

## A tough road to defend remediation suits in Louisiana

State high court considers whether landowners can recover damages in excess of the cost of restoration.

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Louisiana “legacy litigation” refers to hundreds of lawsuits in the state seeking damages allegedly related to environmental harm caused by oil and gas exploration and production activities. For landowners, legacy lawsuits in Louisiana have been likened to winning the lottery. Indeed, Louisiana generally remains an unwelcome venue for oil and gas companies facing allegations that properties they operated or had interests in are contaminated by historic oil and gas operations. Often, these landowners seek hundreds of millions, or even billions, of dollars in damages concerning property that is valued at a minute fraction of those amounts, arguing that the property should be restored beyond regulatory standards to its “original” condition. However, oil and gas companies question whether landowners awarded such damages will ever conduct such a restoration.

Legacy litigation increased in volume significantly after the Louisiana Supreme Court’s decision in *Corbello v. Iowa Production*, 850 So. 2d 686 (La. 2003). In *Corbello*, landowners were permitted to recover substantial damages for remediation that were not tethered to the value of the land, and the owners were not required to use the damages to actually restore the property. The Louisiana Supreme Court did not end its analysis in *Corbello* with an application of the law to the facts. It opined that there was a “need for a comprehensive body of legislation wherein the state would oversee the problem in oilfield waste sites.” Id. at 696.



**RESTORATION:** A natural remediation process involving tree planting takes place at a site in New Iberia, La., contaminated with gasoline.

AP PHOTO/THE DAILY IBERIAN, LEE BAIL

### ENERGY

In 2006, the Louisiana Legislature responded to the Louisiana Supreme Court’s call for legislation by enacting a procedure for addressing legacy litigation. See *M.J. Farms Ltd. v. Exxon Mobil Corp.*, 998 So. 2d 16, 36 (La. 2008). This “legacy legislation” is commonly known as “Act 312.” See La. Rev. Stat. § 30:29. Act 312, in practice, provided little relief to the oil and gas industry. Among other things, Act 312 did not streamline litigation or expressly curtail the amount of damages a plaintiff could recover for environmental damage, and it has been interpreted to allow a trial before the Louisiana Department of Natural Resources (DNR) can opine on an appropriate standard of remediation.

For example, in *Sweet Lake Land & Oil Co. LLC v. Exxon Mobil Corp.*, 2011 WL 3878329 (W.D. La. September 1, 2011), the district court presiding over a legacy lawsuit stayed DNR proceedings, finding that the court had primary authority “to determine (1) that environmental damage has occurred; (2) who is responsible for remediation; and (3) what the plan of remediation will be.” Id. at \*6. The district court added that the DNR’s role, under Act 312, is limited “more or less” to that of an adviser “after the existence of contamination and responsibility therefore has been determined.” Id. On rehearing, the district court affirmed its prior ruling, stating that allowing the DNR to “issue orders concerning remediation during the litigation process through a separate, parallel process would lead to absurd results.” 2011 WL 6300343, at \*5 (W.D. La. December 16, 2011).

The *Sweet Lake* court has also held that the liability of an owner of a nonoperating working interest is not limited to the extent of the interest acquired in the mineral leases at issue, despite language in Louisiana Mineral Code Art. 128. Although this ruling has not been universally adopted, it creates considerable risk to oil and gas companies investing in Louisiana mineral leases. 2011 WL 5326992, at \*4 (W.D. La. November 3, 2011).

After a hard-fought battle during the 2012 Louisiana legislative session, additional legislation was enacted that purports to resolve some of the issues not resolved by Act 312. One of the more significant changes to Act 312 opens the door to DNR involvement in creating a remediation plan before the parties go to trial. Specifically, a defendant can now admit regulatory liability for all or part of the environmental damage at issue. If limited admissions are timely made, the matter is referred to the DNR to determine an appropriate remediation plan. Defendants and plaintiffs submit their proposals, and there is a public hearing, after which the DNR creates a plan and submits it to other agencies for comment. Eventually, the DNR adopts a final plan, which is admissible at trial, along with the other agencies' comments. Each party that files a limited admission is responsible for certain costs incurred by the DNR. A minimum \$100,000 deposit is required by an admitting party.

Ostensibly, a DNR-approved remediation plan, coupled with evidence of the cost to implement the plan, could help a finder of fact determine an appropriate measure of damages, assuming liability. However, a judge or jury may be deprived of this information unless the parties admit regulatory liability, which admission plaintiffs may attempt to use at trial to argue liability for exponentially greater damages to restore property to its "original condition." Moreover,

even after the 2012 amendments to Act 312, the landowners' position generally remains that a trial should proceed simultaneously with the DNR proceedings, potentially creating a rush to verdict without the benefit of the DNR's recommendation for remediation.

On January 30 of this year, the Louisiana Supreme Court issued an opinion in *State of Louisiana v. The Louisiana Land & Exploration Co.*, No. 2012-0884, 2013 WL 360329 (La. January 30, 2013), interpreting Act 312 on the issue of a landowner's right to be awarded damages beyond the cost of the regulatory remediation plan. The court affirmed the appellate court's ruling denying partial summary judgment to the defendants, who argued that the plaintiffs had no right to seek remediation damages in excess of those found necessary to fund the plan for remediation mandated by Act 312 absent an express provision in the lease. Concluding that the statute was procedural in nature and did not affect the substantive rights of landowners, the court concluded that, by its clear language, Act 312 allowed recovery of damages by a landowner in excess of the cost of the approved feasible remediation plan. Justice Jeffrey Victory delivered a strong dissent criticizing the majority opinion for creating a new substantive right nonexistent in statutory law or jurisprudence. The defendants have filed an application for rehearing, which remains pending.

Louisiana's approach can be contrasted with that taken by its neighbor, Mississippi. Mississippi has focused more intently on the remediation of land and administrative rights and remedies available to the parties. In *Chevron U.S.A. Inc. v. Smith*, 844 So. 2d 1145 (Miss. 2003), the Mississippi Supreme Court reversed the trial court's award of \$2,349,275 for contamination of 55 acres of land. The court held that the trial court should not have allowed the jury trial because, under Mississippi law, the plaintiffs were required to

first seek restoration of the land from the Mississippi Oil and Gas Board. The court opined that the board would be more qualified than the average juror to understand the regulations and the facts in each case of pollution. The court also said the citizens of Mississippi would be better served if a regulatory agency enforced the environmental statutes instead of having to wait for private citizens to bring individual actions in which there was no guarantee of actual restoration of the land.

In sum, notwithstanding the legislative efforts, Louisiana remains an antagonistic venue for oil and gas exploration and production companies facing environmental contamination claims. It remains to be seen if there will be a significant increase in legacy suits in Louisiana based on the Louisiana Supreme Court's ruling on rehearing in *The Louisiana Land & Exploration Co.*, which may keep the door open to windfall verdicts in favor of landowners.

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