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Kenneth M. Murchison*

In the United States, analysis of environmental law tends to concentrate on federal law. The focus is understandable given the primacy of federal law in the field and the diversity of state environmental statutes. Nonetheless, the focus is unfortunate with respect to enforcement issues. Major federal statutes envision that states will assume primary responsibility for routine enforcement, subject always to the oversight of the federal Environmental Protection Agency (EPA). Understanding state law relating to enforcement is, therefore, an essential step for evaluating the effectiveness of pollution control legislation in the United States.

This Article analyzes the statutory provisions for enforcing environmental standards in Louisiana. After a brief overview of the state's constitutional protection for the environment and the Louisiana Environmental Quality Act, the Article describes the methods the Act provides for detecting violations; analyzes the statute's provisions for administrative sanctions and emergency orders, civil actions initiated by the government, criminal prosecutions, and enforcement by private parties; and compares the state provisions to analogous provisions of federal law. It concludes with an assessment of the effectiveness of the state enforcement devices together with some suggestions for reform.

I. POLLUTION CONTROL STANDARDS IN LOUISIANA: AN OVERVIEW

A. The Constitutional Duty to Protect Natural Resources

The Louisiana Constitution establishes environmental preservation as the public policy of the state. It directs that the “natural resources of the state,
including air and water, and the healthful, scenic, historic, and esthetic quality of the environment” are to “be protected, conserved, and replenished.” Moreover, it mandates the legislature to “enact laws to implement this policy.”

The constitutional policy is not absolute. Other economic and social needs of the community temper it. Nonetheless, the obligation imposed by the constitution is a substantial one. It commits the state to the protection, conservation, and replenishment of its natural resources “insofar as possible and consistent with the health, safety, and welfare of the people.”

*Save Ourselves, Inc. v. Louisiana Environmental Control Commission* is the leading decision interpreting the constitutional mandate. In *Save Ourselves*, Justice Dennis—writing for a unanimous Louisiana Supreme Court—construed the constitutional provision as continuing “the public trust doctrine” established in the 1921 Constitution. According to Justice Dennis, the effect of this continuation of the public trust doctrine is to impose “a duty of environmental protection on all state agencies and officials” and to establish “a standard of environmental protection” as well as to mandate “the legislature to enact laws to implement fully this policy.”

The *Save Ourselves* opinion also recognized the significance of the qualifying language in the constitutional text. The obligation imposed by the state constitution is, Justice Dennis explained, “a rule of reasonableness.” Although the constitution “does not establish environmental protection as an exclusive goal,” it does require “a balancing process in which environmental costs and benefits must be given full and careful consideration along with economic, social and other factors.”

**B. The Environmental Quality Act**

1. *Statutory Framework*

To fulfill its obligations to enact laws to protect the natural resources of the state, the legislature has enacted the Louisiana Environmental Quality Act.

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4. Id.
5. 452 So. 2d 1152 (La. 1984).
7. La. Const. of 1921 art. VI, § 1.
8. *Save Ourselves, Inc.*, 452 So. 2d at 1156.
9. Id. at 1157.
10. La. R.S. 30:2001-2391 (1989 and Supp. 1996). In 1979, the legislature enacted the Louisiana Environmental Affairs Act, which consolidated administration of most of the state’s environmental protection programs in the Office of Environmental Affairs in the Department of
Although the Act is "modeled in part" on federal statutes, the "Louisiana regulatory framework is also based on state constitutional provisions and the public trust concept."

The Environmental Quality Act includes most of the state's pollution control and environmental remediation laws. Substantively, the Act combines state legislation regarding air and water pollution, the management and disposal of solid and hazardous waste, and releases of hazardous substances into one comprehensive act. It also creates the Department of Environmental Quality, "the primary agency in the state concerned with environmental protection and regulation," to administer the Act.

The organizational head of the department is its secretary. In addition to vesting in the secretary "all incidental powers necessary or proper to carry out the purposes of [the Environmental Quality Act]," the statute specifically grants the secretary broad enforcement powers when violations occur.

To assist the secretary in carrying out the directives in the legislation, the Act provides for four assistant secretaries. Three of the assistant secretaries direct substantive programs; the fourth is responsible for legal affairs and enforcement. The assistant secretaries have "immediate supervision and
direction" of the offices they head, and they may exercise "such powers and duties as are assigned to them by the secretary or by law."

2. Detection of Violations

One of the primary methods for discovering when environmental regulations have been violated is to require the violators to report the violations. The Environmental Quality Act contains a general reporting requirement applicable to all violators. Various substantive chapters add additional mandates to report specific types of violations.

The department also has broad investigatory powers. Department personnel have access to facilities and records of regulated entities. They can also conduct tests and meet with alleged violators to determine if violations have occurred and, when violations are uncovered, to decide how the department should respond.

One of the most important aspects of the department's investigatory powers is the authority to inspect facilities of persons who are covered by the Environmental Quality Act. The Act's authorization for inspections confers considerable authority on departmental personnel to conduct warrantless inspections, but—for the reasons explained below—constitutional concerns may encourage a narrow interpretation of the statute if it is challenged judicially.

3. Enforcement Alternatives

A violation of the Environmental Quality Act or its implementing regulations is the essential prerequisite for the imposition of administrative or judicial sanctions under the statute. Before initiating an enforcement action, the department must determine that a violation of a preexisting requirement has occurred, is occurring, or is about to occur. However, for most enforcement

25. La. R.S. 30:2025(J) (1989); see infra note 48 and accompanying text.
actions, the finding of a violation is sufficient. Except for emergency cease and desist orders, the secretary need not prove that the particular violation damaged public health or the environment.

The Act requires the secretary to "establish policies and procedures to address violations in a formal and consistent manner." To the extent that such procedures have been formalized into rules, many are still found in the rules issued by the Environmental Control Commission before it was abolished in 1984. Although the secretary has recently superseded some of the commission rules, the unrepealed portions (which contain many outdated references) remain in effect.

The commission rules provide for public complaints about, and departmental investigations of, possible violations. They allow any person to file a complaint with the Secretary of the Department of Environmental Quality and require the secretary to determine, within fifteen days, if an investigation is warranted.

To "develop facts," the secretary may use either "staff investigatory procedures" or


33. Although the Environmental Control Commission initially published its procedures rules as emergency rules, 6 La. Reg. 159 (1980), it did not publish a verbatim copy of the permanent rules. Instead, it provided (and the Department of Environmental Quality continues to provide) copies of the final rules on request. The quotations in the text come from the final rules.


35. Environmental Control Comm'n Rules of Procedure, Rule 3.0. As explained in supra note 34, the Commission rules antedate the creation of the Department of Environmental Quality. Although the rules provide for complaints to be filed with the Assistant Secretary of the Office of Environmental Affairs in the Department of Natural Resources or the Environmental Control Commission, the secretary has assumed the powers of both the assistant secretary and the Commission. See supra note 34.

Within seven days after an investigation is completed, the person responsible for the investigation must present a report of the investigation to the secretary, with a copy furnished to the attorney general “for use in any civil or criminal proceedings under the Act.”

When the secretary determines that a violation is occurring, the rules direct that “appropriate action” under the Act “shall” be commenced. When “enforcement actions” are undertaken, the rules direct that the secretary is to conduct them “in accordance with” the provisions of the Environmental Quality Act and that all hearings for penalty assessments are to be adjudicatory.

The Environmental Quality Act authorizes a range of enforcement options. A single section, Louisiana Revised Statutes 30:2025, covers most alternatives for governmental enforcement, although other sections govern particular types of violations. The general enforcement section allows the Department of Environmental Quality to impose administrative sanctions, to request the attorney general to initiate a civil enforcement action, or to refer the matter to a district attorney for criminal prosecution. A separate section, Louisiana Revised Statutes 30:2026, allows any aggrieved person to file a citizen suit. Furthermore, private remedies authorized by other provisions of law also remain available to potential plaintiffs.

In addition to the powers described in the preceding paragraph, the secretary also has emergency power to act immediately to protect the environment, regardless of whether a preexisting rule has been violated. The secretary may direct the filing of civil actions, take administrative action to abate the pollution, or order a response from emergency response personnel. Because no violation is required to support these initiatives, the administrative responses are not true enforcement actions.

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37. *Id.* at Rule 3.3.
38. *Id.* at Rule 3.4.
39. *Id.* at Rule 3.6.
40. *Id.* at Rule 3.7. The rules refer to La. R.S. 30:1073, but that section has been renumbered as La. R.S. 30:2025. See *La. R.S.*, Title 30, at p. 636 (Table 2).
44. La. R.S. 30:2025(B), (G) (1989 and Supp. 1996); see *infra* notes 289-326 and accompanying text.
Nonetheless, this Article discusses them because they give the secretary important powers to prevent or to correct private actions that threaten to degrade the environment.

