

The following is a summary of the various regulatory changes published by the Louisiana Department of Environmental Quality as well as a list of rule changes/notices of intent affecting the Louisiana Department of Natural Resources as published by the Louisiana Register from July through November, 2009.

Included with this report is an update addressing the latest on the *Tensas Poppadoc v. Chevron* case as it relates to Act 312 procedure as well as a summary of the recent “Legacy Case” decision by the Louisiana First Circuit Court of Appeal in *Marin, et al. vs. Exxon Mobil, et al.*

## I. REGULATORY UPDATE

### A. LDEQ Regulatory Changes: July – November, 2009\*

<b>November</b>	<b>Publication Date</b>	<b>Status</b>	<b>Hearing Date</b>	<b>Comment Deadline</b>
Statutory Exemption for Air Permits [LAC 33:III.501]  AQ270	11/20/2009	Final	Expired	Expired
Integration of MACT Standards [LAC 33:V.3105]  HW105ft	11/20/2009	Final	Expired	Expired
<b>October</b>				
2008 State Implementation Plan (SIP) General Revisions  0910Pot1	10/20/2009	Potpourri	11/24/2009	12/1/2009
Declaratory Ruling No. DR-09-004  0910Pot2	10/20/2009	Potpourri	None	None
Methods of Payment (LAC 33:I.1203, 1411, 1911, 2305, 2307; III.215; V.5111, 5119, 5127; VI.709, 917; VII.1505; IX.1309, 1507; XI.307; XV.2509)  MM009	10/20/2009	Final	Expired	Expired
<b>September</b>				
Development of Antidegradation Implementation Procedures.  0909Pot1	9/20/2009	Potpourri	None	10/23/2009
Integration of MACT Standards [LAC 33:V.3105]  HW105ft	9/20/2009	Proposed	10/29/2009	10/29/2009

Miscellaneous Corrections [LAC 33:V.105, 321, 1513, 1529, 3005, and 3105; VII.715 and 1101; IX.5903; and XI.1121]				
*Sent to the Legislative Oversight Committees on 8/11/09	9/20/2009	Final	Expired	Expired
MM010				
Training Requirements for Underground Storage Tank System Operators [LAC 33:XI.601, 603, 605, 607, 609, and 611]	9/20/2009	Proposed	10/29/2009	11/5/2009
UT017				
<b>August</b>				
Advance Notice of Rulemaking and Solicitation of Comments on Organic Solvents and Solvent Degreasers, Log #AQ307 [LAC 33:III.111 and 2123]	8/20/2009	Potpourri	9/24/2009	9/24/2009
0908Pot1				
Baton Rouge Area Ozone Attainment Demonstration State Implementation Plan Revision	8/20/2009	Potpourri	9/24/2009	9/24/2009
0908Pot2				
Baton Rouge Area Redesignation Request and 1997 8-Hour Ozone Maintenance Plan	8/20/2009	Potpourri	9/24/2009	9/24/2009
0908Pot3				
Control Techniques Guidelines (CTG) State Implementation Plan (SIP)	8/20/2009	Potpourri	9/24/2009	9/24/2009
0908Pot4				
Interstitial Monitoring Requirement for Emergency Power Generator UST Systems [LAC 33:XI.101 and 303]	8/20/2009	Final	Expired	Expired
UT016				
Louisiana Water Pollution Control Fee System Regulation [LAC 33:IX.1309, 1311, 1313, 1315, 1317, and 1319]	8/20/2009	Final	Expired	Expired
WQ070				
<b>July</b>				
Sewage Sludge and Biosolids Use or Disposal [LAC 33:IX.7301]	7/20/2009	Emergency	none	none
WQ078E				
Advanced Notice of Initiation of the Triennial Revision of the	7/20/2009	Potpourri	None	None

Water Quality Standards, [LAC 33:IX.Chapter 11]  0907Pot1				
Extension of Comment Period for Advanced Notice of Rulemaking on Criteria Pollutant Emissions Inventory, Log #AQ300 [LAC 33:III.111, 311, 501, 605, 918, 919, 1513, 2115, 2153]  0907Pot2	7/20/2009	Potpourri	None	None
Abrasive Blasting [LAC 33:III.1327 and 1333]  AQ303	7/20/2009	Final	Expired	Expired
Methods of Payment [LAC 33:I.1203, 1411, 1911, 2305, 2307; III.215; V.5111, 5119, 5127; VI.709, 917; VII.1505; IX.1309, 1507; XI.307; XV.2509]  *Sent to the Legislative Oversight Committees on 9/9/09  MM009	7/20/2009	Proposed	8/25/2009	9/1/2009

