

The Energy Law Advisor

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Volume 5, No.2 -- April 2011

Industry News

Louisiana ACT 312 Case Update

Submitted by [Jon C. Vicklund](#), Beirne, Maynard & Parsons, LLP, Houston

After the Louisiana Supreme Court's opinion in *Corbello v. Iowa Production*, 850 So.2d 686 (La. 2003), numerous lawsuits were spawned by landowners seeking environmental damages from oil and gas exploration and production operations. These cases are generally referred to as "legacy lawsuits" because the operations conducted on the properties may have commenced literally decades ago leaving behind historical pollution.

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To submit an industry news item for the next issue, contact Brit Brown at bbrown@bmpllp.com and ieladvisor@cailaw.org.

Members in the News

A Message from the Young Energy Professional Chairs

It's an exciting time to be a YEP. Last year's changes to the Institute's rules have made both the Institute and our YEP organization much more accessible to young professionals. The result has been an influx of new Young Energy Professionals. We encourage all eligible YEPs and Sustaining and Supporting Members to take advantage of the opportunities presented by the rule changes.

The YEP Committee remains committed to its mission of providing information for career and professional development, education in oil and gas basics, and networking opportunities for its members. In order to better serve the newly-expanded membership and actively involve more young professionals, the YEP committee created four new subcommittees:

1. The GC Forum Subcommittee, chaired by Patrick Dunn of Hess Corporation;
2. The Social Events Subcommittee, chaired by Tiago Cruz of the Miranda Alliance;
3. The Education Subcommittee, chaired by Liz Klingensmith of Haynes & Boone; and
4. The Membership Subcommittee, chaired by the YEP Vice-Chair, David Sweeney of Bracewell & Giuliani.

YOUNG ENERGY PROFESSIONALS EDITOR

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IEL Associate Director
Plano, Texas

YEP events held thus far this year have been larger and more successful than ever. Our practice committee meeting was very well attended. The wine tasting, held on the last day of the annual IEL Oil & Gas Conference, featured a sampling of South American wines and a few good laughs over last year's guesses about the price of oil this year.

On March 28, we co-hosted an ethics presentation at the Magnolia Hotel in Houston with the Oil & Gas and Oilfield Services Committee. Jay Martin of Baker, Hughes and Ryan McConnell of Haynes & Boone discussed ethical issues surrounding FCPA investigations and the effect of the Dodd-Frank legislation on how disclosures are handled.

We have a number of exciting upcoming programs as well. On May 5, Vinson & Elkins will host another installment of our joint IEL/AIPN young member breakfast series. Marie Wagner, Sr. Counsel with Anadarko will talk to us about farmouts and other entry points. Marie is a knowledgeable and entertaining speaker, and has worked on some of the most interesting and challenging oil and gas projects in the world. If you haven't already registered, please do so soon, as attendance is limited to 25 YEPs (and 50 overall). In addition, we are planning another YEP practice committee meeting (and happy hour) early this summer. Please be on the lookout for that invitation.

We look forward to seeing you at our next event.



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Committee Vice Chair:
David Sweeney
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Derek Anchondo has joined Curtis, Mallet-Prevost, Colt & Mosle LLP. Derek works with the firm's Corporate, Oil & Gas and Latin America groups. His practice focuses on complex domestic and international commercial transactions, where he has advised clients on general corporate and commercial matters, mergers, acquisitions and divestitures, joint ventures, and U.S. regulatory filings.



Derek Anchondo



Alan Dunlop

New Associate Director at the Institute for Energy Law

Alan Dunlop has joined the Institute for Energy Law, a division of the Center for American and International Law, in Dallas, Texas as Associate Director.

Alan brings to the IEL a wealth of experience, particularly in U.S. and international continuing legal education and in the energy industry.

Alan is already a volunteer leader in the Institute for Energy Law. He is currently a vice chair of the IEL, having also served as chair of the Institute's International Committee and on its Strategic Planning Committee and its Governance and Nominations

Committee. He was instrumental in forging IEL's ongoing alliance with the International Bar Association's Section on Energy, Environment, Natural Resources and Infrastructure Law (SEERIL), and the resulting IEL-SEERIL International Oil & Gas Law Conference in London, which is now in its third year.

