

ENVIRONMENTAL & TOXIC TORT UPDATE



Fall 2011

ENVIRONMENTAL UPDATES

By Brett F. Willie



Every quarter we provide our readers with an update of select environmental regulatory actions, including the adoption of noteworthy emergency rules, proposed legislation and/or final rules 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 recent 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 report on toxic tort litigation and recent judicial decisions in the area of environmental law. In this update, we'll be reporting on the expert testimony from the much-anticipated M.J. Farms, Ltd. v. Exxon Mobil Corp., et al. trial that recently settled in Concordia Parish.



Regulatory Summaries - July

LDNR – NOTICE OF INTENT

Office of Conservation
Statewide Order No. 29-B
Hydraulic Fracture Stimulation Operations (LAC 43:XIX.118)
Source: La. Register for July 2011, p. 2290

The Louisiana Office of Conservation has proposed amending LAC 43:XIX Subpart 1 (Statewide Order No. 29-B) Chapter 1 General Provisions. The

Table of Contents

Environmental Updates	
Regulatory Summaries	
July	Page 1
August	Page 2
September	Page 3
Jurisprudential Summaries	
<i>M.J. Farms, Ltd. v. Exxon Mobil Corp., et al.</i>	Page 4
Toxic Tort Updates	
Asbestos Bankruptcy Trusts under Scrutiny	Page 9
Labor and Employment Law Corner	
NLRB Issues Requirement for New Notice Posting – Then Extends the Deadline	Page 10

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.

recent development of the Haynesville Shale in North Louisiana is made possible through the use of multi-stage hydraulic fracture stimulation technology. This technology involves the introduction of large amounts of fluids under very high pressure into a well to create fractures in the rock which then allow oil and/or gas to flow into the wellbore.

The intense development of the Haynesville Shale in Louisiana and other shale resources across the United States has created a large amount of public interest in the hydraulic fracturing process and its potential effect on the environment. In addition, in November 2010, a review of Conservation's policies and regulations associated with the hydraulic fracturing process was conducted by the non-profit, multi-stakeholder organization, STRONGER, Inc. to assess the effectiveness and adequacy of current regulations. Their report, finalized in March 2011, recommended some of the changes included in the proposed amendment.

As a result of the aforementioned conditions, a proposed Rule was drafted by staff of Conservation using portions of the hydraulic fracturing regulations recently promulgated in the State of Arkansas and statutes recently passed in Texas as models. The proposed Rule requires that a work permit be obtained from Conservation prior to initiating hydraulic fracture stimulation operations on a well. Following completion of hydraulic fracturing operations, information on fracturing fluid composition and volumes are to be reported to Conservation or to a publicly accessible registry.

The intent of the Rule is to provide transparency to ensure that hydraulic fracturing operations are conducted in a manner which is protective of the public health and the environment and to collect technical information on the hydraulic fracturing operations conducted in Louisiana.

LDNR – POTPOURRI

**Office of Conservation
Advanced Notice of Proposed Rulemaking and Solicitation of Comments on Emergency Action Plans
(LAC 43:XIX.Chapter 1)
Source: La. Register for July 2011, p. 2309**

As part of the ongoing efforts to promote oil and gas exploration and production activities while protecting public health, safety and the environment, Conservation is considering a regulation which would require the development of an emergency action plan (EAP) by well operators to aid in alerting and protecting the public upon detection of an accidental and uncontrolled release from a well.

Although uncontrolled releases are an uncommon occurrence, they create the potential for disruption of normal activities and commerce in an affected area. An EAP requirement would be an effective tool to help ensure that an operator is prepared for an accidental release and emergency response agencies have the information they need when responding to an incident, thereby reducing the potential for impact to public health, safety and the environment. As a result, Conservation sought comments from interested parties on the proposed rule along with information on the potential fiscal and economic impacts of such a rule on all affected parties.

Regulatory Summaries – August

LDNR – NOTICE OF INTENT

**Office of Conservation – Fees
(LAC 43:XIX.701, 703, and 707)
Source: La. Register for August 2011, p. 2497**

Conservation proposes to amend LAC 43:XIX.701, 703, and 707 (Statewide Order No. 29-R) to adopt Statewide Order No. 29-R-11/12 (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-10/11.