The remaining analytical sections describe the methods available for the department to detect violations of the Environmental Quality Act, the options for enforcing the Act, and the emergency powers of the secretary. The final section evaluates the adequacy of the enforcement alternatives that are currently available under the statute.

II. DETECTION OF VIOLATIONS

A. Self-Reporting

To a significant degree, environmental enforcement relies on self-reporting by those who violate environmental regulations. The Environmental Quality Act requires that "[a]ny person who discharges, emits, or disposes of any substance in contravention of any provision" of the Environmental Quality Act or any rule or permit issued under the Act must report the violation "to the proper authorities." The violator is to make the report "immediately, or in accordance with regulations adopted" under the Act. The report is to describe the "nature and amount [of the substance that is discharged] and the circumstances surrounding same." The format of the report is to comply with "uniform reporting procedures" of the Department of Environmental Quality and the Department of Public Safety and Corrections. A proviso at the end of the reporting subsection prohibits requiring "additional notifications or reports . . . for emergency releases except as specifically required by law or rules as provided by this Section." 48

The substantive laws that make up the Environmental Quality Act also impose reporting requirements. The Air Control Law requires "a written report within seven days" for "any discharge of a toxic air pollutant" that exceeds allowable quantities. 49 The reporting requirement of the Water Control Law is even broader; it applies to "[a]ny person who allows, suffers, permits, or causes the unpermitted pollution of the waters of the state in contravention of any provision" of the Water Control Law or of rules, permits, or orders issued pursuant to the law. 50 The Nuclear Energy and Radiation Control Law mandates that "[a]ll cases of exposure in excess of that permitted by regulations" must be "immediately reported" to the

49. The report must contain "information on the source, nature, and cause of the discharge"; list "[t]he date and time of the discharge"; indicate "[t]he approximate total loss during the discharge"; explain "[t]he method used for determining the loss"; describe "[t]he action taken to prevent the discharge"; identify "[t]he measures adopted to prevent future discharges"; and include other information that the Secretary deems necessary. La. R.S. 30:2060(H) (Supp. 1996).
50. La. R.S. 30:2077 (Supp. 1996); see also La. R.S. 30:2076(D) (1989). The water law does not define the scope of the reports that it requires to be filed.
Office of Air Quality and Nuclear Energy. The Hazardous Waste Control Law provides that the "owner or operator" of an "active site" or facility must notify the Office of Solid and Hazardous Waste "whenever the owner or operator ... obtains information indicating that hazardous waste is leaching, spilling, discharging, or otherwise moving in, into, within, or on any land or water." Certain releases of hazardous substances require reports to the state police rather than to the Department of Environmental Quality. The Hazardous Materials Information, Development, Preparedness, and Response Act requires "owners and operators" to notify the Department of Public Safety and Corrections of any release, "other than a federally or state permitted release or application of a pesticide or fertilizer, of a hazardous substance listed pursuant to" the Act whenever the release exceeds "the reportable quantity when that reportable quantity has the potential to escape the site of the facility." Notice is to be provided "as soon as the owner or operator has knowledge of such release." In addition, the Hazardous Materials Transportation and Motor Carrier Safety law establishes special requirements for accidents relating to the transportation of hazardous materials. The duty to report extends to any person "involved in an incident, accident, or the cleanup of an incident or accident during the transportation, loading, unloading, or related storage in any place of a hazardous material." The report must be filed "immediately by telephone" if the incident involves a "fatality" or the "hospitalization of any person due to fire, explosion or exposure to any hazardous material," any "continuing danger to life, health, or property at the place of the incident or accident," or "[a]n estimated property damage of more than ten thousand dollars."

A 1989 amendment to the Environmental Quality Act directed the Department of Environmental Quality and the Department of Public Safety and Corrections "jointly [to] establish a uniform reporting procedure" by January 1990. Although uniform regulations have not yet been issued, both departments have issued rules governing reports that must be submitted. The rules of the Department of Environmental Quality establish reporting requirements that are mandated by both the general reporting requirements of the Environmental Quality Act and the specific provisions of the laws governing air and water pollution and hazardous waste. The rules have a four-fold purpose:

1) To protect the health and well-being of the people of the state of Louisiana and to prevent and [to] mitigate damage to property or to the

environment due to unauthorized discharges of pollutants to land, water, or air.

2) To provide a uniform notification and reporting procedure for unauthorized discharges.

3) To enable appropriate emergency response to unauthorized discharge incidents.

4) To provide the department with the discharge information that may be used to insure compliance with permit terms and conditions.

The rules mandate two types of reporting. Unauthorized discharges that cause "emergency conditions" must be reported "immediately."

Other unauthorized discharges must be reported "promptly" when the amount discharged exceeds a "reportable quantity." The rules contain detailed procedures for making both verbal and written reports.

Rules that the secretary has issued pursuant to the substantive laws that make up the Environmental Quality Act also include reporting mandates. These mandates cover emissions of toxic air pollutants, discharges of hazardous wastes, and releases from underground storage tanks.

The Department of Public Safety and Corrections has promulgated separate rules governing reports that must be submitted under the Hazardous Materials Information, Development, Preparedness, and Response Act, which requires reporting of releases of designated hazardous substances as well as the development of plans for responding to releases. The department's rules require immediate reporting of releases of materials designated as hazardous by the federal Environmental Protection Agency, the Department of Transportation, or the Occupational Safety and Health Administration.

When a reportable release occurs, the person responsible must report it to the Hazardous Material hotline, operated by the Louisiana Emergency Response Commission, and the local emergency planning

58. An unauthorized discharge that causes "an emergency condition" requires notification of the department "immediately (a reasonable period of time after taking prompt measures to determine the nature, quantity, and potential off-site impact of a release, considering the exigency of the circumstances), but in no case later than one hour after learning of the discharge." It also requires a subsequent written report. The regulation defines an "emergency" as any condition that "could reasonably be expected to endanger the health and safety of the public, cause significant adverse impact to the land, water, or air environment, or cause severe damage to property." Id. §§ 3915, 3925.

59. When the discharge does not create an emergency condition, the discharger must make verbal contact with the appropriate office of the department within 24 hours followed by a written report. Id. § 3917. Reporting is required only when the unauthorized discharge exceeds the threshold limits identified in the rules. See id. A lengthy set of tables specifies what constitutes a reportable quantity for a large number of substances. Id. § 3931.

60. Id. § 3925.
61. Id. at pt. III, § 5107(B).
62. Id. at pt. V, § 105(J).
63. Id. at pt. V, §§ 1913(D); pt. XI, §§ 509(A)(2), 707.
65. La. Adm. C. 33:10111(A), (B).
committee, as well as to "other agencies . . . [who] may need to be notified." Within five days, the person responsible for the discharge must submit a written report to the state commission and the local emergency planning committee.66

Failure to report a violation of the Environmental Quality Act is a violation of the Act that is distinct from the substantive violation that triggers the obligation to report.67 Under the Act, the secretary can assess an additional penalty for the failure to report.68 Moreover, the duty to report is a continuing one, and each day of noncompliance is a separate violation.69

Although no reported decisions have construed the reporting requirements of the individual substantive laws that are part of the Environmental Quality Act, the language of those requirements is similar to the wording of the general reporting provisions of the Act. Like the general reporting provisions, the specific statutes expressly declare that violation of the duty to report is a separate statutory violation for which a civil penalty can be assessed, and they declare each day of noncompliance to be a separate violation.70

Mandatory reporting duties may raise self-incrimination problems when violators are subject to criminal prosecution. Information a natural person is required to provide cannot form the basis for conviction. Moreover, as discussed below,71 the Louisiana courts have not yet determined whether the privilege also applies to the civil penalties that the Act authorizes the secretary to impose.