Beyond the IEL, Alan has been a volunteer leader in international continuing legal education in a variety of capacities, having served, inter alia, as chair and other important posts in the IBA's energy law section (SEERIL), chair of the United Kingdom Energy Lawyers' Group, member of the Texas General Counsel Forum, and Trustee of the Energy, Petroleum, Mineral and Natural Resources Law and Policy Education Trust (which supports the Center for Energy, Petroleum, Mineral and Natural Resources Law and Policy at The University of Dundee, Scotland).

Previously, Alan was Vice President and General Counsel, Worldwide Exploration & Production, for Hess Corporation, based first in London and then in Houston. Before joining Hess, Alan was, inter alia, a solicitor in Edinburgh, a captain in the 4th Royal Tank Regiment in the British Army and President of the Edinburgh University Union.

Alan can be reached at his new coordinates, adunlop@cailaw.org and +1-972-244-3411.

Ken Irvin has joined the law office of Cadwalader, Wickersham & Taft LLP. Ken represents clients on federal and state commodity and energy electricity, natural gas, oil, alternative energy and emissions matters. His counsel includes advising on hedging and credit risks, contract structures and disputes, arbitrations, bankruptcy, non-performing assets, and regulatory issues involving energy and commodities trading, market regulation and structured transactions.



Ken Irvin

Sustaining Member **Baker Botts L.L.P.** added **Mark Glasser**, **Mike Lennon** and **Denmon Sigler** (Houston) as advisory board representatives and designated **Mike Bennett**, **Patrick Byrd**, **Meghan Dawson**, **Louis E. Layrissou, III**, **Jason Newman**, **Ted Prouty**, **Brian Salazar** and **Anthony Speier III** as young energy professional advisory board representatives.

Sustaining Member **BP America, Inc.** added **Allison Davis**, **Marty Detloff** and **Murray Greene** (Houston) as advisory board representatives and designated **Meryl Andry** and **Mike Rigo** (Houston) as young energy professional representatives.

Sustaining Member **Bracewell & Giuliani LLP** added **Kelly Hackett**, **Spencer Kerr** and **Austin Lee** (Houston) as young energy professional advisory board representatives.

Sustaining Member **Fulbright & Jaworski L.L.P.** added **Barclay Nicholson** and **Alex Niebruegge** (Houston) as young energy professional advisory board representatives.

Sustaining Member **Locke Lord Bissell & Liddell LLP** added **Patrick Beaton** (Houston) as an advisory board representative and designated **Steven Kolos**

and **Max Stubbs** (Houston) as young energy professional representatives.

Sustaining Member **Mayer Brown LLP** added **Jon Scott** (Houston) as a young energy professional advisory board representatives.

Sustaining Member **Winstead PC** added **Linda M. Glover** (Houston) and **Jeff King** (Ft. Worth) as advisory board representatives and designated **Jamie Bryan** and **Koy Killen** (Ft. Worth) as young energy professional advisory board representatives.



Patrick Beaton



Mike Bennett



Jamie Bryan



Patrick Byrd



Meghan Dawson



Mark Glasser



Linda Glover



Kelly Hackett



Spencer Kerr



Koy Killen



Jeff King



Steven Kolos



Louis Layrisson



Austin Lee



Mike Lennon



Jason Newman



Barclay
Nicholson



Alex
Niebruegge



Ted Prouty



Brian Salazar



Jon Scott



Denmon Sigler



Tony Speier



Max Stubbs

Supporting Member **Baker & McKenzie** added **Mike Byrd** and **Louis Davis** (Houston) as advisory board representatives.

Burleson Cooke LLP increased their membership to the Supporting Member Level. **Robert Ballentine** and **Randy Burton** join **Rick Burleson** (Houston) as advisory board representatives and **Thomas G. Ciarlone, Jr.** (San Antonio) joins as a young energy professional advisory board representative.

Supporting Member **Greenberg Traurig, LLP** added **Tony Guerino** (Houston) as an advisory board representative and designated **Pamela Horowitz** (Houston) as a young energy professional advisory board representative.

Supporting Member **Kilburn Law Firm, PLLC** added **Karen O. Donnelly** (Houston) as an advisory board representative and designated **Jamie S. Budnick** (Houston) as a young energy professional advisory board representative.

Supporting Member **Looper Reed & McGraw** added **Jorge Gutierrez** (Dallas)

and **Ryan McKenzie** (Houston) as advisory board representatives.

