

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 January through March, 2010.

Additionally, we have included a summary of three recent decisions addressing various elements of Act 312-related litigation in Louisiana: *Kling Realty Co. v. Chevron U.S.A., Inc.*; *C.S. Gaidry, Inc. v. Union Oil Co.*; and *Broussard v. Hilcorp Energy Corp.*

## I. REGULATORY UPDATE

### A. LDEQ Regulatory Changes: January – March, 2010\*

Title/Louisiana Administrative Code Citation	Publication Date	Status	Hearing Date	Comment Deadline
March				
Organic Solvents and Solvent Degreasers (LAC 33:III.111 and 2123) (AQ307)  <a href="#">AQ307</a>	3/20/2010	Proposed	4/28/2010	5/5/2010
Gasoline Handling (LAC 33:III.2131) (AQ309)  <a href="#">AQ309</a>	3/20/2010	Proposed	4/28/2010	5/5/2010
HW Tanks: Secondary Containment Requirements and 90 Day Turnover of Hazardous Waste (LAC 33:V.109, 1109, 1901, 1907, 1909, and 4437) (HW106)  <a href="#">HW106</a>	3/20/2010	Proposed	4/28/2010	5/5/2010
Reportable Quantity for Brine from Solution Mining (LAC 33:I.3905 and 3931) (OS085)  <a href="#">OS085</a>	3/20/2010	Proposed	4/28/2010	5/5/2010
Standard Fees for Solid Waste Transporters (1003Pot1)  <a href="#">1003Pot1</a>	3/20/2010	Potpourri	None	None
February				
Training Requirements for Underground Storage Tank	2/19/2010	Final	Expired	Expired

System Operators (LAC 33:XI.601, 603, 605, 607, 609, and 611) (UT017)  UT017				
Regulation of Greenhouse Gas Emissions and Title V Applicability (1002Pot1)(LAC 33:III)  1002Pot1	2/19/2010	Potpourri	None	3/31/2010
DEQ Notifications to State Police (LAC 33:I.3913, 3915, 3917, 3923, 3925; VII.315, 713; XI.713 (MM012)  MM012	2/19/2010	Proposed	3/30/2010	4/6/2010
Regulatory Permits for Cement and Concrete Facilities - LAC 33:III.317 (AQ299)  AQ299	2/19/2010	Proposed	3/30/2010	4/6/2010
Termination Determination of CAAA Section 185 Penalty Fees - State Implementation Plan Revision - (1002Pot2)  1002Pot2	2/19/2010	Potpourri	3/30/2010	3/30/2010
January				
Control of Emissions of Nitrogen Oxides (NOx) [LAC 33:III.2201; 2202]  AQ305	1/20/2010	Final	Expired	Expired
Technical Review of Working Drafts of Waste Permits  1001Pot1	1/20/2010	Potpourri	None	None

\*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
- OS - Office of the Secretary
- Pot - Potpourri

**B. Louisiana Department of Natural Resources Rule/Notices of Intent  
Published in the Louisiana Register for January - March, 2010\***

**January:**

<b><u>Rules/Notices of Intent</u></b>	<b><u>Page No.</u></b>
1.) Office of Conservation—Exploration and Production Site Groundwater Evaluation and Remediation (LAC 43:XIX.Chapter 8)	132

**Comment:** Proposes to amend LAC 43:XIX.Subpart 1. by adding a Chapter 8 in accordance with the provisions of the Administrative Procedure Act, R.S. 49:950 et seq., and pursuant to the power delegated under the laws of the State of Louisiana. The proposed amendment adds a Chapter 8 which shall apply to and provide procedures for the evaluation or remediation of groundwater conditions and potential sources that may have contributed to those conditions at oil and gas exploration and production sites pursuant to compliance with the requirements of Chapters 3, 4, 5 or 6 of LAC 43:XIX.Subpart 1 (Statewide Order No. 29-B). The amendments to the above existing Rules are intended to codify practices already being implemented under the authority of the Commissioner of Conservation.

