

# ENVIRONMENTAL & TOXIC TORT UPDATE Winter 2010



## ENVIRONMENTAL UPDATES

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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 recent judicial decisions in the area of environmental law. In this update, we'll be reporting on *Donald Marin, Sr., et al. v.*

*Exxon Mobil Corp., et al.*, a legacy oilfield litigation case, in which the Louisiana State Supreme Court granted writs to consider the issues of prescription, subsequent purchaser rights, punitive damages, restoration obligations and groundwater remediation obligations. The Court ultimately found 1) the lower courts had erred in applying the doctrine of *contra non valentem* to suspend prescription on the plaintiffs' tort claims; 2) the oilfield contamination claims at issue did not constitute a continuing tort and thus the plaintiffs' tort claims had prescribed; 3) because the plaintiffs' tort claims had prescribed, they were not entitled to punitive damages; 4) Exxon Mobil Corp. owed a duty to remediate the contaminated property as to those plaintiffs on whose property the mineral and surfaces leases were still in effect; and 5) the plaintiffs were not entitled to damages

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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.

for groundwater remediation because the groundwater at issue was not subject to the provisions of Louisiana's Groundwater Act. The Court did not analyze the plaintiffs' rights as subsequent purchasers.

We will also discuss *Wagoner v. Chevron USA Inc.*, in which the Second Circuit recently reversed itself and held that landowners did not, in fact, have claims for damages that were caused to their property prior to the acquisition of the property."

## Regulatory Summaries – October

### LDEQ – FINAL

#### Office of the Secretary – Legal Affairs Division Revision of the Drinking Water Source Use (LAC 33:IX.Chapter 11) (WQ080)

Source: La. Register for October 2010, p. 2276

The Secretary has amended the Water Quality regulations, LAC 33:IX, Chapter 11 (WQ080). LDEQ revised 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 have been 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 (40CFR 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 revised the description of subsegment 030806-554700 to extend drinking water protection to the aforementioned undersigned 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.

## Regulatory Summaries - November

### LDEQ - FINAL

**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 November 2010, p. 2552**

The Secretary has amended 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 has 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.

### LDNR – FINAL

**Office of Conservation - Fees (LAC 43:XIX.701, 703, and 707)**  
**Source: La. Register for November 2010, p. 2567**

The Office of Conservation amends 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. This 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.



**Office of Conservation - Statewide Order No. 29-B (LAC 43:XIX.301, 303, 501, 519 and 565)**  
**Source: La. Register for November 2010, p. 2570**

The Louisiana Office of Conservation has amended LAC 43:XIX.303, 501, 519 and 545 in accordance with the provisions of the Administrative Procedure Act, R.S. 49:950 et seq., and pursuant to the power delegated under the laws of the State of Louisiana. The 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.

## Regulatory Summaries – December

### LDNR – EMERGENCY RULE

#### Office of Conservation - Statewide Orders No. 29-B and 29-B-a

(LAC 43:XIX.Chapters 2 and 11)

Source: La. Register for December 2010, p. 2823

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 July 8, 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 program requirements, mandatory diverter systems and blowout preventer requirements, oil and gas well work over 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 December 9, 2010. The Emergency Rule shall remain in effect for 120 days after its effective date.

## Jurisprudential Summaries

### *Donald Marin, Sr. v. Exxon Mobil Corp., et al.*

**Louisiana Supreme Court Rules the Doctrine of Contra Non Valentem Does Not Apply to Plaintiffs' Tort Claim and the Oilfield Contamination Does Not Constitute a Continuing Tort; Accordingly, the Plaintiffs' Tort Claims Have Prescribed**

The Louisiana Supreme Court recently rendered a decision in *Donald Marin, Sr. v. Exxon Mobil*, a “legacy case” involving two sets of plaintiffs, the Marin plaintiffs and the Breaux plaintiffs, who owned property in St. Mary Parish upon which Exxon or its predecessors conducted oil and gas exploration and production operations. The Court granted writs in this case to consider certain issues which have become common among the hundreds of similar legacy suits currently pending across the state including: prescription, subsequent purchaser rights, restoration obligations, punitive damages and groundwater remediation obligations.