\*As Published by LDEQ. See [www.deq.louisiana.gov](http://www.deq.louisiana.gov)

LDEQ Prefix Key

- AQ - Air Quality
- HW - Hazardous Waste
- MM - Multi Media
- UT - Underground Storage Tanks
- WQ - Water Quality

**B. Louisiana Department of Natural Resources Rule/Notices of Intent Published in the Louisiana Register for July - November, 2009**

**November:**

<u>Rules/Notices of Intent</u>	<u>Page No.</u>
1.) Office of Conservation—Fees (LAC 43:XIX.701, 703, and 707)	2463

**Comment:** Amends LAC 43:XIX.701, 703, and 707 (Statewide Order No. 29-R) in accordance with the provisions of the Administrative Procedure Act, R.S. 49:950 et seq. The action will adopt Statewide Order No. 29-R-09/10 (LAC 43:XIX, Subpart 2, Chapter 7), which establishes the annual Office of Conservation Fee Schedule for the collection of Application, Production, and Regulatory Fees, and will replace the existing Statewide Order No. 29-R-08/09.

- 2.) Pit Closure and Onsite Disposal of E and P Waste  
(LAC 43:XIX.311 and 313)

2464

**Comment:** This rule amends LAC 43:XIX, Subpart 1 (Statewide Order No. 29-B), Chapter 3 (Pollution Control—Onsite Storage, Treatment and Disposal of Exploration and Production Waste (E&P Waste) Generated from the Drilling and Production of Oil and Gas Wells (Oilfield Pit Regulations)).

The development of the Haynesville Shale in North Louisiana is made possible through the use of hydraulic fracture stimulation technology which requires the use of large quantities of fluids which are primarily composed of freshwater taken from either surface water reservoirs or groundwater aquifers. This has placed strain on the limited freshwater aquifer resources of the region.

The intent of the amendment is to conserve these freshwater aquifer resources by allowing the limited use of Exploration and Production Waste as a substitute for the fluids required to perform fracture stimulation operations on the Haynesville Shale. The amendment uses waste minimization principles along with conservative waste management requirements to promote groundwater resource management and conservation while protecting public health and the environment.

### **October:**

#### **Rules/Notices of Intent**

**Page No.**

- 1.) Office of the Secretary—Beneficial Use of Dredged  
Material (LAC 43:I.700 and 723)

2183

**Comment:** The Rule governs the administration of the Beneficial Use of Dredged Material and sets forth the standards and procedures for the secretary of the Department of Natural Resources to implement the requirements and authorizations under R.S. 49:213.30 for beneficially using material dredged pursuant to a use or activity for which a coastal use permit is required. The Rule will permit payment into a trust fund in-lieu of performing such beneficial use directly, with any such in-lieu payment to be used for other coastal restoration type purposes. Any such payments shall be remitted voluntarily and at the election of the applicant.

- 2.) Coastal Use Permit Extensions (LAC 43:I.723)

2187

**Comment:** The Rule amends the Coastal Use Permit Extension rules with regard to the process for requesting an extension of the term to initiate a coastal use permit and the term to complete the use of a coastal use permit. The Rule amends the existing provision of LAC 43:I. Chapter 7, Subchapter C which prohibits a coastal use permit recipient from requesting an extension of the term to complete use of a coastal use permit and authorizes a request to extend the term to complete use pursuant to the same guidelines set forth for requesting an extension of the term to initiate a coastal use permit.

The Rule will authorize the secretary to issue an administrative order to extend the terms to initiate or complete use of a coastal use permit up to thirty days, without public notice of the request, a public comment period, or further formality upon a showing of good cause. The Rule will also authorize the Secretary to modify, suspend or extend the terms of all or an individual coastal use permit when an executive order or proclamation has been issued declaring an emergency.

