

### UPSURGE OF CITIZEN SUITS

During 2003, numerous citizen suits were filed in Louisiana involving a wide variety of issues. Most of these are still pending and thus, deserve attention during the upcoming year. The majority of these involved actions were filed by the Tulane Environmental Law Clinic ("TELC") as counsel to a handful of citizen groups, but there were several suits filed by other public interest law firms as well.

In June, the Louisiana Environmental Action Network ("LEAN"), represented by TELC, filed suit against Honeywell International, Inc. in the U.S. District Court for the Middle District of Louisiana and against CII Carbon L.L.C., Daybrook Fisheries, and T.T. Coatings, Inc. in the Eastern District of Louisiana alleging violations of their Clean Water Act federal and/or state discharge permits. In October, TELC gave the 60 day prior notice required by the Clean Water Act that it intended to file similar suits on behalf of the Lake Ponchartrain Basin Foundation against Preferred Quity, Inc., Southeastern Louisiana Water & Sewer L.L.C., Pineapple Management Systems, Delta Glass Works, Inc., and Titan Industries. In December, the TELC gave notice to ExxonMobil's Chalmette refinery that it intended to file a citizen action on behalf of the St. Bernard Citizens for Environmental Quality and the Louisiana Bucket Brigade under both the Clean Air Act and the Emergency Planning and Community Right-to-know Act.

In addition to these lawsuits, TELC, representing LEAN, has filed both administrative and judicial challenges to a number of air permits issued to Louisiana industries, including DuPont Dow, Dow Chemical, ExxonMobil, and Georgia Pacific Corp.

In a case of national importance, the TELC is representing the Holy Cross Neighborhood Association, LEAN, and the Gulf Restoration Network in a challenge to an Army Corps of Engineers proposed dredging project for the Inner Harbor Navigation Canal in New

Orleans. The case is pending in the U.S. District Court for the Eastern District of Louisiana, where the court has already denied a Corps motion for summary judgment. The court disagreed with the Corps contention that the dredged material was not subject to RCRA hazardous waste status. The court agreed with the citizen groups contention that the dredged material is subject to RCRA and cannot be disposed without compliance with hazardous waste rules.

In other actions involving the TELC, on December 23, 2003, LEAN filed suit against EPA in the U.S. District Court, Middle District of Louisiana in Baton Rouge, alleging that EPA violated the Clean Air Act by not reviewing the SOCMH HON NESHAP standards (40 CFR Part 63, Subparts F, G, and H) and determining whether such standards need to be made more stringent. Under the Clean Air Act, EPA is required to review the rules every 8 years, so the suit seeks an order of mandamus requiring EPA to perform the review. Suit was filed for the Concerned Citizens Coalition against the Federal Highway Administration in the U.S. Middle District in April 2003 to challenge the proposed extension of Interstate 49 in Lafayette. The suit alleges the FHA violated NEPA, the National Historic Preservation Act, and the Department of Transportation Act. Cross motions for summary judgment were filed in late November. In August, TELC filed suit for a citizen group in the Nineteenth Judicial District Court in East Baton Rouge Parish in the case In Re: Waste Management of Louisiana, L.L.C., to challenge the permit issued to the Woodside Landfill on the grounds that one of the LDEQ employees responsible for permitting was bribed.

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# TRENDS IN LOUISIANA OIL FIELD POLLUTION CASES

In law school we were taught that “bad facts make bad law”. In the practice of law, we soon learn that “bad decisions mean more litigation”. Such is the case in Louisiana, where three recent decisions adverse to the oil & gas industry - *Corbello* (oil field remediation), *Grefer* (NORM remediation), and *Castex* (wetlands remediation) - have led to an onslaught of similar lawsuits in Louisiana.

The *Corbello* case (*Corbello v. Iowa Production*, 850 So.2d 686) involved the issue of restoration of portions of a 320 acre tract of land subject to mineral and surface leases in the Iowa Field in Calcasieu Parish. The surface lease contained a standard industry lease stipulation requiring the lessee to “reasonably restore the premises as nearly as possible to their present condition.” After expiration of the surface lease, the land owners brought suit against Shell to recover the costs of restoring the property to its original condition. After a two week jury trial, plaintiffs were awarded \$33 million to restore the property (valued at \$108,000). The Third Circuit Court of Appeals affirmed the jury’s award and writs were granted by the Supreme Court. The Supreme Court issued its decision on February 25, 2003 upholding the jury’s award of \$33 million for remediation finding that the “damage award for a breach of contract obligation to reasonably restore property may not be tethered to the market value of the property.”

In the *Grefer* case (C.A. 97-15004, C.D.C. in Orleans Parish), land owners claimed that Exxon, a number of other oil and gas companies, and ITCO were responsible for the contamination of their land with naturally occurring radioactive material (NORM). The land owners leased the property to ITCO, an oil field services contractor which cleaned and refurbished drilling tubing, casing and other oil and gas production equipment.

Following five weeks of trial, on May 22, 2001, the Orleans Parish jury awarded the plaintiffs \$56 million for restoration of the property (which had a value of \$1

million) plus \$1 billion in punitive damages. The case is now on appeal to the Louisiana Fourth Circuit Court of Appeals. Oral Arguments were heard on September 4, 2003.

The *Castex* case (Docket No. 126752, 32<sup>nd</sup> Judicial District Court), to a large extent, revolves around whether oil field operators are obligated under their mineral leases to back fill canals dredged in wetland oil fields. On June 18, 2001, the trial judge awarded \$1.1 million to the plaintiff and ordered that the money be placed in the registry of the court. The trial court further assigned a Special Master to review the remediation proposal and determine if it is feasible and, if so, ordered that the money must be used to actually restore the property and that the school board has two years to complete the work. If the Special Master finds that the plan cannot be completed for the sum awarded, the parties are ordered to return to the court for determination of how the money shall be spent. The case is now on appeal to the Louisiana First Circuit Court of Appeals. Oral Arguments were heard on November 4, 2003.

While the Louisiana Supreme Court has had its say in *Corbello*, the *Grefer* and *Castex* cases are still working their way through the appeals process and decisions by their respective intermediate appellate courts are expected soon. However, regardless of their procedural status, the immediate effect of these three oil field pollution cases has been the dramatic increase in the number of oil field related pollution cases filed against the oil and gas industry in Louisiana.



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## Web Watch

<http://www.sacbee.com/static/archive/news/projects/environmental/graphics/graphic3a.html>

This website provides statistical information on the significant attorney fee awards to citizens in environmental citizen suit cases.

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