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LDEQ ISSUES NEW RECAP DOCUMENT

On October 20, 2003, the Louisiana Department of Environmental Quality ("LDEQ") revised the Risk Evaluation Correction Act Plan ("RECAP") document from its 2000 version.

RECAP is the guidance LDEQ uses to evaluate the risk at contaminated sites and determine what, if any, and at what level, environmental clean-up is required. This document can be used for new spills, unless exempt, or for voluntary clean-ups at "Brownfields." The RECAP 2003 still contains a tiered framework consisting of a screening option, to determine if contamination is present at or above risk levels, and three management options, to determine how a clean-up should be accomplished. Some of these options involve "cookbook" numerical standards for soil, groundwater and air contamination; others are more complex and require site-specific calculations if the contamination is above levels at lower management clean-up options, e.g., option 1, which contains "cookbook" standards.

LDEQ published a "RECAP 2000" versus "RECAP 2003" summary at its website: *http://www.deq.state.la.us/technology/recap/2003*. Although the basic conceptual approach of RECAP has not changed, there are a number of details and procedural changes to the document that are summarized in the LDEQ website.

For instance, RECAP 2000 may be used for the current phase/task of a project undergoing remediation at this time. Future incremental assessments, however, must be in accordance with RECAP 2003, unless otherwise approved by the department. The soil intervals or depths for sampling have changed from three to two types, being surface to fifteen feet below ground surface and subsurface below fifteen feet below ground surface. This eliminates needing to take extra samples (three intervals were required in RECAP 2000). Major changes to the identification and application of RECAP (remediation) standards include: (1) consideration of volatile emissions from groundwater to ambient air, and (2) groundwater or soil pathways with volatile constituents under enclosed structures may be assessed under management option 1. A minimum of four sampling points are required to establish site-specific "background" levels, if it is believed that high site readings are due to the particular area rather than contamination. Applicable or relevant and appropriate requirements ("ARAR") borrowed from a variety of regulatory schemes for specific constituents level of exposure (comparable to federal CERCLA remediation standards) may now be used under RECAP. For example, OSHA permissible exposure limits ("PELS") could be an appropriate ARAR under RECAP. Additionally, old appendices H (screening), I (management option 1), and J (management option 2) were combined into one to be more user friendly (new appendix H).

Of particular legal importance, Section 2.17 clarifies that, if residual contamination in soil is greater than RECAP levels for non-industrial (residential) soil, then a conveyance notification must be placed on the property. Additionally, if residual contamination in certain groundwater aquifers is above the groundwater RECAP standard for certain quality aquifers, again a conveyance notification must be filed with respect to the portion of the "hot" plume within the property boundaries.

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Section 2.18 addresses self-implementation guidance and explains that prior LDEQ approval is not needed for certain interim remedial activities that are conducted during routine operations and construction activities, provided the following conditions are adhered to:

1. All reporting requirements to LDEQ are met;
2. The department is notified prior to samples being collected;
3. Reimbursement may not be sought from the state for remedial action costs that were not part of an emergency response; and
4. Engineering institutional controls shall not be used as part of the final remedy unless installed during an emergency response.

For more extensive site characterization or remediation, however, LDEQ recommends that the LDEQ and the owner reach an agreement about site management objectives and site characterization strategy prior to expending extensive efforts and resources in site activities. The LDEQ states that "performance of such activities without prior department approval will be conducted at the risk of the submitter." Importantly, LDEQ acknowledges that "typically, these investigations (e.g., Phase II property transfer investigations) are of limited scope and are not sufficient to obtain...[a no further action]...decision from the department...." LDEQ reporting requirements, however, must also be met if contamination is found.

Section 2.20 is also new, setting forth landowner identification requirements related to off-site migration of contamination. This is presumably so the LDEQ could notify adjacent landowners, lessees and servitude holders of off-site contamination threats.

Additionally, RECAP tables 1 through 3 have been changed and updated based on revised EPA toxicity values and default parameters. These tables include the screening and remediation standards for RECAP. Therefore, they must be evaluated carefully to see if any RECAP management is needed on a potentially contaminated site, and if so, what levels and management options would be applied. To be more mathematically pure, LDEQ no longer uses "user friendly" positive whole numbers or decimals (e.g., non-industrial soil screening for arsenic at 0.38 ppm), but now uses scientific notations (e.g., non-industrial soil screening for arsenic at 1.2E+01) (meaning 1.2 times 10 raised to an exponent of 1), which translates to 12 ppm arsenic in soil to be below screening levels. The actual numbers involved are not so small or large to require scientific notation, but LDEQ's Excel program requires it. You almost need tables to read the tables.

