Environmental & Toxic Tort Update

Summer 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 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 will report on House Bill 563, the "Expedited Remediation Act" authored by Representative Patrick Page Cortez. HB 563 proposed to expand the jurisdiction of the La. Department of Natural Resources Office of Conservation to include claims for certain environmental damages resulting from oil and gas activity.

Regulatory Summaries - April

LDNR – NOTICE OF INTENT

Statewide Order No. 29-B—General Provisions (LAC 43:XIX.104)
Source: La. Register for April 2011, p. 1268.

The Louisiana Office of Conservation has proposed amending LAC 43:XIX.Chapter 1 (Statewide Order No. 29-B) in accordance with the provisions of the Administrative Procedure Act, R.S. 49:950 et seq., and pursuant to power delegated under the laws of

Table of Contents

Environmental Updates

Regulatory Summaries
April ....Page 1
June ....Page 2
Legislative Summaries
2011 Regular Session of the Louisiana Legislature ....Page 4

Toxic Tort Updates

Becker v. Murphy Oil Corporation ....Page 5

Labor and Employment Law Corner

Who Enforces Federal Environmental Whistleblower Laws? OSHA, That's Who! ....Page 8

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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the state of Louisiana and particularly Title 30 of the Louisiana Revised Statutes of 1950, Sections 30:4 et seq. The proposed amendment modifies the specific provisions of LAC 43:XIX.104 which provides for financial security requirements for each applicable well to ensure that such well is plugged and abandoned, and associated site restoration is accomplished.

The amendment to the above existing Rule is intended to provide clarification on the financial security amounts for blanket financial security consistent with current Office of Conservation practice.

OFFICE OF THE GOVERNOR – POTPOURRI

Division of Administration – Tax Commission
Substantive Changes to Proposed Rule
Oil and Gas Properties
(LAC 61:V.901 and 907)
Source: La. Register for April 2011, p. 1308.

The tax commission published a Notice of Intent to promulgate §901, Guidelines for Ascertaining the Fair Market Value of Oil and Gas Properties, specifically §901.C, the definition of Production Depth and §907, Valuation of Oil, Gas, and Other Wells, specifically Table 907.B-3, Serial Number to Percent Good Conversion Chart Horizontal Wells, in the December 20, 2010 edition of the Louisiana Register (LR 36:2762-2764). On March 14, 2011 a Legislative Oversight Committee (House Ways and Means and Senate Revenue and Fiscal Affairs) hearing was held regarding these two issues. Both committees found the two issues to be unacceptable and, with no response from the governor, the committee's decision was final.
A public hearing was held on May 24, 2011 at the Louisiana Tax Commission offices regarding this matter. The fiscal and/or economic impact will be to local government having a decrease in the value of these properties and lower tax collections than would have been if the changes had been found acceptable by the committees or the governor.

Regulatory Summaries – June

LDNR – EMERGENCY RULE

Statewide Orders No. 29-B and 29-B-a
Office of Conservation - Statewide Orders No. 29-B and 29-B-a - Deadline Extension for 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 June 2011, p. 1547.

The Emergency Rule signed by the commissioner and effective January 12, 2011 is hereby rescinded and replaced by the Emergency Rule addressed herein. The effective date of this Emergency Rule was May 12, 2011. 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 extending the effectiveness of the Emergency Rule it supersedes for drilling and completion

operational and safety requirements for wells drilled in search of oil and natural gas at water locations. The following Emergency Rule provides for Commissioner of Conservation approved exceptions to equipment requirements on workover operations. Furthermore, the extension of the Rule allows more time to complete comprehensive rule amendments.

Need And Purpose For Emergency Rule - In light of last year's Deepwater Horizon oil spill incident in the Gulf of Mexico approximately fifty miles off Louisiana's coast and the threat posed to the natural resources of the state, and the economic livelihood and property of the citizens of the state caused thereby, the Office of Conservation began a new review of its current drilling and completion operational and safety requirements for wells drilled in search of oil and natural gas at water locations. While the incidents of blowout of Louisiana wells is minimal, occurring at less than three-tenths of one percent of the wells drilled in Louisiana since 1987, the great risk posed by blowouts at water locations to the public health, safety and welfare of the people of the state, as well as the environment generally, necessitated the rule amendments contained herein.

