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LOUISIANA SUPREME COURT ADDRESSES TORT DAMAGES FOR PROPERTY RESTORATION CLAIMS

Hornsby v. Guilliot d/b/a Bayou Jack Logging, 04-1297 (La. 05/06/05), 2005 La. Lexis 1500

Plaintiff landowners, the Hornsbys and the Guidrys, sued Defendant Guilliot, doing business as Bayou Jack Logging ("Bayou Jack"), for cutting down timber on their lands without their permission. Specifically, Plaintiffs' claims were based on La. R.S 3:4278.1, which makes unlawful the removal of trees growing on the land of another without consent, and on negligence, pursuant to La. R.S. 2315. Bayou Jack admitted that it had inadvertently cut down and removed the trees without Plaintiffs' consent.

The Hornsbys' trees had been located on approximately 3.2 acres of land, while the Guidrys' trees had been located on approximately 1.5 acres. The maximum value of these wooded acres before the damage occurred, based upon evidence submitted by Plaintiffs, was $9200 an acre. The cost of fully restoring the Hornsbys' property to its pre-damage condition was estimated to be $224,000, while the cost of restoring the Guidrys' property was estimated to be $154,000. The fair market values of the timber cut from the Hornsbys' and Guidrys' lands were $10,507.89 and $12,021.40, respectively.

The trial court found that the Hornsbys and the Guidrys had "emotional ties" to the land at issue. Specifically, the court credited the testimony of the Hornsbys, who said they planned to build a home and a camp on the property at issue, and that they planned to pass the property on to their decedents. Likewise, the court found that the Guidrys intended to build homes on the property based upon their testimony.

Pursuant to Article 2315, the trial court awarded Plaintiffs full restoration damages, minus 20% due to Plaintiffs' comparative fault for not clearly marking their property. The court based its award upon the Louisiana Supreme Court's decision in *Roman Catholic Church of the Archdiocese of New Orleans v. Louisiana Gas Service Co.*, 618 So.2d 874 (La. 1993). In *Roman Catholic*, the Supreme Court held that, while ordinarily tort-based damages to property are limited to the reduction in

its fair market value, restoration damages in excess of the property's value may be awarded in cases where "there is a reason personal to the owner for restoring the original condition or there is a reason to believe that the plaintiff will, in fact, make the repairs . . . ." Id. at 879-880. The Third Circuit Court of Appeal affirmed the trial court in all respects except for the comparative fault reduction, which it set aside.

The Supreme Court reversed the damage award, holding that the district court clearly erred in finding that the evidence showed that the lands at issue were sufficiently personal to the Plaintiffs to justify the award. The Supreme Court noted that the only evidence in the record showing that the Plaintiffs intended to build on the land was their testimony to that effect and that the Plaintiffs presented no "tangible proof or documentation to support their intent." *Hornsby*, 2005 La. Lexis 1500 at *18. The Court concluded:

We do not find that plaintiffs' self-serving testimony of their inchoate intent to develop the land at some undetermined future point is sufficient to justify recovery of restoration costs in excess of the actual market value of the land and the trees cut. Consequently, we find that the district court's reliance on *Roman Catholic* in awarding plaintiffs restoration costs exceeding the market value of the land and trees under the principles of general tort law was in error.

Id. at *19-20.

Instead of restoration damages, the Supreme Court found that the appropriate award, pursuant to R.S. 3:4278.1, was three times the market value of the trees cut-- $31,523.67 for the Hornsbys, and $36,064.20 for the Guidrys.

- *Eric M. Whitaker*

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LOUISIANA COURT OF APPEAL DENIES REHEARING BUT CLARIFIES ITS ORIGINAL OPINION IN NORM CONTAMINATION SUIT

Grefer v. Alpha Technical, et al, No. 2002-CA-1237

On May 1, 2005, the Louisiana Fourth Circuit Court of Appeal denied defendant Exxon's application for rehearing but clarified its original opinion in *Grefer v. Alpha Technical, et al*, No. 2002-CA-1237. Judge Tobias concurred in the denial of rehearing, assigning reasons. We reported on the court's original opinion, in which the Fourth Circuit upheld a controversial $56 million jury award for property restoration damages, but reduced the jury's $1 billion punitive damage award to $112,290,000, in an article in our *April 2005* E*zine.

