

August 21, 2007

In the last year, there have been some interesting regulatory developments in Louisiana which concern the exploration and production industry. Newly enacted legislation now directly impacts those parties responsible for legacy sites or property contaminated by historic oilfield exploration and production waste in this state.

Act 312 of the 1996 Regular Session

LSA-R.S. 30:29, otherwise known as Act 312 of the 2006 regular session of the Louisiana Legislature applies to litigation involving allegations of environmental damage resulting from activities associated with exploration and production sites. Upon judicial determination of environmental damage and after the legally responsible party is identified, that party or parties is ordered to develop a plan or submittal for the evaluation or remediation to applicable standards of the contamination that resulted in the environmental damage. The Office of Conservation within the La. Dept. of Natural Resources reviews the proposed plan, considers timely submitted comment and approves the plan it determines to be most feasible to remediate the environmental and protect the public health, safety and welfare.(Or structures its own plan). The Court is required to adopt the plan approved by the Department unless a party is able to prove the superior feasibility of an alternate remediation plan. This statute arose out of industry and state concerns that landowners would sue for windfall judgments and simply pocket large sums intended for the cleanup of contaminated sites, that plaintiffs' attorneys would pocket too large a share of the recovery in contingency fees, creating distorted incentives and concern that remediation plans developed without DNR input would be too burdensome. (A link to a copy of the statute can be found on our website under Publications and is entitled *LSA RS 30 29*.).

The Exploration and Production Waste Management Section of the Office of Conservation is now overseeing the submittal of remediation plans under the new statute in relation to ongoing legacy litigation. The Office of Conservation is charged under the statute with receiving, reviewing and commenting on those plans submitted and is responsible for applying LDNR standards to the various submittals during the review process. After a public hearing pursuant to Act 312, the Office of Conservation will either approve a submitted plan or structure its own that the department determines to be the most feasible plan to evaluate and/or remediate the environmental damage present at any particular site. Additionally, the Office of Conservation will provide written reasons for the approval or restructuring of each plan they receive. Thereafter, unless an opposing party proves by a preponderance of the evidence in the trial court that the Conservation approved/re-structured plan is not the most feasible, the court will adopt the plan approved by the department. See R.S. 30:29 (C)(2); (C)(5). (A link to a copy of the proposed LDNR standards and procedures developed for the evaluation of the aforementioned remediation plans can be found on our website under Publications and is entitled *RS 30-29 Procedures*.).

M.J. Farms, Ltd. v. Exxon Mobil Corp., et al

On January 8, 2007, Act 312 was ruled unconstitutional by Judge Kathy Johnson of the 7th Judicial District Court in Catahoula Parish. The ruling came in the case of *M.J. Farms, Ltd. v. Exxon Mobil Corp., et al.* In her ruling, Judge Johnson held that Act 312 was unenforceable and unconstitutional, stating in essence that the new law violates those sections of the Louisiana Constitution that deal with court jurisdiction and individual property rights.

On April 27, 2007, however, the Louisiana Supreme Court rejected Judge Johnson's declaration of unconstitutionality on procedural grounds. The Supreme Court remanded the matter to the trial court, giving the plaintiff the opportunity to properly plead the unconstitutionality of the statute. M.J. Farms subsequently filed a "Motion to Dismiss and/or Strike and/or For Declaratory Judgment Declaring Act 312 of 2006 Unconstitutional and Inapplicable to the Instant Case." We are currently awaiting the judge's latest ruling on this Motion. There are, however, still other legacy cases expected to raise the issue of constitutionality as well and it is expected that the La. Supreme Court will render a substantive judgment on the issue in the not too distant future.

Dore Energy Corporation v. Carter-Langham, Inc. et al.

There have also been recent rulings in the pre-Act 312 case of *Dore Energy Corporation v. Carter-Langham, Inc. et al.*, which addresses environmental damage caused as a result of the long running industry-wide practice of the discharging and storing of produced water into canals and pits around E&P sites. Specifically, the *Dore* case addressed the E&P operations of Exxon Mobil Corporation in the Cameron Meadows field prior to 1975. Exxon Mobil ceased operations as sub-lessee on a tract of property in the Cameron Meadows Field prior to the enactment of Article 128 of the Louisiana Mineral Code. At that time, an original lessor had no right of action against a sub-lessee under contract for environmental damages. The plaintiff in the *Dore* case sought retroactive application of the Mineral Code to grant them a right of action against Exxon Mobil. The Court refused to apply the Mineral Code retroactively citing federal and state law prohibition against the impairing of contracts except to protect a serious governmental interest.

The Court then addressed whether Louisiana's interest in protecting its natural resources and its environment provided the authority to retroactively impair existing contractual obligations through Act 312, the newly-enacted oilfield statute and its express purpose to address, through judicial procedure, environmental damage caused by the oil and gas industry. As Act 312 addresses, its provisions would not apply to any case which had not been set for trial by order of the court on or before March 27, 2006. Exxon Mobil unsuccessfully argued that because it did not file its answer until October of 2006, no trial could have been set prior to the deadline set by Act 312 and therefore the Act

would not apply. (The court noted that Exxon Mobil had agreed to a pre-deadline trial date prior to filing an answer in the existing litigation.) However, on reflection, the Court pointed out its error in not allowing the State of Louisiana an opportunity to raise an objection to the validity of any trial date set before March 27, 2006.

The jury in the *Dore* case ultimately found that environmental damage had been caused by Exxon Mobil and that the damage was a breach of the contract between Exxon and Dore's ancestors in title. The plaintiff was ultimately rewarded a large sum for remediation of the environmental damage caused by Exxon Mobil. In the subsequent JNOV, the trial judge expressly pointed to the fact that the plaintiff knew of the existence of production damage when they acquired the property and even used the property's condition to negotiate a more favorable sales price. The judge went so far as to question what damages Dore had actually suffered. The Court balanced that fact with the need to remediate the property as envisioned through the operation of Act 312. In the end, the judge held that Act 312 was applicable to the *Dore* case and he ordered that no relief would be granted until the court was notified what action the State would undertake.

The Louisiana Court of Appeal for the 3rd Circuit ruled on August 1, 2007 that Act 312 was not applicable to *Dore* because the Act specifically excludes its applicability to any case set for trial prior to March 27, 2007, despite certain procedural violations in the setting of the case for trial.