**February:**

<b><u>Rules/Notices of Intent</u></b>	<b><u>Page No.</u></b>
1.) Office of Conservation—Ground Water Management (LAC 43:VI.103 and 307)	326

**Comment:** Amends LAC 43:VI.Chapter 1 et seq., in accordance with the provisions of the Administrative Procedure Act, R.S. 49:950 et seq., and pursuant to power delegated under the laws of the state of Louisiana and particularly Title 38 of the Louisiana Revised Statutes, Sections 38:3097.1 et seq. The 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 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.) Office of Conservation—Exploration and Production Site Groundwater Evaluation and Remediation Statewide Order No. 29-B (LAC 43:XIX.Chapter 8)	388
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**Comment:** The Louisiana Office of Conservation, in an effort to afford all interested parties ample opportunity to review and comment on the herein proposed amendment, including the referenced SERP manual, a copy of which can be obtained either on line at: <http://dnr.louisiana.gov/cons/DNR-SERP-Manual.pdf> or by contacting John Adams at the Office of Conservation as stated below, does hereby re-notice the proposed amendment to LAC 43:XIX.Subpart 1.Chapter 8 in accordance with the provisions of the Administrative Procedure Act, R.S. 49:950 et seq., and pursuant to the power delegated under the laws of the State of Louisiana. The proposed amendment

adds a Chapter 8 which shall apply to and provide procedures for the evaluation or remediation of groundwater conditions and potential sources that may have contributed to those conditions at oil and gas exploration and production sites pursuant to compliance with the requirements of Chapters 3, 4, 5 or 6 of LAC 43:XIX.Subpart 1 (Statewide Order No. 29-B). The amendments to the above existing rules are intended to codify practices already being implemented under the authority of the Commissioner of Conservation.

- 3.) Manifest System—Statewide Order No. 29-B  
(LAC 43:XIX.545) 390

**Comment:** Proposes to amend LAC 43:XIX.545 in accordance with the provisions of the Administrative Procedure Act, R.S. 49:950 et seq., and pursuant to the power delegated under the laws of the State of Louisiana. The proposed amendment would allow commercial facilities to accept E and P Waste when Part II of the "E and P Waste Shipping Control Ticket" is incomplete or improperly completed, so long as the remainder of the manifest is properly completed. Furthermore, the proposed amendment requires a commercial facility to forward to the Office of Conservation, within 24 hours of receipt, any manifests regarding accepted E and P Waste shipments which did not have a completed Part II of the "E and P Waste Shipping Control Ticket".

**March:**

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

- 1.) Office of Conservation—Pit Closure Techniques and Onsite Disposal of E&P Waste (LAC 43:XIX.313) 679

**Comment:** Intent is to amend 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 recent development of the Haynesville Shale in North Louisiana is made possible through the use of multi-stage hydraulic fracture stimulation technology. This technology requires the use of large quantities of fluids which are primarily composed of freshwater taken from either surface water reservoirs or groundwater aquifers. The intense development of the Haynesville Shale has placed additional strain on the already limited freshwater aquifer resources of the region. The intent of the amendment is to conserve these freshwater aquifer resources by expanding 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. Specifically, the current rule is being amended to eliminate the one-time usage limitation on E&P Waste and change the landowner affidavit requirement to an operator affidavit requirement. It is hoped that this added flexibility, requested by members of the regulated community, will further reduce demands for the area's limited freshwater aquifer resources.

\* Source: Louisiana Register

## II. RECENT LEGACY CASE-RELATED ACTIVITY

### A. *Kling Realty Co. v. Chevron U.S.A., Inc.* 575 F.3d 510 (5 Cir. 2009)

#### Background

The U.S. 5<sup>th</sup> Circuit Court of Appeals held that employees of operators are not liable for lessors' property contamination claims.

