



Unsafe Oysters: Who's to Blame?

by Louise Morrison

Summary: *Illness caused by Vibrio Vulnificus infections from the consumption of raw oysters have concerned the oyster industry and oyster consumers for some time. Louisiana courts have historically found oyster harvesters, processors, and restaurants free from liability for Vibrio Vulnificus injuries of raw oyster consumers. The Louisiana courts have used several different tort law theories to reach their decisions and have thus left a confusing path. Tort law reform in Louisiana has included the passage of the Louisiana Products Liability Act (LPLA), but no oyster injury cases have yet been decided under the Act. An important fact in these cases is that oysters naturally carry V. Vulnificus and there was no feasible way to remove or kill it without cooking the oyster. Recently developed processes which can essentially cleanse oysters of Vibrio Vulnificus without significantly altering their raw taste and texture have thrown a new wrinkle into the liability issue. Will the availability of the purification processes cause the courts to hold oyster processors and restaurants to a higher standard of care? Because it is now possible and feasible to cleanse*

oysters will that process now be required to escape liability? Under the duty-risk tort analysis the availability of the purification process could change the analysis in oyster injury cases. If oyster injury cases are ever decided under the LPLA the purification processes could represent state of the art "design" for "raw" oysters.

INTRODUCTION

Vibrio vulnificus (V. vulnificus) is a parasitic bacterium that infests oysters and has been responsible for nearly all deaths and numerous illnesses associated with oyster consumption during the past 15 years.¹ V. vulnificus is an opportunistic pathogen that affects high-risk people suffering from health conditions that compromise and weaken their immune system, but apparently has no serious effect on healthy people. People who are aware that they suffer from any of these conditions may make a conscious effort to avoid consuming raw oysters, but the most important risk occurs when people may not be aware that they are suffering from one of these disorders and unwittingly put themselves at risk of serious life threatening infection. Because of the potentially life threatening nature of this infection, con-

sumer groups have been crying out for eradication of this deadly bacteria in food. The Center for Science in the Public Interest (CSPI), a nonprofit food policy group, has demanded that the FDA require shellfish sold for raw consumption be free of *V. vulnificus*.² They further point out that the only way to accomplish this is to treat the oysters after harvest with a purification process. These methods of bacterial eradication (MOBEs) use different methods to purify raw oysters without cooking them, and reputedly without significantly altering their natural state, including taste and texture.

The FDA responded by issuing a notice on January 21, 1999 requesting information and views from the general public regarding CSPI's petition so that the agency could consider requiring the pasteurization of all raw oysters.³ The oyster industry, FDA and other officials, state that the actual threat is not as high as the public may perceive. Primarily because of the limited number of people that *V. vulnificus* affects. In response to the FDA's notice, the Louisiana legisla-

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ture showed its support for the industry by passing a Concurrent Resolution adopted on April 14, 1999, in the Regular Legislative Session that memorializes the United States Congress to oppose any action that the FDA might take in requiring post-harvest treatment of oysters and other shellfish.⁴

As a result of *V.vulnificus* scares, the wholesale price and resulting sales of raw oysters plunged in the past.⁵ It was even reported that at one point, some giant oyster purchasers such as Red Lobster quit buying oysters altogether, regardless of whether the oysters were raw or cooked.⁶ Do these types of actions by large restaurants and food service companies indicate a fear of impending liability or merely a fear of lost sales? How much of this concern can be substantiated, and what kind of liability would these food servers face under this increased fear of *V. vulnificus* poisoning? Most importantly, with the advent of new purification processes can the producers and servers of raw oysters be held liable for not using the available technology to provide the purest product possible?

The following discussion will explore some of the workings of tort law in an attempt to shed light on how oyster injury cases may be treated by courts. The discussion will focus on traditional "proximate cause" and "duty-risk" tests for negligence and on the more recent products liability statute, the Louisiana Products Liability Act (LPLA). The reader should be forewarned that the topic of tort law is difficult to grasp even for a wary legal practitioner.

A traditional common law tort involved a negligent act which caused damages to another person. To determine whether an act was negligent, the courts used the legal concepts of "proximate cause" and "foreseeability."

Not only must the act have actually caused the injury it must also be the legal or proximate cause of the injury. What is the proximate cause of an injury? It has been defined as the force or cause of an injury that would not have occurred "but for" the action of the tortfeasor (the person causing the harm), in other words it must be a natural and continuous chain of events that is unbroken by any intervening event. If carried to its logical extremes this is a very open ended definition. A key element of proximate cause is that, the injury must be reasonably foreseeable or anticipated as a natural consequence of the action of the tortfeasor. In order for the injury to be foreseeable, a person of ordinary intelligence and prudence should have reasonably anticipated the danger to others created by his act without regard to what he actually believed would be the consequences of his act. Simply put, would a reasonable person have taken this action?

Louisiana courts for a time applied the "proximate cause" test but eventually gravitated toward another test called the "duty-risk" test which determines liability based on the duty the tortfeasor owed to the injured and whether that duty was breached by the tortfeasor that caused the harm.

While the proximate cause and duty-risk tests may seem at first blush to be straightforward, in reality they are fraught with subjectivity and not entirely by accident. The central question in tort law is how far do we go as a society in holding people responsible for their actions and how much can we compensate injured parties for accidental losses? The duty-risk and proximate cause theories allow courts and juries flexibility in deciding difficult cases, and the application of the various tests to such cases has left a muddled and

confused trail of tort law cases that can, and often do, befuddle lawyers and laymen alike. It is not our intention to entertain a serious discourse on the vast subject of tort law but merely to set the stage for a variation of tort law that involves injury from a product of some sort, such as a food product, and is referred to as "product liability."