After implementation of the Emergency Rule, the Office of Conservation formed an ad hoc committee to further study comprehensive rulemaking in order to promulgate new permanent regulations which ensure increased operational and safety requirements for the drilling or completion of oil and gas wells at water locations within the state.

Synopsis of Emergency Rule - The Emergency Rule addressed herein 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 extending the effectiveness of new operational and safety requirements for the drilling and completion of oil and gas wells at water locations. Following the Gulf of Mexico Deepwater Horizon oil spill, the Office of Conservation ("Conservation") investigated the possible expansion of Statewide Orders No. 29-B and 29-B-a requirements relating to well control at water locations. As part of the rule expansion project, Conservation reviewed the well control regulations of the U.S. Department of the Interior's Mineral Management Service or MMS (now named the Bureau of Ocean Energy Management, Regulation and Enforcement). Except in the instances where it was determined that the MMS provisions were repetitive of other provisions already being incorporated, were duplicative of existing Conservation regulations or were not applicable to the situations encountered in Louisiana's waters, all provisions of the MMS regulations concerning well control issues at water locations were by the preceding Emergency Rules, which this rule supersedes, integrated into Conservation's Statewide Orders No. 29-B and 29-B-a. Conservation is currently performing a comprehensive review of its regulations as it considers future amendments to its operational rules and regulations found in Statewide Order No. 29-B and elsewhere. Specifically, the Emergency Rule extends the effectiveness of 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

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the required use of storm chokes in oil and gas wells at water locations.

Reasons: 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. By this Emergency Rule, Conservation extends the effectiveness of these requirements until such time as final comprehensive rules may be promulgated.

Protection of the public and our environment therefore requires the Commissioner of Conservation to extend the Emergency Rule in order 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 Emergency Rule, Amendment to Statewide Order No. 29-B (LAC 43:XIX.Chapter 2) and Statewide Order No. 29-B-a (LAC 43:XIXChapter 11) (Emergency Rule) set forth hereinafter are adopted and extended by the Office of Conservation.

Legislative Summaries

2011 Regular Session of the Louisiana Legislature

Expedited Remediation Act
House Bill 563
Authored by Rep. Patrick Page Cortez
(Enacts R.S. 30:4(L), 84(A)(3) and 86(D)(7) relative to the remediation of oilfield sites)
Source: http://www.legis.state.la.us/

Representative Cortez's bill, referred to as the "Expedited Remediation Act", would expand the jurisdiction of the La. Department of Natural Resources Office of Conservation to include claims for certain environmental damages resulting from oil and gas activity and would have authorized the Secretary of the Dept. of Natural Resources to take legal action to meet the purpose of the La. Oilfield Site Restoration Law. Popularly known as Act 312, the oilfield restoration law was passed by the La. Legislature in 2006 to address concerns about numerous "legacy" lawsuits which had been filed over the alleged environmental contamination of land formerly used in the exploration and production of oil and gas. Act 312 was enacted to ensure that portions of any damages awarded in legacy lawsuits would be used to remediate any contamination found to be present on the affected properties.

The proposed law provided that the Office of Conservation would have primary jurisdiction for all demands arising as a result of any actual or potential impact, damage, or injury to environmental media caused by contamination resulting from activities associated with oilfield sites or exploration and production sites. Additionally, the new law would require that all judicial demands which have been filed or amended as of July 1, 2011, and for which the Office of Conservation had

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not approved a plan to evaluate or remediate the environmental damage per Act 312, be stayed and referred to the office for approval of a plan. Finally, the proposed law would provide that monies recovered from activities conducted pursuant to the La. Oilfield Site Restoration Law should be placed in the Oilfield Site Restoration Fund, and it would authorize the Secretary of the Dept. of Natural Resources to take legal action to meet the purpose of the La. Oilfield Site Restoration Law.

