

March 10, 2008

### **Act 312 - Constitutionality**

In the last year we have been monitoring how Act 312 is being received and how it will ultimately be interpreted by the Louisiana courts. Not surprisingly, since becoming law over one and a half years ago, the legislative intent behind the procedural aspects of Act 312 as well as its constitutionality have been challenged by various interests. One particular constitutional challenge to Act 312 which continues to progress back and forth in Louisiana courts is the case of *M.J. Farms, Ltd. Vs. Exxon Mobil Corp., et al.*

#### **MJ Farms v. Exxon Mobil, et al.**

To summarize, the *M.J. Farms* case involves a property owner claiming to have suffered damages as a result of oil and gas exploration and production operations taking place on and contaminating his property in the past. Specifically, the plaintiff alleged that the surface, subsurface and groundwater in and around its property were contaminated by wells and unlined earthen pits historically used for the disposal of oilfield wastes. The defendants sought to enforce the provisions of Act 312 and dismiss the plaintiff's claims for environmental damage subject to the primary jurisdiction of the DNR over environmental damage claims. The plaintiff objected, claiming the provisions of Act 312 were an unconstitutional divestment of property rights. The State of Louisiana subsequently intervened and argued that injuries to the environment and natural resources of the state are not, in fact, private claims but public harms and private parties have no right to receive and retain compensation for public harms. The State took the position that any funds for restoration/remediation of damaged property must be used for its intended purpose, consistent with its obligation to protect the public's interest which includes the natural resources of the State. To do otherwise, the State argued, would essentially supplant the State as trustee for its environment and natural resources.

Judge Kathy Johnson of the 7<sup>th</sup> JDC in Catahoula Parish eventually ruled in the plaintiff's favor, holding that Act 312 was unenforceable and unconstitutional. She found that the new law violates those sections of the Louisiana Constitution that deal with court jurisdiction and individual property rights. The Louisiana Supreme Court rejected Judge Johnson's earlier ruling on procedural grounds and remanded the matter. 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. That matter was heard in August and in an October 8, 2007 judgment, Judge Johnson again declared Act 312 to be an unconstitutional and unenforceable divestment of individual property rights. The issue is once again headed to the Louisiana Supreme Court for review.

### **Duplantier v. BP Amoco, et al.**

Another case has recently come to light which involved Act 312. In *Duplantier v. BP Amoco, et al.* the court addressed the issue of whether Act 312 mandates separate trials in environmental damage cases, one for establishing the existence of environmental damages and liability therefor, and one for all other contractual and/or tort claims.

Much like *M.J. Farms*, the *Duplantier* case involved allegations of property damage arising out of oil/gas exploration and production activities. Act 312 was enacted as the case was pending and the defendants moved to revise the case management order to incorporate the provisions of Act 312. The defendants argued, and the trial court agreed, that Act 312 first required a determination of the existence of environmental damage and liability followed by submission and approval of an adequate remediation plan. Thereafter, a second trial would determine all other contractual and tort issues. The plaintiffs sought supervisory writs, arguing that judicial efficiency required all claims and issues to be resolved at one trial and that two trials could result in conflicting judgments and rulings on appeal. The 4<sup>th</sup> Circuit Court of Appeal for the State of Louisiana agreed with the plaintiffs and subsequently reversed the finding of the trial court, acknowledging that Act 312 was still fairly new and that there was a lack of jurisprudence to guide the Court's interpretation of the legislative intent regarding the bifurcation of issues. The Court noted that any confusion of the claims could be handled with specific jury interrogatories on the different claims pled by the plaintiffs. The Court further found that Act 312 does not require any sort of initial determination of the existence of environmental damage. Instead, as Act 312 states, the determination of environmental damage may occur at any time during the litigation. Currently, a number of trial courts are considering Act 312 motions and other appellate decisions are expected soon.

### **Recent Regulatory Developments/News**

As of December of this year, the DEQ has finalized twenty-five Rules: 7 Air Rules (AQ), 6 Hazardous Waste Rules (HW), 1 Multi Media (MM-New Category), 4 Office of the Secretary (OS), 2 Radiation, 2 Solid Waste (SW), and 3 Water Quality (WQ). These rules and other DEQ regulations can be accessed directly from DEQ at [www.deq.louisiana.gov](http://www.deq.louisiana.gov).

