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 April through June, 2010.

Additionally, we have included a summary of three recent decisions addressing various elements of Act 312 and NORM-related litigation in Louisiana: *Duhon v. Petro "E," L.L.C.*.; *Eagle Pipe and Supply, Inc. v. Amerada Hess Corp.; and Meaux v. Hilcorp Energy Corp.*

I. REGULATORY UPDATE

A. LDEQ Regulatory Changes: April – June, 2010*

Title/Louisiana Administrative Code Citation	Publication Date	Status	Hearing Date	Comment Deadline
April				
Spill Prevention and Control (Title 33, Part IX, Subpart 1, Chapter 9) WQ079	4/20/2010	Proposed	5/26/2010	6/2/2010
May				
Miscellaneous Amendments for NRC Compatibility (LAC 33:XV.102, 328, 713, and 763) RP051ft	5/20/2010	Proposed	6/24/2010	7/1/2010
June				
DEQ Notifications to State Police (LAC 33:I.3913, 3915, 3917, 3923, 3925; VII.315, 713; XI.713) MM012	6/21/2010	Final	Expired	Expired
HW Tanks: Secondary Containment Requirements and 90 Day Turnover of Hazardous Waste (LAC 33:V.109, 1109, 1901, 1907, 1909, and 4437) HW106	6/21/2010	Final	Expired	Expired
Reportable Quantity for Brine from Solution Mining (LAC 33:I.3905 and 3931)	6/21/2010	Final	Expired	Expired

OS085				
Control of Emissions of Smoke (LAC 33:III.1101, 1106 and 1107) AQ310	6/21/2010	Proposed	7/28/2010	8/4/2010
Prevention of Significant Deterioration (Significance Level for Direct PM2.5 Emissions) (LAC 33:III.509.B) AQ311ft	6/21/2010	Proposed	7/28/2010	7/28/2010

*As Published by LDEQ. See www.deq.louisiana.gov

LDEQ Prefix Key

AQ - Air Quality
HW - Hazardous Waste
MM - Multi Media
OS - Office of the Secretary
RP - Radiation Protection
WQ - Water Quality

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

April:

No regulatory activity.

May:

Rules/Notices of Intent	Page No.
1.) Office of Conservation—Manifest System Statewide Order No. 29-B (LAC 43:XIX.545)	1017

Comment: Amends LAC 43:XIX.545 to 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 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".

June:

Rules/Notices of Intent	Page No.
1.) Office of Conservation—Pit Closure Techniques and Onsite Disposal of E&P Waste (LAC 43:XIX.313)	1264

Comment: 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 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 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 Rule has been amended to eliminate the one-time usage limitation on E&P Waste and change the landowner affidavit requirement to an operator affidavit requirement.

*** Source: Louisiana Register**

II. RECENT LEGACY CASE and NORM CASE-RELATED ACTIVITY

A. *Duhon v. Petro "E", L.L.C.*

34 So. 3d 1065, 2009-1150 (La. App. 3 Cir. 4/7/10

Re: Primary Jurisdiction in Act 312 Claims

Background

In *Duhon*, Louisiana's 3rd Circuit Court of Appeal held that the District Court, as opposed to the Department of Natural Resources, had subject matter jurisdiction over landowners' claims in oilfield contamination cases.

The landowner in this case filed suit against various defendants involved in oilfield operations on her property and sought damages for contamination of the property allegedly resulting from the storage and disposal of oil field wastes in unlined pits. She alleged that the defendants "conducted, directed and participated in various oil and gas exploration and production activities on plaintiff's property as lessee, sub lessee, operator and/or working interest owner/joint venturer in wells, [saltwater disposal wells], pits, tank batteries, flowlines, pipelines, processing facilities, treatment facilities, separation facilities, transportation facilities, and other facilities which have caused pollution related property damage on and/or adjacent to plaintiff's property." The plaintiff claimed that she first learned of the possibility of pollution on her property in September 2007 when she reported a spill on the property to The Louisiana Department of Environmental Quality ("LDEQ"). According to the plaintiff, the LDEQ did not act on her concerns and failed to effect proper cleanup of the property.

The defendants filed various exceptions in the case, including an exception of lack of subject matter jurisdiction arguing that the Louisiana Department of Natural Resources ("LDNR") had primary jurisdiction. The District Court granted the exception and referred the matter to the LDNR Resources "for review and such agency action as may be appropriate in advance of further consideration by this Court of the allegations of substandard conditions and/or non-compliance raised herein." The plaintiff appealed the Court's ruling.