In June 2006, the plaintiffs, owners of certain agricultural property in Iberia Parish, filed suit against Chevron U.S.A., Inc. and two other non-diverse individual defendants in state court seeking compensatory and punitive damages due to alleged contamination of their property. The plaintiffs alleged that the exploration and production activities of Chevron's predecessor, Texaco, caused ongoing property damage and emotional distress.

Chevron subsequently removed the case to federal court, alleging that the two non-diverse defendants, both Louisiana citizens, were improperly joined. The plaintiffs' motion to remand was subsequently denied by the district court and the non-diverse defendants were dismissed. The district court thereafter dismissed the plaintiffs' claims on prescription grounds and the plaintiffs appealed. The 5<sup>th</sup> Circuit thereafter affirmed the district court's judgment.

#### Diversity Jurisdiction

The 5<sup>th</sup> Circuit undertook an analysis of whether the two individual defendants were properly joined and noted that there were two bases on which the district court could determine that the plaintiffs improperly joined non-diverse defendants to defeat subject matter jurisdiction: (1) actual fraud in the plaintiff's pleadings of jurisdictional facts or, (2) the inability to establish a cause of action.

In this case, the first prong was inapplicable. Under the second prong, the court stated that the test is whether the defendant has demonstrated that there is no possibility of recovery by the plaintiffs against an in-state defendant. Essentially, there must be a reasonable possibility of recovery and not merely a theoretical one. As the plaintiffs made no argument that one of the non-diverse defendants was properly joined, the court focused its analysis on the other non-diverse defendant.

Chevron argued that the defendant was properly dismissed because the plaintiffs' Petition failed to state a claim against him under Louisiana law. Chevron further noted the absence of allegations or evidence presented by the plaintiffs to show how that defendant was connected to their property such that he would face any liability for alleged contamination. The Court agreed. Citing *Canter v. Koehring*, 283 So.2d 716 (La. 1973), which addressed liability of supervisor employees under Louisiana Law, the district court ruled that the plaintiffs failed to state a claim against the remaining diverse defendant.

In *Canter*, the Louisiana Supreme Court held that an employee could be held personally liable for injuries to third persons where: 1) the employer owed a duty of care to the third person and breached that duty, causing the damage for which recovery is sought; 2) that duty was delegated by the employer to the employee-defendant; 3) the employee-defendant breached that duty through personal fault; and 4) the employee-defendant had a personal duty toward the injured third party. The *Canter* Court further noted that personal fault could not be imposed on the employee-defendant based simply on his administrative responsibilities arising from his employment.

In *Kling*, the plaintiffs argued that the remaining non-diverse defendant's supervisory capacity gave him the authority and a personal duty to prevent or limit the contamination which gave rise to the suit. They claimed that this defendant violated his duty and rendered him personally liable to them. Chevron argued that the plaintiffs' allegations failed to identify the employer for whom the non-diverse defendant worked or to allege any specific acts performed by him that would give rise to a personal duty owed to the plaintiffs. The 5<sup>th</sup> Circuit found that the plaintiffs' allegations against the non-diverse defendant were simply general and unsupported allegations that the non-diverse defendant breached a personal duty owed to them. The plaintiffs provided no evidence in support of their argument relating to the alleged damages caused to their property or to the non-diverse defendant's knowledge thereof. The Court found that there was no evidence that any of the plaintiffs' allegations arose from a non-managerial duty or that his position and responsibilities entailed more than general administrative and managerial responsibilities through which he could be held personally responsible under *Canter*.

