

ENVIRONMENTAL & TOXIC TORT UPDATE



Fall 2010

ENVIRONMENTAL UPDATES

By Brett F. Willie

Every quarter we provide our readers with a brief update of select environmental regulatory changes recently proposed and/or adopted by the Louisiana Department of Environmental Quality (LDEQ) and the Louisiana Department of Natural Resources (LDNR). These updates are generally helpful as a quick reference resource for those involved with and/or employed by the communities regulated by LDEQ and LDNR and more specifically those involved with the oil and gas industry. The following are brief descriptions of the proposed and final regulatory changes. The full text of these changes can be viewed at the website for the Louisiana Register by going to: <http://doa.louisiana.gov/osr/reg/register.htm>.



In addition to regulatory updates, we likewise report on toxic tort litigation and various judicial decisions which continuously influence related cases in the area of environmental litigation. In this update, we'll be reporting on the *Eagle Pipe and Supply, Inc. v. Amerada Hess Corp.* case in which the Louisiana Court of Appeal for the Fourth Circuit recently reversed itself and determined that the plaintiff in a NORM contamination case had a right of action to seek damages against various oil company and transporter defendants for property

damages claimed to have been cause to property prior to its purchase by the plaintiff.

Regulatory Summaries - July

LDEQ - PROPOSED

Revision of the Drinking Water Source Use (LAC 33:IX.Chapter 11)(WQ080)
Source: La. Register for July, 2010, p. 1612

The Secretary for the Louisiana Department of Environmental Quality gives notice that rulemaking procedures have been initiated to amend the Water Quality regulations, LAC 33:IX, Chapter 11 (WQ080).

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This update is intended for general informational purposes only. The contents contained herein should not be construed as formal legal advice nor the formation of a lawyer/client relationship. The reader is urged to consult his or her personal attorney concerning specific legal questions and/or situations. This is an advertisement.

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LDEQ is revising the designation of the drinking water supply use in nine subsegments based on the evaluation of the existing use of drinking water supply in those subsegments. Descriptions of two subsegments are being revised to accurately reflect the waters that have an existing use of drinking water supply.

After a review of LDEQ's water quality standards and of information received from the Louisiana Department of Health and Hospitals, it was determined that the water quality standards needed to be revised to accurately reflect the waters that have an existing use of drinking water supply and to be in compliance with federal regulations (40 CFR 131.10). The basis and rationale for this Rule are to appropriately protect the waters of the state. Federal regulations (40 CFR 131.10 (a)) require that each state must specify appropriate water uses to be achieved and protected. LDEQ currently has 44 subsegments designated for the drinking water supply use. Most of these subsegments appropriately protect existing drinking water supplies, but in some of these subsegments, the drinking water supply use is not an existing use. An existing use is a use actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards (40 CFR 131.3 (e)). Federal regulations (40 CFR 131.10 (g)) allow states to remove a designated use if it is not an existing use. LDEQ is removing the drinking water supply use from nine subsegments in accordance with federal regulations.

Federal regulations (40 CFR 131.10 (i)) state that, where existing water quality standards specify designated uses less than those which are presently being attained, the state shall revise its standards to reflect the uses actually being attained. LDEQ determined that the descriptions of two subsegments needed to be revised to accurately reflect the waters that have an existing use of

drinking water supply and to be in compliance with federal regulations (40 CFR 131.10(i)). A portion of the Houston River Canal-which has an existing use of drinking water supply-was in a subsegment that was not designated as a drinking water supply. LDEQ is revising the description of subsegment 030806-554700 to extend drinking water protection to the aforementioned undesignated portion. Because of this revision, the description of an adjacent subsegment (030306 Bayou Verdine) needed to be revised. This Rule meets an exception listed in R.S. 30:2019(D)(2) and R.S. 49:953(G)(3); therefore, no report regarding environmental/health benefits and social/economic costs is required.

LDEQ - FINAL

HW Tanks—Secondary Containment Requirements and 90 Day Turnover of Hazardous Waste (LAC 33:V.109, 1109, 1901, 1907,1909, and 4437)(HW106)

Source: La. Register for July, 2010, p. 1535

Editor's Note: This Rule is being repromulgated to correct typographical errors and a citation error. The original Rule may be viewed on pages 1234-1239 of the June 20, 2010 edition of the *Louisiana Register*.