**September:**

**Rules/Notices of Intent** **Page No.**

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- 1.) Office of Conservation\_Ground Water Management (LAC 43:VI. 103 and 307) 1989

**Comment:** The proposed amendment modifies the specific provisions at LAC 43:VI.103 and 307 which set forth definitions, the procedures for registering new water wells, the procedures for seeking and declaring areas of ground water concern. The amendments to the above existing Rules are intended to revise the regulations to correspond with recent amendments to the Ground Water Resources Management Law (R.S. 38:3097.1 et seq.).

- 2.) Hazardous Liquids Pipeline Safety (LAC 33:V.Chapters 301-313) 1990

**Comment:** This proposed Rule amends the minimum pipeline safety requirements for hazardous liquids pipelines.

- 3.) Natural Gas Pipeline Safety (LAC 43:XIII. Chapters 1-65) 2000

**Comment:** These proposed Rules amend the minimum pipeline safety requirements for natural gas pipelines.

**August:**

**Rules/Notices of Intent** **Page No.**

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- 1.) Office of Conservation\_Fees (LAC 43:XIX.701, 703, and 707) 1798

**Comment:** The proposed action will adopt Statewide Order No. 29-R-09/10 (LAC 43:XIX, Subpart 2, Chapter 7), which establishes the annual Office of Conservation Fee Schedule for the collection of Application, Production, and Regulatory Fees, and will replace the existing Statewide Order No. 29- R- 08/09.

- 2.) Pit Closure and Onsite Disposal of E and P Waste (LAC 43:XIX.311 and 313) 1800

**Comment:** The intent of the amendment is to conserve these freshwater aquifer resources by allowing the limited use of Exploration and Production Waste as a substitute for the fluids

required to perform fracture stimulation operations on the Haynesville Shale. The proposed amendment uses sound waste minimization principles along with conservative waste management requirements to promote groundwater resource management and conservation while protecting public health and the environment.

**July:**

**Rules/Notices of Intent** **Page No.**

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- 1.) Office of the Secretary\_Beneficial Use of Dredged Material (LAC 43:1.700 and 723) 1348

**Comment:** The proposed Rule governs the administration of the Beneficial Use of Dredged Material and set forth the standards and procedures for the secretary of the Department of Natural Resources to implement the requirements and authorizations under R.S. 49:213.30 for beneficially using material dredged pursuant to a use or activity for which a coastal use permit is required. The Rule will permit payment into a trust fund in-lieu of performing such beneficial use directly, with any such in-lieu payment to be used for other coastal restoration type purposes. Any such payments shall be remitted voluntarily and at the election of the applicant.

- 2.) Coastal Use Permit Extensions (LAC 43:1.723) 1352

**Comment:** The proposed Rule amends the Coastal Use Permit Extension rules with regard to the process for requesting an extension of the term to initiate a coastal use permit and the term to complete the use of a coastal use permit. The proposed Rule amends the existing provision of LAC 43:I.Chapter 7, Subchapter C which prohibits a coastal use permit recipient from requesting an extension of the term to complete use of a coastal use permit and authorizes a request to extend the term to complete use pursuant to the same guidelines set forth for requesting an extension of the term to initiate a coastal use permit. The proposed Rule will authorize the Secretary to issue an administrative order to extend the terms to initiate or complete use of a coastal use permit up to thirty days, without public notice of the request, a public comment period, or further formality upon a showing of good cause. The Rule will also authorize the Secretary to modify, suspend or extend the terms of all or an individual coastal use permit when an executive order or proclamation has been issued declaring an emergency.

**II. ACT 312 PROCEDURE (Tensas Poppadoc)**

**Office of Conservation Hearing**

In February 2009, following the 2008 *Tensas Poppadoc* trial, the Office of Conservation (sometimes hereinafter referred to as “Conservation”) held its much anticipated, first of its kind, post-trial public hearing pursuant to Act 312. Under Act 312, the purpose of this hearing was for Conservation to determine the “most feasible plan” to evaluate or remediate the environmental damage determined to be present by the trial jury/court, and which is in compliance with applicable standards and regulations.

Act 312 defines a feasible plan as “the most reasonable plan which addresses environmental damage in conformity with the Louisiana Constitution Article IX, Section 1 to protect the environment public health, safety, and welfare, and is in compliance with specific relevant and applicable standards and regulations promulgated by a state agency in accordance with the Administrative Procedure Act in effect at the time of clean up to remediate contamination resulting from oilfield or exploration and production operations or waste.”