Product liability cases are often placed within another category of tort law known as "strict liability" which does not require an actor to be found negligent before imposing liability on him for injury of another. The simple fact of the injury from some act or instrumentality under the control of the actor is sufficient. Traditionally, strict liability was reserved for "ultra-hazardous activities" such as pile driving or blasting activities. The theory is that by their nature these activities are so unreasonably dangerous, that no negligence need be found in order to result in liability for damages caused by them. Strict liability has been expanded to cover unreasonably dangerous products in many jurisdictions, including Louisiana.

The provisions of the Louisiana revised statutes have created a separate test for determining liability under product liability that has more complex standards than the basic "duty-risk" test. The provisions can be found in the Louisiana Products Liability Act (LPLA), which was enacted in 1988 by the Louisiana legislature in order to create a statutory standard for determining product liability cases in Louisiana. The LPLA is a strict liability statute incor-



porating some traditional common law product liability tests but also setting some new standards which could be important for future product liability cases, especially those arising out of injuries caused by raw oysters.

We will begin our discussion with a case in which the cause of action arose before the LPLA was enacted, *Simeon v. John Doe d/b/a Sweet Pepper Grill*, 618 So.2d 848 (La. 1993). Since we now have the LPLA, why is it important to discuss this case? The *Simeon* case is important because it may indicate whether oyster processors and restaurants are covered under the LPLA and to what standard they would be held if not subject to the LPLA. Following the discussion of *Simeon*, we will discuss the LPLA and finally a recent Louisiana Supreme Court case, *Porteous v. St Anne's Deli*, 97-0837 (La. 5/29/98), 713 So.2d 454 decided after the enactment of the LPLA.

SIMEON V. DOE

In 1993, the Louisiana Supreme Court decided *Simeon*, in which a patron of the Sweet Pepper Grill restaurant consumed raw oysters and subsequently died from septicemia caused by the *Vibrio vulnificus* bacteria present in the oysters. The victim had suffered a liver disorder which compromised his immune system. In this case the court decided that neither a restaurant nor a supplier could be held strictly liable for a patron's injury because raw oysters are not unreasonably dangerous to the ordinary consumer. The court further stated that the defect is in the person with the underlying illness, not in the oyster. The

court applied the theory of strict liability arising from La. Civ. Code Arts. 2317-22 and the common law theory of product liability under §402(A) of the Restatement of Torts in making its decision, since the cause of action (the injury) occurred before the promulgation of the LPLA. In 1996, the strict liability provisions of the La. Civ. Code Articles 2317-22 were amended to remove strict liability except in very limited circumstances, and the common law product liability test is no longer applicable in Louisiana since the promulgation of the LPLA. Other aspects of this case are still applicable however, and are important in analyzing the way the court may determine several issues, as discussed below.

The trial judge and the court of appeal in *Simeon* applied the "foreign-natural" test, a theory of negligence frequently used in food injury cases. The "foreign-natural" test requires that a substance must be natural to the food for the server to escape liability.⁷ If the injury-causing object is foreign to the food, then the server can be held liable. A foreign substance has been defined as "a substance that occurs outside of the organism where it is normally not found, usually introduced from without." The trial court and the court of appeal both used this "foreign-natural" test. However, the Louisiana Supreme Court refused to apply the "foreign-natural" test reasoning that it was not the proper test since *V. vulnificus* only poses a risk to a very small number of persons, whereas the test is traditionally applied when the foreign substance is a potential danger to all persons.

In dicta, the court alluded that without a product being unreasonably dangerous, strict liability is not a possible avenue of recovery for a person injured by the product. How-

ever, the court stated that the plaintiff may bring an action under the theories of failure to warn or for failure to adopt an alternative design. The court did not decide whether there was a failure to warn or alternative design claim and remanded the issue to the trial court for further evidence, where no action was taken. The court in *Simeon* did not apply the LPLA because the cause of action arose before the LPLA's enactment. However, the court apparently felt a need to address the hypothetical applicability of the LPLA. The court stated in dicta (statement not part of the holding with no binding precedent) that the LPLA most likely could not be applied to this situation because the act specifically exempts the producers of oysters from liability under the LPLA. Since the restaurant and suppliers were defendants, the court apparently considered them producers for LPLA purposes. These statements, of course, do not set any binding precedents but may indicate the disposition of the court in the future regarding this exemption. If the producers are exempted from product liability under the LPLA, they could still be found liable under the current tort theories applied to harmful food cases, such as duty-risk discussed with the *Porteous* case.

LOUISIANA PRODUCT LIABILITY ACT

Since 1988, all suits against manufacturers for damages caused by unreasonably dangerous products must be brought exclusively under LPLA, and not La. C.C. Art. 2315, the usual avenue for recovery in tort, and which is the source of the "duty-risk" test.¹⁰ It is important to note that the LPLA specifically excludes harvesters or producers of oysters



from strict liability under its provisions, but the courts have yet to interpret who a "producer" of oysters includes, meaning that a court may interpret "producer" as narrowly as harvesters, or as broadly as all those who handle oysters sold to the public. Therefore, once a party is classified as a "manufacturer" of a product under the LPLA any claim regarding injury from the product is exclusively decided under the LPLA. The LPLA uses four elements in determining whether liability falls under the act: 1) is the defendant a "manufacturer" of the product under LPLA? 2) was the claimant's damage "proximately caused" by a characteristic of the product? 3) did the damage arise from a "reasonably anticipated use" of the product by the claimant or someone else? 4) and finally, was the product "unreasonably dangerous"?

