



THE

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## Phase II of the NPDES Storm Water System

by Erinn Neyrey

### Introduction

The 1972 amendments to the Federal Water Pollution Control Act (usually referred to as the Clean Water Act or CWA) focused on developing a permitting program for point sources of pollution entering the waters of the United States. Industrial wastes and municipal sewer treatment plants were the key areas addressed by the CWA §402 national pollution discharge elimination system (NPDES). Research conducted, as the NPDES program was implemented, revealed that diffuse sources of water pollution, such as storm water systems, were also a significant source of impairment to our nations waters. Storm water systems collect and carry storm waters and pollutants swept up by the running surface waters and deposit them into local lakes, rivers and waterways. When the CWA was amended in 1987, Congress broadened its focus

and included the implementation of a comprehensive national program to address storm water related pollution. This program is designed to focus on municipal separate storm sewers, which as defined below, covers a broad spectrum of facilities and structures.

“municipal separate storm sewer (MS4) means a conveyance or system of conveyances(including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):

- (i) Owned or operated by the State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law)...including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization,

or a designated and approved management agency under Section 208 of the Clean Water Act that discharges into the waters of the United States;

- (ii) Designed or used for collecting or conveying storm water;
- (iii) Which is not a combined sewer; and
- (iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2.” (40 CFR 122.26(b)(8))

### Phase I

The NPDES storm water program was designed to be implemented in two. Phase I was developed in 1990, and required NPDES permits for storm water discharge from:

- “large” and “medium” MS4s generally serving populations of 100,000 or more people, and
- eleven categories of industrial activities, including construction sites that disturb five acres

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or more of land.

Under Phase I, regulated facilities are required to obtain individual permits and construction sites could pursue either individual permits or the more common general permits, depending on which permitting options were designated by that state's permitting authority. Population figures used to trigger Phase I requirements are based on the 1990 Census data. More recent data will not trigger inclusion into the group of entities regulated by Phase I.

## Phase II

The final rule for the Storm Water Program, Phase II was published in the federal register December 8, 1999. The goal of Phase II is to address the remaining storm water systems and construction activities that are contributing to the impairment of the waters of the United States. The regulations designate:

- "regulated small MS4s," and
- "small construction activities" or construction sites between 1-5 acres, as the focus of the Phase II program.

Important deadlines for the Phase II program are December 8, 2002, when all NPDES permitting authorities are required to issue general permits for phase II regulated activities and March 10, 2003, when regulated operators are required to obtain permit coverage.

## Regulated Small MS4s

The universe of small MS4s is prohibitively large, therefore,

not all small MS4s are covered by Phase II. There are three ways a small MS4 may be designated as regulated. (40 CFR 122.32)

1. Automatic Designation by Rule This first category is an automatic designation and requires all MS4s within "urbanized areas" to be permitted/regulated under Phase II. "Urbanized areas" are designated by the Bureau of the Census and are based on a specific set of criteria applied to the latest decennial census data (see 55 FR 42592, October 22, 1990, 2000 census numbers will be available in August 2001). While actual designation requires complex application of the set criteria, the general definition of "urbanized areas" reads as follows:

An urbanized area (UA) is a land area comprising one or more places - central place(s) - and the adjacent densely settled surrounding area - urban fringe - that together have a residential population of at least 50,000 and an overall population density of at least 1,000 people per square mile. It is a calculation used by the Bureau of the Census to determine the geographic boundaries of the most heavily developed and dense urban areas. (EPA Storm Water Phase II Compliance Assurance Guide, hereinafter, EPA Phase II Compliance, p.4-6)

Government entities may look at Appendix 6 to the Preamble of the Final Phase II Rule for a list of urbanized areas based on the 1990 census data. . It is cautioned that this list may not

be complete and final designations will include data collected by the 2000 census, therefore, areas that have grown may find themselves included.

