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FIFTH CIRCUIT STEMS GOVERNMENT'S EXPANSIONIST REGULATION OF WETLANDS

The Fifth Circuit rendered a decision on December 16, 2003, in U.S. v. Needham, 2003 WL 22953383 (5th Cir. 2003), that gave the government a pyrrhic victory over recovering some oil clean-up costs based on factual findings. At the same time, the court accepted legal arguments that significantly restrict government regulation over "waters" under the Clean Water Act and the Oil Pollution Act.

The government had sought recovery of response cost for an oil spill from the Needhams and attempted to expand regulatory jurisdiction under the Clean Water and Oil Pollution Acts. The government argued that the jurisdictional term "waters of the United States" extended to all waters, including non-navigable tributaries, ditches and adjacent wetlands, that were hydrologically connected to a navigable waterway. The Fifth Circuit rejected the government's broad interpretation and certain holdings of other circuits that supported the government's interpretation. Instead, the Fifth Circuit held that the Acts cover only waters that are actually navigable or that are truly adjacent to open bodies of navigable water. The court ruled that the statutes do not cover all tributaries, puddles, ditches and the like and further ruled that the proper inquiry is whether the site of the farthest traverse of an oil spill is navigable or adjacent to an open body of navigable water.

In the case, oil spilled on land into a drainage ditch, traveled in a non-navigable tributary and then into another tributary that flowed directly into a navigable-in-fact waterway. Based on its conclusion that the oil discharged into a second tributary that flowed directly into a water that the parties stipulated was navigable-in-fact and on its finding that the second tributary was considered "adjacent" to an open navigable waterway, the court held that the statutes applied to that limited extent. The court did not define adjacency in a manner that would create a bright line separating regulated waters from unregulated waters. The court, however, viewed adjacency more narrowly (requiring "significant[]...proximity") than did the government (any hydrologic connection).

Unless and until the issue is resolved by proper rule-making or a Supreme Court decision, in Texas, Louisiana and Mississippi, at least, the government will be required to make fact-specific inquiries before asserting claims under the statutes, a burden the government sought to avoid by pursuing this case. The administration previously rejected rule-making to

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resolve this issue, and at least one case (Deaton from the Fourth Circuit) may be headed toward the Supreme Court.

By Stanley A. Millan

EPA MOVES CLOSER TO DEVELOPING PROPERTY AUDIT STANDARD

2003 saw EPA take a step closer to developing regulations to define the standard for conducting due diligence audits of property as a prerequisite to establishing defenses to liability under CERCLA. Under the 2002 "Brownfields" Amendments to CERCLA,[1] Congress required EPA to promulgate regulations by January 11, 2004, to define "all appropriate inquiry [AAI]," the definitional basis for establishing the innocent landowner defense and establishing the contiguous property owner and bona fide prospective purchaser exemptions to CERCLA liability. EPA had established an AAI negotiated rule-making committee to draft a consensus AAI document. That committee reached consensus on a draft rule after its November 12-14, 2003, meeting. EPA intends to use the consensus document as the basis document in its rule-making effort to meet Congress' authorization to establish an AAI rule (to be promulgated at 40 C.F.R. Part 312). EPA did not meet the January 11, 2004, statutory deadline. It remains to be seen when EPA will belatedly meet the statutory mandates.

Congress had authorized the use of ASTM Standard E 1527-00, *Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process*, as an interim standard.[2] ASTM Phase I standards have been in existence for many years and have served as the commercial guidance for conducting property due diligence. Until the 2002 Brownfield Amendments to CERCLA, the ASTM standards did not necessarily have any legal force or effect and also did not address all aspects of inquiry required to establish CERCLA defenses. The new EPA standard will establish mandatory practices and fill some, but not all, of the gaps in the ASTM standard.

[1] *Small Business Liability Relief and Brownfields Revitalization Act,* P. L. 107-118; 42 U.S.C. §§9601, 9601(35)(B) (2000).
[2] See 68 *Fed. Reg.* 24888 (2003).

