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2 LEGACY LAWSUIT LEGISLATION: Making the Most of the DNR Public Hearing

by Lou Buatt and Boyd Bryan
Special Counsel, Jones Walker Law Firm

In the 2012 Regular Session, the Louisiana legislature enacted significant changes to the laws governing lawsuits that allege contamination of oilfield sites – the so-called “legacy lawsuits.” The new laws became effective August 1, 2012, but do not apply to any case in which the court on or before May 15, 2012, issued or signed an order setting the case for trial, regardless of whether the trial setting is continued.

Under the new legislation, a defendant may admit liability for environmental damage and limit this admission to responsibility for implementing the most feasible plan to evaluate and, if necessary, remediate some or all of the contamination to applicable regulatory standards (a "limited admission"). Certain consequences – such as responsibility for costs of the Department of Natural Resources ("DNR") and the plaintiffs and waiver of contractual rights to indemnification against punitive damages – may result from a limited admission. Thus, whether to make such an admission in a given case must be carefully considered.

That said, there are benefits to be gained from the DNR pretrial public hearing. If a defendant makes a limited admission, the court is required to refer the matter to DNR and DNR is to conduct a public hearing to approve or structure a plan which it determines to be the most feasible plan to evaluate or remediate the environmental damage. The limited admission, the plan approved by DNR and

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all written comments provided by the state agencies with respect to the plan are subject to certain provisions of the Louisiana Code of Evidence and Code of Civil Procedure, admissible as evidence at trial. Also, any party may subpoena, for purposes of deposition or trial, any employee, contractor or representative of DNR involved in the formulation of the plan approved by DNR, or any agency that reviews and provides comments regarding the plan.

In trials governed by existing (pre-2012 legislation) law, the jury typically has been presented with scientific evidence from the plaintiffs' and defendants' experts regarding the extent of the contamination, the actions required to remediate the property to the applicable standards, and the cost of remediation. The jury has seldom, if ever, heard from

a state regulatory agency with respect to these cleanup requirements. Not surprisingly, the evidence presented by both sides has differed greatly in both the scope and cost of the proposed remediation. Therefore, the jury has been called upon to resolve a battle of the experts where it has lacked the technical expertise to reasonably resolve the differences in the experts' opinions. This process has led to grossly excessive jury awards that have not been used to clean up the property in the manner proposed by the plaintiffs at trial.

The DNR public hearing has the potential to change this dynamic at trial. It interjects an administrative and regulatory process into the litigation. As a result of the DNR public hearing, the jury should hear at trial evidence and testimony from DNR and perhaps other regulatory

agencies – which have the technical expertise and are not the paid experts of any party – regarding the most feasible plan to remediate the contamination and the costs of doing so. This evidence should aid the jury in its decision and could greatly impact the jury verdict.

Thus, in those cases where a limited admission is made, the DNR public hearing will be a critical step in the process and, in fact, could "make or break" the case. A thorough understanding of the regulations and policies that will be applied by DNR and other agencies at the hearing in approving the most feasible plan, and how the agencies have historically interpreted and applied their regulations and worked through issues of overlapping jurisdiction and presently coordinate these activities through a Memorandum of Understanding, is a must. The following are some of the more important considerations.

Statewide Order 29-B. Understanding the regulatory standards and other requirements of DNR's Statewide Order 29-B is imperative. The 29-B regulations include

the General and Specific Requirements for the submission and approval of remediation plans. They also provide authority and a process for exceptions to 29-B and the application of other regulatory standards in lieu of 29-B.

RECAP. DEQ's Risk Evaluation/Corrective Action Program ("RECAP") is a regulatory standard that may apply in addition to or in lieu of 29-B. RECAP establishes risk-based cleanup standards and management options for addressing contaminated sites. While RECAP will not be applicable in every instance, it will be important to demonstrate that the proposed remediation plan is consistent with RECAP. For instance, if the proposed plan requires cleanup of contaminated soils to 29-B standards, but the applicable 29-B standard would not be considered protective of groundwater under RECAP, DEQ would likely provide adverse comments to the proposed plan and suggest that groundwater is not being adequately protected. Accordingly, the best approach will generally be to consider RECAP in

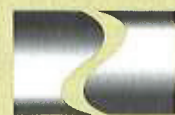
developing the remediation plan to ensure that the proposed cleanup will be consistent with RECAP as well as 29-B.

Coastal Zone Requirements. Additional requirements apply if the site is located in the Louisiana Coastal Zone. For example, a coastal use permit from DNR is required for many activities in the Coastal Zone and a Section 404 permit from the U.S. Army Corp of Engineers may also be required for activities in jurisdictional wetlands under the federal Clean Water Act. Also, by Executive Order in 2008, Governor Jindal ordered all state agencies to administer their programs and functions in a manner consistent with the "Integrated Ecosystem Restoration and Hurricane Protection: Louisiana's Comprehensive Master Plan for a Sustainable Coast" (the "Master Plan") issued by the state and approved by the Louisiana legislature in 2007. An updated Master Plan was approved in March 2012. State law now prohibits DNR from issuing a coastal use permit that is not consistent with the Master Plan. The coastal use regulations also require DNR to consider a

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variety of factors in evaluating whether a proposed activity in the Coastal Zone is in compliance with the coastal use guidelines, including the availability of feasible alternative methods of implementing the activity, the extent of resulting public and private benefits and the proximity to and impacts on important natural features. The regulations further state that it is DNR's policy to avoid to the maximum extent practicable adverse alterations to protective coastal features. These considerations require a balancing

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of the benefits and adverse impacts of the proposed activity.