B. Departmental Investigations

The Environmental Quality Act grants broad investigatory powers to the secretary. The section that delineates the general powers and duties of the secretary expressly includes authority to conduct "inspections."72 It also allows the secretary to "hold meetings or hearings . . . for [the] purpose of factfinding . . . [or] conducting inquiries and investigations." In connection with these meetings or hearings, the secretary may issue "subpoenas" that require "the attendance . . . witnesses and the production . . . documents."73 Finally, the section confers on the secretary "all incidental powers necessary or proper to carry out the purposes of" the Act.74

66. Id. § 10111(D).
70. See La. R.S. 30:2060(H), 2077, 2107(B), 2183(I), 2373(A) (1989 and Supp. 1996); see also La. R.S. 32:1510(A) (1989) (Department of Public Safety and Corrections).
71. See infra notes 266-272 and accompanying text.
Provisions in several other parts of the Environmental Quality Act supplement the general grants of authority to the secretary. A 1995 amendment to the general provisions of the Act grants the secretary discretion to hold "public hearing[s] for the purpose of fact-finding or establishing policy." The Air Control Law provides that the Office of Air Quality and Radiation Protection may "make investigations upon receipt of information concerning an alleged violation" of the air law. The Nuclear Energy and Radiation Control Law authorizes the same office to investigate violations of that statute, and the Water Control Law contains a similar provision covering investigatory authority of the Office of the Secretary for violations of the water statute. The only general rules regarding investigations were issued by the Environmental Control Commission in 1980, but they apparently remain in effect because the secretary has never repealed them. The commission rules provide for investigations in response to citizen complaints and also authorize investigations "[u]pon the receipt of reasonable information" that a violation of the Environmental Quality Act (or rules issued pursuant to the Act) has occurred. The rules define the purpose of any investigation as "determining whether a violation exists, the scope of the violation, and the persons or parties involved." In conducting the investigation, the secretary may use either "staff investigatory procedures or . . . formal investigatory proceedings." After the investigation is complete, "[a]ll facts concerning any alleged violation" must "be fully documented in a report of investigation" that is to be presented to the secretary. If the secretary determines that a violation has occurred, the rules direct that "appropriate enforcement proceedings" be instituted.

76. La. R.S. 30:2054(A)(2) (1989). The subsection further provides that the authorization to make investigations "upon receipt of information concerning a violation" is not intended to "detract from the power of the office to make investigations and inquiries upon its own motion."
80. See supra note 34.
82. Id. at Rule 3.1.
83. Id. at Rule 3.3.
84. Id. at Rule 3.2. This rule specifically authorizes the secretary to "hold non-adjudicatory, fact-finding public hearings" and to "conduct . . . inspections of facilities" in the course of investigations.
85. Id. at Rule 3.4. A copy of the report is to be furnished to the Attorney General.
86. Id. at Rule 3.5.
The rules implementing the substantive statutes in the Environmental Quality Act generally grant investigatory authority to the secretary or the secretary's designee with respect to violations of the particular environmental regulations with which they are concerned. Thus, for example, air rules provide authority to investigate violations of standards relating to air pollution, the water rules grant investigatory authority over possible violations of the water law, and the rules pertaining to solid and hazardous waste allow investigations of violations of those controls on pollution.

The only judicial opinion to analyze the department's investigatory powers in any detail emphasized the broad discretion that is conferred by the Environmental Quality Act. In re BASF, Inc. involved a citizen group's challenge to the compromise of a civil penalty that the department had imposed administratively. Although the first circuit ultimately remanded the penalty to the secretary on other grounds, the appellate court construed the statutory and regulatory framework to confer substantial discretion regarding the way departmental investigations are conducted. Specifically, the court upheld the department's authority to conduct settlement negotiations with an alleged violator without complying with the procedural requirements applicable to "hearings." According to the first circuit, the department's "authority to settle or [to] resolve any claim informally" allowed it to hold "private meetings" with alleged violators. Because those meetings were not "hearings" within the meaning of the Environmental Control Commission rule, the department was not required to follow the procedural rules applicable to hearings.

C. Inspections

Unlike the inspection provisions of most federal statutes, Louisiana Revised Statutes 30:2012 expressly authorizes the Department of Environmental

87. La. Envtl. Reg. C., pt. III, §§ 107, 111 (1994). The air rules limit investigations "upon receipt of evidence concerning an alleged violation" to cases where the department has received a "written complaint" of a violation. Id. § 107C.
88. Id. at pt. IX, § 503 (1993).
90. 538 So. 2d 635 (1st Cir. 1988), writ granted and denied, 539 So. 2d 624 and 541 So. 2d 900 (La. 1989).
91. The court concluded that the secretary had erred by failing to submit the compromise to the attorney general for concurrence, 538 So. 2d at 644; see infra notes 247-250 and accompanying text, and that the secretary had failed to offer an adequate rationale to justify the penalty that was imposed. 538 So. 2d at 645.
92. 538 So. 2d at 643. The court also held that neither the Environmental Quality Act nor the commission rules granted "the public an absolute right to be heard concerning violations of the Act." Although an interested party could request a public hearing, the department could, "in its own discretion, . . . grant or deny the request." Id.
Quality to inspect facilities without obtaining a warrant. However, the precise reach of the provisions authorizing warrantless searches is unclear. Moreover, a broad construction of the statutory authorization raises substantial constitutional concerns.

Subsection A of Section 2012 begins with justifications for allowing inspections. It declares that "the protection of the environment and public health" requires that "all facilities subject to the provisions" of the Environmental Quality Act be subject to "timely and meaningful inspections" and that "inspections of such facilities are essential to assure compliance" with the Act. It defines the "purpose of such inspections" as determining whether "[e]nvironmental standards have been achieved," an environmental "emergency" exists, "[t]here is a present or potential danger to the health or environment," a violation of the Act "has occurred," or "an abandoned waste site" exists.

The remaining subsections of Section 2012 address three sets of issues. Subsections B-E define the nature of the inspections that Subsection A declares to be necessary. Subsections F and G provide mechanisms for enforcing the secretary's right to conduct warrantless inspections. Subsections H and I impose certain conditions on how inspections are carried out.

Subsection B authorizes inspections of permitted facilities. It conditions "[e]very permit" on "the right of the secretary or [a] representative to make an annual monitoring inspection and, when appropriate, an exigent inspection of the facility operating thereunder."

Subsection C confers inspection authority without reference to the existence of a permit. It declares that "to assure effective enforcement" of the Act, the department may conduct "the inspections" without obtaining a warrant.

Subsection D requires an annual "monitoring inspection" for "all facilities operating with a permit issued pursuant to" the Environmental Quality Act. In addition, it directs the secretary to prescribe "guidelines for additional monitoring inspections" in light of "the type of activity to be monitored, the requirements of the individual regulatory programs, the environmental history of a given facility, and any other relevant environmental, health, or enforcement factors."

94. La. R.S. 30:2012(C) (Supp. 1996); see also La. R.S. 30:2002(3) (1989); cf. La. R.S. 30:917(B) (1989) (allowing the Commissioner of Conservation to make "irregular" inspections "without prior notice" under the Surface Mining and Reclamation Act). Not all environmental statutes contain similarly broad authority for warrantless searches. In particular, the inspection powers of the Commissioner of Agriculture under the pesticide law are much more limited. Normally, the Commissioner must obtain a judicial warrant before conducting searches. La. R.S. 3:3204(A) (1987). However, the chapters governing water protection and pesticide wastes allow the Commissioner to "enter" properties "during working hours." La. R.S. 3:3275(B), 3307(B) (1987). In addition, employees of the Structural Pest Control Commission shall have "access to any premises where there is reason to believe structural pest control work is being conducted . . . during reasonable hours and . . . upon presentation of proper credentials." La. R.S. 3:3365 (1987).


The guidelines must provide that inspections are to be conducted at "reasonable
times," and the secretary must give "[w]ritten notice of the adoption of such
guidelines . . . to each person subject to inspection." \(98\)

Subsection E authorizes additional "special" inspections "[w]henever there
exists an imminent danger to the environment or health, an emergency under [the
Environmental Quality Act], an abandoned hazardous waste site, or a violation"
of the Act or rules adopted pursuant to the Act. In these special inspections, the
inspector must inform a "responsible person at the facility of the particular
exigent condition" that is believed to exist. Moreover, the scope of these
inspections is limited "to those matters which are reasonably related to the
exigent condition," but the department may nonetheless prosecute "any other
violation discovered in the course of the investigation." \(99\)

Subsection F allows the secretary to obtain "a permanent or temporary
injunction, restraining order, or any other appropriate order" to compel
inspections. The judge may enter an order, "ex parte or after a hearing," if the
department shows that the owner or operator of a facility has:

1) Interfered "with the secretary or [the secretary's] authorized
representative in carrying out the provisions" of the Environmental
Quality Act; or

2) Refused "to admit the secretary or [the secretary's] representa-
tive to a facility"; or

3) Refused "to furnish information requested by the secretary or
[the secretary's] representative"; or

4) Refused to allow "access to, or the copying of, such records as
the secretary or [the secretary's] representative determines are necessary
for the enforcement" of the Act or "to provide reasonable copies of
such records within a reasonable time."