Furthermore, the Court found that the plaintiffs failed to produce any evidence that supported their allegation that the non-diverse defendant knew or should have known of any ongoing activities hazardous to the property and how a reasonable supervisor in that defendant's position should have acted on that knowledge. The plaintiffs only made conclusory allegations with respect to the employee-defendant, including that the defendant supervised certain activities on the subject property at the time of the alleged activities and that his supervisory position presupposed certain knowledge. The plaintiffs claimed that these supervisory roles and presupposed knowledge gave rise to a duty owed to the plaintiffs. The 5<sup>th</sup> Circuit noted, however, that under Louisiana law, a court must have more before it can find personal fault on the part of an employee. In this matter, the plaintiffs' conclusory allegations were not enough to establish a *Canter* duty. The court held that the plaintiffs did not show any evidence or other facts which would establish that there was a possibility that this employee-defendant could be held personally liable under *Canter*.

Additionally, the 5<sup>th</sup> Circuit noted that *Canter* liability for the negligence of corporate officers and employees may only be imposed for bodily injury claims, not for claims for damage to property. In this case, as the only injuries alleged in the plaintiffs' Petition were economic and emotional damages to their property and forms of mental distress, the plaintiffs would not have a basis for recovery against the non-diverse defendant under Louisiana law, essentially due to the fact that the plaintiffs were alleging only property damages, there was no reasonable possibility of establishing liability against the non-diverse defendant, and therefore removal was proper.

**B. C.S. Gaidry, Inc. v. Union Oil Co.  
2009 WL 2765814 (E.D. La. 2009)**

**Background**

In this case, the Court held that the *Burford* Abstention was not applicable in cases involving Act 312's regulatory scheme requiring the involvement of the Louisiana Department of Natural Resources. Act 312's requirement involving LDNR did not create a special forum for adjudication of suits involving claims for property contamination.

*Gaidry* involved four plaintiffs, two individuals and two corporations, who owned land in the Houma oilfield in Terrebonne Parish. They contracted with several oil and gas companies for certain leases on their property and claimed that those companies' production activities contaminated their property.

As a result of this alleged contamination, the plaintiffs filed suit in state court against three oil companies (Union Oil, Forest Oil and Chevron U.S.A.) and four individuals who were employed as field supervisors for those oil company defendants. The plaintiffs were Louisiana citizens and the oil companies were foreign corporations. The four employee-defendants however were also Louisiana citizens. Claiming improper joinder, the defendants removed the case to federal court citing diversity jurisdiction. The oil companies claimed that there was complete diversity of citizenship among the corporate defendants and alleged that the employee-defendants were joined for the sole purpose of defeating diversity.

The plaintiffs moved to remand; however, citing the U.S. 5th Circuit's ruling in *Kling*, the district court ruled that the employee-defendants were improperly joined and removal was proper.

**Improper Joinder**

The Court noted, as in *Kling*, that a defendant may remove a case upon a showing that a non-diverse party was improperly joined, a narrow exception to the rule requiring complete diversity. Citing *Ross v. City Financial, Inc.* 344 F.3d 458, 461 (5<sup>th</sup> Cir. 2003), the court stated that improper joinder may be established by showing (1) actual fraud and pleading jurisdictional facts or (2) the inability of the plaintiff to establish a cause of action against the non-diverse defendant. As no actual fraud was alleged, the court considered only the second test for improper joinder.

As in *Kling*, the court analyzed whether the plaintiffs would be able to establish a cause of action and whether the defendants could demonstrate that there would be no possibility of recovery by the plaintiffs against the in-state defendants. To determine whether the plaintiffs would be able to establish a cause of action against the defendants, the court undertook an analysis to assess the plaintiffs' claims. The court first looked at the allegations of the complaint to determine whether it stated a claim under state law against the in-state defendants, specifically

whether the non-diverse employee-defendants negligently contributed to the alleged environmental damage on the plaintiffs' property.

The court looked to the Louisiana Supreme Court's decision in *Canter v. Koehring Co.*, 283 So.2d 716 (La. 1973) which set forth the requirements a plaintiff must satisfy in order to establish personal liability against an employee defendant for damages arising from that defendant's employment. In *Canter*, the Louisiana Supreme Court held that an individual employee could be held liable to a third party when four criteria were satisfied: (1) the employer owes the plaintiff a duty of care; (2) the employer delegates that duty to the employee; (3) the employee, through personal fault, breaches the duty; and (4) the employee has a personal duty towards the plaintiff and a breach of that duty caused the plaintiff's damages.