On its first point of clarification, the court observed that *Roman Catholic Church of Archdiocese of New Orleans v. Louisiana Gas Service Co.*, 681 So.2d 874 (La. 1993) and *Corbello v. Iowa Production*, 02-0826 (La. 2/25/03), 850 So.2d 686, applied to support an award of damages that greatly exceed the value of the property regardless of whether the claim is in tort or contract so long as a reasonable basis exists in the record to support the finding. The court concluded that a reasonable basis existed to support the *Grefer* compensatory damage award by looking to the experts' estimates on the cost to remediate and finding the jury's award of $56 million reasonable because it fell between the two highest estimates advanced by the experts.

The cases upon which the Fourth Circuit relied, *Roman Catholic Church* and *Corbello* both concerned property damage claims. In *Roman Catholic Church*, a case concerning claims raised in tort, the Louisiana Supreme Court held that property damage awards must be tied to the market value of the property absent a reason personal to the property owner justifying an award exceeding the property's value. *Corbello*, on the other hand, concerned contract claims. In it, the Louisiana Supreme Court rejected as limited to tort only, application of *Roman Catholic Church's* market-value rule to breach of contract claims, holding that, based on the defendant's specific contractual agreement to restore the leased property, defendant was liable for damages far in excess of the property's market value.

On its second point of clarification, the Fourth Circuit addressed and rejected Exxon's challenge to the court's exemplary damage award based on the United States Supreme Court's *Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003), decision. Exxon argued that, under *Campbell*, its conduct that allegedly put the employees of ITCO (the former tenant who conducted oilfield pipe cleaning operations at the property) at risk had no place in the punitive damages analysis because harm to third parties cannot be punished. While reiterating that the overturned $1 billion exemplary damage award was manifestly erroneous, the court concluded that "based upon the jury's compensatory award, the manner in which Exxon was less than forthcoming about the NORM contamination on the *Grefer* property/ITCO leasehold when weighed against the size of Exxon's bureaucracy and the potential for causing mass hysteria in the community if the disclosure was made in less than a careful manner after discovery of the NORM problem, warrants an award of twice the compensatory damage award as the highest figure that a reasonable jury could award in view of *Campbell*." The court also described Exxon's conduct as "callous, calculated, despicable and reprehensible."

In his concurrence, Judge Tobias noted the tension between *Roman Catholic Church* and *Corbello*. Judge Tobias distinguished *Corbello* and *Roman Catholic Church* on the basis that, in a contract case, damage awards may properly include "speculative costs without an obligation to expend the money to restore." In contrast, in a tort case, Judge Tobias observed that "only actual sums expended can be considered." He then pointed to evidence supporting the court's finding that the Grefers had personal economic reasons for wanting to restore their property to its original condition.

Judge Tobias further distinguished the Louisiana Supreme Court's recent *Hornsby v. Bayou Jack Logging*, 04-1297 (La. 5/6/05), __ So.2d __, decision. In *Hornsby*, the Louisiana Supreme Court rejected the property owners' attempt to recover damages in excess of the market value of the property. Although the owners argued that they had "personal" reasons to want to restore the land, the court instead awarded them damages under a statute that imposes specific damages for the improper cutting of trees. To distinguish *Hornsby*, Judge Tobias noted a material difference between the reduction in the price of land based on the absence of trees and the inability of a landowner to sell its land based on its radioactive contamination. Judge Tobias therefore

concluded that the inability to sell contaminated property comes within the ambit of something personal to the owner. As support for the jury's determination, Judge Tobias also compared the Church's financial wherewithal in *Roman Catholic Church* to the Grefers' apparent lack of financial resources as a basis to distinguish the results reached in the two cases.