Subject Matter Jurisdiction

The plaintiff argued that the trial court erred in granting the exception of subject matter jurisdiction an referring the matter to the LDNR. The defendants argued that, under La. R.S. 30:29, commonly referred to as Act 312, subject matter jurisdiction in this matter is discretionary with the trial court, which may refer the matter to the LDNR at any time.

The 3rd Circuit disagreed with that argument quoting the Louisiana Supreme Court's decision in *M.J. Farms, Ltd. v. Exxon Mobil Corp.* wherein the Court discussed the application of Act 312 which governs the "[r]emediation of oilfield sites and exploration and production sites," *M.J. Farms, Ltd. v. Exxon Mobil Corp.,* 998 So.2d 16, 37 (La. 7/1/08). Quoting *M.J. Farms*, the 3rd Circuit stated that:

> Act 312 does not divest the district court of original jurisdiction. .... [N]ot only is the claim for environmental damages filed in the district court, the claim is not deferred to DNR until the district court

> determines environmental damage exists and further determines the legally responsible party. La.Rev.Stat. § 30:29(C)(1). Moreover, the district court is not required to adopt the plan approved by the administrative agency, and further retains jurisdiction to compare the various proposed plans, whether proposed by a party or the administrative agency, and determines which plan is "a more feasible plan to adequately protect the environment and the public health, safety, and welfare." La.Rev.Stat. § 30:29(C)(5).

In rejecting the Defendants' argument that the district court retains the discretion to send Act 312 cases to the LDNR, the 3rd Circuit noted that the jurisprudence cited by the defendants predated the enactment of Act 312 and stated that the Supreme Court in the *M.J. Farms* case "made it clear that it is the job of the district court to determine whether environmental damage exists and who the legally responsible party or parties are prior to referral to the Department of Natural Resources" and that Act 312 "plainly sets forth a procedure whereby litigation is filed in the district court and remains there until 'a party admits liability for environmental damage or the finder of fact determines that environmental damage exists and determines the party or parties who caused the damage or who are otherwise legally responsible therefore.' As the 3rd Circuit held, Act 312 allows for intervention by the LDNR or for an independent enforcement action but makes no provision for a referral to the LDNR by the district court prior to the determination of environmental damage and the responsible parties."

B. *Eagle Pipe and Supply, Inc. v. Amerada Hess Corp.* 2010 WL 487238 (La. App. 4 Cir. 2/10/10) Re: Purchaser of Property Cannot Recover for Damages Occurring To Property Prior to Sale in the Absence of an Express Assignment of the Prior Owner's Rights

Background

This case involves the claims of a property owner that brought suit against various oil and trucking companies that had conducted business on the property with the previous owners' tenant. The plaintiff alleged that the property had been contaminated with Technologically Enhanced Radioactive Material arising from the activities of the defendants. The Louisiana Court of Appeal for the 4th Circuit held that the sales contract did not assign to the plaintiff the previous owners' rights to seek relief for the alleged contamination. In addition, the Court held that the plaintiff was not a third-party beneficiary of the oil companies' contracts with the previous owners' tenant.

The case arose from the purchase of an industrial pipeyard by the plaintiff, Eagle Pipe, in 1998. Union Pipe, now defunct and not made a party to this suit, allegedly leased the land from the prior owners from 1981 to 1988 and operated an industrial pipeyard that bought, cleaned, inspected, handled, stored, and sold used oilfield pipe. At some point after Eagle Pipe purchased the property, the Louisiana Department of Environmental Quality ("LDEQ") determined that the property was contaminated with

Technologically Enhanced Naturally Occurring Radioactive Materials ("TENORM"). The LDEQ found Eagle Pipe in violation of TENORM exposure regulations and allegedly ordered remediation of the property.

After receiving LDEQ's Notice of Violation, Eagle Pipe filed suit against various groups of defendants, including the previous landowners and the oil and transport companies that it claimed "either sold or tendered to Union Pipe used oil field equipment for cleaning or maintenance, which at all pertinent times contained hazardous, toxic, and carcinogenic radioactive materials."

Among the various exceptions heard by the trial court, the defendants' exception of no right of action was ultimately granted, dismissing Eagle's claims with prejudice. Eagle Pipe appealed the trial court's ruling.

Exception of No Right of Action

The 4th Circuit addressed the exception of no right of action stating that it presented a question of law, which required a *de novo* review by appellate courts. Its function was to determine whether a plaintiff belonged to that class of persons to whom the law granted the cause of action asserted in the petition for damages. Except as otherwise provided by law, an action can be brought only by those persons or entities which have a real and actual interest in the claims they assert.