No case law has determined whether under the LPLA a restaurant is a manufacturer of foods served raw, nor is it conclusive whether litigation under the LPLA will continue to use standards established in pre-LPLA litigation, such as *Simeon's* dicta stating that restaurants are not manufacturers. In *Simeon*, which was decided before the promulgation of the LPLA definitions, the court stated in dicta that restaurants would not be manufacturers of food that they neither packaged, processed, nor prepared under the LPLA.¹¹

As discussed earlier, this is not a holding and therefore not precedent, but an indication of how the court may decide the issue in the future. The next two elements of the LPLA test are easily met. There is no question that a restaurant serving raw oysters will anticipate that its customers' intent is to consume the oysters on the premises in the raw state. In the case of raw oysters, the presence of *V. vulnificus* is not a result of mishandling by the manu-

facturer, but the infection exists naturally in the oyster as it is served by the restaurant, and as the restaurant intends to serve the oysters, raw. Additionally, the LPLA requires that the claimant's damage be "proximately caused" by a characteristic of the product, which existed when the product left the manufacturer's control. This proximate cause test is no different from the "cause-in-fact" causation test of the duty-risk analysis.¹² The use of proximate cause in the LPLA should be associated with the factual determination of cause-in-fact, but should not be confused with the use of "proximate cause" as a term of art meaning the legal cause.

Arguably, the most important test in the LPLA to be applied to raw oysters is whether this characteristic, the *V. vulnificus* infection, makes the product unreasonably dangerous. Under the current LPLA, a product can be unreasonably dangerous in four ways: 1) the product is unreasonably dangerous in construction or composition; 2) the product is unreasonably dangerous in design; 3) there was no adequate warning; or 4) the product does not conform to an express warranty.¹³

Since the *Simeon* decision, the advent of purification processes have created what could be considered an "alternative design," meaning that if left unprocessed the oysters could be a product that is "unreasonably dangerous" in design. The appellate court and the supreme court in *Simeon* both indicated that there was no feasible way to prevent oysters containing *V. vulnificus* from reaching the consuming public at the time of the case. Although this is dicta, it could indicate that the court's assessment of liability would be different if there is an alternative to serving the infected oysters.

The purification processes

do have the capacity to prevent infection by the *V. vulnificus* virus, but the slight physical change to the oyster resulting from the purification is a cost that must be weighed against the benefit. Section 2800.56 of the LPLA states that if there was an alternative design that existed that would prevent the damage to the claimant, and "the likelihood that the product's design would cause the claimant's damage and the gravity of that damage outweighed the burden on the manufacturer of adopting such alternative design and the adverse effect, if any, of such alternative design of the utility of the product," then the product is defective. Prior to the LPLA there was a test used by the courts called the "risk-utility" test in product design cases, thus the LPLA seems to have essentially codified this test. The actual fiscal cost of purification is not prohibitive, yet consumers seem to prefer the raw oysters in their unpurified state, implying that the change to texture and taste are costs the consumers are unwilling to bear.¹⁴ Thus, the industry may argue that the risk the unpurified oyster may present to a select few people does not outweigh the effect on the "utility" of the product, the utility of the raw oysters presumably being the appeal of their natural taste and texture which makes them desirable, thus marketable. Essentially, the question is whether the precaution is necessary in light of the risks.

As was stated above, a product can also be unreasonably dangerous because there was no adequate warning provided. Whether a warning was



adequate may easily be determined because the Louisiana Department of Health and Hospitals (LDHH) regulations require restaurants serving oysters to provide a warning regarding the possible adverse health effects. If this warning is not given as prescribed by the LDHH, then the warning is probably not adequate per se, and the product may be considered unreasonably dangerous. With an adequate warning, the un-

reasonably dangerous nature of the oysters may be mitigated, although not necessarily eliminated.

PORTEOUS V. ST. ANNE'S DELI

Until 1998, the Louisiana courts used the common law "foreign-natural" test to determine liability in restaurant-harmful food cases.⁸ Most recently, in *Porteous*, the Louisiana Supreme Court abandoned the

"foreign-natural test" and returned to the civil code, Louisiana jurisprudence and the "duty-risk" test of tort negligence. However, the court did consider the natural nature of a pearl in an oyster as a factor in determining negligence under the duty risk test. *Porteous* held that a restaurant was not liable for an injury caused by a pearl in an oyster poboy it

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Jurisich v. Jenkins: Limits on DWF's Authority to Place Conditions in Oyster Leases

by Joe F. Stevenson

On October 19, 1999, the Louisiana Supreme Court issued their ruling in *Jurisich v. Jenkins*, a case requesting a preliminary injunction to bar the Secretary of the Louisiana Department of Wildlife and Fisheries (DWF) from including, what the plaintiffs term "onerous" clauses in their oyster leases.¹ The action was brought in response to DWF adding new clauses to existing leases upon renewal, thereby creating new leases.

While a total of five clauses were added by the DWF to the plaintiff's oyster leases, the Louisiana Supreme Court limited their decision to only one of the five clauses, the Navigation and Oil Field Activity clause. The other 4 clauses being challenged by the plaintiffs were not addressed by the Louisiana Supreme Court, but may be addressed by the trial court in a hearing for a permanent injunction.²

The inclusion of the Navigation and Oil Field Activity clause in the plaintiff's oyster leases made the plaintiff's lease

"subservient to navigation, maintenance of navigation and all normal, usual and permissible mineral and oil field activity, which has been sanctioned by the State of Louisiana through prior existing lease, permit or contract."³ In simple terms, the new clause eliminated the plaintiff's right to bring legal action against the holders of pre-existing mineral leases on the same area to recover damages to oyster beds caused by the construction or maintenance of canals leading to oil wells or other actions regarded as usual and permissible in the exploration and recovery of oil and minerals.