By Stanley A. Millan

LOUISIANA FIRST CIRCUIT REINSTATES MODEST JURY AWARD IN OIL AND GAS PROPERTY RESTORATION CASE

***Simoneaux v. Amoco Production Co.*,**
2003 WL 22220112, 2002-1050 (La.App. 1 Cir. 9/26/03)

The Louisiana First Circuit Court of Appeal found that a trial judge committed legal error when he overturned a jury award of $375,000 in oilfield remediation costs and

entered his own judgment of nearly $13,000,000 for the plaintiffs. Holding that the trial judge improperly substituted his own evaluation of the case for that of the jury, the First Circuit reinstated the jury verdict.

In this suit plaintiffs owned property in the Napoleonville Field in Assumption Parish that had been leased to various entities that conducted oil and gas exploration and production activities on the property over a number of years. Plaintiffs contended their property had been contaminated by the lessees' use of earthen pits to contain various oilfield wastes. According to plaintiffs and their experts, hazardous wastes had migrated from the pits into surrounding areas. Plaintiffs sought money damages to have their property restored to its original condition as well as personal injury damages for their claimed fear of contracting cancer and other illnesses.

After hearing conflicting opinions from experts on both sides the jury returned a verdict finding that only one of seven contested sites required cleanup. The jury awarded $375,000 for costs of restoration and declined to award anything for fear of future illness.

The plaintiffs moved for judgment notwithstanding the verdict asking the trial judge to increase the jury award. The plaintiffs also moved for a new trial on the ground that following the conclusion of the case it was learned that two of the jurors were not domiciled in Assumption Parish. The trial judge granted the first motion finding that all seven well sites were contaminated. In doing so, he entered an award of almost $13,000,000. He also granted a "conditional" new trial on the issue involving the non-resident jurors. The defendants appealed these rulings.

The defendants raised an initial question concerning whether the plaintiffs had the right to bring such a suit without first seeking the intervention of certain Louisiana administrative agencies. Relying on the Louisiana Supreme Court's recent decision in *Corbello v. Iowa Production* (noted in the April 2003 e-zine), the First Circuit held that the private landowner plaintiffs had a right to sue directly for remediation of oilfield sites without first seeking administrative relief before the Louisiana Office of Conservation or the Louisiana Department of Environmental Quality. (The First Circuit did not address recently passed legislation, La. R.S. 30:2015.1, which now requires plaintiffs suing to recover for contamination of usable groundwater to notify the Department of Natural Resources and the Department of Environmental Quality, allowing them the opportunity to intervene. The new statute also requires that any judgment in favor of the plaintiff related to contamination of usable groundwater be deposited in the court registry and authorizes the court to issue orders so that the award is actually used for the evaluation and remediation of usable groundwater.)

The First Circuit next addressed the alleged jury defect. Plaintiffs challenged the validity of the jury verdict on the basis that two of the jurors were not living in Assumption Parish at the time of the trial, in violation of Louisiana Constitutional and procedural requirements that jurors serve only in the parish in which they are domiciled. The First Circuit reversed the trial court's grant of a new trial on this ground, finding that the plaintiffs waived any challenge based on the residency of the jurors when they failed to question the jurors on this point during voir dire. The First Circuit also noted that even if the two jurors should have been disqualified, the original verdict would not be affected. The jury verdict was unanimous. Because only nine out of twelve jurors must agree on a

verdict in a civil case in Louisiana, excluding the non-resident jurors still left ten votes in favor of the verdict, a sufficient number to sustain it.

Finally the First Circuit turned to the trial court's decision to grant the plaintiffs' motion for judgment notwithstanding the verdict. The court reviewed in detail the testimony of plaintiffs' experts and defendants' experts.

Based upon results of testing done by ICON Environmental Services, plaintiffs' three experts testified that there was widespread contamination in the Napoleonville Field and that remediation was necessary to prevent further spread into the aquifer and to protect human health. One of plaintiffs' experts estimated the costs of cleanup as being between $21 and $33.5 million.

Defendants' expert witnesses disagreed with plaintiffs' experts on every point, including the existence of contamination, whether remediation was even necessary, and, if so, the extent of the remediation. According to the defense witnesses the plaintiffs' property met Louisiana's regulatory guidelines for oilfield wastes. One expert even testified that the Napoleonville Field was the lowest risk site he had ever evaluated. Other defense witnesses criticized the plaintiffs' remediation plan, which required the removal of 1.25 million cubic yards of dirt, questioning whether such a massive excavation plan could even be approved by the Department of Natural Resources.

