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4. Act 312 and the Legacy Site Cases

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I. History of “Legacy Litigation”

A. *Corbello v. Iowa Production*, 850 So. 2d 686 (La. 2003).

1. Contractual property damage awards need not be “tethered” to the market value of the property.
2. Damage awards may include estimated cost of remediation and monitoring to respond to “threat” to drinking water in aquifers. This allows for damages to protect from injury to public things where actual damages are speculative.
3. Landowners not required to use damage award to remediate property.

B. *Terrebonne Parish School Board v. Castex*, 893 So. 2d 789 (La. 2005).

1. Heavy emphasis on the text and express provisions of lease.
2. No implied duty to restore the surface after “ordinary, customary, and necessary acts” done for drilling or exploration, unless caused by “unreasonable or negligent operations.”

C. *Dore Energy Corporation v. Carter-Langham, Inc.*, 901 So. 2d 1238 (La. App. 3d Cir. 2005, writ denied 918 So. 2d 1042 (La. 2006).

1. Language in *Corbello* said that the duty to repair the leased premises does not arise until the lease expires.
2. *Dore* called this *dicta* and found that:
 - a. Claims for “maintenance” of the land as a reasonably prudent operator are not premature while the lease remains in effect.
 - b. Claims “to restore land upon which operations have been completed to the extent that the use of the land was negligent” are not premature while the lease remains in effect.

- c. Claims for restoration of land on which operations are ongoing are premature while the lease remains in effect.
- d. Regardless of the status of the lease, plaintiffs may pursue non-restoration claims, such as personal injury and other tort claims.

D. The First “Corbello Statute”: Act No. 1166 of 2003.

1. Applied to claims “to recover damages for the evaluation and remediation of any contamination or pollution that is alleged to impact or threaten usable ground water,” defined as Groundwater Classification I or Groundwater Classification II under the terms of the Risk Evaluation Corrective Action Program (RECAP) regulations promulgated by LDEQ and in effect on January 1, 2003.
2. Required plaintiff to notify LDNR and LDEQ, which had right to intervene.
3. Required formulation of remediation plan and deposit of funds into registry of court to implement plan under court supervision.
4. Created right of plaintiff and state agency to receive costs, including expert witness fees and attorney fees, related to proving groundwater contamination claims.

II. Act No. 312 of 2006

A. Background

1. Cases continued to be filed despite 2003 statute, often specifically excluding “usable ground water” claims to avoid the 2003 statute.
2. Industry concern that landowners would sue to obtain “windfall” and not use money to clean up property.
3. Industry concern that landowner attorneys would take too large a share of recovery as contingency fee, creating distorted incentives.
4. Industry concern that remediation plans developed without agency input would be excessive.

B. The Legislative Battlefield

1. Governor and Industry in Support
2. Some Landowners and a Small Group of Trial Attorneys in Opposition
3. Key Fights over Amendments on Senate Floor and in House Committee

C. The New Law: Act No. 312 of 2006.

1. Section 3 Exclusion. Does not apply “to any case in which the court on or before March 27, 2006, has issued or signed an order setting the case for trial, regardless of whether such trial setting is

continued.” However, plaintiffs in such cases had option to “opt-in” to the new law on or before August 7, 2006.

2. Application to Other Pending Cases. Plaintiffs had until August 7, 2006 to provide notice to state as required by new law, unless such cases had by that date been settled or had “final and definitive” judgment on the merits. Act No. 312, Section 2; LA. R.S. 30:29(K).

3. Application to New Cases. Plaintiffs must immediately provide notice to the state as required by new law. R.S. 30:29(B)(1).

4. Applies to claims for “environmental damage” defined as “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. Environmental media shall include but not be limited to soil, surface water, ground water, or sediment. R.S. 30:29(I)(1). “Oilfield site” or “exploration and production (E&P) site” is broadly defined. R.S. 30:29(I)(4). Such claims are removed from the jurisdiction of the LDEQ. R.S. 30:2015.1(L).

5. Shall not be construed to impede or limit provisions in private contracts imposing remediation obligation in excess of regulatory requirements. R.S. 30:29(A).

6. The required notice is to the Commissioner of Conservation and the Attorney General, sent by certified mail, return receipt requested, and shall include a copy of the petition and any other filing in such litigation. R.S. 30:29(I)(5).

7. The litigation is stayed until thirty days after such notice is filed and return receipt is filed with the court. R.S. 30:29(B)(1).

8. Attorney General has right to intervene in the litigation, but no prejudice to other agency administrative or civil action. R.S. 30:29(B)(2)-(3).

9. Lack of notice as required prevents any relief from being granted or dismissal of the litigation. R.S. 30:29(B)(4).

10. Upon determination of environmental damage (whether by admission or after trial) and legally responsible party(ies), the legally responsible party(ies) will be ordered “to develop a plan or submital for the evaluation or remediation to applicable standards of the contamination that resulted in the environmental damage.” R.S. 30:29(C)(1).

11. LDNR reviews the proposed plan, considers timely comments of any party, holds a public hearing and “shall approve or structure a plan based on the evidence submitted which the department determines to be the most feasible plan to evaluate or remediate the environmental damage and protect the health, safety, and welfare of the people,” with written reasons. LDNR “shall use and apply the appli-

cable standards in approving or structuring a plan to evaluate or remediate the environmental damage.” R.S. 30:29(C)(1)-(4). “Feasible Plan” must be “most reasonable plan” and “in compliance with the specific relevant and applicable standards” and regulations in effect at time of cleanup. R.S. 30:29(I)(3).

12. The court shall adopt the plan approved by the department, unless a party proves by a preponderance of the evidence that another plan is a more feasible plan. The court shall order the legally responsible party or parties to fund the implementation of the plan. R.S. 30:29(C)(1).

