



## IN THIS ISSUE:

- State of Louisiana Report on “Green” Legislation to Incentivize Green Technology
- Supreme Court Rules Corps 404 Fill Permit Trumps EPA 402 Discharge Permit on Alaska Project
- Federal Legislative Update: The American Clean Energy and Security Act of 2009

---

## STATE OF LOUISIANA PASSES “GREEN” LEGISLATION

The Louisiana House and Senate considered several “green” bills and resolutions in its recently concluded legislative session. Lawmakers have realized that Louisiana is behind the national curve for laws that incentivize the implementation of greener technology – for both consumers and businesses.

### Legislation Approved:

#### Carbon Sequestration

- **House Bill 661** establishes a regulatory program under the Department of Natural Resources for carbon sequestration in Louisiana. The 22-page bill authorizes the Commissioner of Conservation to establish regulations for the underground injection and storage of carbon dioxide that will comply with federal environmental laws and gives the authority for using carbon dioxide in the enhanced recovery of oil and gas. Ownership, expropriation, liability, and civil penalties are also addressed in the bill. The House and Senate passed the bill, which was sent to the Governor for final approval on June 25, 2009.

#### Green Jobs

- **House Bill 733** creates a text credit for certain “green job industries” that includes renewable energy companies, energy-efficient construction and retrofit companies, biofuel companies, and manufacturers of sustainable products that is not disadvantageous to materials or products manufactured in Louisiana. The bill allows up to \$1 million per state-certified green project and no more than \$5 million per year. The bill gives the secretary of the Department of Economic Development, the commissioner of administration, and the governor’s office the authority to certify “green projects” through the adoption and promulgation of rules that establish program details. House Bill 733 was approved by House and Senate and sent to the Governor for executive approval on June 25, 2009.

#### Energy Systems

- **House Bill 858** expands the eligibility for the purchase and installation of residential wind and solar energy systems. La. R.S. 47:6030 currently provides a tax credit for individual homeowners; however, Bill 858 modifies the existing



statute to add apartment complexes as well. House Bill 858 was approved by House and Senate and sent to the Governor for executive approval on June 25, 2009.

### Automobiles

- **Senate Bill 26** grants tax credits for the purchase of new, and the retrofitting of existing, automobiles, which utilize alternative fuels—such as liquefied natural gas, biodiesel, and electricity. Senate Bill 26 was approved by House and Senate and sent to the Governor for executive approval on June 25, 2009.

## Two Bills Considered, but Not Coming to a Vote Included:

### Energy Systems

- **Senate Bill 91** would have granted a transferable tax credit for the costs and expenses attributable to the cost of constructing or installing energy systems, which use “qualified energy resources,” as defined in 26 U.S.C. § 45 of the Internal Revenue Code. Unlike the federal tax code; however, Bill 91 included facilities that burn biomass in conjunction with fossil fuels, to produce electricity and transfer the electricity to the point of use or storage. Senate Bill 91 was pending in Conference Committee on June 25, 2009, and the session ended without it coming to a vote.

### Carbon Capture

- **House Bill 192** would reduce the severance tax levied after payout on certain oil production that implements carbon capture technology by 50%. House Bill 192 was passed by the House on May 13, 2009; however, it was not heard by the Senate Revenue & Fiscal Affairs Committee this session.

### Resolutions

- **House Resolution 104** calls for the state to form a committee to study and develop an official green energy policy. The resolution states that “it is vital to the economy to identify, develop, demonstrate, and validate” sustainable and affordable new energy sources—with Louisiana leading the way. The resolution passed committee with no

Jones Walker is sponsoring a breakfast briefing on “**The Carbon Capture Continuum—From Study and Production to Capture and Consumption.**” The briefing, which will take place July 23, 2009, at the Louisiana State University Energy, Coast & Environment Building in Baton Rouge, will begin at 8:30 a.m., and is also available by webinar. Jones Walker has assembled a team of notable experts to discuss the challenges and opportunities with CO<sub>2</sub> emissions. Speakers include:

**Don G. Briggs:** President, Louisiana Oil & Gas Association

**James H. “Jim” Welsh:** Commissioner of Conservation, State of Louisiana

**Dr. David E. Dismukes:** Associate Executive Director, Center for Energy Studies

**Dr. Michael McDaniel:** Professional-in-Residence, Center for Energy Studies, and Former Secretary, Louisiana Department of Environmental Quality

The briefing will be moderated by three members of Jones Walker’s Green Law & Sustainability Team: Marjorie A. McKeithen, Robert W. Scheffy, Jr., and Michael A. Chernenkoff.