The plaintiff had two major objections to the inclusion of the Navigation and Oil Field Activity clause to their leases. First, the plaintiff contended that "the secretary overstepped his legislative authority when he failed to renew the existing oyster lease without the inclusion of the navigation and oil field activity clause." Second, the plaintiffs argued that the secretary exceeded his authority when he proposed the inclusion of the Navigation and Oil Field Activity clause in the lease, which

was neither necessary nor proper for the development of the oyster industry."⁴

In regard to the plaintiff's first allegation, that "the secretary overstepped his legislative authority when he failed to renew the existing oyster lease without the inclusion of the Navigation and Oil Field Activity clause" the Louisiana Supreme Court ruled in favor of the plaintiffs. The court determined that laws regulating oyster leases "differ from the provisions which govern ordinary conventional leases" and that oyster leases are to be regulated by the provisions found in "Sub-part D or Part VII of Chapter 1 of Title 56 of the Louisiana Revised Statutes."⁵ According to the court, oyster leases, in addition to being heritable and transferable, also give the owners of expiring oyster leases the first right of renewal of their oyster leases, so long as the lease is capable of supporting oyster populations. In fact, even if the oyster lease is not renewed by the secretary within "sixty days from the date of expiration of a lease," the lease will be automatically renewed. Furthermore, the



“secretary has a mandatory duty to renew” and can not deny the renewal of an oyster lease, except when the “oyster beds initially leased are incapable of supporting oyster populations...”⁶ Therefore, the court reasoned that the secretary had exceeded his legislative authority by failing to renew the plaintiff’s oyster lease in accordance with R.S. 56:428 (A).

In regard to the plaintiff’s second allegation, that the “secretary exceeded his authority when he proposed the inclusion of the Navigation and Oil Field Activity clause in the lease, which was neither necessary nor proper for the development of the oyster industry,” the Supreme Court agreed with the plaintiffs and held that the new clause in the “lease renewal was prohibited because its inclusion did not develop the oyster industry.” While La. R.S. 56:425 (C) gives the Secretary of DWF the authority to “make such stipulations in the leases made by him as he deems necessary and proper to develop the [oyster] industry,” the Supreme Court found that, under the circumstances of this case, the Secretary overstepped his authority. The Supreme Court determined that the only justification for the inclusion of new language into an existing lease is to benefit Louisiana’s oyster industry and that the oil field navigation and activity clause does not improve Louisiana’s oyster industry. All stipulations included in existing oyster leases by the Secretary, which are not “deemed necessary and proper to develop the [oyster] industry,” requires a clear expression of legislative authority granting the Secretary the authority to make changes in existing oyster leases.

An example of clear legislative intent to grant the Secretary addi-

tional authority to add stipulations in existing oyster leases can be found in La. R.S. 49:214.5, which grants the state immunity from tort and contract liability resulting from coastal restoration projects. In La. R.S. 49:214.5 the Louisiana legislature stated that:

All departments, agencies, boards or commissions of the state of Louisiana and its political subdivisions shall include language which shall hold the state and its political subdivisions harmless for the purposes set out in this Section [coastal restoration projects] in all leases, permits or licenses granted to any individual or other entity after July 1, 1995.⁷

The Louisiana legislature’s intent to make the state immune to legal actions resulting from damages caused by coastal restoration projects is clearly expressed, leaving little doubt about the authority of administrators of state agencies to include new language into permits and leases being issued or renewed.

In general, the effect of the Supreme Court’s decision on the Navigation and Oil Field Activity Clause is three-fold.

1. The secretary of the DWF has a mandatory, non-discretionary duty to renew all existing oyster leases. The only reason that an oyster lease can be terminated by the Secretary is if it is determined that the lease is no longer capable of supporting an oyster population.⁸

2. The inclusion of a new clause into an oyster lease at time of renewal creates a “new contract and effectively eliminates the oyster lessees’ legislatively

crafted first right of renewal.”⁹

3. The secretary may make changes and add language to an oyster lease “as he deems necessary and proper to develop the oyster industry.”¹⁰ Thus, only when changes to an oyster lease will benefit the oyster industry will the DWF be allowed to include new language in an existing lease.

While Jurisich v. Jenkins only applies to the navigation and oil field activity clause and does not address the other clauses, the case could have an impact on other new language the DWF attempts to include in an existing oyster lease and make it more difficult for the Secretary of DWF to make any type of alteration to an existing oyster leases without clear and expressed legislative authority.

¹ *Jurisich v. Jenkins*, 99-007(La. 10/19/99), 1999 WL 955374 (La.).

² The other four clauses are the Future Litigation clause, the Coastal Wetlands Restoration Advisory clause, the Allocation of Risk and Liability and Indemnification clause and the Venue clause.

³ *Jurisich v. Jenkins*.

⁴ *Jurisich v. Jenkins*.

⁵ *Id.*

⁶ *Id.*

⁷ La. R.S. 49:214.5 (B).

⁸ *Jurisich v. Jenkins*.

⁹ *Jurisich v. Jenkins*.

¹⁰ *Jurisich v. Jenkins*.



Louisiana Atchafalaya Basin Program

The Atchafalaya Basin Program (Program) is moving into action after a history of development and planning by dedicated members of Louisiana's state agencies, the U.S. Army Corps of Engineers (Corps) and the public at large. This Program allows Louisiana to focus desperately needed time and funding into one of its most unique natural resources, the Atchafalaya Basin (basin), which is rich with wildlife, magnificent plants and trees and one of a kind Louisiana culture. The Program provides for a capital improvement program, operation and maintenance of projects and empowers the program administration with the powers and duties necessary to establish and perform the activities in the state's master plan for the basin. All the plans for the basin program revolve around the long-term goal of conservation, restoration and enhancement of water quality throughout the basin.

In 1996, Governor Foster directed the Louisiana Department of Natural Resources to be lead agency in the development of a plan for the basin that would involve a partnership with the Corps. Eight Louisiana's state agencies responded in 1997 by joining together to sign a Memorandum of Understanding (MOU) that is an agreement by the agencies to work together on development of a Master Plan for the basin. In addition numerous local organizations and public participants were involved in the planning process. This first step was accomplished in April of 1998 with the completion of the state's

master plan for the Atchafalaya Basin. The next step occurring almost simultaneously was state legislation passed that created the Atchafalaya Basin Program within the Department of Natural Resources. The Program was given the basic authority to partner with state and federal entities, enter into MOUs and cooperative agreements, represent the policy and consensus viewpoint of the state and promulgate rules as necessary and consistent with the purpose of the program. The Program began its mission by introducing the master plan throughout the state through a number of public meetings, joining with the Corps through a MOU formalizing the agencies agreement to work as partners to implement the Atchafalaya Basin Floodway System, Louisiana Project and presenting the 15 year master plan to the Louisiana Legislature for approval.