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A summary of the salient features of the EPA consensus document with comparisons to the existing ASTM standard is set forth below. The most important distinction is that an EPA promulgated standard, unlike ASTM's commercial practice subject to an environmental professional's judgment and experience, would face the rigors of administrative rulemaking and the force and effect of a rule, including being subject to EPA interpretations. The depth and breadth of the new EPA standard, if adopted as proposed by the advisory committee, will expand the scope -- and the cost to conduct -- due diligence property audits.

- Section 312.1 states the purpose of the consensus document is to provide for CERCLA defenses, exemptions and Brownfield grants. The standard covers both hazardous substances and petroleum releases. It emphasizes the potential disclosure obligations of the environmental professional under environmental laws, e.g., reporting. ASTM Section 1 similarly defines commercial and customary practices but does not discuss the potential disclosure obligations of the professional.

- Section 312.10 defines an "environmental professional," one who may lawfully conduct or supervise the all appropriate inquiry, more narrowly than ASTM section 3.2.12 in terms of licenses, degrees, and years of experience. This could lead to a proliferation of licensing requirements.

- Section 312.20 allows for the use of prior audits but establishes more rigorous conditions than existing ASTM standards. ASTM Section 4.7.2 allows use of a prior assessment if site conditions have not materially changed in the opinion of the user. EPA's proposed provision allows for the inclusion of information collected in compliance with the final rule within the prior year and imposes certain additional updating requirements, e.g., interviews, records, etc., that must be conducted within 180 days before purchase. Section 4.6 does not mandate updating a report beyond 180 days old.

- ASTM Section 4.5 contains principles that a site assessment does eliminate uncertainties, is not exhaustive, and allows for variable inquiries (see ASTM Sections 3.3.27 and 7.1.4.3). The EPA standard does state similar flexibility principles, and, therefore, may require inquiries beyond what is currently practical and reasonable.

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- Section 312.20(f) provides that "data gaps" must be described and strongly suggests that sampling be conducted to develop information to address those data gaps. The ASTM standards contain a similar concept, "data failure" (7.3.2.3), but do not require any sampling for a Phase I investigation (Section 6.4).

- Section 312.21 requires interviews, reviews of government records, visual inspections, etc. Section 6 of the ASTM standard has similar requirements for Phase I investigations. The proposed EPA standard places greater emphasis than the ASTM standard on past operations and on activities on adjoining properties.

- Section 312.23 requires interviews of past and present owners. It also requires interviews of owners or occupants of adjacent properties where "abandoned properties" are involved. ASTM Section 9 requires interviews of present owners, including site managers.

- Section 312.24 requires an inquiry into when the property first had structures or was first used for residential, agricultural, commercial, industrial, or government purposes. ASTM Sections 7.3 and 7.3.2 require the environmental professional go back to 1940 for undeveloped land or when the property was first developed, whichever is earlier. These requirements appear similar.

- Section 312.25 requires the environmental professional to search for liens. ASTM Section 5.2 requires the user to provide lien information to the environmental professional.

- Section 312.26 requires the environmental professional to search for federal, tribal, state or local records, on the subject property and on adjoining properties. Search for public health records regarding the subject property is also required. The proposal also establishes search distances for nearby properties but also establishes that those distances may modified based on professional judgment. ASTM Sections 7.1.7, 7.2 and 10 are not as detailed on local government searches and rely more on interviews with local government officials. Search distances on nearby facilities are similar (Section 7.1.2.1). ASTM does not require inquiry into public health records.

- Section 312.27 requires visual inspections of adjoining properties. ASTM Section 8.4.1.3 requires that current uses of adjoining properties be identified if the properties appear impaired (contaminated). The EPA standard is more onerous and requires the professional to seek access of adjoining sites or explain why efforts to gain access were unsuccessful.

- Section 312.28 provides that the person conducting the inquiry must account for specialized knowledge of the subject property and surrounding area. ASTM Section 5.3 only requires users to report specialized knowledge to the environmental professional, if known.

- Section 312.29 imposes an obligation on the person responsible for conducting the inquiry to consider the fair market value of the subject property and compare the price to the value of the property, as if not contaminated . ASTM at Section 5.4 requires actual knowledge of price disparity by the user before it is described in the report.