## 2. Potential Designation due to Required Evaluation of 10,000/1,000 Areas

The second category requires the permitting authority to design an evaluation system to review small MS4s located in jurisdictions with a population of at least 10,000 and a population density of at least 1,000 people/per square mile. The permitting authority will determine which of these MS4s will be designated as regulated MS4s based on their set evaluation system. EPA has recommended a number of criteria permitting authorities should consider when developing their program, such as; discharge to sensitive waters, high population density, high growth or growth potential, contiguity to a UA, whether or not it is a significant contributor of pollutants to waters of the United States, and whether it has ineffective protection of water quality concerns by other programs. Again assistance in these determinations has been provided in Appendix 7 to the Preamble of the Final Phase II Rule. This list should be viewed with the same cautions as mentioned above. The deadline for making these designations is set at December 9, 2002, or at December 8, 2004, if the State is working towards a comprehensive watershed plan and the evaluations are being done accordingly. (EPA Phase II Compliance, p.4-5)

3. Potential Designation based on Physical Connection The third category of potentially regulated small MS4s is based on a system's connection to a MS4 that is regulated under a NPDES permit. Permitting authorities are required to regulate any MS4 that is outside of a UA that is found to substantially contribute to the pollutant loadings of a permitted system due to a physical connection between the two systems. Physically connected has been defined as, "one MS4 is connected to a second MS4 in such a way that it allows for direct discharges into the second system."

#### Waivers

There are two waiver options that would release operators of regulated small MS4s from the permitting requirements of the Phase II program. (40 CFR 122.32(c-e)) The permitting authority may assess regulated small MS4s for waiver potential or the operator of an MS4 may petition the permitting authority for consideration. However, a deadline for waiver acceptance has been set at March 9, 2002, after which the permitting authority may not grant waivers. Again, an extended deadline for waivers made in conjunction with a comprehensive watershed plan is provided, March 8, 2007. (EPA Phase II Compliance, p.4-10)

1. Less than 1,000 population in a UA The first waiver option is three pronged. The following requirements must be met in order to qualify for this program waiver: "The jurisdiction

served by the system is less than 1,000 people; the system is not contributing substantially to the pollutant loadings of a physically interconnected regulated MS4; and if the small MS4 discharges any pollutants identified as a cause of impairment of any water body to which it discharges, storm water controls are not needed based on wasteload allocations that are part of an EPA approved or established total maximum daily load (TMDL) that addresses the pollutant(s) of concern." (40 CFR 122.32)

2. Less than 10,000 population in a UA The second waiver is allowed in situations where "the jurisdiction served is less than 10,000 people, and an evaluation of all waters of the U.S. that received a discharge from the system shows that storm water controls are not needed based on wasteload allocations that are part of an EPA approved or established TMDL that addresses the pollutant(s) of concern or an equivalent analysis, and it is determined that future discharges from the small MS4 do not have the potential to result in exceedances of water quality standards." (40 CFR 122.32)

#### **Types of Regulated Small MS4 Permits**

The permitting options available under Phase II regulations allow the permitting authority flexibility in designing their program. (40 CFR 122.33) Unlike the mandatory individual permits required for facilities under Phase I, regulated small MS4s may have as many as three permitting

options to pursue depending on the program their permitting authority has developed. EPA recommends the use of general permits with the Phase II programs, however individual permits, as well as a co-permittee option (ie. sharing responsibilities with another small regulated MS4, a medium and large MS4s) may be available options.

The use of general permits allows the permitting authority the ability to establish one set of requirements for all regulated small MS4s to follow. The permitting authority drafts permit requirements and publishes them in order to give the public an opportunity to comment before a general permit is adopted. Once adopted regulated small MS4s submit a notice of intent (NOI), which serves as a permit application. The NOI in this situation will include a storm water management plan, thereby allowing individual flexibility within the plan's design to address the specific concerns of the applicant. If necessary or desired an operator of a regulated small MS4 may pursue an individual permit. This will entail a more comprehensive application process, as a specific permit will be drafted for the project in question and public review and comments will be required. Lastly, a regulated small MS4 may join with a currently permitted medium or large MS4 as a co-permittee. If this route is chosen then the regulated small MS4 would be responsible for following the specific permit conditions in



their co-permit rather than just the minimum control measures of the Phase II program. Joining with another regulated small MS4 is also allowed and submission can either be through the filing of a NOI for a general permit or through an application for an individual permit.