In *Poppadoc*, the jury made a determination that the plaintiff’s property was damaged by oil/gas exploration and production activities. The jury determined the “responsible party” and thereafter determined that the evaluation and remediation of the property would cost one million \$1 million, the cost of the defendants’ remediation plan. As required by Act 312, the trial court thereafter ordered the defendant, as responsible party, to submit a remediation plan to the Office of Conservation for determination of whether such plan was “the most feasible plan” to clean up the environmental damage determined to be present on the property. The defendant submitted the same plan it had presented at trial. The plaintiff objected to the defendant’s plan, believing that its own, much more expensive, plan was the most feasible plan under Act 312.

In selecting the most feasible plan pursuant to Act 312, Conservation may adopt the plan of either the responsible party or that submitted by the plaintiff, or it may choose instead to formulate and adopt its own plan which it determines to be “the most feasible plan.” The trial court is thereafter compelled to adopt the plan determined to be the most feasible plan by the Office of Conservation unless there is an objection to the plan selected. If the Conservation Plan is challenged by one or more of the parties, the matter moves back to the trial court which will then conduct yet another hearing, the purpose of which is to determine, by a preponderance of the evidence, if a plan other than that selected by the Office of Conservation is the most feasible plan to remediate or evaluate the environmental damage in a manner which is in compliance with applicable standards. The trial court may then choose to adopt the plan which it finds is the most feasible.

After much anticipation, Conservation held its hearing in February, 2009. Over the course of six days, a panel of legal and technical staff with the Office of Conservation heard opening statements by counsel for the parties, the direct, cross and re-direct examination of several expert witnesses from both sides and thereafter the closing arguments of the parties. In many ways, the hearing mirrored the jury trial which had decided *Poppadoc* the previous year. Through the use of expert witnesses and demonstrative exhibits, each party argued that its plan was “the most feasible plan” to

remediate the environmental contamination present on the property. Following the conclusion of the hearing, the parties were offered the opportunity to submit post-hearing briefs which would thereafter be considered by the panel before it made its decision.

### **Office of Conservation Decision – Written Reasons**

On April 16, 2009, following review and consideration of the pleadings, evidence and arguments introduced at the hearing, the Office of Conservation determined that neither plan submitted by the parties met the criteria of “feasible plan” under the statutory provisions of Act 312. Conservation therefore structured its own plan called the Assessment, Evaluation, and Remedial Action Plan (“the Conservation Plan”) and, with written reasons, deemed it to be “the most feasible plan” as defined by Act 312. The Conservation Plan suggested that the Office of Conservation preferred a “natural attenuation” approach coupled with the use of soil amendments in the areas of concern as apposed to the intrusive excavation and pumping approach preferred by the plaintiff. Conservation estimated the total cost of its plan to be \$1.75 million. The time frame for the “complete remediation” would depend on the result of additional investigation Conservation stated would be necessary to further delineate the extent of the contamination. Nevertheless, Conservation estimated the remediation would take approximately three years.

As required by Act 312, Conservation provided its written reasons for rejecting the plans submitted by the parties and framed its reasons directly on the basis of the definition of “most feasible plan.” Its analysis of the evaluation/remediation plans was derived directly from that definition and the reasons given supporting its own plan were centered on the three components of the definition.

#### **1. Plan’s Compliance with Applicable Standards and State Regulations**

In its written reasons, Conservation discussed the applicable standards and regulations and, specifically addressed §611(F) of the Louisiana Department of Natural Resources (“LDNR”) Amendment to its 29-B regulations addressing the procedures for hearings and the submission and approval of plans for remediation of exploration and production (“E&P”) sites in accordance with Act 312.

- §611(F) – Any plan submitted by any party, or approved or structured by the commissioner, shall comply with the standards set forth in Statewide Order 29-B. Any party that seeks an exception under the provisions of §319 of Statewide Order 29-B shall submit:
  1. a plan that complies with all the provisions of Statewide Order 29-B, exclusive of §319; and
  2. a separate plan that includes:

- a. sufficient proof that there is good cause to grant an exception or exceptions sought under §319;
- b. sufficient proof showing that the exception or exceptions sought under §319 do not endanger USDW's; and
- c. a specific citation to the Louisiana rules, regulations or statutes sought to be applied in lieu of Statewide Order 29-B.