One defense expert, an environmental engineer, acknowledged there was some surface damage to the property around one of the pits. He recommended excavating this one pit and placing wells strategically around the site to monitor the aquifer. The cost of this plan was $375,000. Some of the other defense witnesses agreed that this plan was an appropriate protective measure, while still others thought even this was overkill.

The jury rendered their verdict by means of special interrogatories with the jury finding that only one site merited cleanup and awarding exactly $375,000, in accordance with the testimony of the defendants' environmental engineer.

The First Circuit Court of Appeal found that the jury verdict was substantially consistent with the testimony of the defense experts, indicating that the jury believed them and not the plaintiffs' experts. Noting that the trial judge improperly substituted his own credibility determinations for those of the jury, the First Circuit reversed the trial judge's entry of judgment notwithstanding the verdict. In ruling on a such a motion, the trial court must answer the question: do the facts and inferences point so strongly and overwhelmingly in favor of the moving party that reasonable persons could not arrive at a contrary verdict? If a reasonable juror in the exercise of impartial judgment could have reached the conclusion that the jury did, the motion should not be granted:

> [The finding of the jury] was entirely reasonable based on the evidence, and is supported by the testimony of Mr. Stover, Dr. Deuel, Dr. Frazier, Dr. Droy and Mr. Pisani. Their collective testimony established that: (1) there was no hazardous contaminant at any of the seven well sites posing a risk of harm requiring removal; (2) the only constituent presenting

> any problem at the site was excess salt; (3) the only site requiring remediation was Simoneaux 1, where the centralized facility had been located, and where nearly all of the testimony for both sides at trial was focused; and (4) the cost to repair the salt damage was $375,000.00. In this case, the defense experts refuted plaintiffs' experts' testimony on the necessity, method and cost of cleanup of the Napoleonville Field. The jury weighed the evidence and accepted the defense witnesses' testimony. Because a reasonable jury could clearly have found that only one site required remediation and the cost of that cleanup was $375,000.00, the judge was not empowered to substitute his own evaluation of the evidence to overturn the damage award.

Thus, the First Circuit reinstated the jury verdict.

By Madeleine Fischer

PUBLIC NOTIFICATION OF CONTAMINATION

La. Admin. Code Title 33, Part I., §101, *et seq.*

Title 33 of the Louisiana Administrative Code, Part I, Section 101, *et. seq.*, was enacted "to establish procedures for notifying those members of the public whom the [LDEQ] determines are likely to be adversely affected by a release that poses a significant risk of adverse health effects." Section 101. The rule applies to "releases that exceed the applicable federal or state health and safety standard and pose a significant risk of adverse human health effects." Section 103. Examples of "applicable federal or state health and safety standards" include, but are not limited to: 1. USEPA maximum contaminant level in a drinking water well or aquifer; 2. Louisiana primary ambient air quality standards; and 3. Agency for Toxic Substances and Disease Registry minimal risk levels for air. Section 107.

Under this rule, the DEQ shall provide notice to the public for sites within its regulatory jurisdiction, of a release that poses "a significant risk of adverse health effects to persons whom the department reasonably determines are likely to be adversely affected by the release." Section 109(A) and (B). The DEQ may prioritize sites for notice, but in any event, notice should be given as soon as reasonably practicable. Section 109(C).

The following chart provides the content and time frame for providing notification:

	Public Notice No. 1	Public Notice No. 2
Triggering Event	When the department becomes aware of information and determines that a release is likely to have off-site impacts that exceed the applicable federal or state health and safety standard and pose a significant risk of adverse health effects	When the department confirms off-site impact that exceeds the applicable federal or state health and safety standard and the department determines that the off-site impact poses a significant risk of adverse health effects.
When to Provide Public Notice	When an emergency or exigent circumstance exists, notice shall be given as soon as practicable under the circumstances using any reasonable means or, otherwise, within 30 days of the triggering event.	When an emergency or exigent circumstance exists, notice shall be given as soon as practicable under the circumstances by suing any reasonable means or, otherwise, within 30 days of the triggering event.
Contents of Public Notice	1. Physical address of the release site. 2. Description of the contaminant. 3. Corrective action efforts. 4. Name, phone number, and address of contact person for both the responsible party and the department. 5. Other information the department determines is necessary to protect human health and the environment.	1. Physical address of the release site. 2. Description of the contaminant. 3. Corrective action efforts. 4. Any potential adverse health effects. 5. Name, phone number, and address of contact person for both the responsible party and the department. 6. Other information the department determines is necessary to protect human health and the environment.

