

# ENVIRONMENTAL & TOXIC TORT UPDATE Spring 2011



## ENVIRONMENTAL UPDATES

By Brett F. Willie



Every quarter we provide our readers with a brief 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 is a brief description of the emergency rule recently adopted and promulgated by LDNR. The full text of this emergency rule 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 Eagle Pipe and Supply, Inc. v. Amerada Hess Corp. case in which the Louisiana Supreme Court recently granted writs and will be taking a look at the general applicability of the "subsequent purchaser doctrine" to the facts of that case. We'll also be reporting on other news out of the Louisiana Supreme Court in the case of Tensas Poppadoc, Inc. v. Chevron U.S.A., Inc., et al.

In that case, the Supreme Court denied the plaintiff's motion seeking to compel the testimony of LDNR Secretary, Scott Angelle.

## Regulatory Summaries - February

### LDNR – EMERGENCY RULE

**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**

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## LAC 43:XIX.Chapters 2 and 11)

Source: La. Register for February 2011, p. 460

LDNR's December 9, 2010 Emergency Rule amending and expanding the drilling and completion operational and safety requirements for wells drilled in search of oil and natural gas at water locations is hereby rescinded and replaced by the subsequent Emergency Rule described herein.

This subsequent 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.

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-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. Finally, the Emergency Rule provides for Commissioner of Conservation approved exceptions to equipment requirements on workover operations.

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 January 12, 2011. The Emergency Rule shall remain in effect for 120 days after its effective date.

## Jurisprudential Summaries

### ***Eagle Pipe and Supply, Inc. v. Amerada Hess Corporation, et al.***

#### **Louisiana Supreme Court Grants Defendants' Writ Applications and Will Rule on the General Applicability of the Subsequent Purchaser Doctrine to the Plaintiff's Claims**

On February 4, 2011, the Louisiana Supreme Court granted writ applications in *Eagle Pipe and Supply v. Amerada Hess*, a "NORM case" that involves property damage claims brought by an owner that, subsequent to its purchase, discovered the property was contaminated with radioactive material allegedly deposited as a result of the oilfield-related operations of various third parties. Eagle Pipe, the plaintiff, 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 with NORM.

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 Louisiana 4th Circuit Court of Appeal initially 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 of Appeal 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.

The oil company and trucking defendants thereafter filed separate writ applications to the Louisiana Supreme Court, which were granted on February 4, 2011 with a special briefing notice issued ordering the parties to confine their briefs to the singular issue of "whether the application of the subsequent purchaser doctrine bars the plaintiff's right of action against the various defendants."

Defendants' briefs were due on March 1, 2011. The oil company defendants have argued that, on rehearing, the 4th Circuit committed legal error by: 1) invalidating the long-standing rule that a subsequent purchaser of property must obtain an express assignment of its vendor's personal rights in order to recover in tort for pre-acquisition damages to the property; 2) restricting the subsequent purchaser doctrine to claims involving former lessees and overt property damage; and 3) finding that the time of "manifestation" of alleged property damage determined the existence vel non of a right of action in favor of subsequent purchasers of immovable property.

*"Eagle Pipe and Supply, Inc. v. Amerada Hess Corporation, et al.;* Supreme Court of Louisiana c/w 2010-C-2267, 2010-C-2272, 2010-C-2275, 2010-C-2279 and 2010-C-2289 (La. February 4, 2011).

## ***Tensas Poppadoc, Inc. v. Chevron U.S.A., Inc., et al.***

**Louisiana Supreme Court Denies the Plaintiffs' Motions to Compel the Testimony of LDNR Secretary, Scott Angelle**

In February 2009, following trial the previous year, *Tensas Poppadoc* became the first "legacy" case to undergo the Office of Conservation's much anticipated post-trial public hearing pursuant to Act 312. The purpose of that hearing was for the Office of Conservation to determine the "most feasible plan" to evaluate or remediate the environmental damage determined to be present at trial and to determine which plan was in compliance with applicable standards and regulations.



Following that hearing, in which the Office of Conservation determined that its own plan was the "most feasible"; the trial court was tasked with determining "by a preponderance of the evidence" whether another plan is more feasible than the Conservation Plan. In the wake of Conservation's adoption of its own plan as the most feasible, the trial court's "preponderance hearing" has been indefinitely delayed as multiple procedural issues have been addressed and contested. The most hotly contested posthearing procedural issue thus far has been the plaintiff's pursuit of post-hearing depositions of certain Office Conservation and LDEQ personnel, including, LDNR secretary Scott Angelle. The plaintiff had sought to take Secretary Angelle's deposition over the objections of LDNR, leading to the action taken by the Louisiana Supreme Court addressed herein.