- Section 312.30 broadly requires the environmental professional to gather information about commonly known or reasonably ascertainable information. Section 5.2.1 of the ASTM standard does not require use of information that is not recorded. EPA's proposed standard appears to require a more exhaustive investigation here.

- Section 312.31 requires that the environmental professional's inquiry include an opinion regarding additional appropriate investigation. ASTM Section 11 states the primary focus should be on finding recognized environmental conditions and provides that any additional opinions or work scope be assessed in the terms of engagement.

Although we do not know what final form the new rules will take or the impact of future EPA guidance or interpretations, it does appear the scope of the AAI, formerly known as the Phase I, will expand and be more costly. Additionally, because not all property deals close when contamination is discovered, the expanded AAI may not have a favorable impact on Brownfield re-development and instead may leave current landowners holding the bag.

By Stanley A. Millan and Michael A. Chernekoff

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LOUISIANA SUPREME COURT EXPLAINS STANDARDS FOR ALLOWING EXPERTS TO TESTIFY

***Cheairs v. State ex rel. Department of Transp. and Development*, 2003-0680 (La. 12/3/03), ___ So.2d ___**

In this case, the Louisiana Supreme Court set forth a three-part inquiry that must be satisfied before an expert may testify in any type of case. Although the case involved an automobile accident and claims of negligence rather than environmental or toxic tort law, the three-part inquiry will be used to determine the admissibility of expert testimony in all types of cases. As toxic tort cases invariably involve expert testimony and cannot survive without it, this latest pronouncement by the Louisiana Supreme Court on the standards for allowing experts to testify will significantly affect future environmental tort cases.

The plaintiff Mark Cheairs was injured when he ran into the rear of a stationary vehicle owned by the Department of Transportation and Development ("DOTD") while driving his car up an entry ramp to the Mississippi River Bridge in Baton Rouge. The DOTD vehicle was stopped on the scene of a spill of metal rods. The DOTD driver had turned on a lighted electronic arrow board mounted on the cab of his vehicle to alert oncoming traffic to the presence of the vehicle while he picked up the metal rods to clear the roadway.

Plaintiff's case largely depended upon the testimony of an expert, Michael Gillen, who testified that the DOTD was negligent in not dispatching two vehicles to the scene of the metal rod spill, rather than relying on a single vehicle with an arrow board. Gillen, a former police officer and currently a "traffic reconstructionist" for a private consulting firm, contended that DOTD's actions violated standards set forth in the Manual of Uniform Traffic Control Devices ("MUTCD"), a publication of the Federal Highway Administration.

DOTD argued at a pre-trial hearing that Gillen should not be allowed to testify concerning interpretation of the MUTCD because he was not an engineer. Certain language in the MUTCD states that "the manual is not a substitute for engineering judgment" and that, "Qualified engineers are needed to exercise the engineering judgment inherent in the selection of traffic control devices...." However, plaintiff pointed to other provisions of the MUTCD that implied that in certain circumstances people other than traffic engineers are qualified to apply the provisions of the manual.

The trial court overruled DOTD's objection and allowed Gillen to testify. After trial the jury returned a verdict finding both plaintiff and the DOTD, as well as the unknown individual who spilled the metal rods, at fault. The jury allocated 55 % of the fault to the DOTD. The DOTD appealed, but the First Circuit Court of Appeal affirmed the judgment. In this opinion, the Louisiana Supreme Court also affirmed and took the opportunity to explain the basis for allowing an expert to testify in cases tried in Louisiana courts.

The starting point for the court's analysis was Louisiana Code of Evidence article 702 and the well-known United States Supreme Court *Daubert* case on expert testimony. The court's focus on these two items and the course of its analysis emphasize the identities between Louisiana and federal procedure when determining whether expert testimony should be admitted. Article 702 of Louisiana's evidence code follows Federal Rule of Evidence 702, and the Louisiana Supreme Court adopted the *Daubert* case, decided by the United States Supreme Court under federal procedural law, in 1993 in *State v. Foret*, 628 So.2d 116.

