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ENVIRONMENTAL GROUP AND THE TULANE ENVIRONMENTAL LAW CLINIC TEAM UP IN LAWSUITS REGARDING AIR COMPLIANCE

Louisiana Environmental Action Network v. U.S. Environmental Protection Agency,
2004 U.S. App. LEXIS 18928 (5th Cir. 9/8/04).

In The Matter of Dow Chemical Co. Louisiana Operations Complex Cellulose & Light Hydrocarbons Plants, Part 70 Air Permit Major Modifications & Emissions Versus Reduction Credits,
2003 2278 (La. App. 1st Cir., 9/17/04), 2004 La. App. LEXIS 2134.

The Louisiana Environmental Action Network ("LEAN"), with legal representation by the Tulane University Environmental Law Clinic, has been active in pursuing lawsuits against industry and regulatory agencies alleging non-compliance with federal and state air requirements.

For example, in *Louisiana Environmental Action Network v. U.S. Environmental Protection Agency,* 2004 U.S. App. LEXIS 18928 (5th Cir. 9/8/04), LEAN challenged certain actions by EPA under the Federal Clean Air Act (CAA), 42 USC § 7401, et seq. Certain background information is necessary to explain LEAN's claim. In 1991, EPA designated the Baton Rouge area (which encompasses the Parishes of Ascension, East Baton Rouge, Iberville, Livingston, and West Baton Rouge) as a "serious" ozone non-attainment area under the CAA, meaning it was not in compliance with the National Ambient Air Quality Standards ("NAAQS") for ozone. EPA gave the Baton Rouge area a deadline of November 15, 1999 to achieve compliance. When it failed to meet its November 15, 1999 deadline, EPA, in accordance with the CAA, "bumped" the Baton Rouge area from "serious" to "severe" non-attainment status, established a November 15, 2005 deadline for coming into compliance and imposed additional regulatory requirements that are applicable to "severe" non-attainment areas. As required under the CAA, Louisiana had submitted to EPA a plan known as a state implementation plan (SIP) specifying emission limitations and additional steps it would take to attain compliance with the NAAQS. By law, the SIP was required to include specific contingency measures to be undertaken if the area failed to comply by the applicable deadline.

In the lawsuit, LEAN challenged, among other things, EPA's September 2002 approval of the "substitute" contingency measures proposed by Louisiana under its SIP. The substitute contingency measures required

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that the Trunkline Gas Company – Patterson Compressor Station ("Trunkline") facility in St. Mary Parish — which is outside of the Baton Rouge area — permanently reduce its VOC emissions by 6.1 tons per day from the 1990 emission levels. The Trunkline facility had installed a flare in 1998 to reduce its volatile organic compounds ("VOC") emissions to comply with certain Louisiana regulatory requirements. EPA found that these substitute contingency measures, which required a greater reduction in volatile organic compounds ("VOC") emissions than required under the previous contingency measures, would result in lower emissions and comply with the CAA. LEAN challenged EPA's approval of the substitute contingency measures on three grounds.

First, LEAN contended that the agency erred in approving an emissions reduction at the Trunkline facility that occurred in 1998, one year before the Baton Rouge area missed its November 15, 1999 ozone attainment deadline. LEAN argued that EPA should not have approved this contingency measure because the reduction was not prospective in nature, i.e., it had been implemented many years earlier. The court rejected this argument. It found that the statute was silent as to whether emissions reductions that originate prior to the SIP's failure to achieve attainment, but that continue in effect after such failure, may be utilized as a contingency measure under the CAA. It agreed with the EPA that allowing early reductions to be used as contingency measures comports with the purposes of the CAA by encouraging non-attainment areas to implement contingency measures prior to the attainment deadline thereby complying with the CAA's mandate to achieve compliance as "expeditiously as practicable."

Second, LEAN argued that the continuing Trunkline facility emissions reduction could not be a valid contingency measure because it was required by Louisiana law, and an emission reduction that is already required by law cannot be a future contingency measure. The court did not address the merits of this argument, finding that LEAN had failed to raise it timely during the public comment period as required under the applicable regulations.