On March 4, 2011, the Louisiana Supreme Court took action on the Writ Application by the Secretary of the Louisiana Department of Natural Resources, Scott Angelle, regarding the plaintiff's attempts to compel his deposition testimony and call him as a witness at the La. R.S. 30:29 preponderance hearing, which has been continued to this point and remains unscheduled.



Originally, the trial court granted the plaintiff's Motions to Compel which called for Secretary Angelle to provide his deposition testimony. Secretary Angelle appealed to the Louisiana 3rd Circuit Court of Appeal, which subsequently affirmed in part, reversed in part, and remanded the case back to the trial court and opened the door for his deposition to move forward and for the plaintiff to seek his testimony at trial.

Secretary Angelle thereafter sought a writ of review from the Louisiana Supreme Court, and the Court's action on that Writ Application issued on March 4, 2011. Ultimately, the Supreme Court blocked the plaintiff's attempts to depose the Secretary and examine him at the preponderance hearing in this case, which has been continued pending the Supreme Court's decision herein. The Court's Order says that the plaintiff failed to meet its burden of proving that it should be entitled to take Scott

Angelle's testimony either by deposition or at a hearing.

The Court avoided discussion of the separation of powers issue or the question of whether any plaintiff at any time may be able to subpoena Secretary Angelle to testify. It stated simply that, in this case, the motions to compel his testimony were denied, and the district court should proceed in light of the Court's ruling. The preponderance hearing in this case had remained unset. With this delay resolved, however, the proceedings may now move forward once again.

The text of the Supreme Court's action herein reads as follows; "Writ granted. The plaintiff has failed to sustain its burden of providing under La. R.S. 13:3667.3(A) the relevancy of the facts sought to be proven set forth in its motion to compel and the necessity of the testimony of the witness prior to and at the hearing conducted pursuant to La. R.S. 30:29 on the availability of a more feasible remediation plan. As such, the motions to compel the witness' testimony by deposition and at the La. R.S. 30:29 hearing are denied. The case is remanded to the district court for further proceedings in light of this ruling."

"Tensas Poppadoc, Inc. v. Chevron U.S.A., Inc., et al.; Supreme Court of Louisiana; 2011-C-0077: IN RE: Angelle (Secy.), Scott; - Other; Applying For Writ of Certiorari and/or Review, Parish of Concordia, 7th Judicial District Court Div. B, No. 40,769; to the Court of Appeal, Third Circuit, No. 10-124; (La. March 4, 2011).

## TOXIC TORT UPDATES

By Kevin J. Webb and  
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The National Institute for Occupational Safety and Health (NIOSH) has proposed new recommendations regarding exposure to carbon nanotubes, a substance that may behave like asbestos in the body and potentially cause mesothelioma. The proposed new

recommendations were open for public comment until February 18, 2011. Because these issues are important to us and to our clients, we will continue to monitor this issue and provide updates on their status.

### Carbon Nanotubes Linked to Mesothelioma

Carbon nanotubes, tiny cylindrical manufactured forms of carbon, have recently caught the attention of scientists and governmental agencies because of the potential health risk they pose for humans. Carbon nanotubes are used in electronics, polymer composites and medical



applications.<sup>1</sup> They are generally classified as either single walled or multi-walled and they can vary widely in length, number of layers and structure. Some varieties of them are shaped like asbestos fibers, and recent studies have indicated that carbon nanotubes may behave like asbestos fibers in the body.<sup>2</sup>

NIOSH researchers demonstrated that mice who aspirated single walled carbon nanotubes demonstrated progressive fibrosis and granuloma formation. Two studies have shown that multi-walled carbon nanotubes may cause mesothelioma. The studies involved injecting the nanotubes into the body cavities of mice, rather than by aspiration. The results showed that multi-walled carbon nanotubes longer than 20 microns caused injury to the linings of the body cavity similar to that of asbestos. Another study showed that, in mice that had been genetically modified to be susceptible to cancer, certain multi-walled nanotubes were more potent than asbestos in causing mesothelioma.<sup>3</sup>

