech and DEQ had failed to adequately consider alternative sites for the project, as required by *Save Ourselves,Inc. v. Louisiana Environmental Control Commission*, 452 So.2d 1152 (La. 1984), and its progeny. Specifically, Appellants argued that it was improper for the analysis to be limited to 8 sites in the immediate vicinity of the Dow Chemical Co.'s Plaquemine facility. Shintech and DEQ countered that the new plant would be entirely dependent on the Dow facility for feedstock vinyl chloride monomer, since the Dow faciity was the only merchant supplier of VCM with adequate capacity to supply the new Shintech plant. Furthermore, they argued, locating the new plant close to Dow would allow transportation of VCM by pipeline, which would be both safer and cheaper than transportation by rail, truck or barge. Thus, they argued, limiting the analysis to the area near Dow was justified and allowed under *Blackett v. La. Dept. of Environmental Quality*, 506 So.2d 749 (La. App. 1 Cir. 1987).

Appellants also argued that the project would not avoid adverse environmental effects to the maximum extent possible, as required by *Save Ourselves* and its progeny, because the new plant would emit volatile organic compounds ("VOCs") in an area that is currently failing to attain ambient air standards for ozone. Shintech and DEQ responded by pointing out that there would be no net increase of VOC emissions due to the Shintech plant, because Dow will voluntarily reduce its own VOC emissions by an amount sufficient to offset the new emissions by Shintech. The appellees also argued that new development in ozone non-attainment areas is both expected and allowed by the Clean Air Act.

Appellants third line of attack focused on DEQ's conclusion that the social and economic benefits of the project will outweigh the environmental impact costs. Appellants argued that DEQ failed to consider, or gave inadequate weight to, several alleged adverse environmental and economic factors. Shintech and DEQ responded with arguments that the record and the DEQ's "Basis for Decision" document showed proper consideration of all factors.

Without making any specific findings of fact, or indicating which arguments it accepted or rejected, the Court ruled that DEQ "did not abuse its discretion, act contrary to law, nor was it arbitrary and capricious in granting the Part 70 permit to Shintech." The Court found that "there is a rational basis, supported by the findings of fact in the record, for the ultimate decision by DEQ" to grant the permit.

Counsel for the appellants indicated that the district court's judgment will be appealed to the First Circuit Court of Appeal. Meanwhile, construction of the new plant is well underway.

DEQ Issues Ironclad Cleanup Order to Scrap Metal Dealer. ***In the Matter of Davis Scrap Metal***, La. Dept. of Civil Service, Div. of Admin. Law Docket #99-4573-EQ; 6/16/00 (Finnegan, ALJ). The former owner/operator of a scrap metal business received a compliance order from DEQ, citing unpermitted dumping of trash at the site, and ordering cleanup and proper closure of the site. After an adjudicatory hearing, the administrative law judge found that the unpermitted dumping had occurred. Respondent contended he could not clean up the property because the current owner evicts him, but the ALJ found that the owner had written to Respondent demanding that he "do the necessary clean up." The ALJ ruled that Respondent, as a former operator of an unauthorized and promiscuous dump, was required to clean up and close the site under DEQ rules. The compliance order was upheld.

LEGISLATIVE UPDATE
2000 SPECIAL AND REGULAR SESSIONS

by Jim Manchard

Legislation

The legislature met for a Special Session from March 19 to April 7, 2000 and for the Regular Session from April 24 to June 6, 2000. The Regular Session is limited by the constitution to fiscal matters concerning taxing and spending. The issues considered by the legislature during the Special Session were limited by the call or agenda issued by the Governor. Together these two sessions produced little environmental legislation.

One issue taken up during the special session that was considered important by several legislators and the Department of Environmental Quality concerned the bonds or other financial instruments which are required to obtain or maintain permits to operate privately owned sewerage treatment facilities serving communities or subdivisions. The financial requirements were added to the law in 1999 as a result of problems with an owner of many of these facilities. Eventually, that particular owner pled guilty to criminal charges and was sentenced to jail. However, other owners who had maintained well run facilities were unable to meet the newly enacted financial security requirements and faced the prospect of losing their permits. DEQ recognized that the public health and the environment would be affected should these sewerage facilities cease operations.

Act 93 increased the availability of financial instruments by providing that permits shall be conditioned upon substantial compliance with, rather than full and satisfactory performance of, the Louisiana Water Control Law (LWCL). The new law allows the Secretary of DEQ to waive or reduce the financial security requirement if the facility has been in compliance with the LWCL for seven years and the permittee provides DEQ with a letter of good standing and no objection from the Public Service Commission (PSC).

In addition, the Secretary may also issue a permit waiving the financial security if the permittee has made a good faith effort to acquire the financial security, the permit is necessary to ensure uninterrupted sewerage treatment or necessary to protect human health or the environment, and the permittee provides the secretary with a letter of good standing and of no objection from the PSC. However, in no case shall a discharge be allowed by permit to continue for more than six months without the required financial security under this waiver.