Office of Mineral Resources
Mineral Resources, Alternative Energy Leasing and Dry Hole Credit
(LAC 43.I. Chapter 11 and V. Chapter 4)
Source: La. Register for August 2011, p. 2508



The Secretary of the Department of Natural Resources has given notice that rulemaking procedures have been initiated to promulgate rules for the Leasing of State Lands and Water Bottoms for the Exploration, Development and Production of Alternative Energy Sources, LAC 43:I. Chapter 11, and to repeal the Dry Hole Credit Program, LAC 43:V. Chapter 4.

The proposed regulation relative to alternative energy will detail the procedure which will be utilized in administering the leasing of state lands and water bottoms for the exploration, development and production of alternative energy, allowed for by R.S. 30:124. In addition, the repeal of the Chapter relative to the Dry Hole Credit Program will be repealed since the final date for filing

applications for the credit was June 30, 2009 per Act 2005, No. 298 and Act 2009, No. 196.

Regulatory Summaries – September

LDNR – RULES

Office of Conservation
Surface Mining—Statewide Order 29-O-1
(LAC 43:XV.Chapters 1, 23, 29, 31, 35, 54, 65, and 85)
Source: La. Register for September 2011, p. 2729

Conservation amended LAC 43:XV, (Statewide Order 29-O-1) the Louisiana Surface Mining Regulations, governing permit application information, ownership and control information for the permit applicant and the applicant's operator, transfer, assignment or sale of permit rights, permit eligibility, and remining.

The Department of the Interior, Office of Surface Mining Reclamation and Enforcement, under the provisions of 30 CFR 732.17(d), has notified the Louisiana Office of Conservation, Injection and Mining Division of changes in Public Law 95-87, the Surface Mining Control and Reclamation Act of 1977, as amended, (SMCRA) and the federal regulations promulgated pursuant to SMCRA, which make it necessary for Louisiana to modify its Surface Mining Regulatory Program to remain consistent with all federal regulations. The Director of the Office of Surface Mining Reclamation and Enforcement approved the rules in *Federal Register*, vol. 76, no. 46, March 9, 2011, pp. 12852-12857.

Jurisprudential Summaries

M.J. Farms, Ltd. v. Exxon Mobil Corp., et al.

Longest Running “Legacy” Case Tried and Settled

M.J. Farms, Ltd., a farming operation based in Catahoula Parish, settled its long-running suit against Exxon Mobil Corporation, Tensas Delta Land and Exploration Company and others earlier this year. The suit, one of scores of oilfield contamination cases popularly known as “legacy suits” had been followed particularly closely by litigants in similar oilfield cases. The case became well known several years ago following the passage of Act 312, which was enacted due to the growing concern that landowners receiving damages for contamination to their property were not obligated to actually remediate their property. M.J. Farms challenged the constitutionality of Act 312 and in a long-anticipated decision in 2008 the Louisiana Supreme Court unanimously upheld the new law.

The case finally went to trial in April of this year. Due to the large number of attorneys and court personnel involved in the case, the trial was held in the Vidalia, Louisiana convention center. Judge Glen Strong was appointed by the Louisiana Supreme Court to preside over the case due to the complexity of the issues to be tried and conflicts of interest with other judges in the 7th Judicial District.

The case was tried for nearly ten days before a settlement was reached between the parties. Details of the settlement were sealed.

Summary of Trial

M.J. Farms purchased the property, 32,000 acres of farmland in Catahoula Parish, in 2005 for \$30 million. The case had its origins in the creation of a mineral servitude in 1929. The minerals were

severed from the property and over 200 wells were ultimately drilled pursuant to the terms of the servitude. M.J. Farms alleged that by 1992, approximately 32 billion barrels of oil were produced on the property by the owners of the mineral rights and their assignees. It claimed that the exploration and production activities conducted



pursuant to the servitude generated over 3 billion barrels of “produced water” or saltwater waste that was improperly disposed of in unlined pits, poorly maintained injection wells and through outright dumping, which caused surface, subsurface and groundwater contamination of the property. Less than a year after purchasing the property, M.J. Farms filed suit against the Defendants for the alleged contamination. M.J. Farms sought a total of \$3.9 billion in damages for contamination to the property. The following is a summary of the testimony given by the experts in the case.

Bill Griffin – Plaintiff’s Petroleum Engineer Expert

Bill Griffin testified that exploration and production activities affect the sub-surface strata and the proper methods for protecting groundwater resources while conducting drilling operations. Mr. Griffin testified that water produced during exploration and production is a waste product and that the original method for its disposal was to place it in reserve pits which allowed the water to evaporate or seep into the soil. Later disposal

methods, he contended, utilized saltwater injection wells where the produced water was injected back into the subsurface. Both methods, Griffin testified, resulted in contamination to the property in what he described as “Top Down” and “Bottom Up” contamination, respectively.