The oil company defendants in *Gaidry* argued that the plaintiffs failed to meet the second and fourth criteria as described in *Canter*. Relying on the 5<sup>th</sup> Circuit's ruling in *Kling*, the district court held that "because plaintiffs in the present case allege only damage to property [as opposed to bodily injury claims], they cannot state a claim against employee defendants. This court therefore finds that the defendants were improperly joined. Complete diversity exists among the remaining parties."

### **Burford Abstention**

The *Gaidry* plaintiffs also argued that the Court should abstain from hearing the case under the *Burford* abstention set forth in the case of *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098, 87L.Ed.1424 (1943).

In *Burford*, an oil drilling permit issued by the Texas Railroad Commission was challenged by one of the parties. The Supreme Court noted in *Burford* that the issue of oversight in the regulation of oil fields was a matter of great sensitivity and public importance such that the State of Texas had established "a comprehensive system of administrative and judicial review, and that uniformity and decision making was essential to effective regulation."

The Supreme Court found that the federal court's exercise of equitable power would inject considerable confusion and disrupt Texas' regulatory scheme with regard to oil field oversight, even though federal jurisdiction existed in *Burford*. The Court noted that although it had jurisdiction in that case, it was proper for the Court to decline to interfere with the proceedings or orders of Texas' State Administrative Agencies when there were difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar or when the exercise of federal review of the question in the case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.

In *Gaidry*, citing *Webb v. B.C. Rogers Poultry, Inc.*, 174 F.3d 697, 700 (5<sup>th</sup> Cir. 1999), the Court noted that the 5<sup>th</sup> Circuit had held that *Burford* instructs a district court to weigh federal interests in retaining jurisdiction over a dispute against the state's interests in independent action to uniformly address a matter of state concern and to abstain when the balance tips in favor of the latter. The Court further cited the case of *Moore v. State Farm Fire & Cas. Co.*, 556 F.3d 264,

272 (5<sup>th</sup> Cir. 2009) which held that district courts should additionally consider (1) whether the cause of action arises under federal or state law; (2) whether the case requires inquiry into unsettled issues of state law; (3) the importance of the state issue involved; (4) the state's need for a coherent policy in that area; and (5) the presence of a special state forum for judicial review. The Court noted that, in balancing those factors, the *Burford* abstention is rarely favored and represents an extraordinary and narrow exception to the duty of the district court to adjudicate a controversy properly before it.

The *Gaidry* plaintiffs argued that the *Burford* abstention was warranted because La. R.S. 30:29(C)(1), or Act 312 as it is commonly known, requires in environmental damage claims arising from oil field sites, that after a party either admits liability for environmental damage or is found to be responsible then that party is required to submit a plan for remediation of the damage to the Louisiana Department of Natural Resources.

R.S. 30:29 was enacted in 2006 after the state legislature became concerned that remediation damages awarded to plaintiff property owners for the cleanup of their property which had been damaged as a result of oil and gas exploration and production activities might not be used to actually remediate the property. The statute requires the responsible party to submit its plan for remediation to the Department of Natural Resources. The statute also permits the non-responsible party or parties to submit their own plans or comment on the plans submitted by the responsible party. After review by the DNR and after public hearings are held on the submitted plans, the DNR is required to approve an existing plan or structure its own plan, based on the evidence submitted, which the Department determines to be the most feasible plan to evaluate or remediate the environmental damage and protect the health, safety and welfare of the people. After DNR approves the "most feasible plan", the trial court must approve that plan unless a party shows by a "preponderance of the evidence" that there is a more feasible plan to achieve the goals of the DNR approved plan. The liable party must thereafter fund the plan that is finally adopted by the court.