### **Regulated Small MS4s Program Requirements:**

The basis of the Phase II general permit requirements is a list of six minimum control measures that the regulated small MS4s must meet through the development of best management practices (BMPs). (40 CFR 122.34) The six minimum control measures are listed as:

1. Public education and outreach on storm water impacts,
2. Public participation/involvement,
3. Illicit discharge detection and elimination,
4. Construction site storm water runoff control,
5. Post-construction storm water management in a new development/redevelopment, and
6. Pollution prevention/good housekeeping for municipal operations.

Operators of regulated small MS4s will develop the BMPs needed for their specific operation and submit this with their NOI. This group of BMPs together with identified and measurable goals will become the required storm water management plan (SWMP). The storm water management plan will also pinpoint a timeline for implementation

and specify responsible person(s) for all planned activities. Involving the public and developing a proactive strategy are heralded as the corner stones of a successful SWMP. Improvements in storm water management will rely on participation from a broad spectrum of citizens and, therefore Phase II concentrates on education and participation.

A SWMP will be designed with a specific storm water system in mind. Reaching out and working with small groups and even individuals may be necessary to fulfill program requirements. For example, control measures 1 and 2 may be addressed by forming partnerships with civic groups or other non-governmental organizations. Furthermore, other aspects of the listed control measures could be addressed through community partnerships, such as a program to report illicit discharges. Educating these partners about illicit discharges would give the storm water managers additional resources upon which to depend. In a community with strong citizen leadership these types of alliances would effectively involve and education the public about the program and its implementation.

### **Small Construction Activities**

The Phase II rules also automatically require construction sites between one and five acres and may require sites of less than an acre to obtain an NPDES permit under the storm water program. When evaluating construction sites of less

than an acre there are two guiding principals that assist permitting authorities with their determination of whether or not to regulate. First, sites that are part of a larger common plan for development or sale with a planned disturbance of equal to or greater than 1 acre and less than 5 acres are to be regulated. This prohibits construction site developments from being planned in phases, in order to by-pass permitting requirements. Secondly, less than 1 acre sites are regulated if they are specifically designated by the permitting authority due to their "potential for contributing to a violation of a water quality standard or for a significant contribution of pollutants to the waters of the United States." (40 CFR 122(b)(15), Exhibit 1) Permit application for these small construction activities will be due March 10, 2003.

### Waivers

As with the regulated small MS4s, small construction activities may also be given an opportunity to waive out of the permitting requirements if the permitting authority decides to allow for these options. (Waivers are not available to site greater than 5 acres or smaller sites that are part of a larger development or sale.) Possible waivers may be requested by operators of small construction sites upon certification that a site meets waiver conditions. The waiver conditions are described as follows:

Low predicted rainfall potential This waiver requires evi-

dencethat shows that the construction activities will be conducted during a time where the rainfall erosivity factor is less than 5.

Storm water controls are not necessary A finding that storm water controls are unnecessary based on a current TMDL for the activities or an analysis equivalent to a TMDL that determines allocations are not needed to protect water quality will fulfill this waiver conditions.

**Permit Requirements for Small Construction Activities:** Similiar to Phase I's approach to construction site permits, Phase II regulations do not offer detailed permit requirements. Instead permitting authorities are allowed to

design permit requirements on a site-specific basis. The process begins with the submission by the operator of a NOI, which includes project information. Additionally, the development of a storm water pollution prevention plan (SWPPP) will form the core of the permit requirements. This plan will define how site activities will be conducted to ensure that water pollution does not result. Upon completion of the construction project a notice of termination (NOT) will be submitted ensuring that the site has been stabilized as specified in the SWPPP.