LEAN was successful, however, on its third argument. LEAN contended that EPA erroneously approved the Trunkline facility emissions reductions as a contingency measure without adequately demonstrating that those reductions would have positive effects in the Baton Rouge area. The Trunkline facility is located in St. Mary Parish, approximately 40 kilometers from the Baton Rouge non-attainment area. The court determined that the CAA did not clearly indicate whether emission

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reductions from outside of the non-attainment area could be considered as valid contingency measures. It considered an unpromulgated 1997 EPA policy stating that such emissions reductions could be considered as contingency measures to be unpersuasive. Because the court found no support in the record to show that emissions reductions at sources in attainment areas outside the Baton Rouge area — including the Trunkline facility – would reasonably aid the Baton Rouge area in its quest for ozone attainment, the record failed to support EPA's decision. Accordingly, the court remanded the matter to EPA for additional investigation or explanation.

In a second case, entitled *In The Matter of Dow Chemical Co. Louisiana Operations Complex Cellulose & Light Hydrocarbons Plants, Part 70 Air Permit Major Modifications & Emissions Versus Reduction Credits*, 2003 2278 (La. App. 1st Cir., 9/17/04), 2004 La. App. LEXIS 2134, LEAN sought judicial review of two final permit decisions by the Louisiana Department of Environmental Quality (LDEQ). The permit decisions allowed increases in VOC emissions at two Dow facilities based on a VOC Emission Credit Application that had been previously approved by LDEQ. The VOC emission credits had resulted Dow's 1992 closure of a wastewater pond and its replacement with a floating roof tank. LEAN argued, among other things, that LDEQ erroneously allowed Dow credits for the 1992 emissions reductions because those reductions were already required by law and also that LDEQ had failed to make sufficient findings, supported on the record, justifying its permit decision as required under the Louisiana Supreme Court's decision in *Save Ourselves, Inc. v. Louisiana Environmental Control Commission*, 452 So.2d 1152 (La. 1984). The Louisiana First Circuit Court of Appeal showed considerable deference to LDEQ's decisions. It affirmed LDEQ's approval of the permit modifications, finding that LDEQ had "painstakingly conducted and documented its thorough analysis in compliance with its constitutional mandate."

To sum up, although they have achieved varying degrees of success thus far, LEAN and the Tulane University Environmental Law Clinic appear to be keeping close tabs on the regulatory agencies and Louisiana industry with respect to their compliance with air requirements.

- Boyd Bryan

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FEDERAL COURT ENJOINS WETLANDS PERMIT, BLOCKS RESIDENTIAL DEVELOPMENT IN ST. TAMMANY PARISH

O'Reilly v. U.S. Army Corps of Engineers,
2004 U.S. Dist. LEXIS 15787 (E.D. La. 8/10/04)

On August 10, 2004, the United States District Court for the Eastern District of Louisiana, Judge Zainey presiding, enjoined the issuance of a U.S. Army Corps of Engineers Section 404 of the Clean Water Act permit, which authorized a private developer to dredge and fill 81.58 acres of land in St. Tammany Parish to develop a residential subdivision. 39.54 acres of the land were jurisdictional wetlands. The Corps issued the permit to the developer in December of 2003 for the project, known as Phase I of Timber Branch II.

In complying with environmental statutes, including the National Environmental Policy Act (NEPA), the Corps issued a Finding of No Significant Impact based on mitigation conditions associated with the permit. The Corps did not do a full-blown environmental impact statement (EIS) because it viewed the permit conditions, and the mitigation measures required to offset the wetland impacts, to be adequate. The site consisted of a thriving habitat for wildlife. The mitigation consisted of compliance with local flood plan regulations, a vegetated buffer, and the purchase of credits from a mitigation bank.

The Corps permitted the first phase of the project in the context of considering only vaguely the cumulative impacts of 72 already issued permits within a three-mile radius of the proposed site in fast-growing St. Tammany Parish. In addition, although the developer had excluded two other phases of the project from its revised permit application, they were expected to follow.