Mr. Griffin also testified about what exploration and production activities historically took place on Plaintiff’s property, which included portions of 3 different oilfields. Mr. Griffin claimed that injection wells were used on the property and that the Defendants injected millions of barrels of produced water into those wells during operations. Griffin contended that some of the wells and procedures used to inject produced water back into the subsurface were not sufficient and allowed or even facilitated the escape of saltwater from the injection well at unintended levels, resulting in significant contamination of the subsurface. Griffin concluded that the Defendants’ operations contaminated portions of all 3 fields on M.J. Farm’s property and required extensive remediation including surface soil clean-up and groundwater remediation.

Austin Arabie – Plaintiff’s Expert on Assessment and Remediation of Contaminated Soil and Groundwater

A critical portion of the trial covered the proposed cost to remediate the soil and groundwater contamination allegedly present on and beneath the property. Austin Arabie was called to describe for the jury what his assessment of the property revealed and what, in his opinion, would be the best and most beneficial method for cleaning-up the contamination found on the M.J. Farms property.

Mr. Arabie explained that he undertakes a 3 step process when assessing potential contamination on property: 1) Data and other information gathering

on the property; 2) Sampling and analysis (soil, water, groundwater, etc.); and 3) Clean-up.

Step 1 - Data Gathering: Arabie testified that he reviewed land records from the U.S. Department of Agriculture, the Louisiana Office of Conservation and the Louisiana Department of Transportation and Development. In addition, he studied aerial photographs illustrating the condition of the property in the affected areas, Big Bayou, Long Branch and Lake Larto. Arabie also testified that he reviewed the Seasonal Water Table, which he stated showed the average level of shallow ground water ranges from 1 to 2.5 feet with 92% being at 1 foot. He gathered data on over 300 water wells that were drilled on the M.J. Farms property, and finally said he studied data regarding the Mississippi River Alluvial Aquifer (MRAA) from the Louisiana Department of Environmental Quality that showed the MRAA flows from north to south in Louisiana as does the River. He testified that the salt quantity in the MRAA is typically very low – less than 50 parts per million. By contrast, the standard for drinking water is 250 parts per million or less.

Step 2 - Sampling and Analysis: Mr. Arabie described this as a six stage process: 1) Terrain conductivity sampling, 2) Sub-surface conductivity sampling with conductivity probes, 3) Soil samples, 4) Ground water samples, 5) Sample analysis and 6) Compilation/Assessment. Arabie testified that salt water conducts electricity better than fresh water. As a result, the higher the conductivity of water, the higher the concentration of salt. He referred to electrical conductivity (EC), which is a measurement of the dissolved material in an aqueous solution relating to the ability of the material to conduct electrical current. Arabie and his staff sampled hundreds of locations on M.J. Farms and the locations were marked by GPS position. He testified that areas of high conductivity were found in old oil wells and pit areas on Plaintiffs’ property. He

identified 3 specific areas as the Big Bayou, Lake Larto and Long Branch oil fields.

Arabie testified that he next took soil samples from those areas he claimed were affected and compared them to the soil samples from background areas, those areas on the property which he contended were not affected by exploration and production operations. He told the jury his sampling confirmed that the salt content was much higher in the oil field areas.



Next, he testified that samples of the shallow ground water were taken from water wells in what he claimed were affected areas and compared them to the samples taken in the oil field areas. He testified the salt levels were found higher in the oilfield areas. At the conclusion of this testimony, Arabie presented an aerial chart showing the areas on M.J. Farms property, which he claimed exceeded 50 ppm in the ground water.

Step 3 – Clean-Up: Finally, Arabie testified as to the costs and benefits of his plan to remediate the salt contamination present on the property. First, Arabie discussed his soil remediation proposal.

Soil Remediation: He suggested that the only way to remediate the soil was to dig it up, ship it to a landfill storage area, replace it with clean soil from an undamaged area, and then plant and level it.

Arabie estimated the total sum to excavate all of the affected areas, transport the contaminated soil, properly dispose of it and back fill with clean soil to be \$114.9 million.

Shallow Groundwater Remediation: Arabie described his estimate of the cost to clean-up the shallow ground water. He testified that this step was necessary to protect the clean soil that would be used as fill to replace the contaminated soil. He testified the process would involve running pumped out ground water through a filtration system and then pumping it back in after the salt separated out. According to Arabie, because of the high concentration of salt, the process would have to be performed several times in order to fully “flush-out” the salt. Total cost to pump and filter the shallow groundwater was estimated to be \$37 million.