On July 6, 1999, Governor Foster signed the omnibus Atchafalaya Basin Bill into law. It is this legislation, Act 920, that authorizes the Program and provides the funding necessary to begin work on the activities laid out in the Master Plan. Act 920 provides for a number of new Program activities such as, allowing the Program to request state funds of fifty-five million dollars over the next fifteen years, acquire one thousand five hundred acres in the basin for recreational purposes, monitor environmental easements, and operate and maintain public access features. In order to accomplish all of these goals the Program is encouraged to cooperate with all levels of government and non-government entities when possible. As it stands the Program is undertaking a number of innovative approaches

that fall into three categories: land and easement purchases, recreational opportunities and water management projects. An example of the water management activities is the cuts and gaps projects, in the Buffalo Cove and East Grand lake areas which is designed to create water circulation that more closely mimics natural hydrological systems. Other projects are geared towards building recreational opportunities in the Basin. For example, the Program is teaming with Louisiana Games to sponsor an eco-challenge race in the basin, which is hoped to bring national media attention to the basin. Projects designed to improve access are also being planned and many construction activities will begin in the spring of 2000. Efforts are being made to develop a central welcome center off I-10 at the Butte LaRose exit. The design and building contract was awarded in October 1999, with ground breaking to occur in 2001. Other recreational opportunities include construction of a children's fishing pier, research to improve area maps, development of area parks, interpretative centers and boat ramps and creation of Lynch Gardens, just outside of Henderson, LA. Acquiring land and conservation easements are also key components of the basin plan. At this time the Corps has been able to acquire 50,000 acres within the basin to improve public access and is working towards their goal of accumulating over 338,000 acres of conservation easements over public lands within the basin.

The Atchafalaya Basin Program provides an important forum for the citizens of Louisiana to learn



more about and to access one of their state's treasures. The Program has a strong public participation component that allows local citizens to lead their government in its efforts to spotlight this one of a kind resource. Watching the ideas and plans of this program become reality will be an exciting experience for everyone involved.

For more information about ongoing and upcoming projects and events visit DNR's Atchafalaya Basin Program website at: <http://www.dnr.state.la.us/sec/atchafalaya/index.ssi>

Participants:

Department of Natural Resources (LDNR): The Atchafalaya Basin Program was created within the

DNR.

Department of Wildlife and Fisheries (LDWF): The LDWF will operate and maintain wildlife management areas and plan as well as monitor projects designed to improve fish and wildlife production.

Department of Culture, Recreation and Tourism (LDCRT): The LDCRT will operate and maintain the tourist information centers and state park sites.

Department of Agriculture and Forestry (LDAF): The LDAF will assist the Program by conducting monitoring of all the environmental easements purchased through the Program to ensure that lands in the basin are used in accordance to tra-

ditional uses. LDAF will also be available to assist local landowners with forestry management.

Office of State Lands: The Office of State Lands will monitor and enforce timber harvesting and campsite development on state-owned lands in the basin as required by the Program.

Department of Transportation and Development, Department of Environmental Quality and Department of Health and Hospitals: These agencies will act in an advisory capacity and keep the Program apprised of departmental operations relating to the Atchafalaya Basin.

Environmental Justice by Danielle Brock

The Shintech Case Background:

A battle raged in Louisiana for two years over the construction of a \$700 million chemical manufacturing facility in a predominantly black community situated between Baton Rouge and New Orleans on the Mississippi River. This battle has ended now that the company has plans to build its facility in Plaquemine Parish. Environmental justice activists argue that low-income and minority communities bear a disproportionate share of the adverse health, safety and ecological effects from the facilities while these communities do not receive their share of benefits such as high paying jobs or increase in revenue from taxes that result from the facility. Claims against the Department of Environmental Quality (DEQ), the St. James Parish Council and Shintech were brought

based on the Clean Air Act, the Civil Rights Act of 1964 and President Clinton's Executive Order 12,989.

March 2000 Shintech Update:

- Air and water permits at the Convent (St. James Parish) site are still open, but no one from DEQ is currently working on these.

- Air and water permits for the new site in Iberville Parish were granted by DEQ in October of 1999.¹ (This facility will be smaller than the one proposed at Convent.)

- Construction at the new site of the \$250 million facility for producing PVC is currently underway in Iberville Parish.

EPA will not review the Iberville Parish permits or the process for granting them until the final

guidelines have been released.²

President Clinton's Executive Order 12,898:

The Executive Order directed federal agencies to conduct their programs, policies and activities that affect human health or the environment in a manner that does not have discriminatory effects on minority or low-income persons. Although the Executive Order did not create a cause of action and pointed specifically to other laws under which environmental concerns should be addressed, it has become the stimulus for the filing of more than 50 environmental justice complaints under Title VI of the Civil Rights Act.³ Complaints over the



proposed Shintech facility received much publicity and added issues of environmental justice to the national agenda.

In response to the Executive Order the EPA revised the mission statement of its Office of Environmental Justice to include the achievement of "fair environmental protection so that no segment of the population, regardless of race, ethnicity, culture or income, bears a disproportionate burden of the consequences of environmental pollution."⁴

"Interim Guidance for Investigating Title VI Administrative Complaint Challenging Permits"

The Environmental Protection Agency (EPA) issued "Interim Guidance for Investigating Title VI Administrative Complaint Challenging Permits" designed to aid the processing of complaints alleging discriminatory effects from state and local governments agencies' permits.⁵ This was the first concrete direction to state agencies on how to analyze environmental justice claims. However, Interim Guidance has been highly criticized by

interested parties on all sides. No final guidelines have been released at this time.