The Secretary for the Louisiana Department of Environmental Quality has amended the Hazardous Waste regulations, LAC 33:V.109, 1109, 1901, 1907, 1909.D and E, and 4437.D (Log #HW106).

This Rule sets standards for the use of concrete as an external secondary containment system for hazardous waste tanks. It provides an approval process for using unlined/uncoated concrete as an external liner system under specific circumstances. The Rule also clarifies and adds an additional subsection to compliment the requirement of LAC 33:V.1909.D relating to the subject "accumulation time" exemption from hazardous waste permitting

requirements by using a flow-through calculation in certain situations to provide clear standards in the regulation that will provide protection for the state's environment. This Rule meets an exception listed in R.S. 30:2019(D)(2) and R.S. 49:953(G)(3); therefore, no report regarding environmental/health benefits and social/economic costs is required.

LDNR – EMERGENCY RULES

Office of Conservation—Statewide Orders No. 29-B and 29-B-a—Order Amending and Expanding Drilling and Completion Operational and Safety Requirements for Wells Drilled in Search or for the Production of Oil or Natural Gas at Water Locations (LAC 43:XIX.Chapters 2 and 11)
Source: La. Register for July, 2010, p. 1427



Editor's Note: This Emergency Rule was rescinded and replaced with a superseding Emergency Rule addressed herein below.

The following Emergency Rule and reasons therefore are now adopted and promulgated by the Commissioner of Conservation as being necessary to protect the public health, safety and welfare of the people of the State of Louisiana, as well as the environment generally, by amending and expanding the drilling and completion operational and safety requirements for wells drilled in search of oil and natural gas at water locations.

The Emergency Rule is intended to provide greater protection to the public health, safety and welfare of the people of the state, as well as the environment generally by adopting new operational and safety requirements for the drilling and completion of oil and gas wells at water locations. Specifically, the Emergency Rule creates a new Chapter within Statewide Order No. 29-B (LAC 43:XIX.Chapter 2) to provide additional rules concerning the drilling and completion of oil and gas wells at water locations, specifically providing for the following: rig movement and reporting requirements, additional requirements for applications to drill, casing-header requirements, mandatory diverter systems and blowout preventer requirements, oil and gas well-workover operations, diesel engine safety requirements, and drilling fluid regulations. Further, the Emergency Rule amends Statewide Order No. 29-B-a (LAC 43:XIX.Chapter 11) to provide for and expand upon rules concerning the use of storm chokes in oil and gas wells at water locations.

Recognizing the potential advantages of expanding the operational and safety requirements for the drilling and completion of oil and gas wells at water locations within the state, it has been determined that failure to establish such requirements in the form of an administrative rule may lead to the existence of an imminent peril to the public health, safety and welfare of the people of the State of Louisiana, as well as the environment generally.

Protection of the public and our environment therefore requires the Commissioner of Conservation to take immediate steps to assure that drilling and completion of oil and gas wells at water locations within the state are undertaken in accordance with all reasonable care and protection to the health, safety of the public, oil and gas personnel, and the environment generally.

Notwithstanding the above, it is necessary to allow the affected industry adequate time to prepare for implementation and compliance with the Emergency Rule. Time must be allowed for establishing the required equipment and qualified personnel, training of personnel, and possible modification of exploration and production schedules and procedures. For the above reasons, the effective date of the Emergency Rule, Amendment to Statewide Order No. 29-B (LAC 43:XIX.Chapter 2) and Statewide Order No. 29-B-a (LAC 43:XIX.Chapter 11) (Emergency Rule) set forth herein after is July 15, 2010. The Emergency Rule shall remain in effect for 120 days after its effective date.