For more information on this briefing, or to register to attend, please [click here](#).



opposition and House Resolution 104 was adopted and filed with the Secretary of State on June 24, 2009. The House Committee on Commerce will now report the results of its studies, along with recommendations for changes to laws, regulations, and procedures governing green energy, to the House of Representatives by February 1, 2010.

- **Senate Resolution 83 and House Resolution 38** urge and request the Department of Economic Development and the Department of Natural Resources to promote the clean use of alternative feedstock by the petrochemical industry; to benchmark incentives for companies that could use alternative feedstock; and to provide a report with such benchmarks and recommendations to the appropriate committees of the Legislature of Louisiana at least two months prior to the opening of the 2010 Regular Session. Both resolutions were passed and filed with the Secretary of State on June 18, 2009, and May 14, 2009, respectively.
- **House Concurrent Resolution 93** forms the Louisiana Climate Change Policy Commission (“LCCPC”). The LCCPC will consist of 20 members, including 7 state agency appointees from Departments such as Environmental Quality and Natural Resources, as well as 5 members appointed by the governor from a list of nominated Louisiana professors. The committee is charged with evaluating policy considerations for the development and implementation of a comprehensive state policy for climate change, particularly addressing the areas of carbon sequestration; greenhouse gas reduction; diversification and improvement of energy systems; planning for design, land use, and economic development relative to climate change mitigation; and environmental improvement—all in coordination with federal climate change policies. It was passed by the House and Senate and filed with the Secretary of State on June 11, 2009.

For additional information on this or other “green” topics, or for more information on Jones Walker’s Green Law & Sustainability practice, please [visit the Jones Walker website](#).

—[Sarah S. Brehm](#)

---

## SUPREME COURT RULES CORPS 404 FILL PERMIT TRUMPS EPA 402 DISCHARGE PERMIT ON ALASKA PROJECT

The U.S. Supreme Court (“The Court”) in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 2009 WL 173864 (U.S. 2009), issued a significant ruling on the overlap of Section 404 of the Clean Water Act, dealing with the discharge of dredged or fill material into waters of the United States, and Section 402 of the Clean Water Act, dealing with the discharge of “pollutants” into those waters. If a Section 402 permit is applied in addition or in lieu of a Section 404 permit, there could be no discharge (or project) in this case. Only if Section 404 is applied exclusively could a Clean Water Act permit be validly issued in this case.



The case involved which agency—the Corps of Engineers (“The Corps”) under Section 404, or the U.S. Environmental Protection Agency (“EPA”) under Section 402—issues National Pollutant Discharge Elimination System (“NPDES”) permits for mining waste (“slurry”) discharged into waters of the United States. Coeur Alaska, as part of re-opening Kensington Gold Mine in Juneau, Alaska, sought a Section 404 permit for discharging a mixture of crushed rock and water left behind in tanks. Rather than build a tailings pond for the slurry, Coeur Alaska proposed to use lower Slate Lake for the discharge. Over the life of the mine, Coeur Alaska intended to put 4.5 million tons of slurry into the lake. This would raise the lake bed 50 feet and will increase the lake area from 23 to approximately 60 acres.

The Corps determined that the environmental damage caused by placing the slurry in the lake would be temporary as compared with placing the slurry in nearby wetlands. The Corps issued a Section 404 permit for the discharges. The EPA also issued a Section 402 permit, but only for discharges from the lake into downstream creeks. The legal issue was whether the new source performance standards (“NSPS”) under Section 402 applied to Coeur Alaska, as those NSPS require “zero discharges” from new froth-flotation gold mines like Coeur Alaska’s.