National Environmental Justice Advisory Council

The National Environmental Justice Advisory Council (NEJAC) was developed to "provide independent advice, consultation, and recommendations to the Administrator" of the EPA.⁶ NEJAC set the goal of developing equitable and sustainable solutions to the environmental justice challenges. NEJAC has committed itself to the development of a report that will provide advice on how EPA can integrate environmental justice concerns into the permitting process so as to aid all stakeholders. The last NEJAC meeting was held December 1999, in Arlington Virginia and the next meeting is scheduled for May 23-26 in Atlanta, Georgia. In December the Committee focused on integrating environmental justice issues into the permitting process. Again, the Committee acknowledged the importance of early public participation in environmental justice dialogue and specifically expressed concern about the "crisis" conditions under which certain residents of Louisiana live related to environmental contamina-

tion. For a closer look at NEJAC recommendations and past meeting go to the EPA website <<http://es.epa.gov/oeca/main/ej/nejac/index.html>>.

¹ Personal interview of Dan Nguyen, DEQ permitting office; January 26, 2000.

² Phone conversation with Mike Mattheisen, EPA Office of Civil Rights; January 31, 2000.

³ David Sive and Lemuel M. Srolovic, Environmental Justice Issues Develop, Facility Permits and Civil Rights. *New York Law Journal*, Oct. 26, 1998. Vol. 220, No. 81.

⁴ Environmental Justice at EPA, Environmental Justice Fact Sheet, April 1996.

⁵ Cite for "Interim Guidance for Investigating Title VI Administrative Complaint Challenging Permits"

⁶ National Environmental Justice Advisory Council; Executive Summary, December 1998.

Nonindigenous Species / Ballast Water Update

While concerns about the introduction of nonindigenous species into coastal waters from ballast water discharge have been growing in the Gulf coast states, the western states have been active in passing legislation, developing new programs and petitioning for changes in the federal law. The following update chronicles some of these recent steps being

taken on the west coast to address this area of growing concern.

State of California Passes State-wide Ballast Water Legislation:

California Assembly Bill 703 was passed in September 1999, bringing to California a regulatory ballast management program.¹

California's program closely resembles the voluntary ballast water management program of the

United States Coast Guard. The legislation sets requirements for ships that carry ballast into state waters from outside of the exclusive economic zone (EEZ).² Five management measures are set out for ballast carrying vessel instate waters, in addition to reporting requirements: open water ballast exchange, retain all ballast, use approved environmentally sound alternative, discharge into approved facility, or con-



duct exchange in an agreed upon area.³

These management measures are tempered with a crew safety exemption, as well as exemptions for crude oil tankers, passenger vessels with treatment systems and U.S. Dept of Defense or U.S. Coast Guard vessels subject to §§4713 of NISA (16 USCA §§4701 to §§4751) or any ship subject to National Discharge Standards for vessels of the Armed Forces, vessels in innocent passage and vessels discharging ballast at origin.⁴

Enforcement powers are given to the CA State Lands Commission. Vessels operating in violation of the law may be required to depart state waters and exchange or treat ballast waters that they are carrying. Additionally, civil penalties may be imposed on violators. The law also provides for the establishment of a research and evaluation program, as well as an Exotic Species Control Fund. With this legislation California has stepped out into the forefront on this issue, however other states, especially along the west coast, have introduced similar legislation during recent sessions. How the U.S. Coast Guard's voluntary ballast water program will be affected by individual states passing regulatory program will be the next interesting question.

Port of Oakland Passes Port Specific Ballast Water Regulations:

This past decade the Port of Oakland has experienced a growing problem with the introduction of nonindigenous species through ballast water discharge into port waters. The Port of Oakland is not alone in facing these issues both the Port of Vancouver and the Port of Humboldt have passed port ordinances directly aimed at exotic species introduction from ballast water discharge. In a similar manner the Board of Port Commissioners, City

of Oakland have passed Port Ordinance No. 3516, which became effective August 1, 1999.⁵

The general rule set forth in this ordinance states that "No vessel shall discharge ballast water into the San Francisco Bay..., unless immediately prior to arrival the vessel carried out an ocean ballast water exchange."⁶

Limited exceptions provide reprieve from these requirements when, 1) safety considerations make exchange impossible, 2) vessels can prove that provisions of the IMO resolution A774 (18) were conducted (resolution recommends exchange of ballast water at least 2000 meters deep) and 3) vessels coming from Baja California and the northern border of Alaska, if ballast originated from those waters.⁷

Additional provisions require that vessels have a ballast water management policy and that it be provided to the Port on a yearly basis.⁸

A ballast water reporting form containing specific information and records of ballast water management practices may be required upon entry into the port.⁹ (This form can be viewed at: http://www.portoakland.com/forms/index_forms.html) If no ballast form is provided then no ballast water discharge into port waters will be allowed without specified sampling being conducted.¹⁰

San Francisco Bay Region Proposes TMDL for Nonindigenous Species:

The San Francisco Bay Estuary and the Delta have been listed on the state's 303(d) total maximum daily load list for water quality degradation due to the proliferation of exotic species. A recent study estimated that one new exotic species has

established itself every 14 weeks in the estuary since 1961.¹¹ In response to this, the Regional Board has begun a TMDL Work Plan for the listed water segments aimed at prevention of introductions of viable exotic organisms in discharges from vessels.¹²

The draft plan has many interesting components. The plan provides for baseline research to be conducted in the Bay area to determine the species present and the ecological balance. Also encouraged will be development of new technologies to deal with the current introduction of exotic species from ballast water. Both on-shore treatments and on-board treatments are mentioned as areas needing further research. Pacific coast coordination is another goal set forth in the draft work plan. Regional cooperation is needed to build solutions for an issue of this nature. All of these components have been included in the draft workplan to achieve the goal of zero discharge of exotic species.