The Court found that that the lower courts erred in applying the doctrine of *contra non valentem* to suspend prescription on the plaintiffs’ tort claims and further held that the disposal of oilfield wastes into unlined earthen pits and/or into nearby waterways did not constitute a continuing tort. As such, the Court found that the plaintiffs’ tort claims had prescribed and they were not entitled to punitive damages. As for the Marin plaintiffs’ contract claims against Exxon, the Court found that those claims were valid, as the mineral and

surface leases were still in effect as to those plaintiffs and Exxon owed a duty to remediate their contaminated property, which it failed to do. Finally, the Court held that the Groundwater Act did not apply to the plaintiffs’ claims as the groundwater at issue in the case was determined to be a Class III aquifer, thus precluding the plaintiffs from recovering damages for groundwater remediation.

The *Marin* case arose out of the oil and gas activities of Exxon predecessors, W.S. Mackey and Humble Oil and Refining Company, which had operated open pits on the plaintiffs’ property from the 1940’s until approximately 1988. There were two sets of plaintiffs, the Marins and the Breauxs. The Marin plaintiffs’ claims arose out of a mineral lease and a surface lease while the Breaux claims arose in tort. In 1936, E.F. Marin granted a mineral lease to W.S. Mackey. In 1937, Canal Bank and Trust Company granted a mineral lease to Humble. By 1939, Humble had acquired the Marin lease. In 1941, E.F. Marin granted a surface lease to Humble for use as a landing/dock area, terminal and related facilities. The Breauxs, in 1977 and in 1978, purchased the surface rights to property that was subject to the Canal Bank mineral lease.

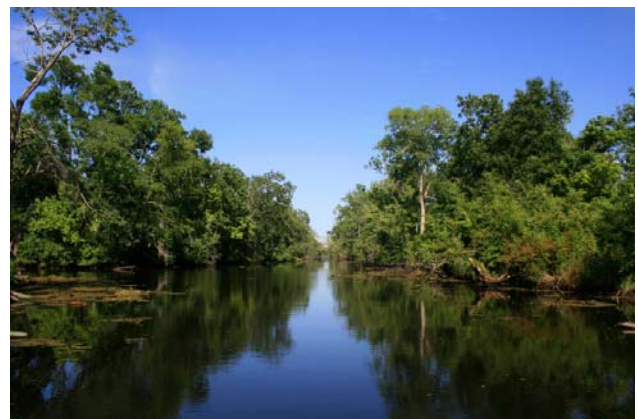
At some point in the 1980s, the plaintiffs became concerned that sugarcane crops would not grow properly in the former pit areas which had been used to store oilfield fluids routinely produced during exploration and production. As a result, the plaintiffs’ representative made numerous demands on Exxon to clean the fields and make them usable for cane farming.

Around the same time, in 1986, the Louisiana Department of Natural Resources (LDNR) amended Statewide Order 29-B to require the registration and closure of existing unlined oilfield pits and remediation of the various enumerated contaminants in the soil to prescribed standards. By 1991, Exxon closed all of the remaining pits on the Breaux and Marin properties and informed the families that it was remediating the pit areas to Statewide Order 29-B standards.

Following the Louisiana Supreme Court's decision in *Corbello v. Iowa Production* on February 23, 2003, the plaintiffs hired an environmental expert to assess the condition of their property. That assessment allegedly found significant contamination at both the Breaux and Marin properties. Thereafter, on November 26, 2003, the plaintiffs filed suit against Exxon asserting claims for remediation of the soil and groundwater and other damages arising out of Exxon's oil and gas activities.

A bench trial was held over five days. The trial court found that continuous contamination of various chemicals deposited by Exxon on the Breaux and Marin Properties was unreasonable and constituted negligent operations by Exxon, resulting in breach of contract and negligence. A judgment was initially rendered in favor of all the named plaintiffs against the defendants for approximately \$14 million in compensatory damages and \$14 million in punitive damages. On motion for new trial, the damages were separated out by plaintiffs. The Breaux plaintiffs were awarded compensatory damages of \$276,498.35 for remediation of the soil, \$63,682.38 for handling groundwater intrusion during soil remediation operations,

and punitive damages of \$340,180.73. The Marin plaintiffs were awarded compensatory damages in the amount of \$15,115,390.65 for soil remediation, \$3,481,317.62 for handling groundwater intrusion during the soil remediation operations, \$2,408,868 for remediation of contaminated soil and sediment in the canal, and \$21,005,576.27 in punitive damages.



