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U. S. Supreme Court Limits Corps of Engineers Jurisdiction Over Wetlands

The U. S. Supreme Court handed down its ruling on January 9, 2001 in *Solid Waste Agency of Northern Cook County v. United Army Corps of Engineers*, No. 99-1178, cert. granted, 120 S.Ct. 2000 (U.S. 2000), slip op. January 9, 2001, reversing a lower court's ruling supporting the Corps' claim of authority over isolated wetlands of the United States. The Court heard oral argument on October 31, 2000. The Corps had claimed jurisdiction under its authority of Section 404 of the Clean Water Act over historically diked areas and scattered depressions containing alleged waters of the United States, including ponds and wetlands. The Corps' main assertion of jurisdiction was that the ponds and wetlands served as habitat or potential habitat for migratory waterfowl. The Supreme Court rejected the Corps' claim of jurisdiction and held that ponds that were not adjacent to open water, were not or had not been navigable in fact or which could not reasonably be so made, were not within the Corps' Section 404 jurisdiction. The Supreme Court also rejected the Corps' argument that the "migratory bird rule" provided the Corps with a basis for claiming jurisdiction. This decision opens the door to land owners and developers to question the Corps' claim of jurisdiction over many inland wetlands in Louisiana. We have been watching this issue for several clients and will be following the Corps' and EPA's reactions to this decision.

Louisiana Considers Regulating Use of Groundwater

All industrial, agricultural and food producing interests should carefully monitor the progress of Senate Bill No. 1 as it makes its way through the Louisiana Legislature.

Recently, groundwater use by industry has become a hot topic with several environmental groups and individuals. Senator Cain, Chairman of the Senate Committee on Environmental Quality, has sparked interest by forming an ad hoc committee to study groundwater consumption in Louisiana and alerting the public to his concerns and his efforts to address the issue. Senator Cain and Representative Damico have drafted Senate Bill No. 1, which would regulate the use of groundwater. A preference for groundwater usage would be established, with drinking and domestic use given the highest priorities, followed by agriculture and food production. Industrial usage would receive the lowest preference. The bill would create a seven member board whose duties would include issuing permits for those entities wishing to extract 1,000,000 gallons or more per day.

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The board would also be empowered to issue penalties and order groundwater well closures if the permittee exceeds the amount of groundwater allowed or uses the water for a non-permitted purpose. The bill would incorporate a tax incentive, contingent upon the availability of funds and legislative approval, for industrial and agricultural users who reduce groundwater consumption through conservation measures or alternative means. All wells registered with the Department of Public Works pursuant to Revised Statute, R.S. 38:3094 would be grandfathered into the program and verification of registration would serve as the permit for groundwater use. The grandfathered entity could not exceed the amount reported under the registration regulation and would be prohibited from selling or transferring groundwater to others. A copy of this proposed legislation is available from Jones Walker's Environmental and Toxic Tort Group upon request.

Louisiana DEQ Proposes Voluntary Cleanup Regulations

Of interest to developers as well as owners of commercial and industrial property, on December 20, 2999, the Louisiana Department of Environmental Quality (LDEQ) proposed its voluntary cleanup program (VCP) regulations. See 26 La. Reg. 2853. These regulations would implement the VCP statutory provisions, which LDEQ has used only sparingly since the program was adopted in 1995. Louisiana's VCP program allows certain parties, upon entering into a cooperative agreement with LDEQ, and conducting approved remedial actions, to obtain a transferable certification of completion and become exempted from remediation liability under Louisiana law for certain actions and levels of cleanup on "Brownfields." LDEQ also expects to obtain a Memorandum of Agreement with EPA, soon after the proposed regulations are final, which may further protect VCP parties from federal CERCLA liability. Written comments on the proposed rule are due February 1, 2001.

Punitive Damages Not Quite Dead in Louisiana

In a September 6, 2000 decision, the Louisiana Fourth Circuit Court of Appeal allowed the plaintiffs in an occupational asbestos exposure wrongful death suit to pursue a claim for punitive damages, even though the decedent's exposure to asbestos had occurred years before the statute allowing for such damages was enacted. *Anderson v. Avondale Industries, Inc.*, 00-0775 (La. App. 4 Cir. 9/6/00), 769 So.2d 653.

