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LOUISIANA LEGISLATURE RESPONDS TO ONSLAUGHT OF OIL AND GAS "LEGACY" LAWSUITS

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In recent years, the oil and gas industry in Louisiana has faced an onslaught of lawsuits brought by property owners alleging environmental damage to their property due to exploration and production operations that often relate to activities that took place 40 or 50 years earlier. The number of property restoration, or "legacy," lawsuits dramatically increased after the Louisiana Supreme Court's 2003 decision in *Corbello v. Iowa Production*, which upheld an award of more than $50 million in property damages even though the market value of the land was just over $100,000. Perhaps even worse, the court did not require the landowner to spend the damage award on cleaning up the property. [Please see the Jones Walker Environmental E*Zine dated April 2003—*Louisiana Supreme Court Affirms $33 Million Property Restoration Damage Award Against Oil and Gas Lessee*.] Louisiana has adopted Act 312 of 2006, which establishes new substantive and procedural rules for the handling of oil and gas property restoration lawsuits. The new law applies to cases that are pending, unless on or before March 27, 2006, the court had issued or signed an order setting the case for trial.

The Act represents a significant improvement in that it alters the focus of remediation lawsuits by requiring cleanup and restoration of property, rather than allowing windfall damage awards that need not be spent on cleanup. It requires that the state Department of Natural Resources ("DNR") play a greater—but not a controlling—role in the litigation. And except in limited cases, it defines the "applicable standard" for cleanup as that promulgated by the state agency in accordance with the state Administrative Procedures Act in effect at the time of the cleanup; in other words, courts cannot adopt differing standards for cleanup based on the opinions of hired experts.

New Procedure

The Act enacts La. Revised Statute 30:29, which requires that upon the filing or amendment of any lawsuit claiming "environmental damage" arising out of oil and gas drilling and exploration activities, the party filing suit must notify the state of Louisiana, through the commissioner of conservation of the Department of Natural Resources and the attorney general, by certified mail. The Act requires a stay of the litigation until 30 days after a plaintiff provides the notice and files the return receipt with the court. The DNR or the attorney general have the right to intervene in the suit, but they are not required to do so. The Act also does not impair their authority to bring enforcement actions at a later date.

The new procedure shifts the focus from damage awards to the preparation of remediation plans. The new law provides that if a court finds that a party is responsible for environmental damage to property, that party must propose a plan for remediation of the property. The "responsible party" must submit the plan to the DNR, giving the plaintiffs or other parties an opportunity to respond to the proposed plan. The law requires the DNR to conduct a public hearing on the plan(s) submitted and to approve or structure a plan, providing written reasons. The court then reviews the DNR plan and approves it unless a party proves by a "preponderance of

the evidence" that another plan is more feasible "to adequately protect the environment and the public health, safety and welfare." The court then enters a judgment adopting the plan[,] ordering the responsible parties to fund implementation of the plan [and requiring the responsible parties to place the funds in the court registry]. At this point, the judgment becomes final for purposes of appeal. The statute also provides that any appeal shall be heard with preference, on an expedited basis, without deference to the decision of the lower court.

There are exceptions to the new procedure. The law appears to relate to claims that arise under general tort law and the Louisiana Mineral Code. The Act states that it does not preclude a landowner from receiving a judicial award for "private claims" suffered as a result of environmental damage, but it does not define what these private claims are. Nor does it preclude a judgment for damages for additional remediation in excess of the adopted plan that may be awarded pursuant to "express contractual provisions" between the parties. This may grant plaintiffs a significant loophole; in *Corbello*, the court based the damage award on a clause in a surface lease obligating the lessee to "reasonably restore the premises as nearly as possible to its condition at the start of the lease." If awarded, the additional damages do not have to be deposited in the court's registry, which leaves a plaintiff receiving an additional damage award free to pocket the money, rather than using it to restore the property.

The statute also subjects any settlement in a remediation lawsuit to the approval of the court and review by the DNR and attorney general. If the court determines that remediation is necessary, no settlement can be certified by the court until the responsible party deposits the funds required for remediation in the registry of the court. The Act, however, provides the court with discretion to waive these requirements if the settlement is for a "minimal amount and is not dispositive of the entire litigation."

The new law may make it easier for plaintiffs' counsel to recover attorney's fees because it expressly provides for them, while prior law did not. In addition to the damages referenced above, a party found responsible for damages or environmental evaluations or remediation of property will be required to pay to "the party providing evidence" (which could be either plaintiffs' counsel, the DNR or the state) "all costs attributable to producing that portion of the evidence that directly relates to the establishment of environmental damage, including, but not limited to, expert witness fees, environmental evaluation, investigation, and testing, the cost of developing a plan of remediation, and reasonable attorney fees incurred in the trial court and department."

Prompt Notice of Any Environmental Testing Required

Act 312 also enacted La. R.S. 30:29.1, which requires the owner or operator of any oilfield site covered by Section 30:29 who performs "any environmental testing on land owned by another person" to provide the results of the testing to the landowner (s) and the DNR within ten days from receipt of the results by the owner/operator of the site, regardless of whether suit has been filed.

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Changes to Statute Relating to Claims for Threats of Damage to Usable Ground Water

In *Corbello*, a substantial part of the damage award was attributable to alleged contamination of a public aquifer that sat partly under the plaintiff's land. Soon after the *Corbello* decision, the Louisiana legislature adopted 2003 Act 1116, which authorized the DNR and Louisiana Department of Environmental Quality ("DEQ") to intervene in a suit, and which provided a procedure for submitting remediation plans to the state agencies. Act 1116 also required the deposit of any award for damages to usable ground water to be paid into the registry of court and to be spent on cleaning up the property. This year's Act 312 further changes the law, by amending 2003 Act 1116, La. Revised Statute 30:2015.1, to provide for separate procedures for claims concerning damage to ground water, depending on whether the claim involves an oil and gas drilling or exploration site. If the claim does not involve an oilfield site, the DEQ exclusively has right to intervene and has jurisdiction over the preparation of a cleanup plan; if the claim does involve an oilfield site, then the DNR is given that role instead. This streamlines the process by providing that, if a claim involves an oilfield site, the appropriate agency for all aspects – both ground water claims and other claims – is the DNR.

Summary

Act 312 establishes new procedural rules by providing for the approval of cleanup plans by state agencies subject to court review. It also enacts substantive changes in the law by: (1) requiring that the damages be spent on remediation of the property, (2) providing that the "applicable standard" for cleanup is that established by state regulators, not some more or less stringent standard set by a court based on expert testimony, (3) providing for recovery of attorney's fees and costs, and (4) clarifying the roles of both DNR and DEQ with respect to claims for damages for environmental harm.

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 these issues, contact:

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