Office of Conservation—Statewide Orders No. 29-B and 29-B-a—Order Amending and Expanding Drilling and Completion Operational and Safety Requirements for Wells Drilled in Search or for the Production of Oil or Natural Gas at Water Locations

(LAC 43:XIX.Chapters 2 and 11)

Source: La. Register for July 2010, p. 1438

The following Emergency Rule and reasons therefore are now adopted and promulgated by the Commissioner of Conservation as being necessary to protect the public health, safety and welfare of the people of the State of Louisiana, as well as the environment generally, by amending and expanding the drilling and completion operational and safety requirements for wells drilled in search of oil and natural gas at water locations. The Emergency Rule signed by the Commissioner on June 15, 2010 and effective July 15, 2010 is hereby rescinded and replaced by the following Emergency Rule.

The Emergency Rule is intended to provide greater protection to the public health, safety and welfare of the people of the State, as well as the environment generally by adopting new operational and safety requirements for the drilling and completion of oil and gas wells at water locations. Specifically, the Emergency Rule creates a new Chapter within Statewide Order No. 29-B (LAC

43:XIX.Chapter 2) to provide additional rules concerning the drilling and completion of oil and gas wells at water locations, specifically providing for the following: rig movement and reporting requirements, additional requirements for applications to drill, casing-header requirements, mandatory diverter systems and blowout preventer requirements, oil and gas well-workover operations, diesel engine safety requirements, and drilling fluid regulations. Further, the Emergency Rule amends Statewide Order No. 29-B-a (LAC 43:XIX.Chapter 11) to provide for and expand upon rules concerning the use of storm chokes in oil and gas wells at water locations.

Recognizing the potential advantages of expanding the operational and safety requirements for the drilling and completion of oil and gas wells at water locations within the state, it has been determined that failure to establish such requirements in the form of an administrative rule may lead to the existence of an imminent peril to the public health, safety and welfare of the people of the State of Louisiana, as well as the environment generally.

Protection of the public and our environment therefore requires the Commissioner of Conservation to take immediate steps to assure that drilling and completion of oil and gas wells at water locations within the state are undertaken in accordance with all reasonable care and protection to the health, safety of the public, oil and gas personnel, and the environment generally.

The effective date of the Emergency Rule, Amendment to Statewide Order No. 29-B (LAC 43:XIX.Chapter 2) and Statewide Order No. 29-B-a (LAC 43:XIX.Chapter 11) (Emergency Rule) set forth hereinafter is July 15, 2010. The Emergency Rule shall remain in effect for 120 days after its effective date.

LDNR – FINAL

Office of Conservation—Exploration and Production Site Groundwater Evaluation and Remediation—Statewide Order No. 29-B (LAC 43:XIX.Chapter 8)

Source: La. Register for July, 2010, p. 1562

The Louisiana Office of Conservation has adopted Chapter 8 which applies to and provides procedures for the evaluation or remediation of groundwater conditions and potential sources that may have contributed to those conditions at oil and gas exploration and production sites pursuant to compliance with the requirements of Chapters 3, 4, 5 or 6 of LAC 43:XIX.Subpart 1 (Statewide Order No. 29-B). The amendments to the above existing Rules are intended to codify practices already being implemented under the authority of the Commissioner of Conservation.

Regulatory Summaries - August

LDEQ - PROPOSED

Office of the Secretary—Miscellaneous Amendments and Corrections (LAC 33:I.903, 1905, 1909, 1911, and 3925; III:502; V.109, 4489, and 4901; VII:303; and XV:588)(MM013)
Source: La. Register for August, 2010, p.1847

The Secretary for the Louisiana Department of Environmental Quality gives notice that rulemaking procedures have been initiated to amend the Radiation Protection regulations, LAC 33:I.903, 1905, 1909, 1911, and 3925; III:502; V.109, 4489, and 4901; VII:303; and XV:588 (MM013).

This Rule corrects errors that have been found in the Environmental Quality regulations. Language found to be unclear has been clarified, grammatical errors have been corrected, some wording as been restructured, and instances of improper regulation citations have been corrected.

Maintenance of the regulations is part of the responsibility of the department. An aspect of maintenance is for the department to correct errors when they are found. The basis and rationale of this

Rule is to maintain the regulations that protect the environment and public health of the state, as authorized by the Environmental Quality Act. This Rule meets an exception listed in R.S. 30:2019(D)(2) and R.S. 49:953(G)(3); therefore, no report regarding environmental/health benefits and social/economic costs is required.



