New Legislation to Address Legacy Lawsuits in Louisiana

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McGlinchey Alert

Considerable effort was expended during the recently completed session of the Louisiana Legislature to reform the procedures for so-called "legacy lawsuits" arising out of historical oil and gas exploration and production activities. The new legislation was the product of extensive negotiations among representatives of landowners and oil and gas interests over the last several months. What came out of the process were two separate bills – House Bill 618 and Senate Bill 555. Together, the bills are intended to encourage quicker remediation of contaminated sites to regulatory standards, and to encourage earlier resolution of claims.

Governor Jindal has just signed both House Bill 618 and Senate Bill 555. House Bill 618 will become Act 754; Senate Bill 555 will become Act 779. Both acts will be effective on August 1, 2012, but both acts will apply only to lawsuits which were not set for trial as of May 15, 2012.

This new legislation is the latest effort to address hundreds of legacy lawsuits that have been filed since the 2002 Louisiana Supreme Court decision in *Corbello v. Iowa Production*, 2002-0826 (La. 2/25/03), 850 So.2d 686. Previous attempts to reform and streamline these lawsuits have failed to live up to expectations, and it is not clear whether a significant number of defendants will invoke the procedure authorized by this new legislation and make admissions of liability in order to limit exposure to liability for cleanup expenses. If a large number of claims are referred to the Office of Conservation to develop "feasible plans" to address testing and remediation, then the State's available resources may be overwhelmed, creating a bottleneck. If, on the other hand, only a small number of hearings are requested, then the statute will have accomplished little to reduce the cost and inefficiency of the pending litigation.

Act 754 creates Louisiana Code of Civil Procedure Article 1552 ("environmental management orders") and Article 1563 ("limited admissions of liability").

Environmental Management Orders. The new Code of Civil Procedure Article 1552 gives any party in a pending legacy lawsuit – or the Department of Natural Resources – the right to ask the court to develop an environmental management order (EMO) to set case specific rules for access to the property, investigation, sampling and testing. The EMO also sets time limitations to conduct the testing. The statute requires that "all

test results be submitted to the Department" within 30 days, and failure to submit the test results to the Department will prevent their use at trial.

Limited Admission of Liability. Act 754 also enacts Code of Civil Procedure article 1563. The new article 1563 gives defendants in legacy lawsuits the right to make a limited admission of responsibility under which defendants may agree to implement the "most feasible plan" that would satisfy "applicable regulatory standards." A defendant can limit its admission of liability to a portion of the property.

Upon entry of a limited admission, the court refers the dispute to the Office of Conservation for public hearing and development of the "most feasible plan" that would suffice to achieve regulatory compliance. That "feasible plan" (together with comments from other agencies) then will be admissible at trial subject to other evidentiary limitations. The admission will have to be made within 90 days of all testing authorized by an EMO, and other parties then will have an additional 60 days within which to make their own admissions of responsibility.

The party making the admission also is required to make an initial payment in the amount of $100,000 to cover the State's costs of developing the plan. Then, within 30 days after a feasible plan has been issued, the defendant admitting responsibility must reimburse certain recoverable costs to the plaintiff (including certain litigation expenses, expert and testing fees and attorneys fees). La. R.S. 30:29(E)(1).

An admission does not establish liability for damages under R.S. 30:29(H) (i.e. private claims otherwise provided by law or contract), and the new statute makes clear that it does not "establish primary jurisdiction with the Department of Natural Resources" (a position that has been urged as a basis to limit landowners' rights to proceed with their claims in court).

Act 779 revises the procedural framework for legacy lawsuits as currently governed by La. R.S. 30:29. Among other things, the new statute implements the limited admission of liability established pursuant to Act 754, discussed above. The new statute incorporates a number of other new concepts:

New subsection 29(B)(5) authorizes parties in legacy lawsuits to conduct discovery and issue subpoenas for documents or representatives of agencies responsible for developing or commenting on a "feasible plan" after an admission of liability under Code Civ. Proc. art 1563 or after a judicial finding of responsibility under subsection 29(C).

The new statute also authorizes a defendant to request a preliminary hearing, at which the landowner will be required to demonstrate "good cause for maintaining" a claim. La. R.S. 30:29(B)(6). The preliminary hearing must be requested within 60 days after a petition is served. The landowner then is required to come forward with some proof of actual contamination, whereupon the burden shifts to require the defendant to "demonstrate the absence of a genuine issue of material fact that the moving party caused or is otherwise legally responsible for the alleged environmental damage." If the landowner cannot establish a prima facie case at the preliminary hearing, then the claim will be dismissed (albeit without prejudice to allow the claim to be reinstated based on newly discovered evidence.)

Landowners have the right to file a "notice of intent" to investigate with the Office of Conservation prior to actually initiating a lawsuit. This filing has the effect of suspending prescription for one year. La. R.S. 30:29(7)(a). The notice must describe the property and the alleged damage; it must provide the name and address of all known owners; and it must disclose the name and address of the current operator. To the extent a landowner invokes this provision, any subsequent lawsuit must include a "map of the location of any alleged environmental damage" and must identify "any environmental testing performed on the property."

Parties are prohibited from any "direct or indirect" ex parte communications with the Office of Conservation while a feasibility plan is being developed pursuant to this new statute. La. R.S. 30:29(7)(b). If the Office of Conservation approves a plan that departs from its own regulatory standards (either by imposing additional standards or by recognizing exceptions from those standards), then the proposed plan must be submitted to other departments for review. Section 29(7)(b)(i). The Office of Conservation has the right to enforce any final feasible plan through a compliance order.

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