Exxon appealed, alleging that the trial court rulings erroneously: 1) allowed the plaintiffs' claims to survive prescription under the doctrine of *contra non valentem*; 2) awarded punitive damages under former La. C.C. ar. 2315.3; 3) terminated Exxon's surface lease; 4) allowed the Breaux family to sue for property damages that occurred before they purchased the land; 5) failed to enforce the terms of the Breaux family's property damage released by relying on inadmissible parol evidence; and 6) awarded excessive, speculative and unsupported damages.

In affirming the trial court's judgment, the appellate court found that that "the doctrine of *contra non valentem* applied to suspend the

running of prescription because plaintiffs lacked sufficient knowledge of the nature or extent of the damages or contamination to commence the running of prescription until they received an expert report in 2003.” With regard to the Breaux Property, the court found that “as a subsequent purchaser of property containing open pits and ongoing oil and gas operations, the Breauxs had a right to recover damages from Exxon arising in breach of contract and tort because the right to recover damages was a ‘property right,’ and not a personal right.” Further, the appellate court found no manifest error in the trial court’s finding that Exxon engaged in “wanton and reckless conduct.”

The Supreme Court began its discussion by addressing Exxon’s argument that the plaintiffs’ tort claims had prescribed because the plaintiffs were aware of the contamination in the pits and that their sugarcane crops would not grow in and around the former pit areas by at least 1991. The plaintiffs argued, however, and the lower courts agreed, that they had no way of knowing whether the pits were properly cleaned because the contamination was not readily discernable and they reasonably relied on Exxon’s assurances that the pits were remediated to applicable state standards.

The Court found that there was ample evidence that plaintiffs knew by 1991 that sugarcane would not grow properly in the pit areas and had gone so far as to make demand on Exxon to properly clean and close the pits so that they could grow their sugarcane crop in those areas. The Court noted that the plaintiffs had known for some time that some of the pits were

closed with sludge remaining in place at the bottom of the pits. The Court specifically made note that the plaintiffs had gone so far as to collect samples of the sludge before the pits were closed. Furthermore, the plaintiffs knew that the pits contained other oilfield wastes and that some former pit areas were too unstable to support farm equipment. They knew that Exxon was having difficulty remediating the pits sufficiently to meet state standards and they were able to observe that a healthy sugarcane crop was still not growing in spite of Exxon’s efforts to clean the sites. The Court noted that “no new damage became apparent that was not already apparent in 1991; in fact, the pit areas still [would] not support healthy cane growth.”

The questions for the Court were then, under the applicable law and considering the plaintiffs’ knowledge of those facts, should they have been put on notice that further inquiry and investigation was necessary and if so, would further inquiry have led to knowledge that the land was contaminated with oilfield wastes? In this case, the plaintiffs took no further action upon learning that sugarcane would not properly grow in certain areas, that something in the soil was causing the sugarcane not to grow, and that Exxon was responsible for this damage. The Court considered whether this inaction was reasonable in light of their “education, intelligence, and the nature of the defendant’s conduct.”

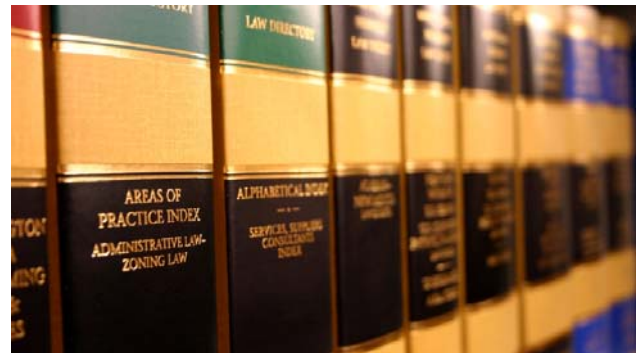
The trial court relied on *Hazelwood Farm, Inc. v. Liberty Oil and Gas Corp.* 844 So.2d 380 (La. App. 3 Cir. 4/2/03) to hold that the “the doctrine of *contra non valentem* applies to this

case and prescription does not begin to run until the plaintiffs had *full knowledge of the extent of damage*” as reported by the plaintiffs’ expert. The Supreme Court disagreed, reasoning that the “discovery rule”, as contemplated by one of the four factual situations in which *contra non valentem* prevents the running of prescription, requires only that a plaintiff acquire “sufficient information which, if pursued, will lead to the true condition of things” in order to begin prescription running, and that this date typically is “the date the damage becomes apparent”. The Court found that the rule does *not* require that a plaintiff have “full knowledge of the extent of damage,” even if an expert must be hired to assess that extent, in order to begin prescription running. Furthermore, the Court noted, although Exxon may have “misled plaintiffs by not disclosing the extent of the contamination when they learned of it,” Exxon did not prevent the plaintiffs from investigating or pursuing their claim as is necessary to invoke one of the other relevant categories of *contra non valentem*.