Spill Prevention and Control (LAC 33:IX.Chapter 9)(WQ079)

Source: La. Register for August, 2010, p.1778

Under the authority of the Environmental Quality Act, R.S. 30:2001 et seq., and in accordance with the provisions of the Administrative Procedure Act, R.S. 49:950 et seq., the Secretary has amended the Water Quality regulations, Title 33, Part IX, Subpart 1, Chapter 9 (WQ079).

This rule change will increase the minimum container volume for applicability of the spill prevention provisions from 660 gallons to 1320 gallons, and will establish a de minimus container size for aggregate container applicability that excludes containers smaller than 55 gallons of oil from consideration. It will also increase the interval between operators' required reviews of their spill prevention plans from three years to five years.

There are also minor corrections of grammar and updates of acronym changes in the Rule. Example: LWPDES to LPDES. This change will make this portion of the state's rules similar to the federal regulations. This Rule meets an exception listed in

R.S. 30:2019(D)(2) and R.S. 49:953(G)(3); therefore, no report regarding environmental/health benefits and social/economic costs is required.

LDNR – PROPOSED

Office of Conservation—Fees (LAC 43:XIX.701, 703, and 707)

Source: La. Register for August, 2010, p.1889

The Office of Conservation proposes to amend LAC 43:XIX.701, 703, and 707 (Statewide Order No. 29-R) in accordance with the provisions of the Administrative Procedure Act, R.S. 49:950 et seq. The proposed action will adopt Statewide Order No. 29-R-10/11 (LAC 43:XIX, Subpart 2, Chapter 7), which establishes the annual Office of Conservation Fee Schedule for the collection of Application, Production, and Regulatory Fees, and will replace the existing Statewide Order No. 29-R-09/10.

LDNR - FINAL

Office of Conservation—Exploration and Production Site Groundwater Evaluation and Remediation Statewide Order No. 29-B

(LAC 43:XIX.Chapter 8)

Source: La. Register for August, 2010, p.1783

This Rule was inadvertently published in the July 20, 2010 *Louisiana Register* on pages 1562-1563. Prior to publication, the department decided not to finalize this Rule and advised the Office of the State Register of its intent in a letter received on June 25, 2010. This Rule was printed in error and has not been incorporated into the Louisiana Administrative Code.

LDNR - POTPOURRI

Office of Conservation—Advanced Notice and Solicitation of Comments on Proposed Rulemaking for Onsite Exploration and Production Waste Pollution Control and Oilfield Pit Regulations (LAC 43:XIX.301, 303 and 313)

Source: La. Register for August, 2010, p.1907

The Department of Natural Resources, Office of Conservation is requesting comments on proposed amendments to regulations under LAC 43:XIX.Subpart 1.Chapter 3, Pollution Control-Onsite Storage, Treatment and Disposal of Exploration and Production Waste (E&P Waste) Generated from the Drilling and Production of Oil and Gas Wells (Oilfield Pit Regulations). The proposed regulatory amendments are summarized as follows and provided in length thereafter.

The proposed amendments will: A) provide greater specificity and clarification to the definition of “Contamination” under LAC 43:XIX.301, B) recognize acceptance of Department of Environmental Quality Risk Evaluation/Corrective Action Program methods to address contamination under the general requirements of LAC 43:XIX.303 and C) codify the necessity for landowner consent on “future land use” determinations applicable to land treatment criteria under LAC 43:XIX.313.D. Respective proposed regulatory revisions are detailed, as follows:

A) LAC 43:XIX.301. Definitions

Contamination—the introduction of substances or contaminants into a groundwater aquifer, a USDW or soil at or below an area (site) located within an onsite location in such quantities as to render them reasonably unsuitable for purposes consistent with use of the site immediately preceding the onset of onsite oil and gas exploration and production activities.

B) LAC 43:XIX.303.D. Onsite areas found to have contamination as defined in LAC 43:XIX.301 shall be

properly addressed according to the provisions of this chapter or any other applicable requirement of LAC 43:XIX.subpart 1 unless otherwise authorized by the commissioner in accordance with LAC 43:XIX.319.A. Use of Louisiana Department of Environmental Quality Risk Evaluation/Corrective Action Program (RECAP) methods to address contamination will be considered on a case-by-case, site-by-site basis in accordance with LAC 43:XIX.319.A.