Supporting Member **Shell Oil Company** added **Anne-Marie Roy** (Associate General Counsel - Deep Water, Houston) as an advisory board representative.

A new Supporting Member is **Steptoe & Johnson PLLC**. **Sharon Flanery**, **Kurt Krieger** (Charleston) and **Russell Schetroma** (Meadville) join as advisory board representatives and **Erin Anderson**, **Diana Prulhiere** (Charleston), **Andrew Graham** (Morgantown) and **Benedict J. Kirchner** (Meadville) are designated as young energy professional advisory board representatives.



Erin Anderson



Robert Ballentine



Jamie Budnick



Randy Burton



Mike Byrd



Tom Ciarlone



Louis Davis



Sharon
Flanery



Andrew
Graham



Tony Guerino



Jorge Gutierrez



Pamela
Horowitz



Benedict
Kirchner



Kurt Krieger



Ryan McKenzie



Diana Prulhiere



Russ
Schetroma



Richard Capozza

New Sponsoring Members are **Discover Ready LLC** (**Amy Hinzmann**, New York) and **Hiscock & Barclay LLP** (**Richard R. Capozza**, Energy & Utilities Practice Area Chair, Syracuse).

New Associate Members are **John A. Anderson** (Harter Secrest & Emery LLP, Rochester), **Robert D. Belcher** (Belcher Law Firm, PLLC, Fort Worth), **Daniel Droog** (Shipleigh Snell Montgomery LLP, Houston), **Wayne I. Fagan** (Pulman, Cappuccio, Pullen & Benson, LLP, San Antonio), **John R. Hays, Jr.** (Hays and Owens LLP, Austin), **Wesley D. Lloyd** (Naman Howell Smith & Lee PLLC, Waco), **Gbemisola Esther Owolabi** (Owolabi & Oyefeso, Lagos), **Jerry Swonke** (Law Office of Gerard J. Swonke, Houston), **Joe Wilkinson** (Director, Berkeley Research Group, Houston) and **Ronald E. Wright** (Drinnon & Wright, Houston).



John Anderson



Daniel Droog



Wayne I. Fagan



John Hays



Wes Lloyd



Gbemisola Owolabi



Joe Wilkinson



Ronald Wright

A new Government Member is **Daniel T. Zwart** (Office of the Attorney General of Texas, Pearland).

New Academic Members are **Olanrewaju Aladeitan** (University of Abuja, Abuja) and the **University of Houston Law Center** (**Jacqueline L. Weaver**, Houston).



Lanre Aladeitan



Jackie Weaver



Megan Bibb



Elizabeth Goldstein

New Young Energy Professional Members are **Natalie Barletta** (Kilburn Law Firm, PLLC, Houston), **Megan Bibb** (Haynes and Boone, LLP, Houston), **Elizabeth Goldstein** (Dilworth Paxson, Harrisburg), **Sergio Andre Laclau** (Xavier Bernardes Braganca, Rio de Janeiro), **Kirt Mayland** (General Counsel, Penn Energy Trust, Bala Cynwyd), **Jennifer W. Mosley** (Porter Hedges, Houston), **William Radler** (University of Tulsa College of Law, Tulsa) and **Paula Surerus** (Xavier Bernardes Braganca, Rio de Janeiro).

Participate in the IEL Advisory Board LinkedIn Group

Share your thoughts on current issues and developments in the field with other members of the Advisory Board in our new members-only [IEL Advisory Board LinkedIn group](#). If you are not already a member of LinkedIn, [click here](#) for directions on how to join.

Visit the Advisory Board Members website

To visit the members website, [click here](#) and enter the password that was sent to you recently by email (If you need the email sent to you again, please email iel@cailaw.org). Here you will find current information about the Institute, the Advisory Board and the members themselves, including member photo rosters, committee descriptions and rosters, and a calendar of upcoming events. Here you can also access our new members-only online forum on LinkedIn, our bimonthly

newsletter *The Energy Law Advisor*, our *Online Articles Index*, our other publications, and a description of Sponsorship Opportunities at upcoming programs.

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Submit your member announcements for the next issue, with a photo if possible, to ieladvisor@cailaw.org.