#### **Conclusion**

As is plainly evident upon reading this short review of Phase II of the NPDES storm water program, this program is

complex with many layers of information to sort through. Requirements and responsibilities under this program turn on a number of specific definitions/"terms of art" that will mandate close attention to detail. EPA has developed a number of fact sheets, program overviews and assistance guides that can be found at [[www.epa.gov/owm/sw/about/](http://www.epa.gov/owm/sw/about/)]. On the state level, Louisiana's permitting authority is the Louisiana Department of Environmental Quality, Office of Environmental Services, Permits Division. (see LAC 33.IX.2341 *et seq.*)

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## Inside DEQ

### **RULE-MAKING UPDATE**

#### **Air Quality**

**AQ210 - Standards of Performance for New Stationary Sources, Incorporation by Reference Update, 40 CFR 60 (LAC 33:III.3003)** (La. Register vol. 26, #11; 11/20/00). Updates LAC 33:III Chapter 30 by adopting by reference changes to the federal rules, published at 64 FR 37196 (7/9/99); 64 FR 38240 (7/15/99); 64 FR 53027 (9/30/99); 65 FR 13243 (3/13/00); 65 FR 18908 (4/10/00).

**AQ209 -Filling of Gasoline Storage Vessels – Exemptions (LAC 33:III.2131)** (La. Register

vol. 27, #2; 2/20/00). Adds St. Mary Parish to the list of parishes exempted from compliance with the requirements of LAC 33:III.2131.A for certain facilities, correcting and inadvertent omission.

#### **Hazardous Waste**

**HW074 - Manifest Requirements Revised (LAC 33:V.903, 905, 907, 913, 915, 917, 919, 1107, 1111, and Chapter 11, Appendix A)** (La. Register vol. 27, #1; 1/20/00). Revises requirements relating to hazardous waste manifests to achieve consistency with equivalent federal regulations. Redundant requirements are eliminated.

#### **Nuclear Energy**

**NE023 - Amendments for Compliance with Nuclear Regulatory Commission Compatibility Requirements (LAC 33:XV.Chapters 1, 3, 4, 15, and 20)** (La. Register vol. 26, #12; 12/20/00). Amendments to the radiation protection regulations addressing several different subjects. Those subjects, as described by the Nuclear Regulatory Commission (NRC) in the pertinent articles of the Federal Register, are: resolution of dual regulation of airborne effluents of radioactive materials - Clean Air Act; recognition of agreement state licenses in areas under exclusive federal jurisdiction within an agreement state; radio

logical criteria for license termination; and minor corrections, clarifying changes, and a minor policy change. Included are changes in the definitions of background radiation, decommission, declared pregnant woman, very high radiation area, high radiation area, individual monitoring devices, and eye dose equivalent. The definitions of constraint, critical group, distinguishable from background, and residual radioactivity are added. The main impact of this rule is the determination of criteria under which a site will be considered acceptable for unrestricted use so that a license can be terminated. The principal criterion is that the residual radioactivity that is distinguishable from background radiation results in a total effective dose equivalent (TEDE) to an average member of the critical group does not exceed 25 mrem per year. As a Nuclear Regulatory Commission Agreement State, in accordance with the NRC agreement signed on May 1, 1967, Louisiana has accepted the responsibility for promulgating regulations that satisfy the compatibility requirement of Section 274 of the Atomic Energy Act of 1954, as amended. In certain areas defined by the NRC, state regulations must be the same as the NRC regulations. The extent to which the regulation must be identical, whether in content or in effect, is determined by the NRC. All amendments in this package are consequently mandated by the NRC, to comply with recent NRC regulation changes.

**NE025 - Radiographer Trainee Requirements and Records (LAC 33:XV.503 and 588)** (La. Register vol. 26, #12; 12/20/00).

Changes the definition of "radiographer trainee" to allow the individual to be a trainee for 24 consecutive months, provided the industrial radiography exam is taken during the first 12-month period. Previously the trainee status was only good for 12 consecutive months. The 12-month period for trainee status was putting a burden on some industrial radiography companies. This action will allow them to maintain trained personnel for a longer period of time and will give the trained personnel more time to prepare themselves to pass the industrial radiography exam. If an individual is granted trainee status and is working as part of a two-man radiography crew, the licensee must have the written confirmation letter from the department at the temporary job site where the individual is working. The rationale for this rule is to ensure that the individual working has been given written authorization as a trainee and time to get the proper experience needed for the trainee status.