Although denying Exxon's rehearing application, the Fourth Circuit engaged in additional analysis in an effort to support its decision to affirm the award of tort damages that greatly exceeded the property's value, a decision contrary to the general rule established by the Louisiana Supreme Court in *Roman Catholic Church.*

- Alida C. Hainkel

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U.S. SUPREME COURT OPENS DOOR TO MORE LITIGATION AGAINST PESTICIDE MANUFACTURERS

Bates v. Dow Agrosciences LLC,
504 U.S. ___ (4/27/05)

Twenty-nine Texas peanut farmers sued Dow, the manufacturer of the pesticide "Strongarm," claiming the product severely damaged their crops. The federal district court dismissed plaintiffs' claims and the Fifth Circuit affirmed. These courts held that the peanut farmers were pre-empted from filing state law tort claims against Dow, because the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) provides the sole means of regulating labeling and packaging of pesticides. Since an unfavorable state law tort judgment would induce Dow to alter its product label, the courts resolved the conflict between state tort law and FIFRA in favor of Dow, holding that FIFRA was exclusive.

The majority of federal and state appellate courts have been in line with this reasoning for a number of years. However in *Bates*, the Supreme Court held that FIFRA does not pre-empt most state law claims against pesticide manufacturers.

Section 136v(b) of FIFRA says that states "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." The Supreme Court held that section 136v(b) applies only to "requirements." For a state law to be preempted, it must be a requirement "for labeling or packaging" and must be "in addition to or different from" the requirements of FIFRA. The court held that an event such as a negative jury verdict against a pesticide manufacturer is not a "requirement." Rather, it is merely an event that may motivate an optional decision by the manufacturer to make some change in its product.

The Court found that in the main, section 136v(b) pre-empts competing state labeling standards as well as statutory or common law rules that would impose a labeling requirement that diverges from those

set out in FIFRA. It does not pre-empt state rules that are consistent with FIFRA.

Given this reasoning, the Court revived the peanut farmers' claims on breach of express warranty, violation of the Texas Deceptive Trade Practices-Consumer Protection Act, strict liability (including defective design and defective manufacture), and negligent testing. As to the plaintiffs' claims sounding in fraud and negligent failure to warn, the Court remanded the case to the Fifth Circuit to determine whether Texas laws on these points conflicted with or were equivalent to FIFRA regulations. If the latter, these claims would be allowed as well.

With this decision, the Supreme Court has decisively opened the courthouse doors to a variety of state law tort litigation against pesticide manufacturers.

- Madeleine Fischer

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CLASS ACTION PLAINTIFFS' FORUM SELECTION DEFEATED

Roger Price v. Roy O. Martin Lumber Company,
2004-0227 (La. App. 1 Cir. 4/27/05), ___ So.2d ___

A five-judge panel of the First Circuit Court of Appeal, with one judge dissenting, has ruled that Ascension Parish is an improper venue for a class action brought by residents of Rapides Parish targeting alleged toxic discharges from a wood-treating facility in Rapides Parish.

Plaintiffs, residents of Alexandria, Louisiana (Rapides Parish), alleged that during the course of operations at the Dura-Wood facility, a wood-treating facility in Alexandria, the facility released toxic chemicals into the surrounding community causing them damages. Plaintiffs sued owners and operators of the facility and various companies whom they claimed had something to do with the toxic chemicals used in the lumber treatment process at Dura-Wood.

Rather than sue in Alexandria, where the plaintiffs and the Dura-Wood facility were all located, the plaintiffs filed suit in Ascension Parish, almost 200 miles distant. Plaintiffs attempted to link their suit to Ascension Parish by arguing that some of the toxic chemicals used at Dura-Wood, specifically hexachlorobenzene ("HCB") and pentachlorophenol, originated from Vulcan Materials Company, which had its principal place of business in Ascension Parish.