While Conservation never specifically provided an explanation of Section F in connection with its own plan, its language requires a party seeking an exception under Section 319 to do two things: 1) it must submit a plan that complies with all the provisions of 29-B, exclusive of Section 319, and 2) it must submit a separate plan that includes the three elements spelled out in Section 611(F)(2).

Conservation rejected the parties' plans on the basis that those plans failed to meet one or more of the elements of §611(F). Conservation found that neither of the submitted plans properly delineated the full extent of the environmental damage at the subject property which failed to comply with the Louisiana Department of Environmental Quality's ("LDEQ") Risk Evaluation/Corrective Action Plan ("RECAP"). Conservation further noted that neither plan sufficiently addressed Statewide Order 29-B. For these reasons, the plans were found not to be "in compliance with the specific relevant and applicable standards and regulations" in order to be accepted as a feasible plan.

In light of Conservation's rejection of the submitted plans based on their failure to meet the requirements of §611(F), the plaintiff has argued that the Conservation Plan has also failed to comply with §611(F) in that Conservation only proposed a single plan and went directly to addressing the reason why its plan should be accepted and allowed an exception under §319 of Statewide Order 29-B.

## **2. The Plan Protects the Environment, Public Health, Safety and Welfare**

In its written reasons, Conservation next addressed the second element of "feasible plan" which is the protection of the environment, public health, safety and welfare. The Constituent of Concern ("COC"), arsenic, was used as an example of how environmental damage and potential environmental damage were not properly addressed by either plan.

The written reasons discussed the fact that arsenic was found in concentrations at the subject property above both RECAP and Environmental Protection Agency ("EPA") standards. However, Conservation pointed out that neither the parties' submitted plans nor evidence adduced at the hearing addressed whether the elevated arsenic found at the site was related to some release or whether it was naturally occurring

(background). It was noted that specific background samples were not collected and a background concentration for arsenic were not developed.

Furthermore, Conservation found that neither plan adequately addressed the additional assessment at the site which would be required to fully delineate the COC on the property, a step which is required before any remedial action could effectively be implemented.

### **3. Reasonableness**

Finally, Conservation's written reasons discussed the element of reasonableness and specifically addressed the plaintiff's multimillion dollar remediation plan. It appears that reasonableness is an important element when assessing whether a plan is the "most feasible plan".

Conservation apparently relied on the reasonableness element as its basis for rejecting the multi-million dollar plan presented by the plaintiff. That plan proposed extensive soil excavations in several areas of concern and proposed differing groundwater extraction and treatment/disposal options without fully delineating the contamination at the subject property. The estimated cost of the various plans proposed by the plaintiff ranged from \$11 million up to \$114 million and completion was expected to take approximately 12.5 years. Conservation noted that without first completing a full evaluation of the property, the plaintiff's more intrusive proposal was unreasonable.

### **Office of Conservation Plan – What Next?**

Act 312 is clear with respect to the next procedural step after the Office of Conservation has approved the plan which it has determined to be "the most feasible plan" to evaluate or remediate the environmental damage determined to be present by the trial court.

First: Act 312 states that the plan approved by the Department for submission to the court shall not be considered to be an adjudication subject to appellate review pursuant to R.S. 49:964 or R.S. 30:12.

Second: 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 to adequately protect the environment and the public health, safety, and welfare. The court shall enter a judgment adopting a plan with written reasons assigned. Upon adoption of a plan, the court shall order the party or parties admitting responsibility or the party or parties found legally responsible by the court to fund the implementation of the plan.

Any judgment adopting a plan of evaluation or remediation pursuant to the Act and ordering the party or parties admitting responsibility or the party or parties found

legally responsible by the court to deposit funds for the implementation thereof into the registry of the court pursuant to this Section shall be considered a final judgment pursuant to the Code of Civil Procedure Article 2081 et seq., for purposes of appeal.

Any appeal shall be a de novo review and shall be heard with preference and on an expedited basis.

The appellate court may affirm the trial court's adoption of a plan or may adopt a feasible plan in conformity with Act 312 and shall issue written reasons for its decision.

### **Preponderance Hearing**

The trial court in *Poppadoc* must now determine “by a preponderance of the evidence” whether another plan is more feasible than the Conservation Plan.