MRAA Remediation: Finally, Arabie described his suggested plan to remediate the Mississippi River Alluvial Aquifer. He testified that his plan would follow a procedure similar to one that he proposed for the shallow groundwater only on a much grander scale. His plan for the MRAA called for the pumping and filtering of billions of gallons of water from the aquifer over a period of 70 years. He estimated that the total cost for the MRAA project would be \$3.6 billion dollars.

Arabie testified that the total costs to remediate the Plaintiffs’ property, including miscellaneous costs amounted to approximately \$3.9 billion.

Arville Touchet – Defendants’ Soil Remediation Expert

Following Austin Arabie’s testimony, the plaintiff called Arville Touchet, a soil remediation expert, to the stand as part of its continuing case-in-chief.

Arabie testified that, while salt is toxic to plants and that it does not biodegrade, Austin Arabie’s “dig and haul” plan was far more than was necessary to

address the contamination on the property and might actually be more harmful to the environment. He testified that rather than subjecting the soil to Arabie's "dig and haul procedure," most of the soil at issue would be better served by less intrusive means. He recommended improving the drainage in portions of the property and treating certain affected areas with agricultural gypsum, while simply leaving other inactive ("un-farmed") areas alone. In his opinion, Arabie's recommendation could effectively destroy the soil by actually killing the micro-organisms that are present. Touchet testified that most of the crops currently grown on the property could tolerate the waters currently used for irrigation and countered that Arabie's proposed standard for irrigation water was 10 times higher than that used by the farming industry now.

Plaintiff's counsel showed Touchet a copy of the American Petroleum Institute publication, "Remediation of Salt-Affected Soils at Oil and Gas Production Facilities," and asked whether, in his opinion, the publication was "reliable" and whether he agreed with certain selected quotes from the publication. Touchet testified that while certain quotes from the publication were generalities that would not necessarily apply in every instance, he agreed with the general principles of others. Certain quotes were highlighted from the publication by Plaintiff's counsel, who elicited agreement from Touchet on the following:

- Salt contamination from spills can result in adverse environmental effects.
- The objective of *in situ* chemical treatment (gypsum treatment) of soil is to remove salt from the root zone of the soil.
- Successful treatment with gypsum may be the most difficult remediation measure to accomplish.

- For gypsum treatment to succeed, salts must be permanently leached from below the root zone (> 5-6 feet bgl).
- If drainage problems at the site are caused by a high water table, successful treatment with gypsum requires that the water table be lowered.
- *In situ* chemical amendment remediation techniques are sometimes inadequate.
- Delays in remediating property damage usually produce greater damage and the need for greater remediation.
- Produced-water pits are typically treated mechanically ("dig and haul") rather than by *in situ* chemical amendment.
- Where salt is not leached effectively, it could return to the surface during evaporation.
- Where salt is capable of impacting groundwater and migration cannot be prevented, remediation alternatives may be limited to mechanical means.

Settlement

On the tenth day of trial, prior to the Defendants' case-in chief, the Parties announced that they had a settlement on record and they had signed a Memorandum of Understanding. The details of the settlement were sealed.



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. Described below is the committee hearing on the issue and the studies currently being undertaken to address the problem faced by defendants. Because these issues are important to us and to our clients, we will continue to monitor these efforts and provide updates on their status.



Asbestos Bankruptcy Trusts under Scrutiny

Defendants Involved in Asbestos Cases Urge Congress to Require More Transparency in Asbestos Bankruptcy Trusts

On September 9, 2011 United States House Judiciary Subcommittee held a hearing on how fraud and abuse in the asbestos compensation system affect victims, jobs, the economy, and the legal system. On the witness list for the House Judiciary Subcommittee hearing were: Professor Lester Brickman, Benjamin N. Cardozo School of Law; Michael Carter, Monroe Rubber & Gasket Company; Charles S. Siegel, Waters & Kraus LLP; James L. Stengel, Orrick, Herrington & Sutcliffe LLP. Among the topics at issue in the hearing was transparency of asbestos settlement trusts. In recent years there has been an increase in the establishment of asbestos settlement trusts under 11 U.S.C. §524(g). The purpose of the trusts is to provide payment for asbestos claims in the wake of bankruptcies filed by companies facing asbestos lawsuits. Businesses who have not filed bankruptcy and insurers, “solvent co-defendants,” are requesting more accessibility to the information about plaintiffs that the trusts possess. Although

the information the solvent codefendants are seeking (such as the names of applicants and their reported history of exposure to asbestos) is sometimes available through traditional discovery, some of the trusts have provisions preventing disclosure of certain information. Defendants would like to see legislation enacted to require more transparency by the trusts.