Defendants challenged venue in Ascension Parish, putting on evidence that Vulcan (a) never produced pentachlorophenol and (b) never put HCB into commerce, but rather disposed of its HCB in Ascension Parish. Thus, Vulcan was not properly a defendant in the case and could not be used as the only "hook" connecting the case to Ascension Parish.

Plaintiffs attempted to introduce evidence to contradict defendants' position that Vulcan had no possible connection to the Dura-Wood facility in Rapides Parish. The First Circuit, however, in a lengthy majority opinion written by Judge Downing (and joined in by Judges Parro, McDonald and Hughes), rejected the primary evidence on which plaintiffs relied: an "expert report" that listed and appended memoranda

and correspondence. The First Circuit observed that evidence may be introduced at a hearing on a venue exception but that any evidence must be "competent legal evidence." The First Circuit found that the evidence offered had not been authenticated by the plaintiffs. That is, the documents had not been shown to be what they purported to be. The documents were not of a type to be self-authenticating, and plaintiffs offered no extrinsic evidence of their authenticity. Therefore, the trial judge erred in admitting this evidence or relying upon it in making his decision on venue.

Because the only admissible evidence established that Vulcan was not liable, the First Circuit found that venue was improper in Ascension Parish. The court ordered the case remanded to the trial judge in Ascension and instructed him to transfer the case to a court of proper venue.

Judge Whipple dissented. Although she agreed that the trial judge should not have admitted the plaintiffs' evidence on the liability of Vulcan, she felt that the evidence submitted by the defendants was not strong enough to disprove any link between Vulcan and the Dura-Wood facility in Rapides Parish.

This case illustrates the common practice among plaintiffs' counsel of including defendants who are only remotely related to a case, or even unrelated to a case, to obtain a basis for bringing the case in a venue that they consider to be favorable to their side. Here, the First Circuit carefully reviewed the evidence, enforced the rules of evidence and determined that Vulcan had no relation to the case and that venue would not lie in Ascension Parish.

- Madeleine Fischer

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STATE'S PLAN TO PROTECT LAKE UPHELD; ATTACKS BY CITIZEN GROUP AND LANDOWNERS DEFEATED

Lake Bistineau Preservation Society, Inc. v. Louisiana Wildlife and Fisheries Commission,
No. 39,369-CA, (La. App. 2 Cir. 3/9/2005), 895 So.2d 821

The Louisiana Second Circuit Court of Appeal rejected an attempt by a citizens' group and property owner to obtain a preliminary injunction barring the state from lowering the water level of Lake Bistineau as part of a lake improvement plan.

In recent years, Lake Bistineau, a 17,200-acre lake and impounded water reservoir in Bossier, Bienville and Webster Parishes, has become increasingly burdened by infestations of non-native species, as well as by the accumulation of debris from the surrounding tree canopy. These factors have caused a considerable accumulation of organic material on the lake bed, resulting in declining fisheries, loss of habitat and a reduction in navigability. To address these problems, the Louisiana Department of Wildlife and Fisheries developed a plan to draw down the water level of the lake by opening the gates of the control structure, thereby exposing the organic material to the sun and air, and facilitating its decomposition. The plan called for draw downs of the lake to occur for three consecutive years, with the first occurring between July 15, 2004, and January 31, 2005.

On July 1, 2004, the Lake Bistineau Preservation Society and its president, who is also a landowner on the lake, filed suit in the 26th Judicial District Court in Bossier Parish. The lawsuit sought a declaratory judgment that the agency exceeded its powers and authority under the Louisiana Constitution by approving the draw down plan. Additionally, the plaintiffs sought to enjoin the agency from implementing the plan. The primary concern of the plaintiffs was that the draw downs would drastically reduce the size of the lake – from 17,200 acres to approximately 7,500 acres – and would do so during peak recreational months. Thus, the plaintiffs argued that the plan would restrict the ability of landowners, camp owners and commercial marinas to use the lake, thereby infringing upon their property rights. Specifically, the plaintiffs argued:

- The plan exceeded the agency's constitutional powers and was an arbitrary and capricious abuse of their discretion;

- The agency failed to balance the environmental costs and benefits with the economic and recreational costs;

- The agency did not create a record adequately setting out the basic facts and establishing a rational connection between its findings and the decision made, as required under *Save Ourselves, Inc. v. Louisiana Environmental Control Commission*, 452 So.2d 1152 (La. 1984);

- The agency failed to consult with other state and federal agencies that have an obligation to protect and conserve environmental resources.