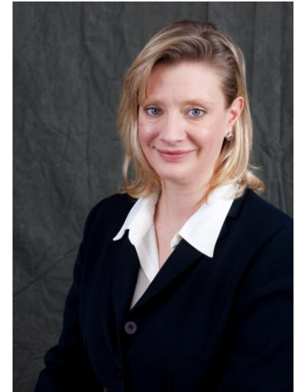
Proponents of HB 563 suggested that Act 312 was not being utilized as intended and that monies received by affected landowners was not being used to remediate damaged properties. As such, HB563 supporters argued that this legislation was necessary to clarify Act 312 to ensure that the Oilfield Site Restoration Law is not being circumvented and that land that has environmental impacts from oilfield activity would be cleaned up on a more expedited basis as opposed to such remediation efforts being needlessly tied up in the court system.

HB 563 was ultimately taken up by the House Natural Resources Committee on May 18, 2011 and was involuntarily deferred.

TOXIC TORT UPDATES

By Kevin J. Webb and Shannon C. Burr

The Louisiana Fourth Circuit Court of Appeal has ruled that plaintiffs' gradual onset hearing loss was caused by exposure to noise in the workplace, at Murphy Oil Refinery. The court held that the claims are not subject to the Louisiana Workers Compensation Act and that *contra non valentum* prevented the running of prescription. Because these issues are important to us and to our clients, we will continue to monitor these proceedings and provide updates on their status.



Becker v. Murphy Oil Corporation

Louisiana Fourth Circuit Court of Appeals Rules Plaintiffs' Hearing Loss Claims Caused by Exposure to Noise at the Murphy Oil Refinery, Claims Are Not Subject to the Louisiana Workers Compensation Act and the Doctrine of Contra Non Valentum Applied to Prevent the Running of Prescription

The Fourth Circuit recently decided *Becker v. Murphy Oil Corporation*, involving allegations that workers at the Murphy Oil refinery, in St. Bernard Parish, Louisiana suffered loss of hearing due to noisy working conditions at the plant.

The plaintiffs were Peter Becker, Jr., Joseph Barcia, Marvin Baudean, Salvador Di Carlo, Ronald Gilmore, and Roy Phillips. The plaintiffs ranged in age from 68 to 76 years old and had worked at Murphy Oil ("Murphy") anywhere from 25 to 35 years. They were examined by Dr. Moises Arriaga, an expert in neuro-otology, who diagnosed each plaintiff with varying degrees of hearing loss, all of which were, according to his opinion, caused by the plaintiffs' employment at Murphy. The trial court dismissed the claims of plaintiff, Ronald Gilmore, and found in favor of the remaining plaintiffs. Murphy appealed,

and the Fourth Circuit affirmed the trial court's decisions.

Murphy appealed the trial court's decision alleging the following errors:

1. The trial court erred in excluding evidence of noise exposure at other refineries.
2. The trial court erred in finding that the plaintiffs' noise exposure at Murphy Oil as the cause of their hearing loss.
3. The claims alleging pre-July 1983 exposure were barred by the Louisiana Workers Compensation Act (LWCA).
4. The claims of Mr. DiCarlo, Mr. Becker, and Mr. Baudean were prescribed.

The Fourth Circuit held that the trial court's exclusion of evidence of sound measurements at the Tenneco refinery was proper. The court disagreed with Murphy's assertion that, because plaintiffs, Ronald Gilmore and Vincent Vicidomina, testified that the noise at Tenneco was comparable to Murphy Oil, the data from Tenneco should have been admitted. The court held that Gilmore and Vicidomina are not experts, and the plaintiffs' expert, Dr. Lipscomb, testified that the noise exposure would be different due to several variables, including the distance a particular employee was from a piece of equipment.