The Court ultimately found that the sugarcane damage was an “outward sign of actual and appreciable damage and was sufficient information to excite attention and put plaintiffs on guard and call for inquiry.” The Court stated that by 1995, at least, the plaintiffs had sufficient knowledge to excite their attention and that they should have investigated further at that time. “Therefore it was unreasonable to wait until 2003 to file suit.”

The Court next addressed the issue of whether the continuing tort doctrine served to prevent

the commencement of prescription, regardless of their personal knowledge of the property damage, until the contamination was removed. The plaintiffs claimed that the contamination continued to migrate, causing “successive, ongoing and cumulatively increasing deterioration of their property.” Exxon argued that for the continuing tort doctrine to apply, “the operating cause of the injury must be a continuous one, and that where the damage-causing conduct ceases, the tort is no longer continuing.”



In its recent opinion in *Hogg v. Chevron USA, Inc.*, 09-2632 c/w 09-2635 (La. 7/6/10), the Supreme Court explained the parameters of the continuing tort doctrine and set out the test to be used in making such a determination, that “the court must look to the operating cause of the injury sued upon and determine whether it is a continuous one giving rise to successive damages, or whether it is discontinuous and terminates, even though the damage persists and may progressively worsen.” Citing *Hogg*, the Court reasoned that the continuing tort doctrine did not apply to this case because a continuing tort consists of the actual “operating cause of the injury sued upon,” that is, of the “unlawful acts” of the defendant rather than simply the continuation of ill effects from the

defendant's conduct in the form of continuous contamination. The Court reasoned that "[t]he operating cause of plaintiffs' injury was still the actual disposal or storage of the oilfield waste in unlined pits on plaintiffs' property." As the Court stated, "[w]hen the pits were closed, the conduct ceased. Simply because the contaminants may have continued to dissolve into, or move with, the groundwater with the passage of time does not turn this into a continuing tort." As such, the Court ruled that the plaintiffs' delictual actions had prescribed.

The Court further held that because the plaintiffs' tort claims had prescribed, they were not entitled to punitive damages under former Louisiana Civil Code article 2315.3 as such damages were available only as a derivative of tort-based liability.

A casualty of the Court's ruling on prescription of the plaintiffs' tort claims was any comprehensive analysis of the "subsequent purchaser doctrine." The Court stated that because any tort claims the plaintiffs may have had have prescribed, there was no need to analyze the plaintiffs' rights as subsequent purchasers. It should be noted however that on February 4, 2011, the Court granted writ applications in *Eagle Pipe and Supply, Inc. v. Amerada Hess Corporation, et al.*, a NORM contamination case, and it is expected that the subsequent issue will be addressed in that case.

The next issue addressed by the Court was the matter of the lone damages remaining intact from the lower courts' rulings that is the compensatory damages awarded by the trial court to the Marin plaintiffs. Affirming the

lower courts' award of compensatory damages, the Court found that Exxon owed a contractual duty of restoration to the Marin plaintiffs and let stand the quantum of compensatory damages previously awarded to them which represented the amount found necessary to restore the property to Order 29-B standards. The Court found that the Marin plaintiffs' contract claims had not prescribed because the leases at issue were still in effect.

The Court further found that the restoration duty had accrued even though the leases had not yet terminated, because the provisions governing leases in the Louisiana Civil Code supplement mineral lease relationships, and some of those provisions obligate a lessee to repair damage to the leased premises caused by the lessee's fault during the term of the lease.

The plaintiffs argued that the quantum should have been the amount necessary to restore the land to its original condition as it existed at the time the parties entered the leases at issue. The plaintiffs based their argument on the Louisiana Supreme Court's 2005 decision in *Terrebonne Parish School Bd. v. Castex Energy, Inc.*, which they claimed required a finding that Exxon had acted "unreasonably and excessively" and which would thereby mandate Exxon to restore the property to its original, pre-lease condition.