The governing bodies of each of the parishes in which the lake is located filed a petition of intervention in support of the draw down plan.

The trial court denied the plaintiff's application for preliminary injunction. In its decision, the court distinguished the *Save Ourselves* case, determining that it involved only the regulations of the Louisiana Environmental Control Commission, which were much more exacting than the regulations applicable to Wildlife and Fisheries. Moreover, the court held that the agency had considered all of the factors cited by the plaintiffs in a manner consistent with the Public Trust Doctrine, La. Const. art 9, §1. Finally, the court found persuasive the agency's argument that the plan was the only feasible way to control exotic species in the lake.

On appeal, the plaintiffs argued that the trial court should have focused on whether they made a prima facie showing that the agency's plan was invalid or that the agency failed to perform its fiduciary duties as primary public trustee of the lake by adequately considering the economic and recreational impacts of the plan. The appellate court, however, found no "clear abuse" of the trial court's discretion in denying the preliminary injunction.

The court based its decision largely on its interpretation of the Public Trust Doctrine as granting the state considerable discretion in assessing environmental matters and not imposing rigid requirements or particular substantive results. The court quoted extensively from the Louisiana Supreme Court's decision in *Save Ourselves, supra*, in which the Supreme Court called the Doctrine a "rule of reasonableness" that "requires a balancing process in which the environmental costs and benefits must be given full and careful consideration along with economic, social and other factors." In this framework, the Supreme Court held that the agency must have "a latitude of discretion to determine the substantive results in each particular case," and that "in some instances environmental costs may outweigh economic and social benefits and in other instances they may not."

Specifically addressing the merits of the plaintiffs' argument, the appellate court found that the Department of Wildlife and Fisheries had adequately undertaken the balancing process required by the Public Trust Doctrine. The court noted that previous draw down efforts, which had begun after Labor Day, had met with only limited success due to heavy rains that hindered the decomposition process. Moreover, the court stated that the other options considered by the agency, such as dredging and spraying, were either too costly or not as feasible or effective. Finally, the court noted that, while the plaintiffs complained of temporary economic losses, the agency properly weighed these losses against the potential long-term economic losses that would result from the continued degradation of the lake. In all, the court held that the agency adequately "considered the various and competing interests related to the draw down and reached a decision as to the best and most reasonable course to follow." Thus, the plaintiffs failed to make a prima facie showing that the agency failed to adequately consider the economic and recreational impacts of the plan.

The court also observed that its decision primarily addresses an event that had already occurred, namely the first draw down. The court left open the possibility that a trial on the merits could still be held prior with respect to the second and third draw downs and that any intervening or new considerations could be presented at that time – including the results of the first draw down.

- Robert D. Rivers

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DOT ISSUES NEW HAZMAT RULE

70 Fed. Reg. 20018 (April 15, 2005)

On April 15, 2005, the Pipeline and Hazardous Materials Safety Administration, U.S. DOT, issued a final rule to clarify an earlier final rule it published on October 30, 2003 (68 Fed. Reg. 61906). The new rule clarifies the applicability of HAZMAT regulations (49 C.F.R. Parts 171-180).

The October 30, 2003, clarification resulted in a number of administrative appeals of the final rule by the regulated community seeking further clarification. This new rule is the result of clarification in that administrative litigation.

DOT HAZMAT regulation involves proper classification of hazardous materials to be shipped in various transportation modes (air, water, rail, road), proper employee training, proper packaging, proper shipping papers, proper labeling and placarding, proper reporting of transportation incidents and so forth. DOT does not regulate transport of such materials in private vehicles for non-commercial purposes, e.g., transport of chlorine from a store to one's private pool.