LAC 43:XIX.303.D becomes E, E becomes F, etc. for remainder of LAC 43:XIX.303.

C) LAC 43:XIX.313.D. Land Treatment. Pits containing E&P Waste may be closed onsite by mixing wastes with soil from pit levees or walls and adjacent areas provided waste/soil mixtures at completion of closure operations do not exceed the following criteria, as applicable, unless the operator can show that higher limits for EC, SAR, and ESP can be justified for future land use with land owner consent or that background analyses indicate that native soil conditions exceed the criteria.



For the full length of the proposed regulatory amendment, see p. 1908 of the August Louisiana Register.

Regulatory Summaries - September

LDNR – PROPOSED

Amendment of Statewide Order No. 29-B
(LAC 43:XIX.301, 303, 501, 519 and 565)
Source: La. Register for September, 2010, p. 2117

The Louisiana Office of Conservation has proposed to amend LAC 43:XIX.303, 501, 519 and 545. The proposed amendment would allow commercial facilities to reclaim material that would otherwise be disposed of as E&P Waste and use said material solely as media during Office of Conservation permitted hydraulic fracture stimulation operations.

Jurisprudential Summaries

Eagle Pipe and Supply, Inc. v. Amerada Hess Corp.

Court of Appeal for the Fourth Circuit State of Louisiana

Reverses Itself and Rules that Plaintiff Has Right to Seek Damages in NORM Suit

The Louisiana Fourth Circuit Court of Appeal reversed itself recently by holding that a property owner has a right of action against third parties to recover for damages incurred prior to its purchase of the property. *Eagle Pipe and Supply, Inc. v. Amerada Hess Corp.*

Eagle Pipe involves property damage claims brought by a purchaser (Eagle Pipe) that, subsequent to its purchase, discovered that the property was contaminated with radioactive material allegedly deposited as a result of the oilfield-related operations of various third parties. Eagle Pipe purchased the property in 1988 for its fair market value. However, between 1981 and 1988, the

property had been leased by the previous owners to Union Pipe, Inc. which operated an industrial pipe yard “for the purpose of buying, cleaning, storing, and selling used oilfield tubing.” During that timeframe, various companies sold and/or tendered used oilfield tubulars for cleaning, maintenance and storage at the yard leased by Union Pipe. By the time Eagle Pipe purchased the property in 1988, Union Pipe’s lease had terminated and its activities on the property had ceased.

Eagle Pipe has alleged that during the cleaning process at the Union Pipe yard it subsequently purchased, radioactive scale, formed from the exploration and production of oil and gas, was removed from the tubing and was deposited onto the surface of the pipe yard, contaminating the soil.

A number of years after the purchase of the property, the Louisiana Department of Environmental Quality (LDEQ) conducted an inspection of the site and discovered the presence of radioactive materials. LDEQ found Eagle Pipe to be in violation of state radiation regulations as a result of the presence of technologically enhanced naturally occurring radioactive materials (TENORM) and Eagle Pipe was subsequently ordered to remediate the property.

As a result, Eagle Pipe sought relief against a number of parties, including the previous owners and the various oil and trucking companies it alleged were responsible for the radioactive contamination on the property.

The oil and trucking companies excepted successfully arguing before the trial court that in Louisiana the general rule is that “a purchaser cannot recover from a third party for property damage inflicted prior to the sale.” Eagle Pipe appealed, arguing that the defendants should not be allowed to escape liability because the

contamination was hidden and not reasonably discoverable prior to the sale and that it was a damaged party under La. C.C. art 2315 which provides that “[E]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.” The 4th Circuit rejected that argument and affirmed the trial court’s ruling, holding that, without an express subrogation of rights, damages to the owner of land occurring prior to the sale of the land are personal to the owner and not recoverable by the new owner. (In his dissenting opinion, Judge Bonin cited art. 2315 asserting that Eagle Pipe, as the damaged party, should have a right to recover damages from the responsible parties.)