*Terrebonne Parish School Bd. v. Castex Energy, Inc.* held, *inter alia*, that "in the absence of an express lease provision, Mineral Code article 122 does not impose an implied duty to restore the surface to its original, pre-lease condition

absent proof that the lessee has exercised his rights under the lease unreasonably or excessively.” The Marin plaintiffs argued that Exxon owed true restoration damages because it was “unreasonable and excessive” in its operations on plaintiffs’ property and that the corollary of the Mineral Code article 122 rule must also be true, namely, that if the defendant *has* so acted “unreasonably or excessively,” the defendant *must* restore to the property to its original condition.



The Supreme Court, as did the lower courts, rejected that argument. While it agreed that Exxon operated unreasonably or excessively on the plaintiffs’ property, it held that the alleged corollary is *not* the law. The Court held that does not necessarily mean Exxon had a duty to restore the property to its pre-lease condition, particularly where the contamination is not “overt” and cannot be considered “normal wear and tear.” As such, it was recognized and held that remediation to 29B standards satisfied the requirements of *Terrebonne Parish School Bd. v. Castex Energy, Inc.*

Finally, the Supreme Court addressed the issue of groundwater remediation. At trial, the plaintiffs argued that the groundwater underlying the contaminated property was a

Class II aquifer, subject to the provisions of Louisiana’s Groundwater Act, La. Rev. Stat. 30:2015.1, which would require remediation. After extensive expert testimony on the subject, the trial court found that the groundwater underneath the property was, in fact, a Class III aquifer consisting of non-useable groundwater, which is not subject to the provisions of the Groundwater Act. The Supreme Court affirmed that ruling finding that the trial court’s reliance on Exxon’s groundwater expert was not manifest error. In the alternative, Plaintiffs argued, even if the aquifer were a Class III aquifer, the groundwater must still be remediated to its original condition pursuant to *Terrebonne Parish School Bd. v. Castex Energy, Inc.* The Court disagreed, stating that, in its view, it would be “illogical to award the landowner money to remediate unusable groundwater, with no oversight by the DNR, when the statute enacted to classify and protect groundwater does not require cleanup.” The Court ultimately ruled that the plaintiffs were not entitled to damages for remediation of the underlying Class III aquifer.

Justice Knoll concurred in part and dissented in part. In her opinion, Justice Knoll concurred only with that portion of the majority opinion that affirmed the judgment in favor of the Marin plaintiffs with regard to their contract claims. She found “serious and fundamental” errors with the remainder of the majority opinion. In her dissent, she found that the majority misapplied and undermined the continuing tort doctrine, and second, that the majority erred in its discussion of *contra non valentem*.

With regard to the continuing tort doctrine, Justice Knoll focused on the fact that oilfield wastes were continuing to seep from the defendants' unlined pits into plaintiffs' property, causing "additional and increasing damages." The majority opinion held that prescription began to run from the moment the pits were closed, a holding Justice Knoll held to be an "exceedingly narrow interpretation of the continuing tort doctrine." She addressed the Courts own decision in *Hogg v. Chevron*, which, in her opinion, had artificially limited the continuing tort doctrine in instances "where the injury-causing activity (i.e., the contamination) remained under plaintiffs' land, causing additional damages." She would find that prescription could not begin as long as containments remained under the plaintiffs' land and the "wrongful conduct" was still ongoing.

With regard to the issue on *contra non valentem*, Justice Knoll took issue with Exxon's "misrepresentations" to the plaintiffs with regard to the closure of the pit areas, the extent of the contamination and whether the pits had been remediated in accordance with state regulations. The majority had found that Exxon's "misrepresentations" were insufficient to trigger *contra non valentem*. Conversely, Justice Knoll found that this was "a textbook case of *contra non valentem*." She gave weight to the underground nature of the contamination as well which would prevent the property damage from being readily apparent to the plaintiffs. In her opinion, given Exxon's assurances to the contrary, the plaintiffs could not have known the extent of the contamination on their property and she found

to be "well-supported" by the record and which should not have been disturbed absent manifest error.