The court next addressed the argument that the noise exposure at Murphy could not have caused the plaintiffs' hearing loss. Murphy argued that there was insufficient evidence that plaintiffs were exposed to 90 dBA as an average daily exposure, and that there is insufficient evidence that an average daily exposure of below 90 dBA but above 85 dBA could cause hearing loss. The Fourth Circuit noted that there are two ways to measure an employee's exposure to noise. The first is to use a dosimeter, worn by the employee throughout the day to determine exposure levels. Alternatively, sound level meter readings, a measurement of dBA levels placed near noise producing machinery, can also be used. The Fourth Circuit noted that despite of OSHA's mandate that employers such as Murphy perform and record noise readings as early as 1971, Murphy failed to do so. The court also noted that Murphy's own internal documents indicated that the noise levels at the plant required a hearing conservation program and recommenced mandatory hearing protection for certain employees. In addition there were reports from USF&G and plant noise surveys, reportedly taken using dosimeters, that indicated many employees were exposed to more than 90dBA over an 8 hour time weighted average. The court also noted that Drs. Arriaga and Roesser found, based on their examination of the plaintiffs and review of other evidence, that the plaintiffs hearing loss was caused by noise exposure at Murphy. Finally, the court noted the various government agencies, including the EPA, that had opined that exposure below 90 dBA could be damaging to hearing. The court found that, given all the evidence, it was not unreasonable for the trial court to accept the plaintiffs' experts' opinions on causation.

The Fourth Circuit then addressed the argument that recovery for any pre-July 1983 exposure was barred by the the Louisiana Workers Compensation Act. The plaintiffs argued that the gradual hearing

loss is not an "accident" in any version of the LWCA. Murphy argued that in the pre-July 1983 version of the LWCA, occupational hearing loss was covered by a "catch-all" provision of La. R.S. 23:1221(4)(p)(1982). The court noted that the cases relied upon by Murphy were not cases involving hearing loss, with the exception of *Chatelain v. American Can Co*., 344 So. 2d, 1180 (La. App. 4 Cir. 1977) and C*omoletti v. Ideal Cement Co*., 147 So.2d 711 (La. App. 1 Cir. 1962). The court distinguished *Chatelain*, saying that the decision did not stand for the proposition that gradual hearing loss is compensable under the LWCA, and noted that the *Comoletti* decision involved hearing loss due to a sudden and unexpected accident, rather than gradual onset.

Finally, the court addressed the arguments that the claims of three plaintiffs, Mr. DiCarlo, Mr. Baudean, and Mr. Becker, had prescribed. The court dismissed Murphy's argument that *Marin v. Exxon Mobile Corp.,* 38 So.3d 234 (10/19/2010) is the applicable governing law, citing the language in *Marin* stating that it is distinguishable from cases involving long latency disease and progressive occupational disease. The court did not give credence to Mr. DiCarlo's statement that he had lost his hearing by 1974, stating that he was elderly and was having trouble remembering events of the past. The court noted that documents from the seventies and eighties indicated that he felt he had good hearing at the time. Likewise, the court rejected Murphy's argument that plaintiffs Baudean and Becker were presumed to have read and understood the notice of hearing shift and audiograms indicating that they had hearing impairment well over one year prior to the filing of the petition. The Fourth Circuit held that gradual hearing loss is similar to asbestos related disease, in that it is difficult to determine at what point a cause of action accrues due to the long latency of the disease.

For the reasons above, the Fourth Circuit affirmed the trial court's judgment.

In his opinion, concurring in part and dissenting in part, Judge Tobias found that the claim of Mr. DiCarlo had prescribed. He opined that, given Mr. DiCarlo's testimony that he couldn't help but lose his hearing with all the noise, a reasonable person would have inquired further to determine whether the noise was causing his hearing loss, thus triggering the running of prescription.

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.

Who Enforces Federal Environmental Whistleblower Laws? OSHA, That's Who!