The notices must be provided in a way reasonably calculated to reach those members of the public directly affected by the release, which may include, but is not limited to, newspapers, block advertisements, public service announcements, direct mailings, personal contacts, press releases, press conferences, and posting on LDEQ's website. Section 109(E)(2).

The rule was effective October 20, 2003, and is applicable to only those releases that occur on or after October 20, 2003. Section 105.

By Stacie Hollis

LOUISIANA FOURTH CIRCUIT EASES SUMMARY JUDGMENT BURDEN FOR ASBESTOS DEFENDANTS

***Booth v. ACandS*, 2003-C-0511 (La.App. 4 Cir. 8/13/03), ___ So. 2d ___.**

This decision from the Louisiana Fourth Circuit Court of Appeal eases the summary judgment burden for an asbestos defendant. Plaintiffs asserted wrongful death and survival actions against numerous defendants related to the alleged occupational asbestos exposure of their decedent, Joe Booth. Plaintiffs claimed that Booth's alleged asbestos disease was caused by his exposure to, *inter alia*, asbestos tape manufactured by

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Defendant 3M Company (formerly, Minnesota Mining & Manufacturing Co.) during his employment at Avondale Shipyards. 3M sought summary judgment, claiming that plaintiffs' evidence was insufficient to maintain their claim against 3M. Plaintiffs offered a 1967 "material requisition" form indicating that Minnesota Mining tape was delivered to an Avondale subcontractor (Hopeman Brothers) for an Avondale job. The trial court denied summary judgment, and the Fourth Circuit reversed.

On appeal, the Fourth Circuit addressed the summary judgment determination by asking two questions: (1) Whether there is a genuine issue of fact that 3M or its predecessor manufactured, sold, and/or distributed asbestos tape used at Avondale; and (2) Whether plaintiffs have sufficient evidence that Booth, more probably than not, was exposed to the 3M asbestos tape referenced in the form. The court held that the material requisition form, by itself, was sufficient to create a genuine issue of fact as to whether 3M asbestos tape was used by Hopeman Brothers while performing work at Avondale. The court reviewed deposition testimony indicating that Booth may have worked around Hopeman Brothers while working as an Avondale pipe insulator in 1969. The court held, however, that this evidence was insufficient to maintain plaintiffs' claim that Booth was *exposed* to that 3M asbestos tape referenced in the material requisition form.

> Construing all factual inferences reasonably drawn from the evidence in plaintiffs' favor, and resolving all doubt in their favor, the evidence does not show that plaintiffs can meet their burden of proving that it was more probable than not that decedent Joe Booth was exposed to any 3M/Minnesota Mining asbestos tape or cloth requisitioned, ordered and/or purchased by Hopeman Brothers during the brief period in 1969 when he worked at Avondale as a pipe insulator. Accordingly, there is no genuine issue of material fact, and 3M is entitled to judgment as a matter of law.

The evidentiary holdings of *Booth* are important because they make it easier for asbestos defendants to obtain summary judgment when plaintiffs can only offer evidence that a plaintiff/decedent may have been exposed to that defendant's asbestos product.

By Judith V. Windhorst

ASBESTOS MEDICAL MONITORING CLASS ACTION CONTINUES

***Bourgeois v. A.P. Green Industries*, 02-CA-713 (La. App. 5 Cir. 2/25/03) ___ So. 2d ___**

This decision from the Louisiana Fifth Circuit Court of Appeal is the latest round in the Bourgeois class action brought by current and former Avondale employees seeking a judicially-administered medical monitoring fund and counseling program due to alleged

occupational exposure to asbestos. In the district court, Avondale and the executive-officer defendants raised exceptions that (1) the claims were barred by the 1999 Act 989 amendment to Louisiana Civil Code article 2315 (excluding medical monitoring damages where there is no physical injury); (2) the medical monitoring claims were barred by the exclusive remedy limitations of workers' compensation; and (3) the claims fell exclusively under the Longshore and Harbor Workers' Compensation Act ("LHWCA"). The district court overruled the exceptions, finding Act 989 unconstitutional as applied to the *Bourgeois* claims. In *Bourgeois v. A.P. Green Indus., Inc.*, 97-3188 (La. 4/3/01), 783 So.2d 1251, the Supreme Court of Louisiana declared Act 989 (excluding medical monitoring costs from article 2315 where there is no physical injury) unconstitutional as retroactively applied in the case and remanded the remaining workers' compensation and LHWCA issues to the Fifth Circuit for resolution.