#### Office of the Secretary

**OS036 - Revisions to Correct Organization Citations Resulting from Reengineering of DEQ (LAC 33:I, III, V, VI, VII, IX, XI, XV)** (La. Register vol. 26, #11; 11/20/00). The recent reengineering of DEQ resulted in the elimination of program-based offices and divisions to create a process-oriented organization. This rule revises existing references to non-existent offices and divisions in the regulations to reflect the new organizational structure of the department. Additional minor revisions are being made to clean up grammati-

cal errors and eliminate outdated forms. This action is required by Act 303 of the 1999 Regular Session of the Legislature effective June 15, 1999.

#### Solid Waste

**SW029 - Revision of the Waste Tire Regulations (LAC 33:VII.Chapter 105)** (La. Register vol. 26, #12; 12/20/00). Clarifies definitions, simplifies the exemption process, simplifies the standards for waste tire generators, transporters, and recyclers, and implements the fee for off-road tires and tires weighing more than 100 pounds. The rule also implements a raise in payments to waste tire processors from \$1 per 20 pounds of waste tire material processed and marketed to \$1.50 per 20 pounds. Waste tire processors have not received an increase since program inception in 1992. The revisions are necessary to meet the standards required by Act 1015 of the 1999 Regular Session of the Louisiana Legislature, which places a fee on off-road tires for their disposal and/or recycling. In addition, many of the sections in the Waste Tire Program regulations have not been updated since inception in 1994. These revisions will make the regulations current.

**SW028 - Miscellaneous Revisions and Statewide Beautification (LAC 33:VII.115, 707, 717, Chapter 13, and Chapter 101)** (La. Register vol. 26, #11; 11/20/00). Adopts changes to include infectious wastes and actions required for offloading and transloading of solid wastes. Chapter 13 is being added to address litter abatement in the state in accordance with R.S.



30:2521 et seq. The regulations in Chapter 101 -- "Recycling Awareness," are no longer applicable to the department's solid waste program, and this Chapter is being repealed.

### Water Quality

**WP035 – Financial Security for Privately-Owned Sewage Treatment Facilities** (La. Register vol. 27 #1; 1/20/01) This rule finalizes emergency rules WP035E – WP035E4, which was first 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. It includes provisions allowing for waiver and exemptions under certain circumstances, as provided by Act 93 of the 1st Extraordinary Session.

**WP037 - Domestic Sewage Treatment: Permit Application Requirements Under the Louisiana Pollutant Discharge Elimination System Program (LAC 33:IX.2313, 2331, 2361, 2413, and Appendices N and O)** (La. Register vol. 26 #12; 12/20/01). EPA promulgated a Final Rule regarding revisions to National Pollutant Discharge Elimination System Permit Application Requirements for Publicly Owned Treatment Works and Other Treatment Works Treating Domestic Sewage on August 4, 1999. A requirement of the Louisiana Pollutant Discharge Elimination System program is to have requirements and regulations which meet at least the minimum EPA requirements. Therefore, revisions to the Louisiana regulations are necessary to meet the EPA minimum requirements. The rule will amend permit application requirements and application forms for publicly owned treatment works (POTWs), treatment works treating domestic sewage (TWTDS), and other dischargers designated by the state administrative authority. The rule consolidates application requirements, including information regarding toxics monitoring, whole effluent toxicity (WET) testing, industrial user and hazardous waste contributions, and sewer collection system overflows. The most significant revisions require toxic

monitoring for facilities designated as majors and other pretreatment POTWs and limited pollutant monitoring by facilities designated as minors. The regulations are being revised to ensure that permitting authorities obtain the information necessary to issue permits which protect the environment in the most efficient manner. The updated forms make it easier for permit applicants to provide the necessary information with their applications and minimize the need for additional follow-up requests from the permitting authority.

### **CASE LAW UPDATE**

#### **Asbestos Penalty Needs Remediation, ALJ rules.**

In the Matter of BAQ Exploration, Inc., No. 98-006-EQ (La. Dept. of Civil Service, Div. of Admin. Law, 10/27/00). Finnegan, ALJ.