House Concurrent Resolution 29 urges the Department of Environmental Quality to deny an operating permit to Louisiana Land Systems, Inc. to operate an industrial waste facility near Alsen, East Baton Rouge Parish, Louisiana. An HCR "urge and request" does not have the force of law but was recognized by DEQ at the hearing on this matter as an expression of the legislature. Testimony was received at that meeting that a large number of environmentally detrimental facilities are already located in the Alsen community.

House Concurrent Resolution 54 urges the Department of Health and Hospitals to test private water wells in the Carencro area to determine their safety. This request resulted from a discovery of contaminants in the city water wells of Carencro.

Bills dealing with the amount of money paid to processors of waste tires were heard in both the Special and the Regular Session. The processors of waste tires were seeking an increase in their portion of the $2.00 fee collected by new tire dealers on the sale of each new tire. Current law provides that $1.00 goes to the processors as a supplement to the money that they receive from selling the processed tire and $1.00 goes to the Department of Environmental Quality for administration of the Waste Tire Management Fund and program, research, and cleanup of tire piles throughout the state. As the majority of piles have been cleaned up, the processors were seeking additional funds.

HB 208 increased the $2.00 fee to $2.05, allowing it to be taken up in the Special Session under the call item providing for legislation dealing with increases in fees. HB 313, changed the $2.00 from a fee to a tax, allowing it to be considered during the 2000 Regular Session dealing with fiscal matters, including taxes. DEQ agreed to amend the rules dealing with the

Waste Tire Management Fund to provide additional revenue for the waste tire processors and neither bill passed.

Senate Concurrent Resolution 41 urges the Senate Committee on Environmental Quality and the House Committee on Environment to study and determine the effects of proposed construction of a power plant in Acadia Parish on the Chicot Aquifer. Prior to the passage of this resolution, the House Committee on Environment had met to discuss the overall status of the aquifers in the states, as discussed below.

Informational Meetings

The Committee on Environment of the House of Representatives met several times during the two sessions to hear testimony and receive information from several groups and on several issues.

During the Special Session, on April 4th, the Sierra Club gave a presentation to the committee on its mission and activities. The committee heard testimony on conservation, urban sprawl, the Atchafalaya Basin, coastal issues, and toxic substances. The Sierra Club expressed its desire to establish a working relationship with the House Environment Committee and to provide information and support to the committee on environmental issues.

The House Committee on Environment also met on May 16th to discuss the status of the state's groundwater aquifers. At that meeting the committee heard from the U.S. Geological Survey, Louisiana Department of Transportation and Development, and the Sparta Groundwater Commission. Testimony indicated that the depletion of the aquifers has not yet reached crisis status, but the aquifers are not recharging as fast as they are drained. The current drought has exacerbated the problem. Some actions have been undertaken in certain areas that have helped to slow the depletion rate. However, groundwater usage is continuing to increase and the effects of saltwater intrusion and lowering water tables are being experienced.

Louisiana has no comprehensive water usage or water resource law, and no executive department has jurisdiction over the subject matter. The committee requested that DOTD prepare legislation to protect and regulate the groundwater resources of the state, to be proposed during the 2001 Regular Session.

On May 17, the House Committee on Environment heard from the LSU Agriculture Center. The meeting centered on efforts being made by the Center and the farm industry to improve the environment. These efforts include water quality and Best Management Practices (BMP's) in farming and forestry, development of more effective wetland plant materials, smoke management, and poultry litter management. In addition, as farming is a large user of groundwater aquifers, the Center is working on alternative planting and irrigation methods to reduce the pressures on the aquifers.

The House and Senate, on May 24th, held a joint hearing on the reestablishment of the Department of Environmental Quality. This "Sunset" hearing is set by statute to assure the necessity of the various executive departments of the state. At that joint hearing, the committees received performance audits, financial audits, and budgets from the department. In addition, DEQ presented information on initiatives that it has undertaken, such as its reorganization and its work toward an international standards certification (ISO 9000). DEQ also discussed its on-going relationship with the U.S. Environmental Protection Agency under the various State Implementation Plans.

The House Committee recommended that the Department of Environmental Quality be reestablished by legislation in the 2001 Regular Session.

Announcements

The 8th Annual Fall Meeting of the American Bar Association's Section of Environment, Energy, and Resources will be held in New Orleans, at the Hotel Inter-Continental, on September 20-24, 2000. The program will include over 30 CLE offerings, several networking and social events, and committee roundtables.

Registration information can be obtained by contacting:

ABA/SEER, Attn:
8th Section Fall Meeting
750 N. Lake Shore Drive
Chicago, IL 60611
Fax: 312/988-5572.

For CLE planning purposes, please note that the Section is currently planning to host a brownbag lunch CLE event in Baton Rouge in mid-October, as well as the annual half-day seminar in New Orleans, which will be held at the Hotel-Intercontinental on November 17, 2000, and will include credits for both the ethics and professionalism yearly requirements.

More information on both events will be forthcoming.

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