In addition, the secretary may also obtain the appropriate order upon a showing
that the owner or operator is "about to" take any of the foregoing actions. \(100\)

Subsection G provides that anyone "who in any way impedes an inspection"
under Section 2012 is liable for "the penalties provided" by the Act unless the
court finds "that the inspection was unconstitutional." It also provides that, in
cases involving a refusal to provide copies of records, "the respondent" has the
burden of demonstrating "that the request to provide copies of records was
unreasonable." \(101\)

Subsection H regulates the person who conducts the inspection. It requires
the inspector to present "identification" and, "to the extent practicable under the

\(98, 99, 100, 101\)
circumstances," to comply with "safety, internal security, and fire protection" rules of the facility being inspected.102

Subsection I mandates the department to furnish "the owner, operator, or agent in charge" of the facility with a receipt for "any samples" that the inspector has obtained. "[I]f requested and if practical," the department must also furnish the person in charge of the facility "a portion of each sample equal in volume or weight to the portion retained." If the department analyzes the samples it takes, it must "promptly" furnish the owner, operator, or agent in charge with "a copy of the results of such analyses."103

The provisions of Section 2012 are ambiguous in several important respects. The section fails to indicate exactly who is subject to the warrantless inspections it authorizes, whether its requirements pertaining to "monitoring inspections" are mandatory or directory, or whether a court order is a prerequisite to the imposition of penalties for impeding an inspection.

First, the statute is unclear as to whether the right to conduct inspections is limited to facilities that have obtained permits under the Environmental Quality Act or whether the department may also inspect unpermitted facilities that it believes have violated the Act. The justification for warrantless inspections in Subsection A is not limited to permitted facilities; it declares that inspections are required for all facilities "subject to the provisions" of the Act. In addition, Subsection E allows "special inspections" whenever "a violation" of the Act exists. However, Subsection B conditions the issuance of permits on the department's right to conduct "an annual monitoring inspection," and Subsection D provides for "monitoring inspections" of "facilities operating with a permit issued pursuant to" the Environmental Quality Act.

Second, the section fails to prescribe sanctions for the secretary's failure to conform to the minimal conditions it prescribes for "monitoring inspections." The department is to inspect every permitted facility "annually," and the secretary is to issue "guidelines" that provide for additional inspections. Although the language of these requirements is mandatory,104 the section makes no express provision as to the consequence of the secretary's failure to comply with them. At least three possibilities exist. The requirements may be merely directory, they may be mandatory obligations enforceable by mandamus, or they may be indispensable so that the failure to satisfy them extinguishes the right to conduct warrantless inspection.

Third, the statute does not explain the relationship between the sanctions that Subsections G and H provide for impeding inspections. Do the two subsections establish alternatives between which the secretary is free to choose, or does the

authority to impose penalties arise only after the secretary has obtained a judicial order authorizing the inspection?  

The constitutional concerns described below counsel a narrow construction of the statute on all three points. The United States Supreme Court has limited warrantless inspections to highly regulated industries, although its most recent opinions have defined the category broadly to include auto "chop shops." Extending the department’s power to inspect to include any person who might be violating any portion of the Environmental Quality Act strains that concept past the breaking point. A second prerequisite of a constitutional system of warrantless inspections is a statutory scheme that provides certainty and regularity regarding the timing and scope of inspections. Allowing the department to ignore the minimal requirements of the Louisiana statute subjects the person who is being inspected to the whim of the inspector or the inspector’s supervisors. Likewise, allowing the secretary to impose administrative penalties in lieu of seeking a judicial order requiring compliance denies the person being inspected an essential aspect of the traditional warrant requirement, review by an impartial official before the search occurs.

Practical considerations also support a narrow construction of the statute. The large number of permitted facilities and the need to discover unknown violations may justify warrantless inspections of permitted facilities. Those considerations, however, do not apply to persons operating without permits. Allowing the department to inspect an unpermitted facility without evidence of a violation would give environmental regulators virtually unlimited discretion. Moreover, exclusion of unpermitted facilities would not seriously hamper enforcement efforts because almost all important pollution sources now have permits. Similarly, interpreting the statutory requirements as mandatory conditions for warrantless inspections would provide a strong incentive for the department to conform to the legislative will. Finally, limiting the secretary’s power to impose penalties to violations of court-sanctioned inspections would protect those being searched from arbitrary or unreasonable inspections without compromising the secretary’s authority to compel a recalcitrant permittee to allow reasonable inspections.

The department has taken a broad view of its powers to conduct warrantless inspections. It has not limited its inspections to permitted facilities, conditioned them on its own compliance with the requirements of Section 2012, or delayed the imposition of administrative penalties until a person has resisted a judicial

108. See Burger, 482 U.S. at 703, 107 S. Ct. at 2644; Donovan, 452 U.S. at 603, 101 S. Ct. at 2540.
order. As a result of this generous construction of the secretary’s powers, the entire statutory scheme may violate the Fourth Amendment to the United States Constitution as well as Article I, Section 5 of the Louisiana Constitution.

Since 1967, the United States Supreme Court has consistently held that “administrative searches” of commercial premises are subject to the warrant requirement of the Fourth Amendment. The Court has, however, crafted an exception for “pervasively regulated” industries. To fall within the pervasively regulated exception, an administrative inspection must satisfy three criteria. A “substantial” governmental interest must “inform[] the statutory scheme pursuant to which inspection is made,” warrantless inspections must be “necessary to further the regulatory scheme,” and the statutory provisions for warrantless inspections must provide “a constitutionally adequate substitute for a warrant.”

Certainly, some facilities with environmental permits could fall within the pervasively regulated exception. Hazardous waste disposal facilities, sanitary landfills, and major emitters of air pollution come immediately to mind. However, extending the concept to any facility that obtains an environmental permit goes too far. In Marshall v. Barlows, Inc., the United States Supreme Court refused to apply the exception to the general requirements of the Occupational Safety and Health Act (OSHA). The broad reach of the requirements of the Environmental Quality Act is more similar to the OSHA mandates than to the industry-specific regulations involved in the Court’s subsequent decisions. Moreover, even if warrantless inspections of permitted facilities are allowed, expanding the exception to unpermitted facilities stretches the

110. A 1988 memorandum from the Assistant Secretary for Legal Affairs and Enforcement outlined an aggressive interpretation of the department’s authority to conduct warrantless inspections under Section 2012. Memorandum from Liz Megginson, Assistant Secretary to All DEQ Staff (Dec. 13, 1988). Although several individuals have occupied the assistant secretary position since the memorandum was issued, neither rescinded the memorandum, and it is apparently still used by enforcement personnel in the department.


113. See Burger, 482 U.S. at 702, 107 S. Ct. at 2644; Donovan, 452 U.S. at 602, 101 S. Ct. at 2540.

114. See Burger, 482 U.S. at 702, 107 S. Ct. at 2644; Donovan, 452 U.S. at 600, 101 S. Ct. at 2539.

115. See Burger, 482 U.S. at 703, 107 S. Ct. at 2644; Donovan, 452 U.S. at 603, 101 S. Ct. at 2540.


concept beyond recognition. In effect, it extends the definition of "pervasively regulated" to facilities that should be, but are not yet, extensively regulated.

Assuming the pervasively regulated exception is broad enough to apply to all facilities covered by the Environmental Quality Act, the Louisiana statute may not satisfy the other criteria established in the decisions of the United States Supreme Court. Certainly, the environmental goals that the Environmental Quality Act is designed to achieve\(^1\) satisfy the requirement for a substantial governmental interest. However, despite the legislative findings in the Environmental Quality Act,\(^2\) some doubt exists as to whether warrantless inspections are "necessary to further the regulatory scheme." The Environmental Protection Agency has determined that warrantless inspections are not necessary to enforce the analogous federal statutes.\(^3\)

Unless the Louisiana statute is narrowly construed, it offers an inadequate substitute for the traditional warrant requirement. Extending the authority to cover unpermitted facilities eliminates any element of certainty or regularity regarding the timing and scope of inspections, as does allowing the inspections to continue despite the department's failure to conform to the statutory conditions. Allowing the department to use administrative sanctions to force acquiescence to inspections also denies the regulated community a traditional protection against unreasonable searches, the interposition of a neutral magistrate before the search occurs.

In the only decision involving the inspection provisions of the Environmental Quality Act, the first circuit upheld the constitutionality of a warrantless inspection of an oil production facility.\(^4\) That decision may, however, not provide the final word on the Louisiana statute for several reasons. Most obviously, the decision of the state court of appeal is not binding on either the Louisiana Supreme Court\(^5\) or on federal courts in the state. That

   The legislature finds and declares that:

   (1) The maintenance of a healthful and safe environment for the people of Louisiana is a matter of critical state concern.