#### **Significant Air Rules include:**

- AQ240 Emissions Factors
- AQ249 Emissions from Abrasive Blasting
- AQ253 Major Stationary Source/Major Modification Emissions Thresholds for Baton Rouge OZONE Nonattainment Area
- AQ255 Emissions Inventory
- AQ256 Comprehensive Toxic Air Pollutant Emission Control Program
- OS078 6 Notification Requirements and Reportable Quantity List
- AQ257FT Clean Air Mercury Rule IBR
- AQ259FT IBR Of the Acid Rain Program

- AQ260FT IBR of the CAIR SO<sub>2</sub> Trading Program
- AQ262 Lead-Based Paint Activities
- AQ281 ó Toxic Air Pollutant Ambient Air Standards
- AQ285 ó CAIR NO<sub>x</sub> Trading Program

**Other Significant DEQ Rules include:**

- DPS001 – Reporting Requirements for Category 3 or Higher Hurricane
- HW089FT Hazardous Waste Recyclable Materials
- HW090FT and HW093 Hazardous Waste Manifest Issues
- HW092 Remediation of Sites with Contaminated Media
- HW095ft ó RCRA XVI Authorization Package
- OS054 Expedited Penalty Agreement
- OS066 ó Standards for the Use or Disposal of Sewage Sludge and Biosolids
- OS072 Immovable Property Environmental Reviews
- OS073 ó Expedited Permit Processing Program
- OS075 ó Permit Application Review Timeline
- OS076FT- Reporting Exemption for Certain Air Releases of NO<sub>x</sub> (NO and NO<sub>2</sub>)
- OS078 ó Notification Requirements and Reportable Quantity List
- RP044ft ó National Source Tracking System
- RP046ft ó National Source Tracking System Reporting Requirements and Agreement State Updates
- SW037 ó Solid Waste Regulations Reorganization
- SW041 ó Construction and Demolition Debris Tonnage Fee
- SW042 Waste Tire Fee Exemption for Salvage Yards
- UT015 ó Delivery Prohibition for USTs
- WQ066FT Extension of Compliance Deadlines for CAFO Permits
- WQ067FT Pretreatment Streamlining
- WQ068 Wetlands Assimilation

**Emergency Rules passed:**

- OS066E Sewage Sludge Regulatory Management
- MM004E Expedited Penalty Agreement
- AQ290E Repeal of Incorporation by Reference of 40 CFR 63, Subpart DDDDD (LAC 33:III.501, 3003, and 5122 ó

**Current Proposed Rules:**

- AQ289ft Periodic Monitoring
- AQ290ft Repeal of Incorporation by Reference of 40 CFR 63, Subpart DDDDD (LAC 33:III.501, 3003, and 5122
- HW101 Evidentiary Hearings for Hazardous Waste Permit Applications
- MM005 Amendments and Corrections
- UT012 Motor Fuels UST Trust Fund Use of Lien

### **Rules on the Horizon for 2008:**

- AQ292 Clean Air Interstate Rule Requirements
- SW043 Recycling Tax Credit
- SW044 Waste Tires
- WQ071 Centralized Wastewater Treatment Standards
- UT015 UST rules for Implementing the Energy Act

### **Disposal of E&P Waste in Solid Waste Landfills**

The DEQ has organized a stakeholder's group to begin the development of necessary technical and permitting criteria to potentially allow for the disposal of certain exploration and production wastes in DEQ regulated Type I (industrial) landfills. The group has completed its initial discussions and the Department is currently reviewing the findings and determining the next step.

The issues discussed and debated by the stakeholders group include the fact that other states allow SW disposal, out-of-state E&P waste is entering our state, amounts of E&P waste expected to be received by SW facilities, landfill capacity, odors from E&P waste, constituents of concern (COCs) including chlorides and benzene, buffer zones, NORM and other radiation, permitting issues, public notice and perception issues and, inheriting DNR problems regarding contamination.

### **DEQ Online Oil and Gas Permitting Project**

DEQ has also developed a stakeholders group for a project to develop a multimedia Oil and Gas Environmental Results Program. The project has the goal of developing on-line DEQ permitting capabilities, compliance checklists, and an on-line compliance certification capability. In addition, the project will attempt to better coordinate the DNR database of information with the DEQ system in order to improve their interface and sharing of information. Several subgroups were formed to address various tasks including education outreach. The DEQ hopes to have the on-line permits submittal aspects of the program completed in 2007. More information on this will follow and it is expected that DEQ will develop a dedicated web page to provide updates.