Article 702 provides that:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The *Daubert* case, relying on the federal counterpart to article 702, established several non-exclusive factors to be considered when determining whether expert testimony is sufficiently reliable to be admitted into evidence. Those factors are:

1) The testability of the scientific theory or technique;

2) Whether the theory or technique has been subjected to peer review and publication;

3) The known or potential rate of error; and

4) Whether the methodology is generally accepted in the scientific community.

Although the DOTD had challenged Gillen's qualifications in what it called a pretrial "*Daubert*" hearing, the Louisiana Supreme Court critiqued that approach saying that an inquiry as to an expert's qualifications has nothing to do with the *Daubert* factors. This should not "be interpreted to mean that a court should not consider an expert's qualifications when deciding whether to admit a particular expert's testimony, only that the *Daubert* case does not directly address that issue." The court found that article 702 actually supports three separate inquiries that must be satisfied before an expert's testimony may be received in evidence:

1) The expert must be qualified to testify competently regarding the matters he intends to address;

2) The methodology by which the expert reaches his conclusions must be sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and

3) The testimony must assist the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

The Louisiana Supreme Court borrowed these three principles from cases from the Third and Eleventh Circuit federal appeal courts, once again demonstrating the harmony between Louisiana and federal procedure.

The court noted that *Daubert* was not an issue in this case as the only challenge was to Gillen's qualifications. The court found that in the situation at issue – the decision to use a particular device at a particular

location in face of an unpredictable incident of short duration (spill of metal rods) – people other than engineers, specifically policemen and highway department employees are qualified to make decisions at the scene, and accordingly Gillen was also qualified "to express his opinion concerning the application of the standards set forth in the MUTCD to lane closures necessary for incident management."

The case is also interesting for its discussion of the jury's allocation of 55% of the fault to the DOTD. Suffice it to say that the jury also found fault on the part of the plaintiff who was apparently driving without his glasses and admitted that his vision was only 20/200. Two of the Louisiana Supreme Court Justices, Victory and Traylor, dissented, contending that the presence of two DOTD vehicles rather than one would not have prevented the accident because it was likely that the plaintiff would simply have run into the first vehicle he came to. Nonetheless, dissent on these grounds does not detract from the new tripartite analysis set up by the majority as applicable to all cases involving expert testimony.

The Louisiana Supreme Court's opinion in this case sets up a structured matrix for examining expert testimony before allowing it into evidence. The distinction drawn between qualifications and the *Daubert* inquiry may seem self-evident, but in actuality a number of federal and state court decisions do not so clearly distinguish the two but rather blend the inquiries on the theory that an opinion cannot be reliable (*Daubert* inquiry) if the expert is not qualified. Indeed even the United States Supreme Court has suggested as much in the almost equally famous *Kumho Tire* case. ("The relevant reliability concerns may focus upon personal knowledge or experience." *Kumho Tire*, 526 U.S. at 150, 119 S.Ct. at 1176 (1999).)

As a practical matter, whether qualifications and reliability are considered separately or together, the result should be the same. Clearly separating the inquiries may assist some courts, however, who continue to make the mistake of believing that an expert who is qualified may testify to anything.

Perhaps the Louisiana Supreme Court may next take up the challenge of the third prong of the analysis: Does the testimony assist the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue? Few cases have explained the meaning of this question and a reasoned examination of this third inquiry would be welcome.

By Madeleine Fischer

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LOUISIANA FIRST CIRCUIT UPHOLDS DISMISSAL OF CHALLENGE TO DEQ AIR QUALITY PERMIT

Louisiana Environmental Action Network, et al., v. Louisiana Department of Environmental Quality
857 So.2d 541 (La. App. 1 Cir. 2003)

The Louisiana First Circuit Court of Appeal upheld a lower court's dismissal of an environmental group's challenge to an amended state air quality permit issued by the Louisiana Department of Environmental Quality ("DEQ"). In dismissing the case, the Court of Appeal held that a federal air quality permit's supersession of DEQ's amended permit rendered the challenge moot.