Calendar of Events

4th Annual Power & Alternative Energy Law Conference

May 12-13, 2011 | Houston, Texas

Natural Resources Law Teachers Institute

May 25-27, 2011 | Columbia River Gorge, Oregon

3rd IEL-SEERIL International Oil and Gas Law Conference

June 27-28, 2011 | London, United Kingdom

International Oil and Gas Law, Contracts, and Negotiations: Upstream Issues and Agreements

September 19-23, 2011 | Houston, Texas

International Oil and Gas Law, Contracts, and Negotiations: Midstream Issues and Agreements

September 26-30, 2011 | Houston, Texas

2nd Conference on the Law of Shale Plays

September 7-8, 2011 | Ft. Worth, Texas

Oilfield Services Law Conference

October 10, 2011 | Houston, Texas

Oil and Gas Law Short Course

October 17-21, 2011 | Westminster, Colorado

10th Annual Energy Litigation Conference

November 3, 2011 | Houston, Texas

2nd International Offshore Oil & Gas Law Conference

December 2011 (TBA) | New Orleans, Louisiana

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Louisiana Act 312 Case Update

Submitted by [Jon C. Vicklund](#), Beirne, Maynard & Parsons, LLP, Houston

After the Louisiana Supreme Court's opinion in *Corbello v. Iowa Production*, 850 So.2d 686 (La. 2003), numerous lawsuits were spawned by landowners seeking environmental damages from oil and gas exploration and production operations. These cases are generally referred to as "legacy lawsuits" because the operations conducted on the properties may have commenced literally decades ago leaving behind historical pollution. Act 312, La. R.S. 30:29 (2006) was implemented to provide a "procedure for judicial resolution of claims for environmental damage to property arising from . . ." such operations. In theory, it is also meant to ensure that any recovery by a landowner actually is used for remediation purposes.

While there is a history of post-Act 312 cases, the scope of this article is limited to a brief discussion of the more recent court opinions in *Debra Bergeron Duhon v. Petro "E", LLC, et al.* and *Tensas Poppadoc, Inc. v. Chevron U.S.A., Inc., et al.*, both of which arise out of the Third Circuit Court of Appeals of Louisiana.

Debra Bergeron Duhon v. Petro "E", LLC, et al., 34 So.3d 1065 (La.App. 3 Cir. 2010).

This case involves a lawsuit brought by the landowner, Debra Bergeron Duhon, against several oil and gas service, exploration, and chemical companies for property damage arising out of oilfield operations involving storage and disposal of toxic oilfield wastes in unlined pits. The District Court granted defendants' exceptions of prematurity and lack of subject matter jurisdiction, and the case was referred to the Louisiana Department of Natural Resources. However, the Louisiana Third Circuit Court of Appeals reversed and remanded.

Subject Matter Jurisdiction. While one of the defendants argued that under Act 312 subject matter jurisdiction is discretionary with the trial court, and thus the trial court could refer the matter to the DNR, the Third Circuit disagreed citing to the prior decision in *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 998 So.2d 16 (La. 2008).

In *M.J. Farms*, the Louisiana Supreme Court discussed the application of [Act 312] in this context, which governs the "[r]emediation of oilfield sites and exploration and production sites" (emphasis added):

Act 312 does not divest the district court of original jurisdiction. **[N]ot only is the claim for environmental damages filed in the district court, the claim is not deferred to DNR until the district court determines environmental damages exists and further determines the legally responsible party.**

[Citation omitted] Moreover, the district court is not required to adopt the plan approved by the administrative agency, and further retains jurisdiction to compare the various proposed plans, whether proposed by a party of the administrative agency, and determines which plan is "a more feasible plan to adequately protect the environment and the public health, safety, and welfare."

[Citation omitted]

The *Duhon* Court confirmed that the duty of the district court is "to determine whether environmental damage exists and who the legally responsible party or parties are *prior* to referral to the [DNR]" (emphasis added). The Court further found that subject matter jurisdiction of the district court is not disturbed by an argument that the DNR has primary jurisdiction, as Act 312 establishes that a lawsuit shall remain in the district court until (1) there is an admission of liability or the factfinder makes such a determination, and (2) the responsible parties are determined. As a result, the Third Circuit found that there was subject matter jurisdiction, and the trial court's grant of the exception of lack of subject matter jurisdiction was reversed.

