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U.S. SUPREME COURT SETS NEW GUIDELINES FOR DEVELOPERS

The U.S. Supreme Court issued a ruling on June 28, 2001 liberalizing the standard for "total" taking claims involving wetlands. See *Palazzolo v. Rhode Island, et al.*, 2001 U.S. Lexis 4910, 69 U.S.L.W. 4605 (2001).

A "total" regulatory taking claim exists when regulation denies all economically-beneficial uses of land. However, even where regulation places limitations on land that falls short of eliminating all economically-beneficial use, a "partial" regulatory taking may still occur depending on a variety of factors, including the regulation's economic effect on the landowner, the extent to which the regulations interfered with reasonable investment-backed expectations, and the character of the government action. The developer in *Palazzolo* pursued both "total" and "partial" taking claims.

The land at issue was substantially wetlands. The developer sought and was denied a permit to develop portions of the wetland acreage. Despite not having applied for permits on all of the wetland acreage, the Court ruled the developer's regulatory taking claim was nonetheless ripe for judicial review. The Court said federal law requiring claims to be legally ripe before judicial resolution did not require the submission of additional, futile applications. Most significantly, the Court held that the wetland regulations did not have to pre-date Palazzolo's acquisition of the property for regulatory takings purposes. (He had formed a company in 1959 to acquire the site, before the state wetland regulations were in effect, but he personally acquired the property later by operation of law in 1978, after his company's charter was revoked and after the state wetland regulations were passed in 1971.) This holding basically reverses prior decisions that held there can be no reasonable investment-based expectation supporting a taking claim, if the regulations pre-dated the acquisition of the property in question.

The court ultimately ruled that the developer's "total" taking claim failed because it could still develop the non-wetland portion, even though that portion amounted to approximately six percent (6%) of the total land value.

In light of this decision, it behooves developers to consider developing large properties with wetland permit issues in batches, if they wish to preserve their right to a total taking claim. If there are upland portions that are more easily developed than other portions, their development scheme must be timed separately from the wetlands portions. Separate subsidiaries, separate names

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for the developments, and clearly distinct phases labeled as such, should be considered so that a taking claim would be limited to wetland portions and not include the larger, more easily developable upland portions.

- Stanley A. Millan, Special Counsel, Environmental and Toxic Torts

LOUISIANA'S CLEAN AIR LAW IS NOT VAGUE OR UNCONSTITUTIONAL: REGULATED COMPANY NOT REQUIRED TO UNDERSTAND THE LAW

The Louisiana Supreme Court, in the case of *State of Louisiana v. Ronnie Hair, et al.*, No. 00-KA-Z694, May 15, 2001, upheld the constitutionability of the Louisiana Air Control Act, LA. R.S. 30: 2051-2065, and reinstated the indictment of three men charged with violating the Act while disposing of asbestos containing materials, and remanded for further proceedings.

The three defendants argued that a person of reasonable intelligence cannot know if a "substance is one that endangers, or could endanger human life or health" as set forth in the statute, and that an average person does not know the difference between friable (easily created or documented) asbestos received to be a health hazard, and the non-friable variety. The court stated:

"[T]he fact that a statute's terms are subjective and susceptible to interpretation does not render it vague." In this case, the panel said, the dangers of asbestos abatement have been so widely publicized than the average person knows that cutting asbestos without adequate protection may create health risks.

"The conduct proscribed is not ambiguous," the Louisiana Supreme Court said, and any person of reasonable understanding would know that it is unlawful to remove friable asbestos from a building without taking the precautions required by law.

Therefore, before undertaking a project that requires removal of asbestos, one should consider either hiring a contractor qualified to do the work, or making sure employees know the rules and procedures, and are properly equipped for the job.

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EPA REISSUES HAZARDOUS WASTE IDENTIFICATION RULES

On May 16, 2001, EPA promulgated yet another set of Hazardous Waste Identification Rules ("HWIR"), retaining EPA's application of the "mixture" and "derived from" rules, and clarifying some exclusions from these rules. This rulemaking did not affect its "contained in" rule or policy. See *66 Fed. Reg. 27266*. These rules are discussed below.

The "mixture" and "derived from" rules are EPA's attempt to close a "loophole" in hazardous waste regulation. Diluting or mixing waste is not an acceptable means to EPA for avoiding hazardous waste regulation. "Managing" a solvent waste by mixing it and diluting it with water is regulatory evasion to EPA. Some of these waste mixtures may pose very low hazards, but EPA could not find a basis to exclude very many wastes from the grasp of these rules. Leachate, sludges, and treatment waste residues are regulated under the derived from rule.

These complex rules basically codify indelible hazards; i.e., once a hazardous waste, always a hazardous waste. Mixing a hazardous waste with a non-hazardous waste, the residues from treating a hazardous waste, or the spilling of a hazardous waste into the environment so that it is "contained in" media (water, soil, etc.), results in the same hazardous waste in most cases, regardless of dilution and reduced risk. But it's not that simple.