As stated in the last issue, retaliation cases are the hottest trend in employment litigation – where large damages are awarded. Yet in the environmental area, most of the action is at the regulatory level. Strangely enough, the federal administrative agency assigned to hear such cases is the Occupational Safety and Health Administration ("OSHA"). Outside of the older agencies that enforce other employment laws, such as the National Labor Relations Board, the Equal Employment Opportunity Commission and the Wage and Hour Division of the U.S. Department of Labor, OSHA was the first agency to develop administrative procedures to handle retaliation claims – under the anti-retaliation portion of the Act – at 29 U.S.C. § 660(c). Using those same procedures, since modified, OSHA also enforces the anti-relation provisions of:

- Safe Drinking Water Act, at 42 U.S.C. § 300j–9(i);
- Federal Water Pollution Control Act, 33 U.S.C. at § 1367;
- Toxic Substances Control Act, 15 U.S.C. at § 2622;
- Solid Waste Disposal Act, 42 U.S.C. at § 6971;
- Clean Air Act, 42 U.S.C. at § 7622;
- Energy Reorganization Act of 1974, 42 U.S.C. at § 5851; and
- Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. at § 9610.

Basically, each one of these statues makes it unlawful for an employer to discharge or otherwise retaliate against an employee who:

- Institutes any proceeding to be held under one of the above laws,
- Testifies, or who is about to testify, in any such proceeding,
- Assists in any such proceeding,
- Notifies the employer of an alleged violation of such statute,
- Refuses to engage in any action in alleged violation of the statute after notifying the employer, or
- Testifies before Congress, or a court, about any provision (or proposed provisions) of such statute.

An employee who believes he or she has been the victim of such retaliation may file a complaint (either orally or in writing) with the local OSHA office in the area. These complaints (except for those under the Energy Re-Organization Act where a 180 day period applies) must be filed within thirty (30) days after the victims learns that action has been taken against him or her.

Once a complaint is received, OSHA will conduct an investigation, considering written submissions by both the complaining party and the employer with specific time targets set forth in the regulations for completion. Upon completing the investigation, OSHA will either:

1. Issue a finding that there is reasonable cause to belief the allegations made by the complaining party have merit and then order that the employer remedy the

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situation, including possible re-instatement, back pay, attorneys fees, costs and/or payment of exemplary damages (in Safe Water Drinking and Toxic Substance Control Act cases only); or
2. Issue a finding that no violation occurred.

Either party then has thirty (30) days in which to file objections to the initial finding and request an administrative hearing before a federal Administrative Law Judge. If such objections are not timely filed, the initial agency decision becomes final and is enforceable in a federal district court.

For cases submitted to an Administrative Law Judge, federal rules applicable to administrative hearings will be followed. Discovery is permitted to all parties. The parties will have the opportunity to present documentary and testimonial evidence in support of their positions. Agencies such as the Environmental Protection Agency, the Nuclear Regulatory Commission and the Department of Energy may also participate, if they so desire. The regulations also provide that if OSHA's pre-hearing investigation is shown to be inadequate, the Judge should decide the case on the evidence presented with no remand back to the agency. Once the ALJ issues a decision, parties then have ten (10) days to appeal to the Department of Labor's Administrative Review Board ("ARB"). Decisions of the ARB are then appealable to the applicable federal circuit court of appeals, with the appeal periods set by the applicable statute asserted to be violated.

In conclusion, whenever your company is considering applying disciplinary actions to an employee who may have engaged in activity protected by one of the above environmental laws, we suggest you review the reasons for the discipline thoroughly. In such cases, OSHA will find that an alleged whistleblower can prevail by showing that their protected activity was a "motivating factor" in the adverse action. Application of this principle means that a whistleblower is not required to prove that the employer's stated reason for acting against her is false. Put another way, even if an employer's stated reason is true, a whistleblower can still prevail if the employer was also motivated by retaliation against the protected activity. It will be up to the employer to prove that the reasons can be separated, and that the adverse action would have happened even without the protected activity.

Department of Labor, Occupational Safety and Health Administration, 29 CFR Part 24, "Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provisions of Six Environmental Statutes and Section 211 of the Energy Reorganization Act of 1974, as amended, 76 Fed.Reg. 2808-2826 (January 18, 2011).

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