Remediation plans that propose extensive excavation of or impacts to cheniers, ridges, marsh, wetlands or other

important coastal features may often be inconsistent with the coastal use regulations and the Master Plan, and the benefits of such remediation activities may be outweighed by the adverse impacts. Whether a coastal use permit could be issued for such a plan could be addressed at the DNR public hearing. DNR's evaluation of these factors, and alternative plans that can accomplish the remediation while avoiding or minimizing such adverse impacts, could then be presented to the jury at trial.

The Public Trust Doctrine. The "public trust doctrine," rooted in the Louisiana Constitution, also provides an opportunity for DNR to consider alternative remediation plans – including, but not limited to the plans advocated by the plaintiffs and defendants in the litigation – in its approval or structuring of the most feasible plan. La. Constitution Art. IX, Section 1, provides: "The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy." Notably, the public trust doctrine is incorporated into the definition of "feasible plan" in La. R.S. 30:29 and in Statewide Order 29-B. It is also codified in the Louisiana Environmental Quality Act, which applies to DEQ and is the statutory authority for the promulgation of RECAP and the other DEQ regulations. The doctrine has been determined to be applicable to DNR and DEQ.

The Louisiana Supreme Court and other courts have stated that the public trust doctrine is a "rule of reasonableness" and that "the constitution does not establish environmental protection as an exclusive goal, but requires a balancing process in which environmental costs and benefits must be given full and careful

consideration along with economic, social and other factors." In evaluating a proposed project, an agency should consider, among other things, whether alternative projects would offer more protection to the environment without unduly curtailing non-environmental benefits.

Interestingly enough, historically the public trust doctrine has been used by environmental groups to challenge agencies' environmental permitting actions as well as other environmental-related decisions. The courts in some instances have remanded permits and other actions back to DEQ and DNR where the court determined that the agency's decision and action did not achieve the proper balancing required by the Louisiana Constitution, or the agency record of decision lacked the necessary information or explanation of the agency's balancing of environmental costs and benefits along with economic, social and other factors. This same balancing process may now be used to hold "in check" those plaintiffs who propose remediation plans that are unreasonable, unnecessary or in conflict with state regulations and policy.

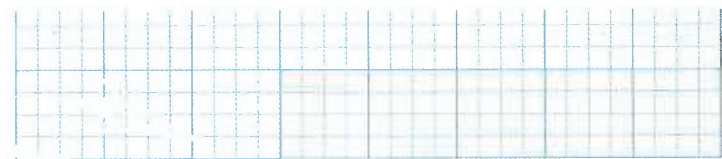
Although the DNR regulations do not provide for a specific regulatory procedure to implement the public trust doctrine, the DEQ regulations establish a procedure that should be consistent with that doctrine. DEQ's Corrective Action Study regulations, which apply in connection with site remediation, require an evaluation of remediation alternative and a balancing of a variety of factors, including: the ability of each remedial alternative to achieve the regulatory standards for cleanup; the long term effectiveness of and performance of each remedial alternative; the relative cost of each alternative; the cost effectiveness of each remedial alternative; the implementability of each alternative (i.e. whether the remediation plan can be permitted by the relevant regulatory agencies and technically can be implemented); and the time it takes to achieve remedial standards. The U.S. Environmental Protection Agency uses a similar process for selecting cleanup plans at contaminated sites. A proper Corrective Action Study should satisfy the constitutional, statutory and regulatory standards for consideration of alternatives and selection of the most

feasible plan consistent with the public trust doctrine.

To summarize, the pretrial DNR public hearing provides the opportunity for DNR and other agencies to evaluate the plaintiffs' remediation plan, the defendants' remediation plan and other alternative plans, and make a determination as to what is the most feasible plan. The defendants should then be able to present DNR's evaluation and determination to the jury at trial, in addition to the testimony of their own experts. Therefore, in order to

make the most of the DNR public hearing, the remediation alternatives and other information to be presented to DNR should be carefully planned and implemented. The results of the public hearing could be persuasive to a jury and have a significant impact on the results at trial or resolving the pending litigation. ●

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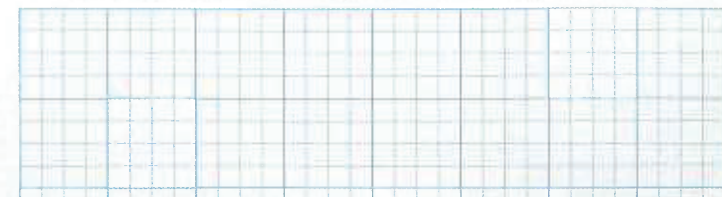


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