Thereafter, Eagle Pipe applied for and was granted a rehearing before the 4th Circuit to revisit the issue of whether Louisiana’s general rule against allowing subsequent purchasers of property the right to recover for pre-sale damages was applicable to the instant case. After reconsideration of the issues, the Court reversed itself on the issue of Eagle Pipe’s right to recover and held that Eagle Pipe was the “injured party” because the damage manifested itself after it purchased the property.

Exception of No Right of Action

As the trial court’s grant of the defendants’ exception presented a question of law, the Fourth Circuit was required to review it *de novo*. In its analysis, the Court of Appeal noted that the “sole basis for the objection is the uncontested fact that Eagle Pipe only acquired the property *after* the contaminating acts, if not effects, of the defendants had discontinued and that the acquisition was without an express reservation of rights, subrogation, or assignment to Eagle Pipe from its vendor.” The Court further noted that “[t]he excepting defendants do not contend that the contamination was known or reasonably knowable

by Eagle Pipe prior to its purchase of the property...[and] the facts stated in the petition were not controverted in the lower court.”

Louisiana Court of Civil Procedure article 681 provides that “[e]xcept as otherwise provided by law, an action can be brought only by a person having a real and actual interest which he asserts.” The purpose of the exception is to assist the trier of fact determine whether the plaintiff belongs to the particular class of persons to whom the law extends relief. The Fourth Circuit undertook an analysis of *Prados v. South Central Bell Telephone Company*, 329 So. 2d 744 (La. 1975) (on rehearing) and *St. Jude Med. Office Bldg. Ltd. P’ship v. City Glass and Mirror, Inc.*, 619 So. 2d 529, 530 (La. 1993), which spelled out the general rule that “a purchaser cannot recover from a third party for damage to the property incurred prior to sale” and upon which the trial court relied in granting the defendants’ exception of no right of action. As stated by the Court of Appeal in its analysis, “[s]uch a rule would preclude, of course, a right of action on the part of Eagle Pipe. We, however, conclude that these decisions bear closer examination of their facts in order to decide whether they do after all preclude a right of action by Eagle Pipe against the parties before our court.”

Of interest to the Court on first glance was the fact that Eagle Pipe’s vendors were the lessors of Union Pipe prior to the sale of the property and that Union Pipe’s lease likewise terminated prior to the sale. Upon closer examination of *Prados*, the Court of Appeal noted it held “that the present owner has no right to recover damages against the former lessee.” However, citing *Hopewell, Inc. v. Mobil Oil Company*, 00-3280 (La. 2/9/01), 784 So. 2d 653, 653 (per curiam), the Court pointed out that the facts presented in *Prados*, as well as *Lejeune Bros., Inc. v. Goodrich Petroleum Co., L.L.C.*, 06-1557 (La. App. 3 Cir. 11/28/07), 981 So. 2d 23, involved rights arising

under a lease and were distinguishable from the instant case.

After analyzing the *Prados* holding and its interpretation by the Louisiana Supreme Court in *Hopewell*, the Fourth Circuit made what it considered to be the same distinction made in *Hopewell*, “that *Prados* is limited to actions by a subsequent purchaser against a former lessee arising out of the terminated lease. Notably, the cases cited by the defendants to support the application of this rule relied upon by the trial court all involve causes of action arising under leases.”



Another distinguishing factor the Court of Appeal addressed was the “covert” nature of the radioactive contamination found to be present on Eagle Pipe’s property. In *Prados* the Court of Appeal relied upon the general rule that “a buyer is presumed to know the overt condition of the property and to take that condition into account in agreeing to the sale price.” The Fourth Circuit in *Eagle Pipe* found that rule to be sound on its face but concluded that it was limited to its dispositive facts and was not controlling in the present case which did not involve a lease and did not involve an overt condition of property.

As opposed to the offending buildings in *Prados* which were clearly visible, the Court of Appeal found that the “hidden” nature of the radioactive contamination to be a distinguishing factor. The Court of Appeal likewise found compelling the fact

that other cases relied upon by the trial court and the defendants in *Eagle Pipe* involved property conditions which were not hidden. The Court of Appeal additionally took note of the fact that the damage to the subject properties was sustained by the vendors as well as being “overt and obvious” at the time of the sale. As a result, Eagle Pipe paid full market value for the property, not a discounted price, “because the true condition of the property was not yet discovered or discoverable.”