For instance, DOT clarifies that "transloading" is to be regulated as a HAZMAT transportation function. Transloading is the transfer of hazardous materials from one bulk packaging to another for purposes of continuing the movement of the hazardous material in commerce. Additionally, DOT revised the definition of "transloading" to include transfers of hazardous materials from bulk to non-bulk packaging and vice-versa.

DOT clarifies the terms "unloading incidental to movement" to indicate that unloading incidental to movement occurs after the hazardous material has been delivered to the consignee's facility when the unloading operation is performed by the carrier personnel or in the presence of the carrier personnel. This excludes regulation of instances where a carrier has delivered a hazardous material to the consignee, and the carrier's responsibility for the hazardous material ceases even though the carrier may not have left the consignee's facility. For instance, the carrier may drop a trailer loaded with hazardous material at one location of the facility and go to pick up a new HAZMAT trailer for transportation at another location at the same facility.

DOT added that "unloading incident to movement" is not only usually subject to HAZMAT regulation, but that it would also be subject to regulation by other appropriate agencies, such as OSHA (for employee safety), EPA (for Clean Air Act purposes) and Alcohol, Tobacco and Firearms (for explosives). Those agencies have authority to regulate non-transportation activities, not DOT. Unloading may be post-transportation.

DOT clarifies that the term "storage incidental to movement" to cover storage by persons of a transport vehicle, freight container or package containing hazardous material, between the time that a carrier takes physical possession of the material for the purposes of transporting it until the package containing the hazardous material is physically delivered to the destination indicated on the shipping document (shipping paper, bill of lading, weigh bill, etc.). A brief break in the loading of such vehicles does not become "non-transportation." However, storage of hazardous materials at a shipper's facility prior to a carrier taking physical possession of the shipment is not subject to HAZMAT regulation (unless pre-transportation requirements have already been completed, e.g., shipping papers, placarding, etc.) While regulated, shipping papers, placards, security, locking and braking requirements, etc., must be met. Storage at the consignee's facility after the shipment has been delivered is not subject to HAZMAT regulation.

DOT declined to clarify what "handling" means. DOT has the authority over handling of hazardous materials for transportation, including incidental loading, unloading and storage, at facilities and by HAZMAT employees.

DOT clarified that it regulates a number of activities at facilities that are neither pre-transportation nor transportation functions. These include packaging requirements and HAZMAT employee training. However, DOT feels that worker protection, environmental protection and handling of explosives are subject to OSHA, EPA, and ATF regulations as appropriate. Thus, there may be multiple instances of regulation of certain hazardous materials at facilities under this view.

DOT also clarified the difference between transloading, which is regulated as a HAZMAT function, and repackaging which is needed for resale. Because the ultimate destination of materials is not known when hazardous materials are delivered to a facility at which the material will

be packaged, DOT says transportation in commerce ends with that delivery.

DOT also clarified that it has the responsibility, shared with the Department of Homeland Security, to regulate security for hazardous material related to transportation. DOT and DHS consult and coordinate concerning security-related issues. In this regard, DOT reiterated its security requirements at 49 C.F.R. Part 172, subpart I. DOT requires a written security plan and employee training on the plan with respect to both empty and filled HAZMAT containers. Persons who offer certain hazardous material for transportation (shippers) in commerce must develop and implement security plans that cover personnel, unauthorized access and en route security. This plan applies to shipments of hazardous materials that require placarding, hazardous materials in bulk, for liquids and gases greater than 468 cubic feet or solids, and for select agents and toxins regulated by the Center for Disease Control.