In framing its analysis, the Fifth Circuit held that "the law in effect at the time of the tortious exposures will apply if the evidence proves that the exposures were significant AND resulted in the later manifestation of damages." Following Cole v. Celotex and its progeny, the appellate court held that, "in resolving latent long-term toxic torts[,] courts must apply the law that was in effect at the time of the significant causative exposure." The Fifth Circuit noted that the Louisiana Workers' Compensation Law ("LWCL") first recognized asbestosis as an occupational disease in 1952 and that the LWCL extended tort immunity to the employer's executive officers in 1976. The court then held that plaintiffs with significant asbestos exposure before 1958 have an assertable negligence claim against Avondale and its executive officers, plaintiffs with significant exposure after 1958 but before 1976 have an assertable negligence action only against the Avondale executive officers, and that plaintiffs with no significant exposure before 1976 have no negligence action against Avondale or its executive officers. (Given the court's recognition of 1952 as the date asbestosis was first covered by the LWCL, it appears that the references to 1958 are typographical errors that should be 1952.)

Plaintiffs with no significant pre-1976 exposure contended that their claims fell within the intentional tort exception to workers' compensation immunity. Finding that it could not ascertain at this stage of the proceeding whether the alleged "willful misconduct" constituted "an intentional act," the Fifth Circuit affirmed the district court's denial of the exception of no cause of action as to the "willful misconduct" allegation.

As to the LHWCA exception, the appellate court followed the decisions in *Poche v. Avondale Shipyards, Inc.*, 339 So.2d 1212 (La. 1976) and *Abadie v. Metropolitan Life Insurance Co.*, 00-244 (La. App. 5 Cir. 3/28/01), 784 So.2d 46, and found that plaintiffs with significant pre-1976 exposure could pursue the executive officers in tort, a remedy not available under the LHWCA.

This latest *Bourgeois* decision demonstrates that many medical monitoring claims remain viable despite the Act 989 legislative amendment limiting such damages in tort cases.

By Judith V. Windhorst

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LDEQ REMOVES HURDLES TO VOLUNTARY REMEDIATION OF CONTAMINATED SITES BY CHANGING DEFINITION OF HAZARDOUS WASTE

In an attempt to speed up the voluntary remediation of contaminated sites without increasing risks to human health or the environment, the Louisiana Department of Environmental Quality (LDEQ) revised the definition of hazardous waste. The definition now excludes environmental media that no longer contain concentrations above the RECAP Screening Standards (LAC 33:1.Chapter 13) and that no longer exhibit any of the characteristics of hazardous waste identified in LAC 33:V.4903. As a matter of EPA policy, states were free to make such "contained in" determinations based upon risk or site history; now the policy is codified in a state rule.

The prior regulation slowed or completely stopped remediation of sites because contaminated environmental media retained the description of having RCRA-listed waste "contained-in" it. Waste that falls under the new "exception" does not have to be managed in the same manner as hazardous waste, which in turn reduces the disposal and transportation costs for contaminated environmental media. The rule also simplifies the waste handling process by reducing administrative requirements and by providing greater consistency with non-RCRA waste handling requirements and practices. The Emergency Rule promulgated by the LDEQ became effective on August 10, 2003, and will remain in effect for a maximum of 120 days or until a final rule is promulgated, whichever occurs first.

Below is the new regulation:

The new rule defines a solid waste as a hazardous waste if it "consists of environmental media (soil, sediments, surface water, or groundwater) that contain one or more hazardous wastes listed in LAC 33:V:4901 (unless excluded by one of the exclusions contained in this definition) or that exhibit any of the characteristics of hazardous waste identified in LAC 33:V.4903. Environmental media no longer contain a hazardous waste when concentrations remaining in the media are below RECAP Screening Standards (LAC 33:1.Chapter 13) and the media no longer exhibit any of the characteristics of hazardous waste identified in LAC 33:V.4903. However, land disposal restrictions (LAC 33:V.Chapter 22) apply to such environmental media even though the media may no longer contain a hazardous waste." This means the waste must usually still be pre-treated if it possesses hazardous constituents above EPA values, e.g., best demonstrated available technology (BDAT).

By Tara Richard

# # # # #

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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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