Justice Weimer likewise gave a dissenting opinion in which he disagreed with that portion of the majority opinion which held that the plaintiffs' tort claims had prescribed. He took issue with the fact that the plaintiffs had received assurances from Exxon that the pits on their property had been closed to state standards. He noted that the district court was persuaded by Exxon's conduct (conduct that was fully documented by the majority opinion) which "prevented the plaintiffs from acquiring the requisite knowledge to commence the running of prescription more than one year prior to the date suit was filed..." Justice Weimer found that there was "ample evidence in the record to support the conclusion that prescription did not begin to run until plaintiffs received the report of their expert detailing the actual extent of the contamination. Prior to that time, as the trial court found, the plaintiffs lacked sufficient knowledge of the nature or extent of the damage or contamination which would have commenced the running of prescription. As such, Justice Weimer found that the factual determination of the trial court was not manifestly erroneous and it should not have been disturbed.

### ***Wagoner v. Chevron USA Inc.\*\****

**Court of Appeal for the Second Circuit, State of Louisiana Reverses Its Earlier Decision, Holds 'Subsequent Purchaser Doctrine' Bars Landowners from Recovering for Damage to Land Caused Prior to Landowners' Acquisition of Land**

On November 24, 2010, the Second Circuit Court of Appeal issued its opinion on rehearing in *Wagoner v. Chevron USA Inc.*, No. 45,507-CA (La. App. 2 Cir. 8/18/10), 2010 WL 3239240. The opinion, among other things, is the newest in a series of opinions that have addressed applicability of the “subsequent purchaser doctrine.” When applied, the “subsequent purchaser doctrine” operates to bar a landowner from recovering for damages caused to the landowner’s land prior to the landowner’s acquisition of the land. Earlier in the *Wagoner* case, in August 2010, the Second Circuit had declined to apply the “subsequent purchaser doctrine,” rejecting the defendants’ argument that the plaintiffs’ claim for damages to their property incurred prior to the plaintiffs’ acquisition of the property was a personal right held only by the prior landowners who owned the property at the time the damage was incurred. See *Wagoner v. Chevron USA Inc.*, 2010 WL 3239240, at \*2-\*4. However, on rehearing, the Second Circuit reversed itself and applied the doctrine to hold that the plaintiff landowners had no claims for damages allegedly caused to their property by certain of the defendants prior to the plaintiffs’ acquisition of the property.

Those defendants had conducted oil and gas operations on the property at issue pursuant to certain mineral leases and assignments of leases. *Id.* at \*6. The plaintiffs acquired the surface interests in the property after those defendants’ conduct on the property had ceased, and the plaintiffs sued those defendants, as well as others, for damages they alleged had been occasioned to the property, particularly through the use of unlined pits. *Id.*

None of the transfers in the plaintiffs’ chain of title included a specific assignment of the right to sue for property damages. *Id.* In applying the “subsequent purchaser doctrine” to hold that the plaintiff landowners had no claim for damages caused to their property prior to their acquisition of the property, the Second Circuit cited a number of earlier cases relying on the doctrine for the proposition that “[t]he right to damages conferred by a lease, whether arising under a mineral lease or a predial lease, is a personal right, not a property right; and, as a personal right, it does not pass to the new owners of the land when there is no specific conveyance of that right in the instrument of sale.” *Id.* at \*8-\*9.



The Second Circuit remarked, “The reasoning behind these principles is that the buyer is presumed to know the overt condition of the property and to take that condition into account in agreeing to a sales price.” *Id.* at 8.

The Second Circuit also reasoned that, contrary to its earlier holding, the case *Magnolia Coal Terminal v. Phillips Oil Co.*, 576 So. 2d 475 (La. 1991), did not require a different result. In its

earlier opinion, the Second Circuit had relied on the First Circuit case *Marin v. Exxon Mobil Corp.*, 2008-1724 (La. App. 1 Cir. 09/30/09), 2009 WL 7004332, *writs granted*, 2009-2368, 2009-2371 (La. 02/26/10), 28 So. 2d 262, *aff'd in part, rev'd in part*, 2009-2368 (La. 10/19/10), 2010 WL 4074948 (prior to the Louisiana Supreme Court's subsequently affirming in part and reversing in part that decision). In *Marin*, the First Circuit had relied in part on *Magnolia Coal Terminal* in declining to apply the "subsequent purchaser doctrine." See *Wagoner*, 2010 WL 3239240, at \*3-\*4. However, on rehearing in *Wagoner*, the Second Circuit reasoned that *Magnolia Coal Terminal* was distinguishable in that, unlike *Wagoner*, *Magnolia Coal Terminal* involved a *stipulation pour autrui* that afforded the plaintiff a right to sue. *Id.* at \*9. The First Circuit's *Marin* opinion also had appeared to decline to apply the "subsequent purchaser doctrine" in part because in that case, unlike in other cases that *had* applied the "subsequent purchaser doctrine," the mineral lease at issue had *not* yet terminated at the time the plaintiffs had purchased the property. *Id.* at \*3-\*4. However, because on rehearing the Second Circuit in *Wagoner* decided to apply the "subsequent purchaser doctrine" even though the mineral leases at issue had not yet terminated at the time the plaintiffs purchased their property, it seems apparent that the Second Circuit has concluded that whether or not the leases at issue had terminated at the time of the plaintiffs' acquisition of the property, in fact, has no meaningful bearing on application of the "subsequent purchaser doctrine."