The Court reconciled Sections 402 and 404. Basically, the Court found that The Corps has authority under dual regulations issued by EPA and The Corps to cover as “fill material” any material that has the effect of a change in the bottom elevation of water and expressly includes slurry or tailings or similar mining-related materials. The Court found that Section 404 ousted Section 402 over the discharge of fill material, as Section 402(a) of the Clean Water Act excepts Section 404 from EPA’s issuance of NPDES permits for the discharge of any pollutants. The Court also noted that even though Section 402 was not involved in the discharge of fill material, the Clean Water Act gives EPA authority over Section 404 discharges, including its issuance of regulatory guidelines for such discharges and the right to veto certain discharges.

The Court found that the definition of fill material expressly excludes “trash or garbage,” but the Court found that the mining waste discharges here did not present any difficulties as to the scope of other solids that are covered by the regulatory definition of fill material.

The Court further found that the no or “zero discharge” prohibition under new source performance standards did not apply to Section 404 discharges of fill material. This was the second issue of statutory ambiguity the Court addressed.

The Court agreed that it would be unworkable to require both permits, Sections 402 and 404 in cases such as this, and such a strained interpretation would present complexities to the regulated community that the Court sought to avoid by harmonizing the provisions of the Clean Water Act.

In both issues, the Court relied on internal EPA memoranda that clarified the interpretation of the Clean Water Act, including that fill material including mining waste was covered under Section 404, and that Section 402 new source performance standard did not apply to Section 404 discharges.

The concurring opinion of Justice Scalia noted that the Court went overboard in apparently applying the Chevron doctrine to low-level agency memoranda that did not go through formal rule making, and indicated that he felt a new era of judicial



deference to agency actions was involved.

Justice Ginsburg dissented.

It is noteworthy that the regulation in question includes as fill material other waste-like discharges, including rock, sand, soil, clay, plastics, construction debris, wood chips, over burden from mining, and other excavation material, and materials used to create any structure or infrastructure in waters of the United States. See 33 C.F.R. §323.2(e)(2). This regulatory change occurred in 2002, when the Corps and EPA abandoned the “primary purpose” test for the definition of “fill” to that of replacing or changing the bottom elevation of a water body as the new definition. Thus, the Court’s decision apparently blesses a full range of waste discharges in waters, being handled as “fill” by the Corps of Engineers.

—*Stanley A. Millan*

---

## FEDERAL LEGISLATIVE UPDATE: THE U.S. AMERICAN CLEAN ENERGY AND SECURITY ACT OF 2009 (H.R. 2454)

The House of Representatives has passed, by a vote of 219–212, H.R. 2454, known as The American Clean Energy and Security Act of 2009 (“ACESA”). A similar bill will be considered by the Senate this summer. The Environmental Protection Agency (“EPA”) recently provided an analysis of the legislation. According to the EPA report, “H.R. 2454 transforms the structure of energy production and consumption,” and would likely:

- substantially accelerate the deployment of clean energy technology
- create new jobs
- double the share of energy from zero or low carbon sources by 2030
- advance carbon capture and storage technology, and
- have low cost of implementation.

The EPA summary analysis of the bill can be found [here](#). The full EPA analysis of H.R. 2454 can be found [here](#).

The bill, largely referred to as the “Cap-and-Tax” or “Cap-and-Trade” Legislation, passed the House on June 26. According to the Congressional Budget Office, this climate legislation would cost the average household about \$175 a year by 2020. Under a cap-and-trade system, the government establishes a cap on the total amount of carbon that can be emitted nationally and companies then buy or sell permits to emit CO<sub>2</sub>. The cap is reduced over time to reduce total carbon emissions.

—*Robert W. Scheffy, Jr.*



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:

### Green Law & Sustainability Attorneys

Brehm, Sarah S.  
Bryan, Boyd A.  
Chernekoff, Michael A.  
Eisenberg, Steven E.  
Hamer, Jennifer D.  
McKeithen, Marjorie A.  
Millan, Stanley A.  
Miller, Stephen T.

Rivers, Robert D.  
Scheffy, Jr., Robert W.  
Tucker, Robert C.  
Tyler, Richard J.  
Walsh, Robert L.  
Wilson, B. Trevor  
Windhorst, Judith V.

*This newsletter should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own attorney concerning your own situation and any specific legal questions you may have.*

To subscribe to other E\*Bulletins, visit <http://www.joneswalker.com/ecomunications.html>.