In *Gaidry* the Court held that the plaintiffs' argument ignored the fact that they were seeking damages primarily as opposed to equitable relief. The Court stated that in suits for damages, in which the court has no discretion and engages in no weighing of the equities, the *Burford* abstention is unwarranted. The court pointed to the case of *Brownell Land Co., L.L.C. v. Oxy USA, Inc.*, 538 F. Supp. 2d 954 (Ed. La. 2007) to illustrate the point. In *Brownell*, the plaintiffs argued that the *Burford* abstention should apply to R.S. 30:29. The judge noted that while it first appeared that the plaintiff was correct in *Brownell*, a closer analysis showed that the case could not be abstained from as the Court was "not asked to weigh competing interests and had no discretion to award damages or not if the jury finds that the land is contaminated."

The Court in *Gaidry* found the same was true and declined to abstain under *Burford* as to those damage claims. The *Gaidry* Court ultimately found that the plaintiffs failed to show that an adjudication of their case would present difficult questions of state law as their allegations were those of negligence, nuisance and breach of mineral lease. The Court further found that federal jurisdiction would not disrupt state efforts to establish a coherent policy of substantial public concern and neither party was asking the Court to make a decision that would overturn an existing state administrative determination, as was the case in *Burford*.

Finally, the *Gaidry* Court found that there was no special state forum for judicial review of oil field contamination claims. It was explained that even if the federal court were to find liability on the part of a party or a party admitted liability in federal court, the regulatory scheme of R.S. 30:29 (Act 312) would still be followed and DNR would still hold hearings and approve a plan for remediation of the contamination which the trial court would then approve or, upon a finding by a preponderance of the evidence, approve a more feasible plan to protect the environment and the public health safety and welfare.

The *Gaidry* Court noted that Act 312 itself does not require that all steps must take place within the administrative process addressed by the statute, but instead envisions private claims that lead to involvement by a court, state or federal, which would be required to employ the same regulatory process and apply the same law. As the Court stated, this was in contrast to cases such as *Burford*. In this case, the Court found there was no potential to disrupt highly centralized state administrative mechanisms and therefore declined to apply the *Burford* abstention in *Gaidry*.

**C. *Broussard v. Hilcorp Energy Co.*  
24 So. 3d 813, 2009-0449 (La. 10/20/09)**

**Background**

The Louisiana Supreme Court held that the written notice requirement of Mineral Code Article 136 does not apply to claims arising from contamination to property and demands for remediation.

The *Broussard* plaintiffs were owners of certain property in Vermilion Parish on which various mineral leases were granted for the purpose of conducting oil and gas exploration and production activities. Plaintiffs claimed that the lessee-defendants conducted their oil and gas operations negligently under their leases, resulting in the contamination of their property. The plaintiffs sought damages for the alleged contamination and sought restoration of the property. The present suit was filed in the 15<sup>th</sup> JDC, Parish of Vermilion against numerous corporations, including ConocoPhillips and Chevron U.S.A..

Among numerous other exceptions, each defendant filed an Exception of Prematurity alleging that the plaintiffs failed to provide Defendants with written notice and a reasonable opportunity to perform, prior to filing suit, where there are allegations that a mineral lessee breached an obligation to operate the leased property as a reasonably prudent operator as required by Article 136 of the Mineral Code.

The defendants' Exceptions of Prematurity were granted and the plaintiffs were given additional opportunity to cure the basis for granting the exceptions. After the Petition was amended, the defendants re-urged several of the exceptions, including the Exceptions of Prematurity. The trial court found that the Amended Petition had not cured the defects underlying the exceptions and dismissed the plaintiffs' action without prejudice. The plaintiffs appealed, arguing that Article 136 did not require them to make amicable demand prior to suit.

The Court of Appeal reversed that portion of the trial court's dismissal which was based on the plaintiffs' failure to provide the written notice required by Article 136. (The Court of Appeal affirmed the trial court with respect to one defendant whose lease specifically required notice of facts relied upon as constituting a breach of the lease.)