The court considered the Corps' actions as piece-mealing in violation of NEPA. It found the Corps acted arbitrarily, capriciously or abused its discretion in issuing the permit because the Corps failed to adequately explain how the required mitigation measures would remove or reduce the adverse impacts of the project and failed to provide an in depth analysis of the cumulative impact of the project, in light of the 72 previously issued permits in that area and the two additional planned phases of the development. It held that the Corps erred in issuing the permit without a full-blown EIS and enjoined the permit, thereby blocking the development.

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The case may signify an end to wetlands development in St. Tammany Parish. Few developers have time to do an EIS or cumulative impact study of a parish to the extent required by the court. The Corps may appeal the decision.

Jones Walker has won several cases involving development (malls, residences, etc.), in wetlands in St. Tammany Parish, by successfully arguing the validity of the permit or procedural issues such as lack of standing, mootness or compliance with the Administrative Procedures Act.

- *Stan Millan and Boyd Bryan*

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POST-HARVEST BURNING OF BLUEGRASS FIELDS NOT REGULATED UNDER RCRA

Safe Air For Everyone v. Meyer,
373 F.3d 1035 (9th Cir. 7/1/04)

In a decision that may be of interest to Louisiana sugar cane farmers and others in the agriculture industry, the U.S. Ninth Circuit Court of Appeal in California has held that the "open burning" of the straw and stubble remaining after the harvest of Kentucky bluegrass seed is not subject to regulation under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901, et seq.

The plaintiff in the suit was Safe Air For Everyone (Safe Air), a non-profit corporation formed by individuals from northern Idaho, Washington, and Montana. Sage Air named as defendants 75 farmers that plant and harvest Kentucky bluegrass seed commercially in Idaho and engage in open burning. Safe Air filed the suit under the RCRA citizen suit provision, 42 U.S.C. § 6972(a)(1)(B), which permits actions against:

> Any person… who has contributed or is contributing to the past or present handling, storage, treatment, transportation, or disposal of any *solid or hazardous waste* which may present an imminent and substantial endangerment to health or the environment. (italics added)

Safe Air alleged that smoke resulting from open burning of the bluegrass fields endangers the public because it contains high concentrations of pollutants that create severe respiratory problems for residents in areas surrounding bluegrass fields. It sought an injunction prohibiting the farmers from engaging in open burning.

The court first considered the process of planting and harvesting Kentucky bluegrass seed. It explained that bluegrass is typically planted in the spring but does not flower and produce seed until the summer of the following year. By that time, the bluegrass plants are 15 to 36 inches tall. To harvest the seed, farmers first cut the crop close to the ground to prepare it for combining (i.e., separating the seed from the crop). A "curing" process then dries out and ripens the head of the crop, after which a combine separates the seed from the straw, leaving the straw on the field. The seed is prepared for commercial distribution. However, the straw and stubble (the part of the crop not cut from the ground) remain on the field.

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Bluegrass farmers burn these remnants in a practice called "open burning." The farmers can repeat this process for several years, depending on the length or the productive life of each bluegrass field.

The case turned on whether the straw and stubble remaining after the harvest of Kentucky bluegrass is "solid waste" within the meaning of RCRA. The court noted that RCRA defines "solid waste" as "any garbage, refuse, sludge from a solid waste treatment plant, water supply treatment plant, or air pollution control facility and *other discarded material*, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations. . . ." 42 U.S.C. § 6903(27). Although RCRA does not define the term "discarded material," the court observed that the verb "discard" is defined by dictionary and usage as "cast aside; reject; abandon; give up."

The farmers contended that they do not "discard" the bluegrass residue but instead reuse it in a continuous process of growing Kentucky bluegrass. They presented evidence showing that the bluegrass residue contains nutrients that are beneficial to the fields when returned to the soil and that the grass residue is an integral component in the open burning process because it carries fire efficiently across the bluegrass fields. They further demonstrated that the open burning process provides four critical benefits for Kentucky bluegrass farmers, by extending the productive life of bluegrass fields, restoring beneficial minerals and fertilizers to the fields, reducing or eliminating insects on the fields and thereby reducing the need for pesticide use, and blackening the soil, which maximizes the its sunlight absorption and thereby increases the yield of the following crop.