In the wake of Conservation’s adoption of its own plan as the most feasible, the trial court’s “preponderance hearing” has been delayed several times as multiple procedural issues have been addressed and contested. The most hotly contested post-hearing procedural issue thus far has been the plaintiff’s pursuit of post-hearing depositions of certain Conservation and LDEQ personnel, including some of the very panelists who presided over Conservation’s hearing. The plaintiff sought these depositions over the objections of both LDEQ and DNR. The trial court allowed the depositions to proceed and both LDEQ and DNR appealed and the issue to the Louisiana Third Circuit Court of Appeal which upheld the trial court’s decision. The Louisiana Supreme Court thereafter refused to consider the issue.

The trial court’s “preponderance hearing” is presently scheduled to commence in February, 2010.

### **III. RECENT “LEGACY CASE” TRIAL/APPELLATE ACTIVITY**

***Donald Marin, Sr., et al. v. Exxon Mobil Corporation, et al.***

**La. Ct. App. 1<sup>st</sup> Cir. (September 30, 2009); Case No. 2008-CA-1724**

**Appeal from 16<sup>th</sup> JDC; St. Mary Parish, Docket No. 112, 908**

#### **Introduction**

The Louisiana First Circuit Court of Appeal recently rendered a decision on September 30, 2009, in the case of *Marin, et al. v. Exxon, et al.* (As the decision was not designated for this publication, a link to a copy of it can be found on our website under Publications and is entitled *Marin Opinion 1st Circuit*). The appeal arose from a judgment in favor of the plaintiffs, who were members of the Marin and Breaux families.

After a five day bench trial, the trial court initially rendered judgment in favor of all the named plaintiffs against the defendants for approximately \$14 million in

compensatory damages and \$14 million in punitive damages. On motion for new trial, the damages were separated out by plaintiffs. The Breaux plaintiffs were awarded compensatory damages of \$276,000.00 for remediation of the soil, \$63,000.00 for handling groundwater intrusion during soil remediation operations and punitive damages of \$340,000.00. The Marin plaintiffs were awarded compensatory damages in the amount of \$15 million for soil remediation, \$3.4 million for handling groundwater intrusion during soil remediation operations, \$2.4 million for remediation of contaminated soil and sediment in the canal, and \$21 million in punitive damages. Additionally, the surface lease, which apparently was still in effect, was terminated.

### **Background**

The *Marin* suit arose out of the oil and gas activities of Humble Oil and Refining Company, Exxon's predecessor, which had operated open pits on the plaintiffs' property from the 1940's until approximately 1988. There were two sets of plaintiffs, the Marins and Breaux. The Marin plaintiffs' claims arose out of a mineral lease and a surface lease. The Breaux claims arose in tort, although the decision seems to allow them additional servitude rights. In 1936, E.F. Marin granted a mineral lease to W.S. Mackey. In 1937, Canal Bank and Trust Company granted a mineral lease to Humble. By 1939, Humble had acquired the Marin lease. In 1941, E.F. Marin granted a surface lease to Humble for use as a landing/dock area, terminal and related facilities. The Breauxs, in 1977 and in 1978, purchased the surface rights to property which was subject to the Canal Bank mineral lease. As a result, the Marins, at least based on the facts that we can glean from the decision, had available claims in tort, contract and under the mineral code. The Breaux had claims available in tort, with the court finding additional servitude rights as well.

### **Prescription**

The Court first addressed Exxon's defense of prescription. Exxon argued that the plaintiffs' claims prescribed before filing of their suit on the basis that they had knowledge of the contamination on the property as early as the 1980's. The trial court found that the running of prescription had been suspended under the doctrine of *contra non valentum*.

Specifically, Exxon argued that Claude Breaux, who had always acted as the family agent/spokesman for the Breaux family in their dealings with Exxon and who basically oversaw the Marin property, had extensive knowledge of Exxon's activities on the property. Breaux, who was a state trooper, had extensive contact with Exxon and even took samples of pit contents which he kept in a jar which he stored in a shed. Breaux had participated in many conversations and meetings with Exxon personnel relating to the pits and their closure. By 1987, he had complained that his sugarcane crops would not properly grow in the former pits which had been closed under Statewide Order 29-B. In addition, Breaux kept a family journal for three years detailing his conversations with Exxon employees. According to Exxon, these acts demonstrated that,

at a minimum, Breaux had constructive notice of any potential claims the plaintiffs may have had against Exxon.