### **Article 136 Notice Requirement**

Conoco and Chevron thereafter filed writ applications on the issue of whether plaintiffs were required to provide written notice pursuant to Article 136 prior to filing suit. In analyzing whether Article 136 required notice or amicable demand, the Court stated that "at the time the Mineral Code was enacted, the Civil Code made a distinction between active and passive breaches of a contract." Former Civil Code Article 1931 generally defined an active violation as doing something inconsistent with the obligation it has proposed and a passive violation as not doing what was contracted to be done or not doing it at the time or in the manner stipulated or implied from the nature of the contract.

The Court noted that this distinction was relevant because it governed whether a putting in default was necessary. At the time the Mineral Code was enacted, in 1974, the Civil Code provided that damages arising from an active breach were due from the moment of the breach whereas damages for a passive breach were only due from the time that the debtor had been put into default. When originally enacted, Article 136 provided: "A putting in default is a prerequisite to a demand for damages arising from drainage of the property leased. If a lessee is found to have had actual or constructive knowledge of drainage and is held responsible for consequent damages, the damages may be computed from the time a reasonably prudent operator would have protected the leased premises from drainage. In other cases, they may be computed only from the time of the putting in default."

The Supreme Court noted that this article, as originally enacted, was in response to the U.S. 5<sup>th</sup> Circuit Court of Appeals' decision in *Williams v. Humble Oil and Refining Company*, 432 F.2d 165 (5<sup>th</sup> Cir. 1970). The Court pointed to the comments for the statute in which the Legislature noted that the *Williams* court had found, as a matter of law, that the plaintiffs' claims for damages for drainage by a common lessee of adjoining tracts of land was considered an active breach of the obligation to protect against drainage. As such, the *Williams* Court held that the plaintiffs were not required to give notice as a condition to their action for damages.

As noted in *Broussard*, the Legislature considered the holding in *Williams* to be erroneous and enacted Article 136 to solve the problem insofar as that case relieved the lessor of the necessity to put the lessee in default in a suit for damages for drainage. Thereafter, in 1984, the Legislature eliminated the distinction between active and passive breaches altogether. Additionally, Civil Code Article 1989 was enacted to provide that obligees are only required to put obligors in default when obligees are seeking damages for delay. All other damages were owed from the time the obligor failed to perform.

As the Supreme Court noted in *Broussard*, however, the elimination of the active and passive breach distinction led to a resulting gap as to what types of claims required a putting in default under the Mineral Code. As such, in 1995, Article 136 was amended and re-enacted to

its current form which states: “If the mineral lessor seeks relief from his lessee arising from drainage of the property leased or from any other claim that the lessee has failed to develop and operate the property leased as a prudent operator, he must give his lessee written notice of the asserted breach to perform and allow a reasonable time for performance by the lessee as a prerequisite to a judicial demand for damages or dissolution of the lease. If a lessee is found to have had actual or constructive knowledge of drainage and is held responsible for consequent damages, the damages may be computed from the time a reasonably prudent operator would have protected the leased premises from drainage.” (emphasis added)

In the present case, the Supreme Court pointed out that the 1995 revision extended the obligation of a lessor to provide pre-suit written notice for claims beyond those involving drainage. The extent of that expansion was at issue in *Broussard*. The defendants in *Broussard* argued that the plain language of Articles 136 required written notice as a prerequisite to a judicial demand in connection with any alleged violation of the prudent operator standard. The plaintiffs argued that Article 136 only required written notice for two specific types of breaches: 1) a breach of the duty arising from drainage; and 2) a failure to develop and operate.

The plaintiffs argued that if the lessees failed to perform their obligations by not developing and operating the leases, then written demand that the lessee develop and operate the leases would be required. Conversely, the plaintiffs argued that the defendants’ interpretation of the statute was overly broad. The defendants argued that all other claims relating to alleged lessee violations of the prudent operator standard should likewise be “interchangeable with the statutory text.”