   (2) It is necessary and desirable for the protection of the public welfare and property of the people of Louisiana that there be maintained at all times, both now and in the future, clean air and water resources, preservation of the scenic beauty and ecological regimen of certain free flowing streams, and strictly enforced programs for the safe and sanitary disposal of solid waste, for the management of hazardous waste, for the control of hazards due to natural and man-made radiation, considering sound policies regarding employment and economic development in Louisiana.

122. The Louisiana Supreme Court has recognized a limited exception for administrative searches, but it has not yet indicated how the exception applies in the environmental context. See Pullin v. Louisiana State Racing Comm'n, 477 So. 2d 683 (La. 1985); see infra notes 125-126 and accompanying text.}
limitation is particularly important because some recent decisions in other states and in lower federal courts have taken a narrower view of how the "pervasively regulated" exception should apply to environmental statutes. In 1990, for example, the United States Tenth Circuit Court of Appeals held that warrantless searches under the Wyoming Environmental Quality Act violated the Fourth Amendment.

Even if the first circuit's approach is followed, its impact may be modest. The court of appeals relied on the department's "reasonable belief" that "exigent conditions" existed in the case before it. Thus, the holding may be inapplicable to the more common "monitoring inspections" to which that requirement does not apply.

In large measure, the importance of the search issue in Louisiana may turn on the scope of the state's exclusionary rule. In Pullin v. Louisiana Racing Commission, the Louisiana Supreme Court indicated that evidence seized in unconstitutional searches may have to be excluded from some administrative enforcement proceedings as well as from criminal prosecutions. Although the Pullin opinion refused to exclude evidence from a racetrack licensing proceeding, the court relied on a balancing test to reach that result. Moreover, two of the factors that the Pullin decision emphasized—that the officers who conducted the illegal search were state police officers, not employees of the racing commission and that the "primary duty" of the state police officers was "to enforce the criminal laws"—do not apply to inspections conducted pursuant to the Environmental Quality Act. Thus, the court might exclude illegally obtained evidence in permit applications and administrative proceedings to assess penalties.

III. ADMINISTRATIVE SANCTIONS AND EMERGENCY POWERS

The Environmental Quality Act grants the Secretary of the Department of Environmental Quality considerable administrative authority to enforce pollution control standards and to respond when an emergency threatens human health or the environment. As noted above, the department has a variety of administrative


125. 484 So. 2d 105 (La. 1986).

126. Id. at 107.

127. Prior to the 1995 legislative session, the statutory language typically granted the enforcement powers to "the commission, the secretary, or the assistant secretary" plus, in the case
options. The secretary may issue emergency cease and desist orders for violations that endanger public health or the environment. In addition, the secretary or subordinates in the department may choose between three basic administrative options for responding to less critical violations of the Act: notices of violation, compliance orders, or civil penalties. Finally, the secretary has emergency powers to respond to threats to public health or the environment even when no violation has occurred.

The choice of one administrative enforcement option does not preclude the department from subsequently using another of the administrative or judicial alternatives that are available. Indeed, the Environmental Quality Act envisions that further enforcement action will be taken following a notice of violation if the violator fails to stop the violation within thirty days. Further-more, the Act doubles the maximum civil penalty when a person violates a compliance order.

Selecting the appropriate enforcement action is a matter committed to the secretary's discretion. The secretary may begin with a notice of violation and proceed to a compliance order or a penalty assessment only if the violation is not of emergency cease and desist orders, to "an authorized technical secretary." See, e.g., La. R.S. 30:2025(C) (1989) (emergency cease and desist orders, notices of violation, and compliance orders), 2025(E) (1989) (civil penalties). As explained in supra note 34, Act 97 of 1983, which created the Department of Environmental Quality, granted to the secretary of the new department the powers previously exercised by the Secretary of the Department of Natural Resources and the Assistant Secretary of the Office of Environmental Affairs in the Department of Natural Resources; and Act 795 of 1984, codified at La. R.S. 30:2013, transferred the powers of the Environmental Control Commission to the Secretary of the Department of Environmental Quality.

The 1995 legislature passed two sets of law amending the enforcement section. Act 947 limits the enforcement power to the secretary for emergency enforcement actions, see 1995 La. Acts No. 947, §§ 1, 2 (adding La. R.S. 30:2050.8 and amending La. R.S. 30:2025(C); but allows the secretary or assistant secretary to take other administrative enforcement actions. See id. (adding La. R.S. 30:2050.2, .3 and amending La. R.S. 30:2025(C), (E)). But see infra note 165 (discussing possible constitutional challenge to Act 947). Act 1160 continues the prior statutory language regarding authority to impose administrative sanctions. See 1995 La. Acts No. 1160, § 1 (amending La. R.S. 30:2025(C)). Because the purpose of Act 1160 was to allow departmental lawyers to represent the department in judicial proceedings when the attorney general was unable or unwilling to do so, the courts are likely to treat the language of Act 947 as controlling on the question of authority to take administrative enforcement action. In any event, the Environmental Quality Act gives the secretary broad authority to assign powers to an assistant secretary. La. R.S. 30:2011(G) (1989).


131. Cf. Heckler v. Chaney, 470 U.S. 821, 105 S. Ct. 1649 (1985) (administrative enforcement decisions are not normally subject to review under the federal Administrative Procedure Act because they are "committed to agency discretion by law").
corrected, but the department need not follow such a sequential approach. If the situation warrants a compliance order or penalty assessment, the secretary can issue either as the initial administrative sanction.132

The Environmental Quality Act does contain one provision that might arguably serve to limit the department’s investigatory authority. It mandates that the secretary “establish policies and procedure to address violations . . . in a formal and consistent manner.”133 No court has, however, relied on the absence of uniform and consistent procedures as a ground for invalidating an enforcement action.134

A. Emergency Cease and Desist Orders

The secretary may issue an emergency cease and desist order for any violation that threatens public health or the environment. An emergency order has a limited duration, however. According to the statute, “[a]n emergency order expires in fifteen days.”135 To continue the order for more than fifteen days, the secretary must initiate an action for civil enforcement, or perhaps, issue an ordinary compliance order.

Two criteria must be satisfied before the secretary can issue an emergency cease and desist order. Because an emergency cease and desist order is an enforcement action, the secretary can issue one only upon a determination “that a violation [of the Environmental Quality Act] is occurring or is about to occur.” But the mere existence of a violation is not sufficient to authorize an emergency order. The violation must be one “which is endangering or causing damage to public health or the environment.”136


134. Cf. 1995 La. Acts No. 947, § 1, adding La. R.S. 30:2050.3(A) (Supp. 1996) (if criteria for assessment of penalties have not been established, “the secretary or assistant secretary shall exercise discretion in applying the factors enumerated in this [Act] on the bases of available information”).

135. La. R.S. 30:2050.8(D) (Supp. 1996), as added by 1995 La. Acts No. 947. Prior to the 1995 amendment, the statute provided that “in no event shall such an emergency order remain in force longer than fifteen days.” La. R.S. 30:2025(C)(1) (1989); In re Rollins Environmental Services, Inc., 481 So. 2d 113, 115 n.7 (La. 1985). The change in statutory language may be significant. In Rollins Environmental Services, the first circuit vacated an emergency order more than seventy days after it was issued. The emergency order had apparently been extended beyond the fifteen-day period without objection from the respondent.

The Environmental Quality Act provides little guidance as to the procedures for issuing an emergency cease and desist order. The order must “[d]escribe with specificity” the activity that is endangering or damaging the environment, “[i]dentify the specific threat to public health or the environment that the activity presents,” and “[s]pecify the measures that the owner or operator of the facility or site is directed to undertake immediately.” An emergency order is effective when it is signed, and “the respondent” must “comply with the order immediately upon receiving knowledge of the order.”

The Environmental Quality Act expressly provides that an emergency order “is not subject to administrative review,” but it allows “[a]n action for injunctive relief against an emergency cease and desist order” to be brought in the district court for East Baton Rouge Parish; the plaintiff need not exhaust “administrative remedies” as “a prerequisite to judicial review.” However, to prevail in the action against the emergency order, the party challenging the order must demonstrate, “by clear and convincing evidence, that the activity specified in the emergency order is not endangering or causing damage to public health or the environment.”

The only administrative procedures governing emergency cease and desist orders are found in the portions of the Environmental Control Commission rules that have never been repealed. The rules require that all orders, including emergency cease and desist orders, be issued in writing and that they be served on the violator by hand delivery or by certified mail, return receipt requested.