There are three, not just two, hazardous waste categories, to consider.

- First, there is waste EPA knows is hazardous so it simply listed them. (If a company generates more than a trifling amount of a listed waste, it must apply for a waste identification number, store the waste with great care, document its waste disposal on a manifest form, select permitted facilities, etc., and report, report, and report some more.) This is **listed hazardous waste**.

- Second, there is **characteristic hazardous waste**, which EPA did not list one by one, but listed generally by their characteristic of ignitability (**I**), reactivity (**R**), corrosivity (**C**), or toxicity (**E**), and then left it to the regulatory community to characterize by following certain tests, or information on an MSDS document, etc.

- Third, there are **listed hazardous wastes that are listed solely because the EPA knew they had some of the above characteristics**. If one examines the lists, for instance, one sees **I, R, C**, etc., in parentheses next to the listed wastes. These three subcodes – **I, C, and R** – now are most important for the applicability of the mixture and derived from rules. There are other wastes (acutely hazardous (H) or toxic (T)) on the lists, too.

The "new" mixture and derived from rules reiterate that a waste listed solely for an **I, C, or R** characteristic is not hazardous if, after mixing, treatment, etc., the characteristic is no longer present. This is the same as the mixture and derived from rules for characteristic hazardous waste, i.e., if it no longer has the characteristic after treatment, mixing, etc., it is no longer hazardous. The "new" rule further says that a waste listed solely for **I, C, or R**, even if not mixed or a derivative, is not hazardous, if the waste has lost its characteristic. However, hazardous waste listed for other than **I, C, or R** characteristics, e.g., if listed as toxic (T) or acutely hazardous (H), remain indelibly a hazardous waste if mixed, treated or spilled, etc.

For instance, if solvent waste F001 is mixed with a dirty rag, the result is always hazardous waste code F001. The ash resides from burning the rag or spilling that ash into a lagoon would also be waste code F001. That is because waste F001 is toxic (**T**). On the other hand, waste F003 is listed because it is ignitable (**I**). The rag and ash would not likely have ignitability as a characteristic any more, so they could be managed as non-hazardous solid waste. However, this "non-hazardous" waste is still subject to land disposal pretreatment restrictions if the characteristic exists at the point of generation.

So, certain forms of characteristic hazardous waste, listed or not, are excluded from the regulations, after mixing, etc. (So, too, is low level radioactive waste mixed with hazardous waste, if managed under special standards.) LDEQ must do its own rulemaking to copy the EPA's new HWIR for exempting **I, C, R** listed waste or mixed waste. However, mixture or derivatives of **I, C, R** listed waste are already excluded from hazardous waste classification under existing regulations, if they no longer are characteristic (see LAC 33: V.109, at §2.c under "hazardous waste").

Make sure your employees know how the materials they are handling are classified by the EPA and are up to date on the rules.

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U.S. FIFTH CIRCUIT RULING MAY SIGNAL DIRECTION IN WETLANDS JURISDICTION CASES

In *Solid Waste Agency of North Cook County v. United States Army Corps of Engineers*, (SWANCC) 531 U.S. 159, 121 S.Ct. 675 (2001), the U.S. Supreme Court held earlier this year that the U.S. Army Corps of Engineers' regulations of "waters of the United States," also known as "navigable waters" under the Clean Water Act, exceeded the scope of the Corps regulatory power under the Act. The regulation included as "waters of the United States," intrastate lakes, rivers, streams (including intermittent streams), mud flats, sand flats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which could affect intrastate or foreign commerce.

The case involved denial of a permit for filling several ponds that had formed in pits and that were originally part of a sand and gravel mine operation. The Court refused to interpret the CWA as extending agencies' regulatory powers to the limit of the Commerce Clause, and held that the application of the CWA to the land in question exceeded the authority granted to the agencies under the CWA.

In particular, the Court said that a body of water is subject to regulation under CWA if the body of water is navigable or is adjacent to an open body of water. The Corps' jurisdiction did not extend to ponds that were not adjacent to open water. The Court left open how near and to what bodies of water a "water of the United States" must be to be regulated under the Clean Water Act.

What types of wetlands are regulated under CWA in Louisiana? Wetlands that fringe upon estuaries, rivers, and lakes are obviously still regulated because of their proximity to navigable water bodies. However, many wetlands in Louisiana are further removed from "open waters" by levees or by developments, and regulation is uncertain as to them. The Corps and EPA take the view that a wetland that is near a ditch that eventually empties into open waters is regulated under the CWA because a ditch is a functional or manmade tributary, which itself is a "water of the United States," nearness to which makes the adjacent wetland also regulated.