The plaintiffs further argued that their allegations were not related to development and operation under the lease, but rather were related to the defendants’ alleged unreasonable and excessive conduct under the lease which resulted in their claims for restoration under R.S. 30:122. The Court of Appeal agreed and reversed the judgment of the trial court as to the need for amicable demand and found that R.S. 31:136 did not apply to the plaintiffs’ claims.

The Supreme Court took specific note that at issue was plaintiffs’ allegation in their original petition that the defendants’ conduct constituted a breach of their oil, gas and mineral leases which covered their oil and gas exploration and production activities. Particularly, the Court took note that the plaintiffs alleged that each defendant had breached those standards imposed by the Mineral Code which governed the conduct of prudent operators. Specifically addressing the above allegations, the Court stated that its task was to address whether the plaintiffs’ claim for property damage and remediation/restoration damages were claims for failure to develop and operate as a prudent operator under Article 136.

The Court began this analysis with a look at the origination of the duty to develop and operate as a prudent operator. This duty was established in Mineral Code Article 122 which states: “A mineral lessee is under a fiduciary obligation to his lessor, but he is bound to perform the contract in good faith and to develop and operate the property leased as a reasonably prudent operator for the mutual benefit of himself and his lessor. Parties may stipulate what shall constitute reasonably prudent on the part of the lessee.” (emphasis added)

The Supreme Court took notice of the comments to Mineral Code Article 122 and pointed out that the pre-Mineral Code jurisprudence in Louisiana recognized the lessee's duty as encompassing five distinct categories of obligations, which included the obligation to restore the surface as near as practical on completion of operations. However, the court noted that in the case of *Terrebonne Parish School Board v. Castex Energy, Inc.*, 893 So.2d 789 (La. 1/19/05), the Supreme Court considered whether Article 22, which requires a mineral lessee to act as a reasonably prudent operator, obligates the lessee to restore the surface of the leased land to its pre-lease condition where the terms of the lease are silent on restoration and there is no evidence that the lessee exercised its rights under the lease excessively or unreasonably.

The Court in *Broussard* noted that, in *Castex*, it had held that the express terms of Article 122 impose upon a mineral lessee only two obligations, (1) to perform the contract in good faith and (2) to develop and operate the leased property as a reasonably prudent operator for the mutual benefit of the lessee and lessor. The Court held that Article 122 did not impose an expressed duty to restore the surface. Further it imposed no implied duty to restore the surface to its original pre-leased condition absent proof that the lessee had exercised its rights under the lease unreasonably or excessively.

Upon completing its analysis *Castex* and Article 122, the Supreme Court in *Broussard* held that, after *Castex*, the obligations imposed by Article 122 on a mineral lessee to act as a prudent operator include the following obligations: 1) the obligation to develop reservoirs discovered; 2) the obligation to explore and test all portions of the leased premises after discovery of minerals and paying quantities; 3) the obligation to protect the leased property against drainage from wells on adjacent lands; and, 4) the obligation to diligently market the minerals discovered and capable of production and paying quantities.

The Court emphasized that the implied duty to restore/remediate the leased property was no longer encompassed in the prudent operator standard; thus the plaintiffs' claims in *Broussard* for remediation/restoration were not related to any duty encompassed by Article 122. The Court held that the written notice requirement and delay for performance requirement by Article 136 were not applicable to the plaintiffs' claims in *Broussard* as the plaintiffs made no allegations that the defendants failed to develop and operate the property as reasonably prudent operators, as contemplated by Articles 122 and 136. As such, the plaintiffs in *Broussard* were not required to provide the defendants with pre-suit notice and an opportunity to perform prior to filing suit.

In *Broussard*, the plaintiffs' claims were claims arising from the contamination of property and not claims based on failure to develop and operate the property as reasonably prudent operators as required under Article 136.