The major restraint that the statute places on an emergency cease and desist order is its limited duration. As noted above, an order “expires in fifteen days.” However, nothing precludes the secretary from issuing the substance of the emergency order as an ordinary compliance order, and the Act expressly authorizes the secretary to file an action in district court for injunctive relief “at the expiration of the emergency cease and desist order.” In the action for injunctive relief, the secretary bears the burden of proving that “a violation is occurring or is

137. La. R.S. 30:2050.8(B) (Supp. 1996), as added by 1995 La. Acts No. 947, § 1. Prior to the 1995 amendment (which became effective on January 1, 1996), the Act provided that the threat to the environment determined the scope of the emergency order. As the name implies, the emergency cease and desist order normally directed a “cessation of operations.” The order could, however, also impose “affirmative obligations” if cessation alone “would not completely abate the damages to the environment.” Those affirmative obligations could require the violator “to take whatever steps [were] deemed necessary to abate the damage to the environment.” Id. Act 1160 of 1995 reenacted this prior language without the changes found in Act 947. As explained above, see supra note 127, the court is likely to give effect to Act 947 because Act 1160 was concerned with representation of the department in court rather than administrative enforcement.


about to occur and that the violation is endangering or causing damage to public health or the environment.” Although the secretary need not post security, “[a]ll other provisions of law relative to injunctive relief apply.”

B. Notices of Violation

In federal environmental statutes, notices of violation normally serve a special purpose. They provide a means for federal oversight of programs in which primary enforcement authority has been delegated to the state. In essence, they offer a mechanism for the EPA to advise the state and the violator that it is aware that a violation has occurred and that the federal agency expects the state to initiate an appropriate enforcement action.

The notice of violation under Louisiana law is different. It provides formal notification to the violator that the department has determined that a violation of the Act has occurred and that the department will take further action if the violation is not corrected within thirty days. Nonetheless, a state notice of violation, like a federal notice, has no coercive impact on the alleged violator. The notice is merely a formal declaration that the department believes the statute has been violated. Because a notice of violation neither forces an alleged violator to do anything nor mandates any payment from the alleged violator, neither the Environmental Quality Act nor the Environmental Control Commission Rules place significant controls on its issuance.

Substantively, the Environmental Quality Act imposes a few conditions for the issuance of a notice of violation. First, the notice must be preceded by a determination that a violation of a requirement of the Act “has occurred or is about to occur.” Although the substantive authority to issue a notice of violation is phrased in the passive voice, the procedural amendments adopted in 1995 indicate that the secretary or an assistant secretary may issue a notice of violation or compliance order “within ten days after completion of the investigation of the violation.”

Whether lower level employees of the department may issue notices of violation depends on how the courts choose to characterize them. The 1995
amendments to the Act preclude assistant secretaries from delegating duties that "require the exercise of deliberative discretion." 148 Because the Act provides additional protections before the department imposes any coercive sanctions, this prohibition should not extend to notices of violation.

The procedural requirements applicable to the issuance of notices of violation are minimal. A notice must describe the violation "with reasonable specificity," and the respondent must be notified that the notice of violation has been issued. 149 The department may either serve the notice personally or send the notice by certified mail, return receipt requested. 150 Despite the provision regarding notice, the Act does not mandate that the department provide any mechanism for the person who receives the notice to challenge the determination that a violation has occurred or is about to occur. 151

The Environmental Control Commission Rules add little to the statutory provisions. They require that all enforcement actions, including notices of violation, be issued in writing, but that requirement is probably implicit in the statute. The rules also follow the statute by allowing service by hand delivery or by certified mail, return receipt requested. 152 Like the Environmental Quality Act, the rules refrain from mandating hearings or other proceedings for contesting notices of violation.

If a violation continues for more than thirty days after a notice of violation has been issued, the statute provides that the secretary "shall" issue a compliance order or initiate a civil enforcement action. Whether this language establishes a judicially enforceable duty is unclear, but the preferable construction of the statute would recognize the secretary’s discretion to decide which type of enforcement action should be undertaken.

Some federal precedents support the argument that the mandatory language of the Environmental Quality Act creates a judicially enforceable duty to take further enforcement action when the violation continues for more than thirty days after the violator has been notified. Generally, an administrative decision not to initiate an enforcement action is unreviewable. However, the United States Supreme Court has held that mandatory language in an enforcement statute can overcome this presumption. 153

For several reasons, Louisiana’s appellate courts are likely to be reluctant to find that the language of the Environmental Quality Act imposes a judicially

enforceable, nondiscretionary duty to initiate an enforcement action. First, if the statutory duty exists, it depends on a threshold factual finding of a continuing violation; that finding is probably discretionary because the secretary has no duty to assemble any particular administrative record on possible violations. Second, the subsection of the enforcement section that follows the provision for notices of violation uses similar mandatory language for the issuance of compliance orders for violations even when the secretary has not issued a notice of violation. Obviously, the secretary cannot have mandatory duties to take both actions; at most, the duty is to take some form of enforcement action with the precise form left to the secretary’s discretion. Third, the Environmental Quality Act provides another enforcement alternative where the secretary fails to take appropriate enforcement action when a violation continues after notice has been given to the violator. The citizen suit provision allows any person adversely affected by a violation to bring a civil action directly against the violator. Because initiation of a civil enforcement action is one of the remedies within the secretary’s discretion, initiation of the citizen suit allows the plaintiff to achieve the goal of the enforcement mandate without the necessity for judicial review of the department’s enforcement decision. Fourth, Louisiana’s courts are likely to follow the precedents of lower federal courts. These lower federal courts have generally declined to construe federal environmental statutes as imposing mandatory enforcement duties, even when the statutes prescribe that the Administrator of the Environmental Protection Agency “shall” respond to violations.

A 1995 amendment to the Act requires that the department send a notice of violation before it assesses a civil penalty administratively. The notice must describe the violation “with reasonable specificity,” and it must also “advise the respondent that the assessment of a penalty is under consideration”; following the issuances of the notice, interested persons may file “written comments . . . regarding the alleged violation and a possible penalty.”

C. Compliance Orders

Compliance orders issued by the Louisiana Department of Environmental Quality differ significantly from the federal orders that the EPA is authorized to

157. La. R.S. 30:2050.3(B) (Supp. 1996), as added by 1995 La. Acts No. 947, § 1; see also infra notes 238-242 and accompanying text.
issue under the Clean Air Act and the Clean Water Act. Federal compliance orders under the air and water statutes advise the persons to whom they are addressed of the steps the EPA believes are necessary to comply with statutory or regulatory requirements, but the order is not a final agency action. As a result, the alleged violator can defend a subsequent administrative or judicial enforcement action on the ground that no violation occurred.

By contrast, compliance orders issued by the Department of Environmental Quality amount to an authoritative administrative determination that a violation has occurred. Moreover, that administrative determination has at least two practical consequences: it doubles the amount of the civil penalty that can be imposed for a future violation, and it allows the state to file a civil enforcement action where "[t]he hearing shall be limited to the issue of whether or not compliance has taken place.

The Environmental Quality Act provides somewhat more specificity with regard to the content of compliance orders than it provides for notices of violations. As with other administrative sanctions, the basic prerequisite is a determination "that a violation of any requirement of [the Environmental Quality Act] has occurred or is about to occur." Moreover, the Act also prescribes that every compliance order must describe, "with reasonable specificity," the "nature of the violation," establish "a time limit for achieving compliance," "[n]otify the respondent of the right to an adjudicatory hearing," and "[a]dvise the respondent that a civil penalty may be assessed for a violation.

The 1995 amendments to the Environmental Quality Act established procedures for issuing and appealing compliance orders. The statute now

159. Numerous courts have ruled that federal compliance orders issued under the Clean Air Act and the Clean Water Act are not subject to judicial review because they are not final agency actions. E.g., Laguna Gatuna, Inc. v. Browner, 58 F.3d 564, 565 (10th Cir. 1995) cert. denied, 116 S. Ct. 771 (1996); Southern Pines Assoc. v. United States, 912 F.2d 713, 716 (4th Cir. 1990) (Clean Water Act); Asbestec Construction Services, Inc. v. EPA, 849 F.2d 765, 766 (2d Cir. 1988) (Clean Air Act); Lloyd A. Fry Roofing Co. v. EPA, 554 F.2d 885, 891 (8th Cir. 1977) (Clean Air Act). For a critical assessment of the refusal to allow judicial review of federal compliance orders, see Andrew I. Davis, Comment, Judicial Review of Environmental Compliance Orders, 24 Envtl. L. 189 (1993).
160. According to the 1995 Amendments to the Environmental Quality Act, a "compliance order" is "an order issued by the secretary or an assistant secretary requiring a respondent to comply with specified provisions of [the Environmental Quality Act], a rule, or a permit within a specified period of time." La. R.S. 30:2004(19) (Supp. 1996), as added by 1995 La. Acts No. 947, § 2.
165. 1995 La. Acts Nos. 739, 947, 1208. In addition, Act 947 directs the secretary to "propose
allows the secretary or an assistant secretary to issue compliance orders and obligates the person issuing the order to notify the respondent by personal service or by certified mail, return receipt requested. It also allows the respondent or any other "aggrieved party" to request an adjudicatory hearing on a compliance order. A respondent who submits a written request to the secretary has a "right to an adjudicatory hearing" on any "disputed issue of material fact or of law arising from a compliance order." If any other

all rules relating to enforcement by January 1, 1997, and... [to] adopt those rules relating to enforcement by July 1, 1997." 1995 La. Acts No. 947, § 4. Constitutional concerns have been raised with respect to two of the 1995 laws.