EPA reviewing petition requesting that ballast water be regulated under the Clean Water Act (CWA) National Pollution Discharge and Elimination System (NPDES):

On January 13, 1999, a coalition of scientists and diverse groups petitioned the EPA administrator to repeal the NPDES regulation set forth in 40 CFR 122.3(a), on the grounds that any vessel exclusion is illegal and runs counter to case law. (The regulation excludes vesseldischarges of ballast wa-



ter from the NPDES permit program) The regulation excludes Eighteen Representatives of Congress from the San Francisco Bay area jointly signed a bipartisan letter dated February 11, 1999, urging the administration to repeal the vessel discharge regulation at 40 CFR 122.3(a), on the basis that the regulation was drafted at a time when the exotic species vector was poorly understood. The Environmental Protection Agency responded in April 1999, stating that a review of the issue would be conducted and a response would be draft released in September 1999, followed by a full report in the spring of 2000, however as of March 20, 2000 no response has been issued.

NOTE: If your state/local govern-

ment/port has begun a ballast water management project aimed at reducing the introduction of exotic species please let us know about it. Send any information to Erinn Neyrey at eneyrey@lsu.edu. Thanks.

¹ CA Bill Number: AB 703 Lempert (1999). An Act to add and repeal Division 36 (commencing with Section 71200) of the Public Resources Code, relating to ballast water.

² California has opted to use the same reporting forms as required by the U.S. Coast Guard.

³ Division 36 Ch. 2 Section 71203.

⁴ Division 36 Ch. 1 Section 71201.

⁵ An ordinance amending Port Ordinance No. 2833 relating to ballast water.

⁶ Port of Oakland Ordinance No. 3516, Section 1 (a). (1999).

⁷ Port of Oakland Ordinance No. 3516, Section 1 (b) (1-3). (1999).

⁸ Port of Oakland Ordinance No. 3516, Section 1 (c). (1999).

⁹ Port of Oakland Ordinance No. 3516, Section 1 (d) (1-6). (1999)

¹⁰ Port of Oakland Ordinance No. 3516, Section 1 (d). (1999).

¹¹ Cohen, A.N. 1998. *Ships' Ballast Water and the Introduction of Exotic Organisms into the San Francisco Estuary: Current Status of the Problem and Options for Management.* San Francisco Estuary Institute, Richmond, CA.

¹² San Francisco Bay Regional Water Quality Control Board, "Draft Exotic Species TMDL WorkPlan – Workload," (September 1999).

Announcements

Attention: Commercial Fishermen, A Fresh Products License May Save You Money

Sea Grant Marine Agent Mark Shirley asked us to highlight the recently enacted legislation creating the Fresh Products License. During the 1999 Legislative Session Act No. 1338 was passed. (amends La. R.S. 56:8(25), 303(A) and 303.4(A); enacts 56:303.1.1) This Act states that commercial fishermen who transport and sell their catch directly to consumers must have a fresh products license (\$20) in addition to a commercial fishing license (\$55). A fresh product license is much less expensive than a wholesale/retail seafood dealer's license (\$250), which allow sales to any one other than a consumer. If you plan on selling directly to consumers only, a fresh products license could save you a significant amount of money.

Sea Grant Legal Program web-site receives a facelift

After nearly a year, the Sea Grant Legal Program's web-site has finally been re-designed. The new design is much cleaner and easier to navigate. The site provides more information on the background of the SGLP as well as links to other legal web-sites. The current and some back issues of the Louisiana Environmental Lawyer and Louisiana Coast Law newsletters will be made available online. Please take a moment to peruse the new site and give us any feedback on what you think. The site can be reached at <<http://www.lsu.edu/guests/sglegal/>>. You can email the Sea Grant Legal Program at <sglegal@lsu.edu>.



Announcements

SGLP Announces NEW Coastal Email Update Service

As an expansion of the Louisiana Coastal Law (LCL) Newsletter the Sea Grant Legal Program will be compiling a coastal email update service. The email service will be a bimonthly update on coastal issues. Topics covered will be recent state and federal case law, wildlife and fisheries regulatory updates, local coastal happenings and a website review examining sites useful for those interested in coastal resource issues. We would ask any of you that are interested in receiving such an email update please send us your email address (send your email information to eneyrey@lsu.edu).

Final Gulf Oyster Initiative Program (GOIP) Report Available

Joe Stevenson, a SGLP legal research assistant, has completed the 1999 GOIP report titled, "Louisiana's Oyster Lease Relocation Program: A Step Toward Common Ground. The report chronicles the recent challenges that have arisen between Louisiana's coastal restoration projects and the local oyster farmers and provides an analysis of the lawsuits that have accompanied these conflicts. The report has been submitted to a number of legal journals and we hope to be announcing its publication soon. For information on the final report contact Jon Supan, Office of Sea Grant Development, 225-388-6427.

Sea Grant Legal Staff members to speak at the Gulf of Mexico Symposium

Three Sea Grant Legal Staff members, Danielle Brock, Joe Stevenson and Erinn Neyrey, will be presenting at the Gulf of Mexico Symposium 2000, April 10-12, in Mobile Alabama. Ms. Brock will be presenting her paper (co-authored with Tara Kebodeaux) detailing the recent evolution of the environmental justice legal regime. Mr. Stevenson will be presenting his paper chronicling the recent challenges that have arisen between Louisiana's coastal restoration projects and the local oyster farmers. Lastly, Ms. Neyrey will be joining a ballast water management panel discussion to provide information on recent regulatory advances being made in this area of law.

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served. The court held that the restaurant was not negligent because although they were able to remove the pearl and they did not, the object was naturally occurring and therefore the restaurant had no duty to remove it.