The First Circuit was unimpressed with Exxon's argument. It held that, although Breaux did have contact with Exxon, he "lacked sufficient knowledge of the nature or extent of the damage or contamination to his property, such as to commence the tolling of the prescriptive period." The Court found that because contaminants contained in soil are not readily discernible or perceptible upon visual inspection by an average person, and because an average person would not know whether a pit had been properly cleaned, the plaintiffs would not have gained knowledge of the nature and extent of the property damage until they had seen the results of Greg Miller's report after the property had been evaluated. As such, according to the First Circuit, the trial court did not commit manifest error in finding that prescription did not commence to run until the plaintiffs learned of the nature and extent of the damages as set forth in Greg Miller's initial report.

Finally, the Court held that Exxon's actions constituted a "lulling" of plaintiffs into inaction and, more specifically, held that Exxon not only knew that contamination exceeded the requirements of Statewide Order 29-B but that it purposely provided false information to plaintiffs. According to the Court, Exxon knew that the contamination would continue to migrate. As a result, the Court held that the doctrine of *contra non valentem* applied and prescription did not begin to run until plaintiffs' knowledge of Greg Miller's initial report. In so holding, the Court did not address the issue of continuing tort, since *contra non valentem* was found to be applicable, suspending prescription.

### **Punitive Damages**

The First Circuit next addressed the issue of punitive damages and specifically stated that Louisiana's punitive damage statute, (Louisiana Civil Code article 2315.3) only applied to conduct which occurred between 1984 – 1996, the effective period of the statute. Exxon was involved in conduct during this applicable period through 1991. Agreeing with Exxon, the Court found that most of the contamination, if any, would have occurred during a period that pre-dated the enactment of Article 2315.3. However, the Court determined that the plaintiffs' property was damaged due to the wanton or reckless disregard of Exxon from 1984 through the closure of the pits in the late 1980's and through 1991. The Court further found that Exxon's failure to properly remediate the contamination served to exacerbate the problem.

Wanton and Reckless Conduct: In discussing Exxon's conduct, the First Circuit focused on the "ample evidence" that apparently supported the trial court's finding that Exxon engaged in wanton and reckless conduct. First, it focused on Exxon's knowledge that the use of unlined earthen pits to handle produced water and operational drilling wastes caused "chronic pit pollution problems." Second, the Court focused on Exxon's knowledge of Naturally Occurring Radioactive Material ("NORM") contamination. Specifically, the Court found that Exxon became aware of NORM contamination in oilfield drilling equipment, particularly pipe scale, in the early 1970's. Despite such knowledge, the court stated, Exxon did nothing to notify or warn the plaintiffs and

continued to utilize the pits. In addition, between 1986 and 1993, Exxon performed testing that showed elevated NORM levels on the plaintiffs' property, but took no action to remove it until later. Finally, Exxon elected to not test the produced water pits on the Breaux property for radiation during the closure operations.

Hazardous or Toxic Substances: Louisiana's punitive damage article required the handling and storage of hazardous or toxic materials. Exxon argued that the substances at issue were neither toxic nor hazardous. The Court found that the contaminants of concern – barium, chloride and radiation – were hazardous to human health, fish and wildlife. Exxon argued that the definition of "hazardous or toxic substance" was impermissibly vague in that Article 2315.3 provided no definition of hazardous or toxic substance. Exxon further argued that because oilfield waste is excluded from the definition of hazardous waste in Louisiana, the punitive damage article did not apply. The Court rejected these arguments pointing out that, in addition to hazardous substances, Article 2315.3 applied to toxic substances and Exxon failed to address whether oilfield waste was a toxic substance.

Amount of Punitive Damages Awarded: Finding that the record supported the trial court's finding that Exxon engaged in wanton and reckless activity during the effective period of Article 2315.3, which included the suppression of material facts in its communications with Mr. Breaux and acting with callous indifference towards the plaintiffs and their property, the First Circuit held there was no abuse of discretion in the trial court's decision to award punitive damages equal to the compensatory damages awarded. The Court refused, however, to increase the punitive damage award finding that there was no basis for such an increase.