The first circuit held Act 1208 unconstitutional on the ground that the body of the bill that became Act 1208 was broader than its title and that the bill contained more than one object. In re Rubicon, 670 So. 2d 475 (La. App. 1st Cir. 1996); see La. Const. art. III, § 15(A). The court also held that its holding regarding Act 1208 rendered ineffective Section 8 of Act 947, which adopted the appeal provisions of Act 1208 by reference. Rubicon, 670 So. 2d at 481. The legislature, however, mooted this last holding by readopting the appeal provision in the 1996 special session. See 1996 La. Acts No. 41 (1st Extraordinary Session).

Act 947 raises a different constitutional question. The original copies of the Act distributed by the Secretary of State and containing the governor's signature differ from the published version. Compare 1995 La. Acts No. 947, § 1 (copy distributed by the Secretary of State and on file with the author) with the printed act in West's Session Law Service and the printed version currently available from the legislature. A check of the Act's legislative history illustrates the difference; the Senate floor amendments listed in the House and Senate Journals are not the same. Compare page 5 of the Senate Journal for June 19, 1995 with page 49 of the House Journal for the same day. This discrepancy suggests that the Senate and House may not have passed identical legislation before submitting it to the governor for signature.

166. La. R.S. 30:2050.2(A), 2050.25(B) (Supp. 1996). In the Environmental Quality Act, the term "assistant secretary" refers to "the assistant secretary to whom a given function or responsibility has been allocated by [the Act] or delegated by the secretary." La. R.S. 30:2004(18) (Supp. 1996), as added by 1995 La. Acts No. 947, § 2.


168. The Act defines an "aggrieved person" as "a natural or judicial person who has a real and actual interest that is or may be adversely affected by a final action." La. R.S. 30:2004(17) (Supp. 1996), as added by 1995 La. Acts No. 947, § 2.

169. La. R.S. 30:2050.4(A), (B) (Supp. 1996), as added by 1995 La. Acts No. 947, § 1. If the request for an adjudicatory hearing raises only issues of law, "the secretary may limit the parties to the presentation of oral or written arguments." If the request raises only a factual issue, "the scope of the hearing may be limited to the disputed issue of material fact." La. R.S. 30:2050.4(C) (Supp. 1996).

Prior to the 1995 amendments, no specific language in the statute or rules unambiguously required the Department of Environmental Quality to grant a hearing to contest a compliance order. Although Rule 5.0 of the Environmental Quality Rules stated that adjudicatory hearings are required for "all enforcement proceedings," that language was arguably limited by the qualifying clause "as contemplated by the Administrative Procedure[] Act," especially since the first circuit had held that the explicit mandate for adjudicatory hearings when civil penalties are assessed does not require a hearing when the person against whom the penalty is assessed agrees to waive the hearing. In re BASF Corp. Chemical Division, 538 So. 2d 635, 642-43 (La. App. 1st Cir. 1988), writ denied, 541 So. 2d 900 (1989). If the Secretary failed to grant an adjudicatory hearing with respect to "[a]ny enforcement... action," the Environmental Quality Act allowed the alleged violator to petition for de novo review in the Nineteenth Judicial District Court. Because the section that contained the
aggrieved party requests a hearing, "[t]he secretary may grant the request when equity and justice require it." 170

A request for an adjudicatory hearing must be filed within thirty days following the date the respondent is notified of the compliance order. 171 If no request is filed within thirty days, "[t]he compliance order becomes a final enforcement action." 172 If a request for a hearing is filed, the secretary must act on the request within thirty days; if the secretary fails to grant a hearing within thirty days, "the applicant" is entitled to file for "de novo review of the secretary's action" in the Nineteenth Judicial District Court. 173

The 1995 legislature enacted conflicting provisions concerning the handling of a compliance order following an adjudicatory hearing. Act 947, which became effective on January 1, 1996, provides that the secretary "issues the final enforcement action after an adjudicatory hearing," unless the secretary delegates the authority to the hearing officer. 174 Act 739, which creates an independent division of administrative law in the Department of Civil Service, transferred responsibility for all "adjudications" 175 to the division effective October 1, 1996. After that date, the "administrative law judge shall issue the final decision or order, whether or not on rehearing, and the agency shall have no authority to override such decision or order." 176 Recognizing that the two acts were being considered simultaneously in the legislative process, the legislature expressly provided that the provisions of Act 739 would control in the case of a conflict. 177

The 1995 amendments to the Environmental Quality Act clarify the right of the public to participate when adjudicatory hearings are held with respect to a compliance order. Any "aggrieved person" 178 may intervene as a party in the


As a practical matter, the provision for de novo review always inclined the secretary to grant a respondent's request for an adjudicatory hearing. If the secretary granted the hearing, the secretary's decision was entitled to the presumption of correctness normally afforded administrative decisions. If the hearing was denied, the attorney general had to convince the district court of the correctness of the secretary's position.

178. An "aggrieved person" is "a natural or juridical person who has a real and actual interest that is or may be adversely affected by a final action under this [Act]." La. R.S. 30:2004(17) (Supp. 1996), as added by 1995 La. Acts No. 947, § 2.
hearing so long as "the intervention is unlikely to unduly broaden the issues or to
unduly impede the resolution of the matter under consideration." In addition,
prior to the adjudicatory hearing, interested parties may file "written public
comments" with the assistant secretary. Moreover, the secretary may, but need
not, hold "a public hearing...in conjunction with an adjudicatory hearing."

Once a compliance order is final, any aggrieved person may file a devolutive
appeal. Prior to 1995, appeals went directly to the first circuit. The
Supreme Court had ruled that this procedure was constitutional. However,
Acts 947 and 1208 of 1995 changed the venue for appeals to the Nineteenth
Judicial District Court. The first circuit ruled that this change was ineffective
because Act 1208 was unconstitutional, but the legislature re-established venue
in the district court in the 1996 special session.

The Environmental Quality Act uses the verb "shall" to authorize the
department to issue compliance orders. Obviously, this language suggests the
argument that the department has a nondiscretionary duty to initiate enforcement
actions when violations occur. However, as noted previously with respect to the
similar language pertaining to violations of notices of violation, the courts are
likely to find the authorization discretionary rather than mandatory.

The first circuit has held that the secretary has broad authority to compromise
compliance orders. Prior to the enactment of Act 947 of 1995, Louisiana Revised
Statutes 30:2025H required the secretary to obtain the concurrence of the attorney
general before settling "suits, disputes, or claims for any penalty," and a 1988
opinion of the first circuit held that the attorney general's compliance was required
before the secretary could compromise a civil penalty that had been imposed
administratively. Nonetheless, the court of appeal subsequently ruled that
concurrence was not required when the secretary is compromising a compliance
order that does not include a penalty. According to the latter decision, "the for

181. La. R.S. 30:2050.12(A) (Supp. 1996). If a public hearing is held in conjunction with an
adjudicatory hearing, the public hearing "shall precede" the adjudicatory hearing. La. R.S.
185. 1995 La. Acts No. 947, § 8; No. 1208, § 2. For constitutional concerns regarding Acts 947
and 1208, see supra note 165.
186. In re Rubicon, Inc., 670 So. 2d 475, 479 (La. App. 1st Cir. 1996); accord In re E. I duPont
de Nemours & Co., 674 So. 2d 1007 (La. App. 1st Cir. 1996).
187. 1996 La. Acts No. 41, § 1 (1st Extraordinary Session); see In re Angus Chemical Co., No.
189. See supra notes 153-157 and accompanying text.
190. In re BASF Corp., Chem. Div., 538 So. 2d 635, 644 (La. App. 1st Cir. 1988), writ granted
on other grounds, 539 So. 2d 624, writ denied, 541 So. 2d 900 (1989).
any penalty' clause" of Section 2025H modifies "disputes" as well as "claims"; to hold otherwise would, the court declared, hinder "the vested authority of the [secretary] as the trustee of the environment and render the 'for any penalty' clause to be nothing more than meaningless or superfluous language."92