Safe Air did not dispute the farmers' arguments regarding the benefits of open burning. Instead, it contended that the primary benefit to the farmers from open burning is the removal of the grass residue and that the other benefits of the grass residue are incidental to the farmer's goal of removing the residue. Safe Air, therefore, argued that the grass residue was "discarded" within the meaning of RCRA.

The Ninth Circuit disagreed. It held that in light of the undisputed evidence that the farmers reused the grass residue in a continuous farming process effectively designed to produce Kentucky bluegrass, the grass residue was not "discarded material," and therefore was not "solid waste," within the meaning of RCRA. As a result, the court affirmed the summary judgment that had been granted by the lower court dismissing Safe Air's suit.

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In concluding, the court noted that any opening burning of bluegrass residue must comply with the federal Clean Air Act and any applicable state regulations. It observed, however, that Safe Air had not alleged that the farmers' conduct was in violation of the Clean Air Act or any Idaho regulation pertaining to air quality, that the record suggested that the farmers had complied with federal and state air quality standards and that Idaho had not outlawed generally the practice of burning Kentucky bluegrass.

- *Boyd Bryan*

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FINE FOR FAILING TO COMPLY WITH EPA INFORMATION REQUEST UPHELD

United States v. Gurley,
6th Cir., No. 03-5132, 9/21/04, 2004 U.S. App. LEXIS 19550 (6th Cir. 2004).

The U.S. Sixth Circuit Court of Appeals recently affirmed the imposition of a $1,908,000.00 civil fine levied against the president and majority stockholder of an oil refining company for his persistent refusal to comply with an EPA information request. The CERCLA §104 (e) information request, issued in February 1992, sought information concerning oil waste dumping activities by Gurley Refining Company ("GRC") over the course of several years at the South Eighth Street landfill in West Memphis, Arkansas, a national priority list site, and about Gurley's assets. Gurley refused to respond to the requests, stating that all inquiries should be sent directly to GRC, and claiming that he had already provided the information sought in a prior deposition. The United States then filed an enforcement action against Gurley for failing to respond. Following a substantial delay due to a bankruptcy action filed by Gurley that was ultimately dismissed, the district court granted the government summary judgment, and, in June 1999, imposed the $1.9 million penalty pursuant to its authority under 42 U.S.C. § 9604(e)(5)(B).

Gurley appealed the penalty on numerous grounds, including that the district court had abused its discretion in awarding the penalty, and that the penalty violated the Excessive Fines Clause of the U.S. Constitution. The court found that an EPA information request is valid if it is within the authority of the agency, if it is definite, and if the information is reasonably relevant, as here. The Sixth Circuit affirmed the penalty, noting that it could have been much higher in light of both Gurley's "willful noncompliance for a period of seven years" and the $25,000 per day maximum penalty allowed by law. The government had also argued that they had incurred millions of dollars in extra costs by having to pursue the needed information from other sources.

While this matter involved a CERCLA information request, this ruling will no doubt be touted by EPA and DOJ to support their efforts in issuing information requests under CERCLA and other environmental statutes.

- Eric Whitaker

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LOUISIANA CREATES BROWNFIELDS CLEANUP REVOLVING FUND

SB 468/Act 655/La. R.S. 30.2551 and 2552

In an effort to encourage and facilitate cleanup, development and reuse of brownfields, the Louisiana Legislature created the Brownfields Cleanup Revolving Loan Fund Program in the 2004 legislative session. A "brownfield site" is "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant."

The Louisiana Department of Environmental Quality will administer this program, for which federal grants and state appropriations will provide the capital. Money from the Brownfields Cleanup Revolving Loan Fund ("Fund") may be used: 1) to make loans from the Fund at or below market interest rates; 2) to assist a political subdivision, public trust, quasi governmental organization or eligible nonprofit or private entity to remediate eligible brownfields' properties; 3) to fund brownfield-related programs; or 4) to make any other expenditures consistent with the terms of the federal grant or state appropriation.