A security plan is performance-oriented providing the shipper with flexibility concerning specific measures that should be in the plan. However, DOT expects the security plan to cover hazardous materials during preparation for transportation, after completion of such preparation, and prior to the shipment being picked up by the carrier. Additionally, empty packaging, such as railcars, that are located in a shipper's facility used for hazardous material transportation would also be covered by the plan. The idea is that the security plan must minimize the possibility that someone could tamper with the packaging or transport conveyances in a way that could impair their security during transportation. However, the security plan would not cover hazardous materials stored at the facility for its own use or prior to their preparation for transportation. Likewise, a security plan need not cover hazardous materials delivered to a facility for use at the facility.

DOT HAZMAT regulation and multiple federal and possibly state regulations, will pose challenges for shippers and facilities that transport hazardous materials in commerce. 70 Fed. Reg. 20018 (April 15, 2005).

- Stanley A. Millan and Judith Windhorst

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CAFO RULE TOSSED

Waterkeeper Alliance, Inc. v. U.S. EPA,
2005 U.S. App. Lexis 6533 (2d Cir. 2004)

The United States Second Circuit Court of Appeals upheld in part and remanded in an administrative rule ("Rule") promulgated by the EPA to abate and control the emission of water pollutants from concentrated animal feeding operations ("CAFO"), farms, ranches, etc. The Court denied many of the challenges brought by the petitioners, which included "Environmental Petitioners" and "Farm Petitioners," but found that several aspects of the regulation violated the express terms of the Clean Water Act ("Act") or were otherwise arbitrary and capricious under the Administrative Procedures Act ("APA").

The Court agreed with the petitioners and ruled that the Rule unlawfully empowered National Pollutant Discharge Elimination System (NPDES) authorities to issue permits to large CAFOs without review of the CAFO's nutrient management plans by the permitting authority. The Court vacated provisions of the Rule that required CAFOs to apply for NPDES permits or otherwise demonstrate that they had no potential to discharge. The Court also directed the EPA to set forth why it failed to promulgate water quality based effluent limitations for discharges other than agricultural storm water discharges and clarify whether states may develop water quality effluent limitations on their own. The Court upheld the remaining provisions of the Rule.

Challenges to CAFO Rule

A. Failure to Require Permitting Authority Review

Compliance with the effluent limitations for land application of manure, litter, and process wastewater by large CAFOs mandates the development and implementation of a nutrient management plan ("Plan"). The Court agreed with the Environmental Petitioners that the Rule allowed the creation of an "impermissible self-regulatory permitting regime" by allowing the issuance of permits to large CAFOs without any meaningful review of the CAFO's Plans by a permitting authority. According to the Court, the Rule did not properly ensure that

the Plans developed by a large CAFO satisfied the requirements set forth in the Act or that it would comply with all applicable effluent limitations and standards. The Rule did not require that NPDES permitting authorities review the Plans to ensure that the Plans reduced land application discharge in a way that "achieves realistic production goals, while minimizing nitrogen and phosphorus movement to surface waters."

B. Failure to Require that the Terms of the Plans be Included in the NPDES permits

According to the Court, the terms of the Plans constitute effluent limitations. As such, the Rule violated the Act by not requiring that the terms of the Plans be included in NPDES permits and was otherwise arbitrary and capricious.

C. Lack of Public Participation

The Court also found that the permitting scheme shielded the Rule from public scrutiny and comment thereby violating the Act's public participation requirements. The Rule provided only that a "copy of the CAFOs site-specific nutrient management plan must be maintained on site and made available to the Director upon request." The Rule did not require that the Plans be made publicly available or that the terms of the Plan be included in the NPDES permit. The Rule deprived the public of its right to assist in the development, revision and enforcement of an effluent limitation and from calling for a hearing about and then commenting on, NPDES permits before they were issued.

D. The Duty to Apply

The Farm Petitioners argued that the EPA exceeded its statutory jurisdiction by requiring all CAFOs to apply for NPDES permits or demonstrate that they have no potential to discharge. Adopting that argument, the Court held that the Act authorized the EPA to regulate only the discharge of pollutants. In other words, "in the absence of an actual addition of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, no statutory obligation of point sources to comply with EPA regulations for point course discharges, and no statutory obligation of point sources to seek or obtain an NPDES permit in the first instance."