Eagle Pipe argued that trial court erred in granting the defendants' exception of no right of action in that its judgment was contrary to the law due to the Court's incorrect interpretation of the Louisiana Civil Code and that it was a third party beneficiary to the alleged contracts between the oil company defendants and Union Pipe. Eagle Pipe's argument centered on its claims that the trial court's judgment wrongly permitted the defendants to profit by "hiding" their alleged tortious actions. Eagle Pipe complained that it was a "damaged" party pursuant to La. C.C.P. art. 2315, "but that a cause of action based on its damages did not accrue until the LDEQ allegedly notified Eagle of the alleged contamination." Eagle Pipe alleged that it paid fair market value for the property at issue and it should be able to seek relief from the defendants because it was unaware of the alleged contamination. As such, Eagle Pipe claimed that "it was the proper party to file suit, as the former land owners allegedly suffered no damage."

Quoting the Louisiana Supreme Court's ruling in *Prados v. S. Central Bell Tel. Co.,* 329 So.2d 744, 751 (La.1976) the 4th Circuit stated, "[A] buyer is presumed to know the overt condition of the property and to take that condition into account in agreeing to the sales price." Likewise quoting the Louisiana Supreme Court in *St. Jude Med. Office Bldg. Ltd. P'ship v. City Glass and Mirror, Inc.,* 619 So.2d 529, 530 (La.1993), the Court stated that "[t]he general Louisiana rule is that a purchaser cannot recover from a third party for property damage inflicted prior to the sale."

Citing a long line of jurisprudence on this issue, the 4th Circuit ultimately upheld the ruling of the trial court stating that damages to the owner of the land occurring prior

to the sale of land are personal to the owner and are not recoverable by the new owner without an express subrogation. Quoting *Dorvin Land Co. v. Parish of Jefferson,* 469 So.2d 1011, 1013 (La.App. 5th Cir.1985) the Court further noted that "[T]he landowner at the time of the alleged damages is the person with the real and actual interest to assert the claim for damages to the land." Thus, the prior owners' personal right was not transferred by the mere transfer of the title to the land, but required a specific assignment of the right.

Eagle Pipe unsuccessfully argued that that the sale of the property included a transfer of these rights by way of the inclusion of the following:

> for the consideration hereinafter mentioned they do by these presents sell, transfer and deliver, with full guarantee of title and free from all encumbrances, and with subrogation to all their rights and action of warranty against previous owners.

The 4th Circuit found, however, that this same language had been considered in *Prados* and was held not to be a valid assignment. The subrogation clause, the Court found, did not mention the assignment of alleged rights the previous landowners possessed pursuant to the alleged expired leases or an assignment of rights as to seeking damages for any alleged previous damage to the property. As such, the Court found that the clause did not constitute an express assignment of the previous landowners' personal right to seek damages for the alleged contamination of the property which allegedly occurred prior to the plaintiff's purchase.

Eagle Pipe claimed that *Hopewell, Inc. v. Mobil Oil Co.,* 00-3280 (La.2/9/01), 784 So.2d 653, provided a right of action against the defendants. However, the Court found that *Hopewell* did not change the established law. It simply stated that *Prados* involved "rights arising under a lease and" was "distinguishable from the instant facts." The 4th Circuit pointed out that the Louisiana Supreme Court ultimately reversed and remanded that matter and that there were "no subsequent state court decisions asserting that the *Hopewell* reversal changed the substance of Louisiana law."

Third-Party Beneficiary

Eagle Pipe likewise unsuccessfully argued that it was a third-party beneficiary of the contracts between the defendants and Union Pipe and as such held an independent cause of action for recovery under those contracts. Eagle Pipe claimed that the oil company defendants "were contractually obligated to inform Union Pipe of any known health hazards that could have resulted from pipeyard cleaning."

The 4th Circuit evaluated this argument and noted that "[a] contracting party may stipulate a benefit for a third person called a third party beneficiary." Such a stipulation gives the third-party beneficiary the right to demand performance from the promisor. However, such an intent of the contracting parties to stipulate a benefit in favor of a third-

party must be made "manifestly clear." Ultimately the Court found that Eagle failed to identify any contract pursuant to which it could establish its alleged third-party beneficiary status.

Rehearing

Soon after the 4th Circuit granted the defendants' Exception of No Right of Action, Eagle Pipe filed an Application for Rehearing which the Court granted. A five judge panel again heard oral arguments on May 11, 2010. The parties are currently awaiting the Court's ruling.