The DEQ also was tasked with adopting rules and regulations to implement the program and provide rules governing: 1) eligibility requirements of the entity or person and properties; 2) criteria for ranking and selecting applicants; 3) procedures for making and repaying loans; 4) requirement of security for loans to eligible non-profits and private entities; and 5) establishment of procedures for interest rates on loans. DEQ must provide a report on all loans made, their status, and monies expended from the fund to the House and Senate Committees on environmental quality by March 1, 2005 and annually thereafter. The law went into effect on August 15, 2004.

The new law authorizes any political subdivision, public trust, quasi-governmental organization, or eligible nonprofit or private entity to make a loan from the Fund if approved by the State Bond Commission and by resolution of the governing authority of the organization making the loan. The entity making the loan can dedicate and pledge any revenues the entity has available.

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The DEQ must determine that the applicant has the ability to repay the loan and authorizes DEQ to require security for the loans. Responsible persons as defined by R.S. 30:2285.2, are not eligible to apply for or receive loans.

- Tara Richard

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2001 AMENDMENTS TO INNOCENT LANDOWNER DEFENSE TO CERCLA LIABILITY DO NOT APPLY RETROACTIVELY, A FEDERAL DISTRICT COURT HOLDS

1325 "G" Street Associates v. Rockwood Pigments NA, Inc.,
No. 02-1622, 2004 WL 2191709 (D. Md. Sept. 7, 2004)

A federal district court in Maryland has ruled that the new, additional elements of the innocent landowner defense to liability under CERCLA imposed by the 2001 Small Business Relief and Brownfields Revitalization Act (the "Brownfields Amendments") do not apply retroactively. Rather, the court held that the applicability of the innocent landowner defense must be judged under the standards in effect at the time the significant events in the case occurred. Although the court suggested that those events were the investigations undertaken by state and federal regulatory agencies beginning in 1986, the court ultimately framed its inquiry as whether the plaintiff "conducted 'all appropriate inquiry' into the property, consistent with good commercial practice at [the time it acquired the property in 1982]."

The court explained that the Brownfields Amendments altered the innocent landowner defense in "four important ways." First, the court stated that, under the new standard, a landowner must demonstrate that it has provided "full cooperation, assistance, and facility access to the persons that are authorized to conduct response actions at the facility," including permitting access to the facility for installing, operating and maintaining remediation systems. 42 U.S.C. § 9601(35)(A). The Brownfields Amendments also altered the "all appropriate inquiry" standard from one that must be "consistent with good commercial or customary practice" to one that must be "in accordance with generally accepted good commercial and customary standards and practices." 42 U.S.C. § 9601(35)(B)(i)(I). The third change identified by the court was the enactment of extensive criteria for the EPA to include in regulations for determining whether a landowner sufficiently has made "all appropriate inquiries." 42 U.S.C. § 9601(35)(B)(iii). Finally, the court explained that under the new standard, a landowner must show that it "took reasonable steps" to stop any continuing release, prevent any threatened future release, and prevent or limit exposure to any previously released hazardous substance. 42 U.S.C. § 9601(35)(B)(i)(II)(aa)-(cc).

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In light of these new requirements, the court found that the Brownfields Amendments "impose additional substantive requirements for use of the innocent landowner defense" because they "unquestionably attach 'new legal consequences' to events that occurred before their enactment by 'alter[ing] the legal standards that are applied in reviewing the merits of [Plaintiff's] claims.'" Accordingly, mindful of the presumption against retroactive legislation and the absence of any clear intention in the Brownfields Amendments that they be given retroactive application, the court refused to apply the new standards retroactively to evaluate conduct that occurred before their enactment.

It is noteworthy that courts have generally considered CERCLA liability to be retroactive.

The court's holding follows that reached in *United States v. Domenic Lombardi Realty, Inc.*, 290 F. Supp. 2d 198 (D.R.I. 2003).

– Aimee M. Quirk

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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding this E*Zine or this practice group, please contact:

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