13. Any appeal shall be a *de novo* review and shall be heard with preference and on an expedited basis. The appellate court may affirm or adopt a more feasible plan.” R.S. 30:29(C)(6)(b)-(c).

14. All damages for evaluation or remediation of environmental damage shall be paid into the registry of the court.” R.S. 30:29(D). Court and LDNR shall retain oversight. R.S. 30:29(F).

15. A party providing evidence upon which a judgment of environmental damage is based shall be entitled to recover costs, including expert witness fees, environmental evaluation, investigation, and testing, the cost of developing a plan of remediation and reasonable attorney fees, attributable to producing that part of the evidence. LDNR and AG also have right to recover costs, including investigation, evaluation, and review costs, expert witness fees, and reasonable attorney fees. R.S. 30:29(E).

16. New law does not preclude “private claims suffered as a result of environmental damage,” which are not required to be paid into registry of the court. R.S. 30:29(H). Therefore, personal injury and other tort claims may be litigated just as they were before Act 312.

17. Settlements of cases are subject to court approval, notice and review by State, and funding of estimated remediation cost into registry of court, except the court may waive these restrictions “if the settlement reached is for a minimal amount and is not dispositive of the entire litigation.” R.S. 30:29(J).

III. Rules

Purpose:

Provide procedural structure to the provisions of Act 312 of 2006 relative to proceedings before the Commissioner for hearings, submittals and approval of plans for clean-up of contaminated E & P sites. The proposed rules will be located in Louisiana Administrative Code 43 XIX. Subpart 1. Chapter 6.

The Ad Hoc Committee

The persons and stakeholders participating on the Ad Hoc Committee were:

1. W. Stephen Walker (Chair) – Office of Conservation
2. William “Bill” Goodell – Plaintiff Attorney
3. John Carmouche – Plaintiff Attorney
4. George Arceneaux – Oil and Gas Industry
5. Carroll Wascom – Environmental Scientist
6. Gary O’Reilly – Paper and Pulp Industry
7. C. A. “Buck” Vandersteen – Louisiana Forestry Association
8. Newman Trowbridge – Louisiana Landowners Association
9. Michael Lyons – Mid-Continent Oil And Gas Association
10. R. Joseph Wilson – Louisiana Oil And Gas Association
11. Gary Snellgrove – Office of Conservation

Definitions

- To strengthen definitions contained in Act 312 and define what is technical data.
- Technical Data - the factual information that will be used by the Commissioner to determine the levels and extent of the contamination.

Commissioner’s Conference

- The Commissioner’s Conference, in the context of Act 312, basically serves the same purpose as a scheduling conference or status conference before a trial court.
- Items to be considered at the conference include the setting of a hearing date, deadlines to release technical data, notices of the hearing to be held, witness and exhibit lists and any other appropriate matters.

Requirements of Plans

A. General Requirements

- Plans are furnished to all parties to the litigation covered by Act 312.
- A statement must be made as to whether the party is proposing to utilize Statewide Order 29-B or the rules of another state agency. If the party seeks to apply the rules and regulations of another state agency, then the party must provide the citation to those rules and regulations.
- If any plan is revised after its submittal, the revisions must be provided to the other parties and the Commissioner in the same manner as the original plan.

B. Specific Requirements of Plans

- The general standards for the remediation of oil and gas sites are found at Statewide Order 29-B. Each plan is required to contain a section comparing the sampling and analysis results with the Statewide Order 29-B criteria.
- All sampling shall be performed in accordance with the protocols set forth in Statewide Order 29-B and the latest revisions of the “Laboratory Procedures for Analysis of Exploration and Production Waste” and must fully delineate the horizontal and vertical extent of the contamination.
- The plans must include a work schedule and an itemized estimated cost schedule.

Requirements of comments and responses

- The comments or responses must be filed and notice provided in the same general manner as plans.
- The comments or responses should either refer to Statewide Order 29-B or contain a citation to the other statutes and rules of another state agency.

Release of technical data

- Any party submitting plan, comment or response that uses technical data must provide such technical data to the other parties.
- If the technical data is located in other filings in the matter, then a reference to their location will suffice.

Mandatory disclosures and new evidence

- The rule requires that any party submitting a plan, comment or response must disclose all ethical data to the other parties, even if the technical data was not used in the reparation of such plan, comment or response.
- If any new technical data becomes available to any party, such party is required to disclose such new technical data

Hearing officer

- The rules require that either the commissioner or hearing officer preside over the hearing.
- If the commissioner appoints a hearing officer, that person must be a licensed Louisiana attorney.

Costs

- The commissioner shall provide the court and parties with an estimate of the costs of conducting the hearing and review of plans, comments and responses.
- The proposed rules allow the money to be deposited in the registry of the court or, with the approval of the court, the funds may be submitted directly to the Office of Conservation.

Rehearings

- Since Act 312 does not make any provisions or allowances for rehearings, rehearings are not allowed.

Rules of conduct and procedure

- The responsible parties present their plan or plans and supporting data first, then the other litigation parties who support the plans make their presentations.
- Any other litigation party then presents their plan or plans and supporting data, any opposition to the responsible parties' plans, and any other support for the litigation parties' plan.
- The responsible parties then have an opportunity to oppose the litigation parties' plans or to provide rebuttal evidence to any opposition to the responsible parties' plans.
- The litigation parties may then provide rebuttal evidence in support of their plans.
- Any witness may be subject to cross-examination by the other parties or by the Office of Conservation staff.
- All parties have the right to make opening and closing statements.

Penalty for non-compliance

- If any party fails to comply with the proposed rules, that party may be precluded from submitting a plan or presenting evidence at any hearing.

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