Several federal courts have considered the issue or similar issues since

the *SWANCC* opinion, with varying results. However, in April 2001, the Fifth Circuit, in *Rice v. Harken Exploration Company*, 230 F3d 264, addressed a claim by property owners against the operator of oil and gas facilities on their property for alleged hydrocarbon and brine discharges in violation of the Oil Pollution Act of 1990 (OPA), 33 U.S.C. 2701 et seq. The court held that intermittent or "seasonal" creeks and streams are not sufficiently connected to other navigable waterways so as to be regulated as "navigable waters" under OPA, that defines "navigable waters" in the same manner as the CWA.

Thus, the Fifth Circuit appears to be moving in a more conservative direction after *SWANCC*.

- Stanley A. Millan, Special Counsel, Environmental and Toxic Torts

BEWARE CORPORATE OFFICERS!! INTENT NOT REQUIRED FOR CRIMINAL CONVICTION

And individual was held criminally liable for violations of the Clean Water Act (CWA) as a "responsible corporate officer" with authority to prevent illegal discharges and sentenced to a three year prison term and a $100,00 fine on each count *United States v. Hong*, 221 F3d 2001 (4th Cir. 2001). Although not identified as an officer of the company, he controlled the company's finances and was aware that the facility would not meet the required standards.

This conviction based upon the negligent violation of the CWA, is another example of the increasing trend towards erosion of the requirement of a finding of intent or a "guilty mind" traditionally necessary for a criminal conviction, zealous U.S. attorneys now have an open season on corporate officers and responsible employees when determining whether to bring charges, even where there is no direct involvement or knowledge of the acts constituting violations.

A well designed training and awareness program is suggested as the best tool for preventative maintenance to avoid prosecution.

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IN AN ENFORCEMENT ACTION, "TIME IS OF THE ESSENCE"

Eight years after a compliance order was issued, LDEQ filed an action in State Court to enforce the order. The district judge then signed a judgment, making the compliance order executory. After the defendant was served with the judgment, he then filed an answer, although not timely. He subsequently moved to dismiss the enforcement action on the grounds of abandonment under La. R.S. 30:2050.9. The statute provides that, "a compliance order or penalty assessment is abandoned when the Department fails to take any steps to obtain final enforcement action for a period of two years after the issuance of an order or assessment".

The district court granted the motion to dismiss on grounds of abandonment. LDEQ appealed.

The First Circuit affirmed and held that more than eight years had passed between the issuance of the compliance order in 1991 and LDEQ's filing of a court action in 1999. Three and one-half dates had passed since the effective date of La. R.S. 30:2050.9. The Court refused to consider the issuance of a compliance order itself as the final enforcement action. It said that interpretation would render La. R.S. 30:2050.9 meaningless, as no action would ever be abandoned once a compliance order became finalized. *LDEQ v. Rottman*, 2001 La. App. Lexis 418 (La. App. 1st Cir. 2001).

In a related case, the First Circuit ruled that the thirty-day prescriptive period afforded to "aggrieved persons" (e.g., citizens, neighbors, etc.), challenging either minor and major source air quality permits under La. R.S. 30:2050.21, is not triggered until notice of the action has been given to them. Since appellants in the case never received official notice that the LDEQ issued the permits, the thirty-day prescriptive period never ran, and the petition was timely filed. The First Circuit reversed the judgment of the district court dismissing the case. *A to Z Paper Company, Inc. v. LDEQ*, 770 So. 2d 445 (La. App. 1st Cir. 2000).

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SENATE BILL 965 FLOATS TO THE TOP: THE LOUISIANA LEGISLATURE ENACTS GROUND WATER LEGISLATION

During the 2001 Legislative Session, Senate Bill 965 sponsored by Senator Fred Hoyt and Representative William Daniel was passed, placing the formulation of a state water-use policy in the hands of the Ground Water Management Commission and the Ground Water Management Advisory Task Force. The Hoyt-Daniel Bill was adopted instead of Senate Bill 1, sponsored by Senator James David Cain, which would have immediately regulated new wells.

The 15-member Ground Water Management Commission is charged with the task of developing rules and regulations that identify and respond to "critical ground water areas." The Commission is authorized to reject or modify non-domestic water use permits based on the impact on the aquifer and surrounding areas in an effort to achieve its primary goal- the long-term protection of each of the state's aquifers.

Additionally, the law creates the Ground Water Management Advisory Task Force. The Task Force is a 49-member body charged with the duty of creating a plan to implement a comprehensive ground water management system. The ground water management system is required to consider such things as current and projected demands on the state's ground water sources, alternatives to ground water use, use of surface water to meet current and future demands, and incentives for the conservation of surface water resources. The plan for implementation of a statewide comprehensive water management system must be presented to the legislative oversight committees for review prior to January 2003.

The act does have a direct impact on water wells. Beginning July 1, 2001, the act requires all owners of any non-domestic, new well to submit certain information to the Commission at least 60 days prior to drilling.

In the upcoming days, Governor Foster will name his appointees to the Commission and Task Force, which will begin meeting in August, 2001.

- Olivia S. Tomlinson, Associate, Environmental and Toxic Torts

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding this E*Zine or this practice group, please contact:

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