BAQ Exploration, Inc. owned and operated a gas processing plant located in Lake Arthur. After closing the plant, BAQ contracted with Our Gulf Coast Connection Recycling Processors ("OGCC") to disassemble, demolish and/or dismantle the gas processing plant. The processing plant contained Regulated Asbestos Containing Material ("RACM"). An inspection by DEQ in January 1997 found the following violations of the Louisiana Radiation Protection Regulations: Neither BAQ nor the contractor notified DEQ prior to demolition; the asbestos was removed without a proper prior inspection and without being properly wetted; no asbestos abatement contractor was on site during demolition; the RACM was not deposited in an accredited landfill in a timely manner; and

the demolition contractor abandoned the facility without properly disposing of the asbestos, most of which was left on the ground. Following the inspection, BAQ voluntarily spent \$40,000.00 remediating the site.

DEQ assessed a civil penalty of \$12,000 against BAQ for the violations cited. BAQ did not contest the violations alleged by DEQ. However, BAQ did contest the penalty assessment at an adjudicatory hearing, arguing that (1) it had sold the gas plant, apart from the land on which it was situated, to OGCC via an unwritten contract, and therefore was not responsible for the violations; and (2) even if BAQ was responsible for the violations, the amount of the penalty was excessive.

After the hearing, the administrative law judge rendered findings of fact that included a finding that BAQ was the owner of record of the tract of land on which the gas plant was situated, and that there was no instrument in the parish conveyance records evidencing a separate sale of the gas plant to OGCC. The judge stated that “this is not the appropriate forum to determine ownership of the buildings and constructions.” However, the judge’s conclusions of law included a finding that the gas plant was immovable property, and therefore DEQ was “entitled to assume that these things [buildings and constructions] are component parts of the ground and thus still owned by the Respondent,” under La. Civil Code art. 491. Therefore, BAQ was responsible for compliance with the regulations as an “owner,” and the judge refused to set aside the penalty entirely.

However, the judge found that the amount of the penalty must be reduced because DEQ had reached incorrect conclusions as to two of the penalty factors listed in La. R.S. 30:2025(E)(3)(a): “the monetary benefits realized through noncompliance;” and “whether the person charged has failed to mitigate or to make a reasonable attempt to mitigate the damages caused by his noncompliance or violation.”

As to the monetary benefits, DEQ had determined that BAQ had avoided \$2,741 in costs by not filing required forms and by not conducting asbestos inspections prior to beginning the demolition. The judge found that these costs were avoided by OGCC, not by BAQ, because “the fees were actually owed by OGCC, as owner of the gas processing facilities.” (This was despite her previous statement that “this is not the appropriate forum to determine ownership of the buildings and constructions.”) “DEQ can legally hold BAQ liable for the violation because the agreement [sale of the buildings and constructions] was not made a matter of public record ...,” the judge stated. But it was improper for DEQ to include the monetary benefits of those same violations in the penalty assessment, she held.

The judge did not explain why the Public Records Doctrine applied when DEQ determines who is liable for a violation, but not when DEQ determines the amount of the penalty for such violation.

The DEQ employee who performed the analysis of the penalty factors testified that she did consider the \$40,000+ dollars

spent by BAQ on mitigation of damages caused by the violations. However, the judge found that it was impossible to determine whether the penalty reflected any reduction as a result of this expenditure.

As a result of these two factors, the judge found DEQ’s penalty assessment deficient. She declined to remand the matter to DEQ for a new assessment, on grounds of judicial economy, because of the small size of the penalty relative to the defense and litigation costs of the parties. Therefore, the judge asserted authority under La. R.S. 49:994(D)(2) to reduce the penalty to \$6,000, an amount she deemed appropriate.

#### **Power Plant Permits Public Participation Procedures were Improper, Judge Rules.**

Acadia-Eunice Citizens for a Healthy Future, Inc., et al. v. Louisiana Department of Environmental Quality, No. 475-123 (19th J.D.C., Div. J, 2/23/01). A district judge has remanded to DEQ two permits for a major new gas-fired electricity generation plant in Eunice. The facility is one of several proposed “merchant” power plants that have been at the center of controversy of late, primarily due to their proposed usage of groundwater for cooling.