JONES WALKER

E*ZINES
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Louisiana Civil Code Article 2315.3, which made punitive damages available in cases involving the improper storage, handling and transportation of hazardous materials, was in effect from September 1, 1984 through April 16, 1996. However, the employee in this case, Mr. Anderson, was exposed to asbestos years earlier, from 1968 until 1980.

In ruling that the plaintiffs could seek punitive damages, the court focused on the date of Mr. Anderson's death in 1994 -- not the date of his alleged exposure to asbestos. The court concluded that the law in effect at the time of Mr. Anderson's death should be applied when determining whether punitive damages are available. Because Mr. Anderson died during the window of time in which the punitive damages statute was effective, his widow could seek these damages from the defendants.

The defendants have appealed the Fourth Circuit's decision to the Louisiana Supreme Court. A motion to consolidate has been filed, which could merge this appeal with a similar previous Fourth Circuit decision currently up for review before the Supreme Court, *Bulot v. Intracoastal Tubular Services, Inc.*, 98-2105 (La. App. 4 Cir. 5/17/00), 761 So.2d 799. In *Bulot*, the Fourth Circuit also applied the law in effect at the time of the death of certain employees allegedly harmed by occupational exposure to radioactive and hazardous materials while cleaning oil field equipment. Thus, the wrongful death suits brought by the relatives of these employees could include claims for punitive damages, so long as the punitive damages statute was in effect at the time of their deaths.

Other Recent Opinions

DEQ Permit Upheld

In the Matter of *Natural Resources Recovery*, 19th Judicial District Court, Docket Number 446-408, Division H. On November 20, 2000, the Honorable J. Michael McDonald dismissed Louisiana Environmental Action Network's (LEAN) lawsuit challenging a permit issued by the Louisiana Department of Environmental Quality ("LDEQ") to a construction and demolition debris disposal and reclamation facility near Baton Rouge, Louisiana. This case was heard by the judge on remand from the First Circuit Court of Appeals. LEAN raised two issues before the district court: LDEQ's violation of the permitted waste capacity statute and denial of due process.

JONES WALKER

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Judge McDonald found that LEAN was not denied due process because its comments on the facility's permit were considered by LDEQ. On the waste capacity issue, the judge granted appellee's motion to strike LEAN's argument because appellants had not raised that issue before LDEQ in the administrative proceedings, nor previously in the pleadings of the case. Of significance, the judge found that the exhaustion of administrative remedy doctrine incorporated in La. R.S. 30:2014.3 was applicable to this case, because appellants had failed to raise the permitted waste capacity issue before LDEQ. The statute was enacted to legislatively overrule In the Matter of *Rubicon, Inc.*, which had held that if appellant's assignment of error in its petition for review implies an issue, the court may address the issue when necessary to fulfill its constitutional duty. 670 So. 2d 475 (La. App. 1st Cir. 1996). Jones Walker represented the appellee before the court.

Cost-Benefit Analysis for Air Rules Before U.S. Supreme Court

American Trucking Industry v. EPA, No. 99-1426, cert. granted.120 S. Ct. 2193 (U.S. 2000). The Supreme Court will decide the constitutionality of EPA's rules regulating ozone and particulate matter of less than 10 microns in diameter (PM-10). The Court is also anticipated to review a potentially broader issue of whether EPA can perform a cost-benefit analysis in setting air regulations. Oral argument was held on November 7, 2000, and a ruling is anticipated this year. Stakes are high for the regulated community. If the EPA's rule stands, compliance will be difficult. If the Supreme Court rules that cost-benefit analysis is required, then this and other future efforts by EPA to strengthen air standards will have to consider the potential high costs of implementation.

Wetlands Issue Before Fifth Circuit

Decisions in two recently decided wetlands cases should be of interest to developers.

In *Bayou Liberty Association v. U.S. Corps of Engineers*, U.S. Fifth Circuit Court of Appeals, No. 98-31260, July 19, 2000, at 217 F3d 393, the court dismissed a suit challenging Wal-Mart/Sam's , et al's permit issued by

the Corps involving construction of a shopping center on some fifty acres. The developers intervened to protect their property rights.