Louisiana Code of Civil Procedure Article 2315

The Fourth Circuit next addressed Louisiana’s general rule regarding the assertion of a real and actual interest which is codified in La. C.C. art. 2315 (A) and states “[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.” According to the Court of Appeal, “[t]he complex factual background of the current case, involving the subsequent purchase of property with a hidden defect, does not present sufficient reason to depart from the fundamental principles of injury and reparation.”

In considering the application of La. C.C. art. 2315, the Court of Appeal evaluated the Louisiana Supreme Court case of *Clark v. Warner*, 6 La. Ann. 408, 408 (La. 1851), and its progeny, concluding that it is generally understood that damages are recoverable only by the party who suffered the injury. Quoting from *Bradford v. Richard*, 46 La. Ann. 1530, 16 So. 487 (La. 1894) (quoting *Clark, supra*, at 408), and addressing damages actually suffered prior to purchase, the Court pointed out that it knew of “no other principles governing the case than those referable to this general provision of the code, that ‘every act of man that causes damage to another obliges him by whose fault it happened to repair it.’” The Court concluded that it was mere corollary that the reparation must be made to him who actually suffered the injury.”

Echoing his dissenting opinion from the Court’s previous ruling, Judge Bonin wrote for the Court of Appeal, “The injury is not dispelled by a subsequent purchase, and therefore we see no reason why the right to seek remedy for it should be. The injured party should not be precluded from seeking reparation merely because the damage remained hidden long enough for the property to be sold. In such cases, injury is deemed to occur when the damage is, or should have been, discovered.” The defendants had argued that Eagle Pipe was a sophisticated purchaser when it bought the property and it should have known the risk of radiation contamination in pipe yards when it purchased the property. The Court of Appeal was not swayed by this argument. In a footnote to the decision, the Court of Appeal stated that a determination of when the damage should have been discovered and whether the plaintiff was indeed a sophisticated purchaser were factual matters to be addressed by the trier of fact at trial.

Ultimately the Court of Appeal determined that Eagle Pipe suffered an injury and, as such, it enjoys a right of action in this matter. The Court of Appeal found that Eagle Pipe had lost the use of its land and would additionally incur the cost of remediating its property which was damaged by the depositing of radioactive materials. Citing *Clark*, the Court of Appeal held that “[t]he oil companies and transporters, if deemed responsible, are therefore obliged to make reparations to ‘him who suffered the injury.’”

On the issue of Eagle Pipe’s right of action under La. C.C. art. 2315, the Court of Appeal concluded, “[t]herefore, applying La. C.C. art. 2315 and the *Clark* line of cases, we hold that: (1) the manifestation of radioactive contamination allegedly caused by defendants constitutes an injury giving rise to a legitimate cause of action; (2) the previous owners sustained no injury through the

sale of the land because they allegedly received full value for their interest as if it were uncontaminated; (3) Eagle Pipe is an injured party because the damage manifested itself *after* Eagle Pipe's purchase of the land, thus devaluing Eagle Pipe's acquisition and requiring its remediation, and (4) as an injured party, Eagle Pipe is deserving of reparation." For these reasons, the Court of Appeal determined that it was necessary to vacate its previous ruling and reverse the trial court's sustaining of the exception of no right of action.

TOXIC TORT UPDATES

By Kevin J. Webb and Shannon C. Burr

Legislation has been introduced this year in an effort to address problems often faced by the defense in toxic tort litigation, especially with matters pertaining to civil procedure. Listed below are summaries of bills introduced into the legislature that



would tighten venue requirements, require the plaintiffs to timely disclose claims submitted to the trust funds and require the plaintiffs to disclose basic information in the petition. Because these issues are important to us and to our clients, we will continue to monitor these efforts and provide updates on their status.

Legislative Summaries

The following bills were before the Louisiana Legislature in 2010.

