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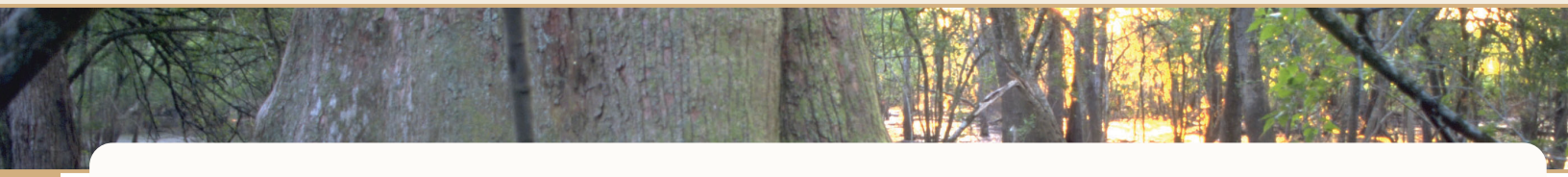
ENVIRONMENTAL NOTES

APRIL 2004



STATE ADMINISTRATIVE LAW SYSTEM RULED UNCONSTITUTIONAL

In a potentially far-reaching decision, 19th Judicial District Court Judge Janice C. Clark has ruled Act 739 of the 1995 Regular Session of the Louisiana Legislature and Act 1332 of the 1999 Regular Session of the Louisiana Legislature unconstitutional. (*See,* Judge Clark's judgment dated February 25, 2004 in *J. Robert Wooley, in his capacity as Commissioner of Insurance, State of Louisiana v. State Farm Fire and Casualty Insurance Company, et al.*, Suit No. 502,311, Section 21, on the Docket of the 19th Judicial District Court in and for the Parish of East Baton Rouge, Louisiana.)

Act 739, effective October 1, 1996, essentially created an independent administrative law division—the Division of Administrative Law ("DAL")—within the Department of State Civil Service. *See,* La. R.S. 49:991 through 999. With some exceptions (e.g., worker's compensation adjudications, state professional and occupational licensing adjudications, Department of Agriculture adjudications, certain office of conservation adjudications, etc.), the DAL handles all state agency adjudications, including those regarding the Department of Environmental Quality. Unlike prior law, under Act 739, the administrative law judge ("ALJ") issues the final decision or order in an adjudication and the affected state agency has no authority to override such decision or order. *See*, La. R.S. 49:991(B)(2). (Under prior law, the ultimate decision rested with the secretary of the affected state agency; e.g., if review of an administrative law judge's decision was requested, the secretary could remand the matter for a new hearing to receive additional evidence, remand the matter with other instructions, or render his or her own order, decision, or ruling as supportable by the record. *See, e.g.,* La. R.S. 30:2050.17.)

Act 1332, effective July 12, 1999, amended La. R.S. 49:964 and 992 to preclude any agency or official thereof, or person acting on behalf of any agency or official thereof, from seeking judicial review of a decision of a DAL administrative law judge. Thus, to the extent that a DAL ALJ rules against a state agency, that decision is truly final, as the agency secretary can neither unilaterally revise the decision nor seek judicial review of such decision.

According to Judge Clark, both Act 739 and Act 1332 are unconstitutional, null and void, and any actions taken pursuant to the provisions of such acts are null and void and of no effect, as such acts violate various provisions of the Louisiana Constitution, including (a) Article II, Sections 1 and 2, by usurping powers of the judicial branch (Acts 739 and 1332), (b) Article V, Section 22, by providing for an unelected judiciary (Act 739) , (c) Article V, Section 16, by creating a new and independent judiciary and divesting district courts of original jurisdiction (Act 739), (d) Article V, Section 1, by transferring judicial power to the executive branch and creating a court not authorized by the constitution (Act 739), and (e) Article V, Section 2, by precluding the judicial branch from exercising its inherent powers over inferior tribunals (Act 1332). Interestingly, under Judge Clark's ruling, it is at least questionable whether any system of administrative review of agency decisions—even the preexisting system—would withstand constitutional muster.

DAL is expected to suspensively appeal Judge Clark's judgment directly to the Louisiana Supreme Court. The status quo ante of DAL and all DAL proceedings will be

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STATE ADMINISTRATIVE LAW SYSTEM RULED UNCONSTITUTIONAL, Cont.

maintained during the pendency of the appellate proceedings. Remedial legislation is also anticipated this spring. *(See, however,* La. Acts 2003, No. 1298, which essentially proposed a constitutional amendment to authorize the DAL and a system of administrative law to commence and handle adjudications, which proposed constitutional amendment was not approved by the voters; and La. Acts 2003, No. 956, which essentially reenacted existing La. R.S. 49:991 through 999.25, regarding the DAL.)

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IRS RULES THAT MANUFACTURING–RELATED ENVIRONMENTAL REMEDIATION COSTS MUST BE CAPITALIZED

In Revenue Ruling 2004-18, the IRS ruled that costs incurred to clean up land and to treat groundwater that a taxpayer contaminated with hazardous waste as part of its ordinary business operations of manufacturing its inventory must be capitalized by including them in inventory costs. In the facts of the ruling, the manufacturer had disposed of hazardous waste produced in its manufacturing operations by burying the waste on portions of its land. In order to comply with environmental requirements, the taxpayer incurred costs to remediate the soil and groundwater that had been contaminated by the hazardous waste and to establish an appropriate system for the continued monitoring of the groundwater to ensure that the remediation removed all hazardous waste. The IRS concluded that these environmental remediation costs were incurred by reason of the taxpayer's production activities within the meaning of Regulation §1.263A-1(e)(3)(i). Therefore, the IRS held that the taxpayer had to capitalize the otherwise deductible environmental remediation costs by including the costs in inventory costs.

The IRS did provide a transition rule in the ruling and held that the IRS will not challenge the treatment of environmental remediation costs as deductible expenses in any tax year ending before February 7, 2004. However, if a taxpayer is currently involved in an examination or other proceeding with the IRS where this issue has been raised, then the transition rule does not apply.

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Web Watch

Several states have created "Supplemental Environmental Project" Libraries to illustrate the types of projects that have been accepted as supplemental environmental projects in settlements of enforcement actions. Some of the best are shown below:

Illinois
http://www.epa.state.il.us/cgi-bin/en/sep/sep.pl?rm=show_list&Submit=View+Projects

Texas
http://www.tnrcc.state.tx.us/legal/sep/sepindex.htm

Virginia
http://www.deq.state.va.us/enforcement/vaseps.html

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