The plaintiffs argued that the Corps had not conducted a sufficient impact study as to present and future wetland losses and that the project would cause increased flooding. The plaintiffs were unsuccessful in having the work stopped, which proceeded during the course of legal proceedings. The lower court, in dismissing the suit, held that the Corps had not acted in an arbitrary or capricious manner, but rather was reasonable in considering issues raised by the public during the permitting process.

During the appeal, the mall was completed. The Appellate Court ruled that substantial completion rendered the matter moot, as the project plaintiffs were trying to stop had been completed. The Court refused to render an advisory opinion on how to assess cumulative impacts in future cases

In *Save Our Wetlands v. Col. William Conner*, U.S. District Court , Eastern District of Louisiana, No. 98-3625, July 20, 2000, 2000 U.S. LEXIS 10496, plaintiffs challenged a permit issued by the Corps of Engineers for development of a marina in wetlands isolated from Lake Pontchartrain. Plaintiff challenged the adequacy of the environmental assessment in connection with the permit. The court dismissed the case, holding that while agencies should consider cumulative impacts, that duty was reasonably satisfied in this case.

In summary, *Bayou Liberty* holds that if plaintiffs are unable to obtain a preliminary injunction to stop a project early on, and the project is essentially completed during litigation, it is quiet likely that the case will be dismissed. *Save our Wetlands* indicates that landowner's consultants should draft their own cumulative impact assessment for consideration by the Corps of Engineers. Jones Walker attorneys represented the landowner/s in each of these cases.

Cleanup Contractor At Risk For CERCLA Liability

Geraghty & Miller, Inc. vs. Conoco, Inc., U.S. Fifth Circuit Court of Appeals, No. 99-20020, December 14, 2000, 2000 U.S. App. Lexus 31831. The U.S. Fifth Circuit affirmed in part, reversed in part, and remanded for future proceeding a dispute between companies ordered to conduct subsurface contaminant investigations and clean-up and its environmental contractor retained to install monitoring wells in furtherance of that investigation/clean-up effort.

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In response to various cross motions for partial summary judgment on CERCLA and State law claims, the Fifth Circuit allowed the companies at issue to pursue claims against the contractor under CERCLA contending that the contractor is a CERCLA operator and arranger on account of allegedly faultily constructed monitoring wells. The Court did conclude that the contractor was not a CERCLA transporter. The Fifth Circuit remanded the matter back to trial court to take evidence on the extent to where the contractor has control over the wells and the movement of contaminants on and under the site. This ruling potentially expands the potential liability of environmental contractors beyond allocations of liability under the parties' contract.

Texas Considering Rules for Marine Emissions

The Texas Natural Resource Conservation Commission (TNRCC) is presently evaluating public comments to determine options for rulemaking regarding emissions emanating from marine vessels while at berth. The TNRCC has concluded that the current new source review permitting program does not account for such emissions. The TNRCC's staff position appears to be that such other emissions must be included unless the shore side operator can demonstrate otherwise. Under study is the effect on minor and new source review determinations, the effect on federal permitting, and the potential effect on maximum achievable control technology requirements. Refineries, chemical plants, terminal facilities, and other industrial concerns with waterfront operations should monitor this matter closely.

Has Your Company Implemented an Environmental Compliance Program ?? Don't Get Caught Short !!!

There now exists a heightened focus by prosecutors and regulators on the enforcement of environmental laws. Violations once treated as civil enforcement matters are now prosecuted as criminal matters under environmental statutes. Officers, managers and employees face possible felony prosecutions, not just misdemeanors charges. Individuals can and have been sentenced to multi-year prison terms for violation of environmental laws. A finding of simple negligence, i.e. the failure to use due care under the circumstances, can support a criminal conviction under the Clean Water Act.

Under the emerging "responsible corporate officer" doctrine, personal liability may be established by showing implied or assumed knowledge based upon an individual's position in a company. General oversight responsibility can lead to a conviction and there is no requirement that the person charged had hands-on involvement in the actions resulting in the violation.

In view of heightened environmental sanctions to companies and their managers and personnel, an effectively designed and implemented Environmental Compliance Program is now a fundamental necessity for virtually every type of industrial and commercial operation.

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 these issues, contact:

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