Venue for Latent Exposure Cases HB 317 by Rep. Neil Abramson



House Bill 317 by Rep. Abramson would have required proper venue in cases of latent disease, including asbestos and silica exposure, to be established only in the parish where the plaintiff has resided for no less than one year or in the parish where the plaintiff alleges substantial exposure occurred. If substantial exposure is alleged in multiple parishes, the district court would have been able to transfer the case to the parish determined appropriate.

Status: Referred to the Committee on Civil Law and Procedure on March 29, 2010.

Disclosure for Asbestos and Silica Claims HB 358 by Rep. Neil Abramson

House Bill 358 by Rep. Abramson would have required a plaintiff in a claim for injury, death or disease related to asbestos or silica exposure, to disclose at least 180 days before trial all existing or potential claims against a trust or a fund.

Status: Referred to the Committee on Civil Law and Procedure on March 29, 2010.

Petition in Latent Exposure Cases HB 572 by Rep. Tim Burns

House Bill 572 by Rep. Burns would have required petitions involving latent diseases to include basic

information such as the time period, location and types of products for each alleged exposure.

Status: Referred to the Committee on Civil Law and Procedure on March 29, 2010.

We feel it is important to monitor all proposed legislation that addresses punitive damages. As noted below Senate Bill 547 failed final Senate passage.

Exemplary Damages for Certain Activities SB 547 by Sen. Marionneaux

Senate Bill 547 by Sen. Marionneaux, would have allowed exemplary damages if it is proved that the plaintiff's injuries were caused by the defendant's wanton or reckless disregard for public safety in the drilling, equipping, operating, or producing of an oil or gas well, or in commercial storage, handling, or transportation of oil, gas, product of oil or gas, or hazardous or toxic substance.

Status: Failed final Senate Passage on June 11, 2010.

Statute of Interest

Employee's Right to Access Information Regarding Toxic Exposure

La. R.S. 23:1016

Louisiana Revised Statute provides that any current or former employee or his designated representative shall have a right of access to his employer's records of employee exposures to potentially toxic materials or harmful physical agents and medical records and any analyses using employee exposure or medical records as provided for in 29 U.S.C. 657 and in 29 C.F.R. 1910.20, "Access to Employee Exposure and Medical

Records". The statute further provides that, if an employee is denied access to the records, he has a separate cause of action against his employer for the denial.

Although the Louisiana statute references C.F.R. 1910.20, the relevant provisions of the C.F.R. are now found in 29 C.F.R. 1910.1020. Specifically, the definition of exposure,

29 CFR 1910.1020(c)(8): Definition of Exposure

Exposure or exposed means that an employee is subjected to a toxic substance or harmful physical agent in the course of employment through any route of entry (inhalation, ingestion, skin contact or absorption, etc.), and **includes past exposure and potential** (e.g., accidental or possible) exposure, but does not include situations where the employer can demonstrate that the toxic substance or harmful physical agent is not used, handled, stored, generated, or present in the workplace in any manner different from typical non-occupational situations.

In addition, 29 CFR 1910.1020(c)(13) Includes noise exposure as well as heat, cold, vibration, repetitive motion, ionizing and non-ionizing radiation in the list of harmful physical agents to which the statute applies.

29 CFR 1910.1020(c)(5)(i-iv) details what type of information and/or incidents the record should include to wit:

- (5) Employee exposure record means a record containing any of the following kinds of information:

(i) Environmental (workplace) monitoring or measuring of a toxic substance or harmful physical agent, including personal, area, grab, wipe, or other form of sampling, as well as **related collection and analytical methodologies, calculations, and other background data relevant** to interpretation of the results obtained;

(ii) Biological monitoring results which directly assess the absorption of a toxic substance or harmful physical agent by body systems (e.g., the level of a chemical in the blood, urine, breath, hair, fingernails, etc.) but not including results which assess the biological effect of a substance or agent or which assess an employee's use of alcohol or drugs;

(iii) **Material safety data sheets** indicating that the material may pose a hazard to human health; or

(iv) In the absence of the above, a chemical inventory or any other record which reveals where and when used and the identity (e.g., chemical, common, or trade name) of a toxic substance or harmful physical agent.

Finally, the employer must keep the records for a period of 30 years per 29 CFR 1910.1020(d)(1)(ii).

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