### **Exxon's Liability to the Breaux Plaintiffs**

Pre-Acquisition Damages: The Court next addressed the issue of the Breaux plaintiffs' right to pursue tort claims for damages which occurred prior to their acquisition of their property in 1978. Exxon argued that the Breaux family purchased the property with full knowledge of the pit areas located on the property and that the Breauxs did not acquire the right to pursue claims for damages occurring prior to their purchase.

The Breaux plaintiffs argued that the parties entitled to assert claims arising from tortious breach of a lease include not only the parties to the lease but also to third parties damaged by the wrongful conduct constituting the breach. The Breauxs also claimed that the failure to remove the contaminants at issue constituted an ongoing and damaging nuisance to the plaintiffs and their properties. The trial court agreed, finding that tortious "conduct" includes not only actions themselves but also to "failure to act or to correct the problem." Addressing this issue, the Court noted that the Breauxs had an action in tort against Exxon and, while not allowing for a third-party beneficiary action, allowed the plaintiffs a right to recover damages as a property right arising out of the original lease. The Court relied on the Supreme Court decision in *Magnolia Coal* and distinguished the *Lejeune* case.

## **Damages**

**Restoration:** The court next discussed damages. The leases in question did not contain language providing for restoration of the property to its original condition. The trial court awarded damages for the restoration of the soil to 29-B standards only. Restoration beyond 29-B standards was not required.

The plaintiffs made a *Castex* argument claiming that they should have been awarded full restoration damages because Exxon exercised its rights under the leases unreasonably and excessively. *Castex* held that, in the absence of an express lease provision providing for restoration, mineral code Article 122 does not impose an implied duty to restore the surface to its original condition absent proof that the lessee exercised his rights under the lease unreasonably or excessively. Plaintiffs argued that the corollary was true, namely that when a landowner does prove unreasonable or excessive use, Article 122 then imposes an implied obligation to restore the surface to the original condition. The First Circuit disagreed. Citing language in *Castex*, as well as certain Louisiana lease codal articles, the court held that an offset or accommodation for “normal wear and tear” was appropriate when calculating the cost of remediation. The Court defined “wear and tear” by reasoning that “wear and tear” equaled the difference between regulatory compliance (29-B) and true restoration.

Exxon argued the *Roman Catholic Church* case applied (which addresses the remediation standard in connection with tort claims), limiting plaintiffs’ damages to the difference between the value of the property before and after the damage. The court notes that the plaintiffs testified that they would use an award of remediation damages to repair their property, thereby satisfying one of the *Roman Catholic Church* exceptions (the other being “reasons personal” for restoring the property). The court then cites *Corbello*, which is a non-tort, contract case for the proposition that the fair market value of the land does not limit the duty to restore.

**Groundwater:** The Court next addressed the plaintiffs’ groundwater claims. *Marin* was a pre-Act 312 case; decided after *Corbello* and after the Groundwater Act had been enacted (governing all claims involving Class 1 and 2, but not 3, groundwater)

Since the Court found that groundwater in the underlying aquifer was Class 3, it was not subject to the Groundwater Act. The plaintiffs apparently provided evidence of only a Class 2 groundwater remediation. In fact, the cost of the plaintiffs’ groundwater remediation was almost \$200 million. After finding that the groundwater was a Class 3, the court also held that plaintiffs had failed to carry their burden of establishing the cost or plan for remediating a Groundwater 3 aquifer.

## **Liability of Exxon Employee – Michael Bourgeois**

The final issue addressed in *Marin* was the liability of Exxon employee, Michael Bourgeois. Mr. Bourgeois was sued in his individual capacity. The trial court held that Mr. Bourgeois was personally liable for the performance of duties in connection with the

plaintiffs' property. The First Circuit rejected that argument. Under Louisiana law, an employee is only liable for breach of a personal duty by failing to act as an ordinary, reasonable man in carrying out employment-related duties.

In overruling the trial court, the First Circuit held that the evidence failed to establish that Mr. Bourgeois had a personal, as opposed to a general administrative, duty to plaintiffs in connection with his employment obligations regarding oversight of the operations on the plaintiffs' property. As a result, the Court found the evidence was insufficient to warrant the imposition of personal liability on his part.