The permits for air emissions and surface water discharges were issued on July 13, 2000 to Acadia Power Partners, LLC, who commenced construction shortly thereafter. Plaintiffs appealed the permits to the District Court, under La. R.S. 30:2050.21. Plaintiffs argued that DEQ had the authority and duty under the



Louisiana Constitution, Article IX, §1, to deny the permits because the adverse environmental effects of the proposed usage of up to 8 million gallons of groundwater per day had not been adequately considered. Judge Curtis Calloway rejected this argument, agreeing with DEQ and the permittee that DEQ has no legal authority to regulate the usage of groundwater (as opposed to protecting it from contamination).

Plaintiffs also attacked the public participation procedures followed

by DEQ in the months preceding the issuance of the permits. Plaintiffs argued that by allowing Acadia Power Partners to supplement its permit applications after the close of the public comment period, up to the day before permit issuance, DEQ had violated its own rules and denied Plaintiffs their procedural due process. The judge apparently agreed, stating that the plaintiffs had been denied an opportunity to evaluate and comment on the information submitted relative to the applicant's site selection process.

DEQ and Acadia Power argued that Plaintiffs had failed to show how this procedural error had caused prejudice to substantial rights, and that therefore no action by the court was appropriate under La. R.S. 49:964 (G). The court rejected the defendants' arguments, and remanded the permits to DEQ "with directions to hold hearings pursuant to the opinions expressed herein." However, the judge specifically stated that he was not ordering that construction of the plant cease.

## Legislative Update

### **Groundwater Use and the Status of the Aquifers**

State government has been active in studying the science, law, and policy dealing with groundwater use and the aquifers. Recent applications for the construction of "merchant" power plants, concern for dropping water levels in the aquifers and the effects of a three year drought precipitated an awareness that the amount of groundwater is not infinite. Public hearings and newspaper reports have increased public awareness of this complex issue. As a result, the governor has appointed a task force on water policy and members of the legislature have drafted legislation on this issue.

### **Governor's Task Force on Water Policy**

The Governor's Task Force on Water Policy recently completed its report to the governor after studying this issue since Novem-

ber, 2000. The short time frame did not allow the task force to determine long term policy solutions. The task force did make short term recommendations to the governor that may lead to legislation in the upcoming session. The purpose of the short term recommendations is to protect the aquifers from activities that may damage them permanently. In addition, the task force made general long term recommendations to study certain issues in depth before a comprehensive water management plan is enacted.

The groups represented on the task force and whose efforts shaped the policy recommendations included domestic users, municipalities, agriculture, industry, coastal restoration, wildlife and fisheries, navigation and flooding. The United States Geological Survey as well as the Louisiana Geological Survey and the Louisiana Department of Transportation and

Development contributed scientific information on the status of the aquifers. It was the general opinion of the members and the scientific support groups that Louisiana does not have a water crisis at this time, but that timely action now to reduce dependence on groundwater will help avoid major problems in the future.

The task force recognized that Louisiana has few laws that allow the state to manage or protect the aquifers. Louisiana currently follows a right of capture rule of the groundwater, with no laws to manage overpumping, sustainability, or protection of surrounding wells. The task force debated issues of ownership, regulation, status of groundwater and damages to surrounding landowners.

As a result of some concern of the members on the issue of ownership and the constitutional limitations on regulatory actions, the

task force recommended that legislation to clarify the status of groundwater be enacted.

Short term, the task force recommended that existing well registration laws be strengthened and that legislation be introduced to authorize management of future withdrawals in critical groundwater areas and emergency situations. This management would be administered by an interim agency or board until a comprehensive water policy is implemented.

In discussing long term needs, the Task Force recognized that a comprehensive water management plan will take several years to develop and requested that its findings and issues be considered for future development. Those findings and issues include:

- a) That continuing rates of withdrawal may lead to depletion of parts of the aquifers within the next 15-20 years, resulting in dry wells, saltwater intrusion, subsidence and other problems.
- b) That laws be enacted to protect the sustainability of both ground and surface water from degradation and depletion.
- c) That water management and planning include all aspects of groundwater and surface water and that any management plan may place a burden on all current users to insure the sustainability of Louisiana's water resources. The Task Force recommended that incentives, disincentives and accommodations be considered in that planning.
- d) That in the absence of critical conditions, current users be

protected for a reasonable length of time.

e) That both state, local and regional interest be incorporated into a comprehensive policy.

f) That future use of groundwater be based on availability, best use and protection of current users, as well as sustainability of the aquifer.