In essence the restaurant had a duty to remove injurious substances that could reasonably and prudently be removed but the duty was not breached in the case of failure to remove a pearl. The court pointed out that pearls occur naturally in oysters, though infrequently, and customers should be aware of that possibility. The restaurant had done everything it could have done, absent dissecting each oyster. Given the small possibility of injury from a pearl it would be unreasonable to impose a duty on the restaurant to

dissect each oyster. Does *Porteous* have any relevance to *V. vulnificus* cases? In the duty-risk analysis it may depend on whether *V. vulnificus* is considered a foreign or natural substance. Although the court has rejected the common law foreign-natural test of strict liability, the foreign or natural nature of the injurious substance was still used as a factor in determining negligence under the duty-risk analysis in *Porteous*. There is already an indication from *Simeon* that the court considers *V. vulnificus* a naturally occurring substance in oysters and such a determination could mean that a restaurant or supplier would not be liable under a duty-risk analysis. Alternatively a determination that *V. vulnificus* is foreign could sway the argument towards a finding of liability. Restaurants that

serve raw oysters may even be subject to a lesser duty to its customers than the restaurant in *Porteous* which had prepared the oysters by frying them. Since oysters that have risk associated with *V. vulnificus* are served raw, and are not really "prepared" by the restaurant beyond shucking the server's duty to the customer may be even less stringent than that of servers of prepared oysters. Other factors to consider are that the purification processes can much more easily remove *V. vulnificus* from oysters than suppliers or restaurants can remove pearls, and the gravity of possible injuries from *V. vulnificus* is much greater than from pearls. Would those factors expose restaurants and processors to more



liability? There would be an easier way to perform the duty (removal of injurious substances) and a much greater risk to affected individuals (death) though the percentage of susceptible individuals would be small. How will a court compare risk of a very small number of individuals exposed to grave danger versus a larger number of people exposed to much less serious injury? Logic would point towards increased liability but that is far from certain.

Porteous did not discuss the possible application of the LPLA, nor did the plaintiffs plead products liability although the cause of action occurred after the promulgation of the LPLA. Can we conclude that the court made an unwritten decision that a restaurant is not a manufacturer for LPLA purposes? Or was it an oversight? In a recent Louisiana first circuit case, the court stated in dicta that although the LPLA is not mentioned or used in *Porteous*, the act still may be a feasible option for recovery against the restaurant who served the harmful-food. In this case, however, the first circuit applied the duty-risk test citing the binding nature of the supreme court's decision in *Porteous*.⁹ Thus, we still do not know the clear intent of the courts as to the applicability of the LPLA because of the supreme court's silence regarding the LPLA in *Porteous*.

CONCLUSION

Before the advent of the LPLA it seems fairly clear that in Louisiana restaurants and processors of raw oysters were not strictly liable for injuries caused

by *Vibrio vulnificus*. The passage of the LPLA and the advent of oyster purification processes hold the possibility of changing the rules of raw oyster injury liability. In the past there has been no feasible way to rid raw oysters of the *Vibrio vulnificus* pathogen. Technological advances have made it possible to approach complete removal of the pathogen relatively cheaply and with only minor changes to the quality of the product. The standards established by the LPLA particularly in the consideration of alternative design as a factor in determining whether a product is unreasonably dangerous could be very important to a court's reasoning. The LPLA has yet to be applied to raw oyster injury cases and the court's dicta in *Simeon* and silence in *Porteous* may indicate that it will not be used in raw oyster cases. *Simeon* and *Porteous* however, do not constitute precedent on the issue and a court could decide to apply the LPLA.

If the LPLA does not apply to raw oyster injury cases and the duty-risk test of negligence is used, again the availability of purification processes could affect the analysis. A restaurant with the opportunity to buy "safe" oysters and a processor with the ability to produce them could be held to a higher standard of care.

¹ Frank Stephenson, *Toward Safer Oysters: A Gene Test for a Troubled Industry*, Para. 3 <<http://mailer.fsu.edu/~research/RinR/oysters.html>>.

² Center for Science in the Public Interest, Press Release *Consumer Group Seeks End to Deadly Shellfish Harvest from Gulf Coast, Asks Federal Government to Require Safe Raw Oysters*. For immediate Release: June 29, 1998.

³ Performance Standard for *Vibrio Vulnificus*; Request for Comments, 64 Fed. Reg. 3300 (1999).

⁴ 1999 La. H.C.R. 106

⁵ Keith Darce, *Raw with a Twist*, *New Orleans City Business*, Jan. 20, 1997.

⁶ Jack Hayes, *Health Warning Sends Florida Oyster Business Out to Sea*, *Nations Restaurant News*, Jan. 11, 1993.

⁷ *Adams v. Great Atlantic & Pacific Tea Co.*, 112 S.E.2d 92 (N.C. 1960) (citing 36 C.J.S. Foreign, pp. 1247 - 1248).

⁸ See *Musso v. Picadilly*, 178 So.2d 421 (La.App. 4 Cir. 1984), *Loyacano v. Continental Insurance Co.*, 283 So.2d 302 (La.App. 4 Cir. 1973), *Title v. Pontchartrain Hotel*, 449 So.2d 677 (La.App. 4 Cir. 1984), *Melady v. Wendy's of New Orleans*, 95-913 (La.App. 5 Cir. 4/16/96), 673 So.2d. 1094.

⁹ *Cain v. Winn-Dixie Louisiana, Inc.*, 1999 WL 814396 (La App. 1 Cir. 1999).

¹⁰ Maraist and Galligan, *Louisiana Tort Law*, 368.

¹¹ *Simeon v. Doe*, 602 So.2d 77, 80 (La. App. 1Cr.) (remaded for decision on other issues.)

¹² John Kennedy, *A Primer on the Louisiana Products Liability Act*, *Louisiana Law Review*, January 1989, 565 - 627 at 583.

¹³ La. R.S. 9:2800.56

¹⁴ Interview with Tommy Cvinovic, Drago's Restaurant, Metairie, LA.

