

CONFLICTS IN THE PERMITTING OF INDUSTRIAL SANITARY TREATMENT UNITS

There exists an apparent conflict between the Louisiana Department of Health & Hospitals (“DHH”) and the Department of Environmental Quality with regard to how sanitary treatment units at industrial facilities should be permitted. The LPDES program requires permits for all discharges of pollutants from any point source into the waters of the State (defined to include groundwater). LAC 33:IX and 40 C.F.R. 122.1(b). The DHH regulations require permits for all sanitary treatment units.

Under the Sanitary Code, Louisiana Administrative Code Title 51, Part XIII, Section 701 (LAC 51:XIII.701), a person shall not install, cause to be installed, alter subsequent to installation, or operate an individual sewerage system of any kind without first having obtained a permit from the state health office and according to the plans and specifications set forth in the Code. There are no specific provisions under these rules exempting those individuals or companies who have obtained NPDES or LPDES permits regulating treated sanitary waste.

Neither the Louisiana Water Control Law nor the Federal Clean Water Act specifically exempts compliance with the Sanitary Code. However, there is a limited exception concerning LDHH’s jurisdiction for enforcement that is contained in the statute authorizing the adoption of the Sanitary Code, La. R.S. 40:4, *et seq.* This Section specifically provides that the LDHH is not authorized to enforce the provisions of the Sanitary Code with respect to “a violation of the state Sanitary Code involving pollution of streams, rivers, lakes, bayous, or ditches located in public rights of way,” when the source of such pollution is “...wastewaters and wastes in discharges from industrial facilities which are subject to permitting under the Louisiana Water Control Law (La. R.S. 30:2071, *et seq.*) or the Federal Clean Water Act (42 U.S.C. § 1251, *et seq.*, as amended), nor to waste waters from industrial facilities in ditches upstream of state or federal wastewater discharge points.” This section was adopted solely to prevent LDHH from alleging a violation of the Sanitary Code with respect to the receiving water or on-site ditches when a facility has a water discharge permit specifically regulating the sanitary sewer system effluent. However, this statutory provision does not supercede the provisions requir-

ing permitting for the sanitary treatment system itself. This is evident from regulatory provisions in both the LDHH and LDEQ programs. Under LAC 51:VIII.703.B., the LDHH Sanitary Code provides:

Individual sewerage systems, other than conventional septic tank systems, i.e., septic tanks followed by a subsurface disposal system, including those facilities built in conflict with the State of Louisiana Sanitary Code, shall comply with all provisions of the Louisiana Department of Environmental Quality Wastewater Discharge Permit. The Louisiana Department of Environmental Quality should be contacted for information regarding wastewater discharge permits. The state health officer may establish other limitations or standards, as needed, in consideration of the water quality of affected surface water bodies and groundwaters.

Correspondingly, the LDEQ General Permits for sanitary discharges all contain language stating that the permit does not authorize “facilities that do not conform with the regulations set forth in the Louisiana Sanitary Code.” However, it should be noted that although LDHH has legal authority to require permits for all individual sanitary treatment systems, it has, by policy, declined to fully exercise this authority. LDHH’s **unwritten policy** exempts from its permitting requirement any sanitary sewerage streams that are combined with industrial effluent **prior to treatment** where: a) the sanitary stream comprises less than 50% of the commingled stream; b) where the commingling occurs prior to treatment; and c) where the industrial effluent is treated pursuant to an NPDES or LPDES permit.

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UPDATE ON 8-HOUR STANDARD FOR GROUND-LEVEL OZONE

The U.S. Environmental Protection Agency (EPA) has established designations for the new 8-hour ozone National Ambient Air Quality Standard (NAAQS). The 8-hour ozone standard (which is 0.08 parts per million (ppm) averaged over an eight hour period), will replace the current 1-hour standard in June 2005. According to the EPA, only 17% of the counties or parishes in the United States do not meet the new standard or have conditions that cause a downwind county or parish to fail.

Although the 8-hour ozone standard was originally promulgated in 1997, implementation has been delayed by legal challenges. In May 1999, the U.S. Circuit Court of Appeals for the District of Columbia struck down the NAAQS on constitutional grounds. However, on February 27, 2001, the U.S. Supreme Court issued a decision in *EPA v. American Trucking Association* which reversed the Circuit Court, in part, and held that the standard-setting discretion allowed EPA by the Clean Air Act was "well within the limits" of the court's nondelegation precedents.

The latest pronouncement by the EPA on the eight hour standard was published in the Federal Register on April 30, 2004. See, 69 Fed. Reg. 23,858. EPA stated in the final rulemaking, known as the 'Transition Rule for the 8-hour Standard,' that areas designated under the 8-hour standard have one year to adjust to the new requirements. In the April 30 rulemaking, the Baton Rouge Area was classified as a marginal area under the new 8-hour standard. Marginal areas are those with a 'design value' of 85 parts per billion (ppb) to 92 ppb. The design value for Baton Rouge is 86 ppb. Thus, as of June 15, 2005, the Baton Rouge Area will be designated as a marginal area, not severe.

In the final implementation rule for the 8-hour standard, the EPA indicated that areas not attaining the 1-hour standard would be required to continue to apply any "applicable requirements" that were mandatory for 1-hour State Implementation Plans until such area was in compliance with the new 8-hour standard. See, 69

Fed. Reg. 23,951. However, the EPA also specifically indicated that certain requirements are not mandatory control measures or applicable requirements and would not continue to apply after revocation of the 1-hour standard. These include the penalty fee provisions in Clean Air Act § 185, the New Source Review requirements corresponding to 1-hour ozone classifications, and the major source threshold of 25 tons/year. These requirements will no longer be required as a matter of federal law in one year, and hopefully, a "sunset" provision will be added to the Louisiana Air Quality Regulations as well to phase out these requirements altogether.

According to the April 30 final rule, the EPA intends to address implementation of the 8-hour ozone standard later this year. Implementation will include reasonably available control technology (RACT) requirements, as well as reasonably available control measures, attainment demonstrations, and modeling requirements. As provided for in the Clean Air Act, areas not in attainment with the new 8-hour standard must achieve compliance within three to 17 years, depending on the particular nonattainment designation.

Under the new standard, states with nonattainment areas are also required to prepare a SIP to reduce ground-level ozone after the new designations take effect on June 15, 2005. As with the 1-hour standard, the five basic nonattainment classifications are marginal, moderate, serious, severe and extreme. Unlike the 1-hour standard, no areas were designated as "extreme" under the 8-hour standard, and Los Angeles was the only area classified as "severe."

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Web Watch

"Actual to Projected Actual" - Several websites provide guidance on interpretation of the EPA's New Source Review reform provisions that allow use of an "actual to projected actual methodology" to determine whether an increase from a modification to an existing source is subject to PSD or Nonattainment New Source Review. The Minnesota Pollution Control Agency FAQ's on determining "actual to projected actual" emissions under the New Source Review reforms is located at <http://www.pca.state.mn.us/air/permits/nsr/nsr-actual.html>. This includes guidance on when startup, shutdown and malfunction emissions are included in New Source Review determinations.

Two presentations from a Michigan workshop on implementation of NSR are found at <http://www.deq.state.mi.us/documents/deq-ess-caap-workshop-psd-Session1.pps> and <http://www.deq.state.mi.us/documents/deq-ess-caap-workshop-psd-Session2.pps>.

Finally, the Department of Energy memorandum to its various offices on NSR, including a discussion of the actual to potential actual methodology is published at <http://tis.eh.doe.gov/oepa/guidance/caa/nsranalysis.pdf>.

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