E. Challenges to the Types of Discharges Regulated

The Rule generally provided that the NPDES requirements applied to discharges from a land application area under the control of a CAFO, but it carved out an exception where the discharge in question was "an agricultural storm water discharge" -- defined as any "precipitation-related discharge of manure, litter, or process wastewater from land areas under the control of a CAFO" where the "manure, litter or process wastewater has [otherwise] been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization." The Court disagreed with the Environmental Petitioners' contention that this approach violated the Act and was otherwise arbitrary and capricious. The Court rejected the challenge after finding that the exemption was premised on a permissible construction of the Act.

F. Regulation of "Uncollected" Discharges

The Farm Petitioners contended that the Rule violated the Act because it regulated "uncollected" or non-channelized discharges from land areas under the control of a CAFO. The Court rejected the challenge, citing the irrelevancy of whether the land application run-off has been collected or channelized at the land application area. According to the Court, a CAFO is, itself, a "channel" because it is expressly included in the list of examples of the types of point sources the EPA may regulate, and is already a point source discharge.

G. Challenges to CAFO Rule Effluent Limitations

The Environmental Petitioners brought a host of challenges to 1) the Rule's technology-based effluent limitation guidelines; and 2) the Rule's failure to promulgate additional water quality based effluent limitations. The Court rejected the argument that the EPA failed to consider the single-best performing or optimally operating CAFO in each category or subcategory. The Rule substantively established standards that make "reference to the best performer in any industrial category." The Court held that in all BAT subcategories, the EPA either adopted the technology employed by the best performers or declined to do so for permissible reasons.

H. Challenge to the Best Conventional Technology (BCT) Standard for Pathogens

The Environmental Petitioners also argued that the EPA's failure to adopt any requirements specifically designed to reduce pathogen discharges violated the Act and was arbitrary and capricious. The Court agreed because the EPA did not make an affirmative finding that the BCT-based guidelines adopted in the Rule represented the best conventional technology for reducing pathogens. BCT focuses on the best machines to control pollution.

I. Challenges to the New Source Performance Standards (NSPS) for Swine, Poultry and Veal

The Environmental Petitioners challenged the NSPS for swine, poultry and veal arguing that it was arbitrary and capricious and violated the public participation requirements of the Act. NSPS here focuses on new as opposed to older CAFOs. The Court agreed after finding no "adequate support in the record for either: 1) the EPA's decision to allow CAFOs to comply with the 'total prohibition' requirement by designing, operating and maintaining a facility to contain the runoff from a 100-year, 24-hour rainfall event; or 2) the EPA's decision to allow CAFOs to comply with the 'total prohibition' requirement through alternative performance standards." The Court also found that adoption of the final rule violated the Act's public participation requirement because the EPA did not indicate that it was considering either the 100-year, 24-hour rainfall event option or the possibility of alternative performance standards until adoption of the final rule.

J. Challenge to the EPA's Failure to Impose Water Quality Based Effluent Limitations (WEBL)

WEBLs focus on downstream water quality and are primarily health-based not solely machine or BCT based. The final challenge addressed by the Court was whether the Rule violated the Act by failing to promulgate water quality based effluent limitations and barring states from doing so. The Court found that the "EPA's failure to justify the lack of water quality based effluent limitations for CAFO discharges other than agricultural storm water discharges violated [the Act] and was arbitrary and capricious." The EPA must know "whether or not,

and why, the [limitations] are needed to ensure that CAFO discharges will not 'interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balance population of shellfish, fish and wildlife, and allow recreational activities in and on the water.'" The Court also granted the petition to the extent that its sought clarification of whether the CAFO rule bars the states from promulgating limitations.

The Court's ruling will likely affect LDEQ's revised CAFO regulations at LAC 33:IX Section 2505, which are based on EPA's CAFO Rule.

- *Stanley A. Millan and Tara G. Richard*

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