The Task Force recommended a time line, ending with the enactment of legislation in the 2003 Regular Session, for the long term recommendations.

### **Proposed Legislation**

As a result of public hearings around the state, legislation has been introduced to begin dealing with the issues of groundwater and aquifer protection. Senate Bill 1, by Senator James David Cain and Representative N. J. Damico represents a first step in dealing with a very large and complex issue. The aim of SB 1 is to regulate future large users of groundwater and to encourage their use of alternative sources of water, such as surface water, "grey" or treated water, or recycled waters. The bill requires permits for users of more than 1,000,000 gallons of groundwater per day and prioritizes uses of water into domestic, agriculture and industrial. SB 1 establishes a board to grant, deny or condition permits. The board shall consider spacing and location of wells, the effect on existing wells and the effect on the aquifer and its depletion.

Existing wells that are registered by August 2001 are

"grandfathered" into the permit process under SB 1. The authors of the legislation recognize that without reduction of use of groundwater by these current users, the sustainability of the aquifers is in jeopardy. The issue of regulating existing users will need to be dealt with in other legislation, possibly in conjunction with the Governor's Task Force. SB 1 also provides for penalties for violation of the permits, restricts the sale or transfer of water, as well as other implementation features.

Water policy and law may get a substantial amount of attention during the 2001 Regular Session of the Legislature as a result of the public interest in this issue. Less than a year ago, it was inconceivable to many that Louisiana would be considering managing its water resources. The state must now consider the alternatives available in order to avoid major problems in the future.

# Announcements

## ANNUAL MEETING SECTION OF ENVIRONMENTAL LAW (LSBA)

**DATE:** Thursday, April 19, 2001  
**PLACE:** The Camelot Club  
21st Floor - Bank One Centre  
451 Florida Street  
Baton Rouge, Louisiana  
**MEETING TIME:** 4:30 P.M. until 5:15 P.M.  
**GUEST SPEAKERS:** Phillip N. Asprodites, Commissioner, LA Office of Conservation  
Dale Givens, Secretary, LA DEQ  
Larry Starfield, Regional Counsel, EPA Region VI (invited)  
**RECEPTION:** 5:15 P.M. until 7:00 P.M., following the business meeting.

As in previous years, at the annual meeting we will conduct the business of the Section, followed by a few brief remarks by our speakers and the announcement of the winners of the Section's annual essay contest. This should conclude about 5:15 P.M. The meeting will be followed by the cocktail reception. 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: Christopher Ratcliff (Treasurer)  
Louisiana Department of Environmental Quality  
P.O. Box 82282  
Baton Rouge, LA

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## LSBA ENVIRONMENTAL LAW SECTION BROWN BAG LUNCH SEMINAR

**DATE:** *Friday, May 18, 2001*  
**TIME:** *12:00 NOON - 1:45 P.M.*  
**PLACE** *Red Fish Grille*  
*115 Bourbon Street*  
*New Orleans, Louisiana 70130*

Approved for 1.0 CLE Hour CLE Presentation to follow lunch

Registration Fees: Section members \$35; Non-members \$50; Students \$25  
At the door \$50

<b>SPEAKER</b>	<b>TOPIC</b>
John L. Church Paul M. Herbert Law Center	"Recent Developments in Environmental Class Actions"

To register, please send a check made payable to the *LSBA Environmental Law Section*, before **May 7, 2001**, to:  
Ms. Bonnie Brady  
c/o Provosty, Sadler, deLaunay, Fiorenza & Sobel  
Post Office Drawer 1791  
Alexandria, LA 71309-1791  
(318) 445-3631



## CONTRIBUTORS

DEQ Update: Chris Ratcliff  
Legislative Update: Jim Marchand

### **Email Addresses Needed!**

If you are not receiving e-mail notification of the web posting of the Louisiana Environmental Lawyer newsletter, it is probably because we do not have your correct email address. Electronic publishing of the LEL saves the Section money and the Section volunteers' time. Please e-mail your address to Jim Wilkins at [sglegal@lsu.edu](mailto:sglegal@lsu.edu)



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