The Subcommittee hearing comes in the wake of an April 29, 2010 request by the House Judiciary Committee that the Government Accountability Office institute a study to determine 1) what actions 524(g) trusts are taking to prevent duplicative payments, 2) whether 524(g) trusts timely disclose information about claimants’ demands where relevant among the trusts and to tort litigation, 3) whether and to what extent the trusts are making information available to courts and participants in the judicial system, 4) whether the trusts are acting to prevent a windfall to any claimant while ensuring the trusts have adequate resources to pay future claimants, and 5) whether greater cooperation and transparency between the trusts and the tort system would reduce duplicate payments.



The GAO has not yet released the report on its study, but is expected to do so this fall. We will continue to keep you informed about the progress of this important issue.

LABOR AND EMPLOYMENT LAW CORNER

By Gerald "Jerry" J. Huffman, Jr.

While most of the laws and regulations in the environmental and toxic substance arena focus on business obligations, an employer's ability to comply with regulatory and legal mandates often depends on the actions of its employees. In some situations, employers are required to ensure that employees perform their jobs in an environmentally safe manner. In other contexts, employers must set up protocols and procedures to periodically test the health conditions of employees who deal with hazardous substances or who are subject to stressful environments, such as areas with high noise levels or concentrations of particular substances. Most of the federal and state statutes also contain provisions protecting employees who refuse to do their jobs in violation of the law, report a violation internally or who provide such information to the government agencies responsible for enforcing the law. In this section, we will summarize recent developments in such labor and employment law matters of interest to the environmental community.



minimum wage and overtime pay, freedom from discrimination and information pertaining to family and medical leave. For 76 years, however, this posting requirement did not apply to the granddaddy of all labor laws – the National Labor Relations Act. Now, the current National Labor Relations Board, believing the low rate of union representation in private sector employment is troubling, is out to fix that problem by, among other proposed steps, increasing employee awareness of their right to organize.

Originally, the Board ordered that, effective November 14, 2011, all employers subject to the NLRA (which is almost every American business) must post a specified notice viewable by all employees advising them of their rights under the Act. The notice must advise employees that they have the right to act together to improve wages and working conditions; to form, join and assist a union; to bargain collectively with the employer; and to refrain from any of these activities. The notice, which will be available from the Board, also includes examples of unlawful employer and union conduct and instructs employees on how to contact the NLRB with questions or complaints. Translated versions will be available and must be posted if at least 20% of the employer's workforce is not proficient in English. Not surprisingly, this new regulation was passed on a straight party-line vote of the Board and it may be challenged in court. In the meantime, your employees will be reminded of their rights to unionize and to engage in other protected concerted activities as of November 14, 2011. If your company does not post this notice, you may be subject to the filing of unfair labor practice charges with the Board, an inference that certain actions your management took were motivated by anti-union animus and the extension of the otherwise applicable six month limitations period for the filing of such charges.

NLRB Issues Requirement for New Notice Posting – Then Extends the Deadline

You may be aware of the various notices in your workplace advising employees of their rights under federal and state labor laws such as the rights to a

On October 5, 2011, the Board postponed the implementation date for its new notice-posting rule by more than two months in order to allow for enhanced education and outreach to employers, particularly those who operate small and medium sized businesses. The new effective date of the rule is Jan. 31, 2012. The decision to extend the rollout period followed queries from businesses and trade organizations indicating uncertainty about which businesses fall under the Board's jurisdiction, and was made in the interest of ensuring broad voluntary compliance. In addition, a federal court lawsuit has been filed seeking to invalidate the rule on the basis that the Board lacks the statutory authority to adopt a posting requirement

Contributing Attorneys

Christoffer C. Friend
Partner
Covington
christofferfriend@curryandfriend.com

Kevin J. Webb
Partner
Covington
kevinwebb@curryandfriend.com

Gerald "Jerry" J. Huffman, Jr.
Partner
New Orleans
geraldhuffman@curryandfriend.com

Brett F. Willie
Associate Attorney
Covington
brettwillie@curryandfriend.com

Shannon C. Burr
Associate Attorney
New Orleans
shannonburr@curryandfriend.com