As a result of these studies, in October 2010, the EPA promulgated a new regulation, under section 5(a)(2) of the Toxic Substances Control Act (TSCA) requiring persons who intend to manufacture, import, or process either single or multi-walled carbon nanotubes for a use that is designated as a significant new use to notify the EPA at least 90 days before commencing that activity.<sup>4</sup>

In December of 2010, NIOSH invited public comment on a draft document, "Current Intelligence Bulletin: Occupational Exposure to Carbon Nanotubes and Nanofibers" in order to assist with the development of final

<sup>1</sup> [http://www.cdc.gov/niosh/blog/nsb052008\\_nano.html](http://www.cdc.gov/niosh/blog/nsb052008_nano.html)

<sup>2</sup> Id.

<sup>3</sup> Id.

<sup>4</sup> 40 C.F.R. § 721.10155.

recommendations for employers. The draft document, found at [www.cdc.gov/niosh/docket/review/docket161A](http://www.cdc.gov/niosh/docket/review/docket161A), includes a recommended exposure limit (REL) of 7 micrograms of carbon nanotubes or carbon nanofibers per cubic meter of air as an eight-hour, time-weighted average, respirable mass concentration. The document also recommends that employers develop a strategic approach for assessing potential work-related exposures and risks. It also recommends that employers develop measures to control exposures, educate workers on potential sources of exposure and personal protection, and institute medical screening programs. The public comment period ended February 18, 2011, but NIOSH has not yet published final recommendations.

## 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.

### ***Ronald Bain v. Georgia Gulf Corporation***

#### **United States District Court, Middle District of Louisiana, Finds Unclean Hands Doom Alleged Whistleblower Even After Jury Rules In His Favor**

A district court judge in Baton Rouge recently reversed a jury's verdict in favor of an ex-employee claiming to be an environmental whistleblower. The jury had ruled in favor of a former operator at Georgia Gulf's Plaquemine, Louisiana plant in his retaliation action filed under Louisiana's Environmental Whistleblower Law, at La.R.S. § 30:2027. The employee, Ronald Bain, testified in 1996-97 civil depositions in another employee's wrongful termination law suit about alleged environmental and safety law violations committed by Georgia Gulf. Specifically, he claimed that operators, such as himself, were reporting false zero readings in their PVC Reactor Open Loss testing to provide false evidence that Georgia Gulf was compliant with environmental regulations. Thereafter, following several incidents for which Mr. Bain was progressively disciplined, he was terminated from his employment in May of 1998. Following an eight-day trial in May, 2005, the jury found in favor of Mr. Bain.

Retaliation cases are the hottest trend in employment law at present. For example, for the first time in its history, the Equal Employment Opportunity Commission received more charges

alleging retaliation from employees raising civil rights issues than from employees alleging any particular type of discrimination. There are multiple reasons for this trend –

- the plethora of laws, including almost every federal and state environmental law, providing protections for whistleblowers,
- the higher probability that juries and judges will rule in favor of plaintiffs, and
- the availability of punitive and, in some cases, treble damages.

While juries sometimes have a difficult time believing that a manager acted against an employee due to his or her race, age, gender, religion or disability, they can relate more to a manager reacting against an employee who has accused them of discriminating or any other unlawful action. Revenge, to misstate a phrase, is a dish often served hot.

However, in this case, what the jury giveth, the judge taketh away. Georgia Gulf asked the Court to overturn the jury’s verdict on the basis that the evidence at trial showed Mr. Bain himself, without any direction or instructions from his supervisors, had engaged in the deliberate unlawful falsification of readings on his own. As such, under the “clean hands” provision of the Whistleblower Law, at La.R.S. § 30:2027 (D), any recovery under the law was barred.

This case demonstrates the difficulty in defending and winning retaliation cases. Even though the evidence showed that Mr. Bain was terminated more than one year after his testimony, that his termination was the result of the application of a progressive discipline system involving four (4) separate incidents and that he had never been instructed to engage in unlawful actions, the jury still returned a verdict in his favor. Georgia Gulf

was saved by a rare occurrence – a judge setting aside a jury’s verdict. The case is currently on appeal to the U.S. Fifth Circuit Court of Appeals.

*Bain v. Georgia Gulf Corporation*, 2010 WL 5298841 (M.D.La. 2010).

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