Prematurity. The *Duhon* Court also considered the exception of prematurity. The defendants argued that there were no restorative requirements until the termination of the applicable leases, but failed to provide the Court with evidence as to whether the leases had expired or not. The Court noted that it was the defendants' burden to show that the leases had not expired. Since there was nothing apparent from the record in support of the exception of prematurity, the *Duhon* Court also reversed the prematurity finding.

Tensas Poppadoc, Inc. v. Chevron U.S.A., Inc., et al., 49 So.3d 1020 (La.App. 3 Cir. 2010).

This Third Circuit decision is a recent opinion arising out of the *Poppadoc* litigation. There are numerous reported opinions relating to this lawsuit, but this article only addresses the more recent issue raised on appeal.

This case involves claims of environmental damages to Tensas Poppadoc, Inc.'s property for which one of the defendants was found liable as a responsible party. A plan for remediation was approved by the Louisiana Department of Natural Resources; however, the approval was challenged by the plaintiff, who contended that the remediation plan was not the most feasible plan. When the trial court set the matter for a hearing, the plaintiff moved to take the deposition of the Secretary of the DNR prior to the hearing date.

Act 312 sets forth a detailed procedure for the resolution of environmental damages claims, and ultimately requires the efficient use of the most feasible remediation plan. One of the final steps in the procedure, after the DNR issues written reasons for the use of a given remediation plan, requires the court to adopt the plan "unless a party proves by a preponderance of the evidence that another plan is a more feasible plan to adequately protect the environment and the public health, safety, and welfare" [citation omitted]. The Third Circuit referred to this hearing requirement as the "preponderance hearing."

This raised the questions whether the Secretary of the DNR may be compelled to (1) provide testimony at the "preponderance hearing," and (2) submit to a deposition prior to the hearing. Resolving these questions requires the trial court to first determine the "relevance" of the facts sought to be proved by the testimony at a "relevancy hearing" and, then determine the "necessity" of the witness to appear at the "preponderance hearing" as determined through a "necessity hearing." Does this seem convoluted? Yes, it appears so at first glance, but the Third Circuit quickly disposed of the issues, affirming in part and reversing in part the trial court's grant of the landowner's motion to compel the requested testimony.

The Third Circuit noted that the trial court specifically determined that the factual assertions in plaintiff's motion were well founded, and prejudice would result if the trial court denied the motion. As such, the Third Circuit found that the facts asserted by plaintiff in its motion were relevant to the case because the asserted facts tended to show that the feasibility plan failed to comply with the relevant statutory provisions, and was also not the most feasible plan. While the Secretary of the DNR complained of the timing of the hearings, the Third Circuit held that the trial court correctly applied the procedure insofar as the relevancy determination. Thus, the trial court's ruling was affirmed on that basis.

However, with respect to the "necessity" determination, there was a different result. The Secretary of the DNR argued that he did not have proper notice for the "necessity hearing," and also that the trial court's exclusion of his affidavit was in error. The Third Circuit found no merit in the first argument, as the Secretary was represented by counsel at the hearing. The Third Circuit also found that the exclusion of the Secretary's affidavit was proper based upon hearsay grounds. So it would seem as though the trial court's ruling concerning "necessity" would stand. But it did not.

The Third Circuit noted that "[b]efore issuing the requested subpoenas [i.e. to compel the Secretary of the DNR to appear and give testimony at the 'preponderance hearing'], it was incumbent upon the trial court to consider the 'necessity' of the [Secretary's] testimony. However, given the exclusion of [the Secretary's] affidavit, the 'necessity' hearing was concluded without the trial court having [any] evidence before it upon which to make a determination as to whether [the Secretary's] testimony [was] 'necessary' at the upcoming 'preponderance hearing' under La. R.S. 30:29(C)(5)." Therein lies the reasoning for the Third Circuit's reversal of "that portion of the judgment of the trial court granting Poppadoc's motion for the issuance of a trial subpoena and permitting Poppadoc to take [the Secretary's] deposition" prior to the "preponderance hearing." If there had been some evidence before the trial court concerning "necessity," a different result may have been reached by the Third Circuit and the trial court's ruling affirmed in its entirety.

Dissent. It is noted that there was a dissent to the majority's opinion, but the dissent is not addressed

given the purpose of this article is to briefly address recent highlights. Therefore, the reader is referred to the entirety of the dissenting opinion beginning on page 1026 of the reported case.

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