C. *Meaux v. Hilcorp Energy Corp.*
26 So. 3d 875, 2009-591 (La. App. 3 Cir. 12/9/09)
Re: Act 312 Standard of Review

Background

In the *Meaux* case, property owners filed suit against a mineral lease holder, its partners and assignees claiming that the oil and gas exploration and production activities of the defendants resulted in the contamination of their property. A jury found that no environmental damage had occurred to the plaintiffs' property as a result of the defendants' activities. The district court entered judgment dismissing the landowners' claims and the landowners appealed. The Louisiana 3rd Circuit Court of Appeal held that the evidence was sufficient to support the jury's finding of no environmental damage and the jury's verdict was subject to the manifest error standard of review rather than de novo.

In 1944, property owner, Davie Meaux, Sr. and his co-owners granted a mineral lease to Union Oil Company of California ("Unocal"). A portion of the property covered by the lease subsequently came to be owned by Mr. Meaux's grandchildren, the appellants in the present case. After entering into the subject lease, Unocal began developing the property which became known as the Tigre Lagoon oil field. This activity involved dredging canals necessary for access to the drilling sites. Gaps were placed in the canal banks to ensure the hydrological integrity of the property. At some point between 1958 and 1963, the gaps were closed off by unknown persons. The plaintiffs alleged that Unocal was responsible while Unocal countered that the landowners hunted and fished these canals without complaint for many years. Unocal argued that the landowners constructed their own levees to prevent poachers and trespassers from accessing the property and to create a "duck pond" for personal recreation activities such as hunting. The landowners allegedly controlled water levels in the pond to create favorable hunting conditions. These water management activities apparently commenced some time prior to 1968. Subsequently, Hurricane Rita damaged the drainage system created by the landowners, flooded portions of the property, including the duck pond and revealed that over time the property had subsided below the level of the surrounding marsh.

Unocal's activities also included the construction of an unlined pit in the area of its operation for the purpose of holding oil field waste. In 1988, Unocal closed the pit in conformity with the Louisiana Department of Natural Resources standards for submerged wetlands as verified by a site inspection conducted by the Department. Unocal performed a remediation of the site and after closing the site, the pit area was left approximately one foot higher than the surrounding marsh area. The field was subsequently transferred to Defendant, Hilcorp Energy Co.

In 1998, a portion of the property known as the "fish pond" experienced an unexplained fish kill which the plaintiffs attributed to leaking saltwater from a nearby pipeline. The plaintiffs requested that Hilcorp replace the fish and clean up the saltwater contamination. Hilcorp declined the plaintiffs' request and this lawsuit followed against Hilcorp, its partners, assigns, and insurer. The plaintiffs alleged breach of the Oil, Gas, and Mineral Lease on the property as well as tort claims. They sought remediation damages for the alleged contamination of the "duck pond" and "pit" areas.

The jury ultimately found that there was no environmental damage to the plaintiffs' property attributable to the defendants' activities and the trial court entered a judgment dismissing all of Plaintiffs' claims with prejudice. The plaintiffs thereafter appealed.

<u>Act 312 Standard of Review</u>

On appeal, the landowners unsuccessfully argued that the jury's verdict should be reviewed *de novo*. They relied on La. R.S. 30:29(c)(6)(b), which is part of Act 312, and addresses the environmental remediation plan to be developed after the finder of fact determines that environmental damage exists. This section provides in pertinent part:

> (a) Any judgment adopting a plan of evaluation or remediation pursuant to this Section 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.
>
> (b) Any appeal under this Section shall be a de novo review and shall be heard with preference and on an expedited basis.

The Court found the plaintiffs' reliance on La. R.S. 30:29(C)(6)(b) to be misplaced and pointed to Section G which states:

> G. The provisions of this Section are intended to ensure evaluation or remediation of environmental damage. If the court finds that no environmental damage exists, the court

> may dismiss the department or attorney general from the litigation without prejudice.

Thus, according to the Court, "it is clear from the statute that absent a finding of environmental damage, Act 312 does not apply. Act 312 does not address the standard by which the determination of the finder of fact is reviewed. Whether environmental damage exists in a particular case is a question of fact. Questions of fact are reviewed by the appellate court under the manifest error standard of review." If the finder of fact finds that no environmental damage exists, "the Act 312 remediation procedure is not triggered…[and] only judgments under Act 312 are subject to *de novo* review."

As such, the 3rd Circuit held that the jury's findings in *Meaux* would be reviewed under the manifest error standard.