In August of 2001, DEQ issued an amended air quality permit to the Georgia-Pacific Corporation for its Port Hudson Operations, which had been operating under state air quality permits since 1988. At the same time, DEQ had been considering a separate application submitted by Georgia-Pacific in 1996 for a Title V air permit, pursuant to 40 C.F.R. Part 70 (regulations that are intended to establish a comprehensive federal system of state air quality permitting as directed by the Clean Air Act). The Louisiana Environmental Action Network (LEAN), an environmental group, filed a timely petition for judicial review of the amended state permit, but, before the court heard the challenge, DEQ issued the Part 70 permit. This prompted Georgia-Pacific, which had intervened in the lawsuit, to file a motion to dismiss on the basis that the subsequently-issued Part 70 permit subsumed the amended state permit. The trial court agreed with Georgia-Pacific, dismissing the action as moot.

On appeal, the First Circuit agreed with the lower court, finding that under both Louisiana and federal law, the force and effect of the state air quality permit ceased upon the issuance of the Part 70 permit. To challenge the amended state permit, LEAN argued that, because the federal regulations only establish minimum requirements and allow the states to impose additional air quality requirements, there are in fact two separate regulatory schemes in place, a state scheme and a federal scheme. Accordingly, the group argued that the permits should be considered separately. The court, however, interpreted the Louisiana Administrative Code as establishing a merged system that combines the elements of state permitting with the federal Part 70 requirements. The court further found that the specific language of the Code provides that existing state air quality

permits remain effective only until issuance of a Part 70 permit. Finally, the court concluded that the dispute did not fall within any exception to the mootness doctrine because any secondary or collateral injury unresolved by DEQ's actions could be addressed via other remedies.

By Robert D. Rivers

EPA ISSUES A LIST OF NATIONAL PROGRAM PRIORITIES

According to a draft notice recently issued in the Federal Register, the EPA wants to undertake a dozen new initiatives during 2005-2007 that will focus on industry compliance with environmental laws, strengthening compliance with financial responsibility requirements found in various environmental laws, and ensuring "that no racial, ethnic or socioeconomic group bears a disproportionate share" of environmental problems due to actions by private companies or federal, state or local governments. Other noteworthy priorities include "the lack of knowledge of hazardous waste management requirements" by port managers, reducing the potential hazard from leaking underground storage tanks, and ensuring that the mining and minerals industry complies with RCRA. Priorities that carried over from previous years include (1) curbing air emissions under EPA's new source review program and (2) enforcing the CWA's provisions on sewer overflows.

After the appropriate comment period, the EPA will complete its analysis of candidate priorities and will present a recommendation for final support to the assistant administrator for enforcement and compliance assurance in late January, 2004.

By Tara Richard

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The following practice group members contributed to this issue:

Michael A. Chernekoff
Madeleine Fischer
Alida C. Hainkel
Stanley A. Millan
Tara Richard
Robert D. Rivers

Please contact your Jones Walker's Environmental Toxic Tort Practice Group contact for additional information on or copies of any of the cited matters.

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:

Michael A. Chernekoff
Jones Walker
201 St. Charles Ave., 50th Fl.
New Orleans, LA 70170-5100
ph. 504.582.8264
fax 504.589.8264
email mchernekoff@joneswalker.com

Environmental and Toxic Torts Practice Group

MICHAEL A. CHERNEKOFF	THOMAS M. NOSEWICZ
MICHELE CROSBY	ANDREW M. OBI
MADELEINE FISCHER	JAMES C. PERCY
LEON GARY, JR.	JOHN C. REYNOLDS
JOHN G. GOMILA	TARA RICHARD
ALIDA C. HAINKEL	ROBERT D. RIVERS
KEVIN R. HAMILTON	ROBERT W. SCHEFFY
HARRY S. HARDIN, III	M. RICHARD SCHROEDER
PAULINE F. HARDIN	PAT VETERS
STACIE HOLLIS	OLIVIA SMITH
GRADY S. HURLEY	RACHEL WEBRE
WILLIAM J. JOYCE	JUDITH V. WINDHORST
ROBERT T. LEMON	ERIC M. WHITAKER
STANLEY A. MILLAN	JAMES E. WRIGHT, III

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