The Second Circuit further held that the Louisiana Mineral Code articles imposing certain obligations on mineral lessees did not change this result, as those articles "contemplate and govern the relationship between the lessor and the lessee," and not relationships like those between the plaintiffs and the lessee defendants in *Id.* at \*10.

The Second Circuit also refused to agree with the plaintiffs' argument that the "continuing tort doctrine" saved plaintiffs' claims from application of the "subsequent purchaser doctrine." The plaintiffs argued that the defendants' failure to remediate leaking pits and to restore the plaintiffs' property constituted a "continuing tort" such that they retained a right to sue for pre-acquisition damages. *Id.* However, relying on recent Louisiana Supreme Court precedent, including the Louisiana Supreme Court's October 2010 *Marin* opinion, the Second Circuit reasoned that a "continuing tort" must consist of the "operating cause" of the injury, or the unlawful acts themselves, not merely continuing damage or ill effects *resulting from* those acts. *Id.* The court reasoned that the alleged operating cause of the contamination in *Wagoner* was the defendants' *use* of unlined pits, and that "[t]he failure to contain or properly remediate the leakage does not constitute a continuing wrong because the failure to remediate was not the operating cause of the damage." *Id.* At \*10-\*11.

The Second Circuit rendered additional holdings unrelated to the "subsequent purchaser doctrine." The court held that even if the plaintiffs otherwise would have had a right of

action in tort, their claims would have been prescribed. *Id.* at \*11. The court reasoned that, pursuant to Louisiana Civil Code article 3493, a claim for damage to immovable property begins to run from the day the landowner knew or should have known of the damage. *Id.* The court reasoned that the plaintiffs were aware when they acquired the surface rights in the property at issue that the mineral rights in the property had been retained by others, that mineral leases had encumbered the property since 1945, and that information indicating that there had been active oil lease operations on the property for nearly 60 years was “readily available” via the public records. *Id.* Thus, the court reasoned that the plaintiffs “could have easily acquired knowledge of the property damage resulting therefrom within their first year of owning the property,” and held, therefore, that the plaintiffs’ claims were prescribed when they filed suit four years after they purchased the property. *Id.*

The court further held that Act 312, La. Rev. Stat. 30:29, did not create a cause of action for the plaintiffs, since, the court reasoned, Act 312 “is procedural, rather than substantive, and does not create a right of action in favor of landowners.” *Id.* at \*12. The court also held that the plaintiffs had explicitly waived their claims for punitive damages in open court. *Id.*

Finally, the court rejected the plaintiffs’ argument that the defendants were obligated to pay plaintiffs for their unauthorized storage of hazardous waste on plaintiffs’ property under the theory that, by virtue of such unauthorized storage, the defendants had been

trespassers and “possessor[s] in bad faith” bound to restore to the plaintiff landowners “fruits” the possessors had gathered, pursuant to Louisiana Civil Code article 486. *Id.* at \*13. The plaintiffs had argued that the defendants’ unauthorized storage of waste of plaintiffs’ property had bestowed an economic benefit on the defendants in the form of saving the defendants storage costs they otherwise would have incurred. *Id.* In rejecting this argument, the court reasoned that such an alleged benefit could not constitute a “fruit” as defined by Civil Code article 551. The court noted that a “fruit” is “produced by or derived from another thing,” yet, in that case, nothing had been “produced by or derived from” the property, and, further, there had been no “revenues” derived from the property by virtue of the storage of the waste. *Id.*

**\*\*NOTE:** This Opinion has not been released for publication in the Permanent Law Reports. Until released, it is subject to revision or withdrawal.

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