Although the legislature repealed Louisiana Revised Statutes 30:2025H in 1995, the first circuit’s holding remains a correct statement of current law. The legislature reenacted the language of Section 2025H in a new section. Moreover, the 1995 legislation added a new sentence that expressly excludes lawsuits involving compliance orders from the normal requirement for obtaining the attorney general’s concurrence.194

The 1995 amendments to the Environmental Quality Act give the secretary authority to prescribe rules establishing "informal procedures" for issuing compliance orders, but the informal procedures may only be used with the consent of the respondent.195 Although a compliance order issued after informal procedures is "a final enforcement action,"196 the informal procedures are not subject to the normal rules regarding adjudications or adjudicatory hearings.197 The rules establishing the informal procedures must identify the compliance orders to which they apply,198 and they must also require documentary evidence "to establish that a violation occurred," notify the respondent "of the evidence relied upon to establish the violation," offer the respondent an opportunity "to present . . . evidence in opposition to the order," give members of the public an opportunity "to file written comments . . . and to attend the informal hearing if one is held, and list the final action on the "public list" of enforcement actions.199

D. Civil Penalties

Administrative assessment of civil penalties against violators has been far more common under the Environmental Quality Act than under most federal environmental statutes. Under both the Clean Air Act and the Clean Water Act, for example, federal law caps the maximum civil penalty that can be imposed administratively and establishes a two-tiered hearing procedure that varies with the severity of the penalty.200

192. 635 So. 2d at 698-99.
197. La. R.S. 30:2050.6(C) (Supp. 1996).
199. La. R.S. 30:2050.6(B) (Supp. 1996).
The state system has most closely approximated the Resources Conservation and Recovery Act provision governing violations of hazardous waste regulation. That federal statute permits administrative imposition of penalties without a cap and without any provision for procedures beyond the opportunity of the respondent to request a "public hearing." The EPA has, however, established an elaborate system of administrative hearings and appeals for civil penalties under the Resource Conservation and Recovery Act.

The future of administratively imposed penalties is uncertain in Louisiana. In 1995, the legislature amended the Environmental Quality Act in ways that may prompt the secretary to rethink current policies regarding administrative assessment of civil penalties. At least two changes make administrative assessment less attractive. Now that penalties may be appealed to the Nineteenth Judicial District Court rather than to the first circuit, administrative penalties will be subject to review in four forums (administrative hearing, district court, court of appeals, and supreme court); by contrast, judicially imposed penalties will be reviewed in only three forums (district court, court of appeals, and supreme court). Even more important, the administrative law judge, rather than the secretary, makes the final administrative decision as of October 1, 1996.

As with other enforcement actions, the prerequisite for the administrative imposition of a civil penalty under the Louisiana Environmental Quality Act is a violation of the Act or of a regulation or order implementing the Act. Although the Act labels the penalties "civil," the first circuit has indicated that the penalty provisions should be strictly construed because they are "penal in nature."

The civil penalty subsection offers three alternatives. When a person is found to be in violation of "any requirement" of the Environmental Quality Act, the secretary may assess two penalties and may also suspend or revoke the violator’s permit. First, the secretary may impose a penalty that enables the state to recoup its costs in "any response action made necessary by [the] violation," except for those costs that are "voluntarily paid" by the violator. Second, the secretary may order the violator to pay an additional penalty of not more that $25,000 for each day of violation. In addition, "any permit, license, or variance

References:
which has been issued to [the violator]" is subject to "revocation or suspen-
sion." 207

The Act allows still a third type of civil penalty for certain types of
violations. The secretary may assess this penalty only when the violator acts
"intentionally, willfully, or knowingly"; when the violation "results in a discharge
or disposal which causes irreparable or severe damage to the environment"; or
when the "substance discharge[d] is one which endangers human life or health."
The maximum amount for this "additional penalty" is $1,000,000. 208

A separate subsection increases the civil penalty when the violator has
previously been issued a compliance order. When a person fails "to take
corrective action specified in [a compliance] order," the secretary may assess a
civil penalty of not more than $50,000 "for each day of continued violation or
noncompliance." 209 However, if the order with which the person failed to
comply was an emergency cease and desist order, 210 "no penalty shall be
assessed if it appears upon later hearing that said order was issued without
reasonable cause." 211

The Act specifies nine factors that are to guide decisions regarding civil
penalties. The statute provides that the secretary "shall" consider the following
factors when "determining whether or not a civil penalty is to be assessed" and
when "determining the amount of the penalty or the amount agreed upon in
compromise":

(i) The history of previous violations or repeated noncompliance.
(ii) The nature and gravity of the violation.
(iii) The gross revenues generated by the respondent.
(iv) The degree of culpability, recalcitrance, defiance, or indiffer-
ence to regulations or orders.
(v) The monetary benefits realized through noncompliance.
(vi) The degree of risk to human health or property caused by the
violation.
(vii) Whether the noncompliance or violation and the surrounding
circumstances were immediately reported to the department and whether
the violation or noncompliance was concealed or there was an attempt
to conceal by the person charged.

207. La. R.S. 30:2025(E)(1) (Supp. 1996). When a compliance order is violated, the maximum
penalty is $50,000 per day. The definitional section of the Environmental Quality Act does not
(1994) (defining the terms "'respond' or 'response'" for purposes of the federal Comprehensive
Environmental Response, Compensation, and Liability Act).
text.
(viii) Whether the person charged has failed to mitigate or to make a reasonable attempt to mitigate the damages caused by [the] noncompliance or violation.

(ix) The costs of bringing and prosecuting an enforcement action, such as staff time, equipment use, hearing records, and expert assistance.\textsuperscript{212}

The secretary may supplement the statutory criteria “by rule,” but no supplementary rules have been issued.\textsuperscript{213}

Any “aggrieved person” may appeal a penalty devolutively.\textsuperscript{214} In addition, the person against whom the penalty is assessed is entitled to a suspensive appeal.\textsuperscript{215} If the penalty is upheld on appeal “in full or in part,” the department is “entitled to legal interest . . . from the date of imposition of the . . . penalty until paid.” If any penalty is “vacated or reduced,” the department must pay interest on any amount that it is required to refund.\textsuperscript{216}

In its reported decisions, the first circuit has generally upheld civil penalties that the secretary has imposed administratively. The appellate court has affirmed the permissibility of using gross rather than net receipts in penalty determinations.\textsuperscript{217} In addition, the court of appeal has also generally deferred to the secretary’s administrative discretion as to the size of civil penalties.\textsuperscript{218}

The first circuit has limited the secretary’s discretion in two respects. It refused to permit the secretary to increase a penalty substantially merely because a respondent exercised the statutory right to request a hearing.\textsuperscript{219} In addition, the court of appeals has determined that the department must explicitly consider


\textsuperscript{217} In re McGowan, 533 So. 2d 999, 1004 (La. App. 1st Cir. 1988), writ denied, 537 So. 2d 1168, cert. denied, 493 U.S. 822, 110 S. Ct. 80 (1989).

\textsuperscript{218} E.g., In re Witco Corp. Taft Facility, 618 So. 2d 1112 (La. App. 1st Cir. 1993) (civil penalty of $130,000 for plant’s failure to implement adequate groundwater monitoring system); In re Mullins & Pritchard, Inc., 549 So. 2d 872 (La. App. 1st Cir. 1989) ($73,034.49 for oil field discharges); In re Sixty Acres, Inc., 546 So. 2d 575 (La. App. 1st Cir. 1989) ($20,999.53 for violation of landfill closure order).

\textsuperscript{219} In re McGowan, 533 So. 2d 999 (La. App. 1st Cir. 1988), writ denied, 537 So. 2d 1168, cert. denied, 493 U.S. 822, 110 S. Ct. 80 (1989).
each of the factors enumerated in the Environmental Quality Act when it selects a penalty.\textsuperscript{220}

\textit{In re McGowan}\textsuperscript{221} reduced a penalty that was increased from $5,000 to $56,000 after the person against whom the penalty was assessed demanded a hearing. According to the court of appeal, "the factors constituting the basis for the amount of penalty were considered" when the penalty was initially assessed. Thus, the "hearing itself appear[ed] to be the only basis for the $51,000 increase in penalty assessment." The appellate court found that justification for the increase "to be arbitrary, capricious and an abuse of discretion."\textsuperscript{222}

The first circuit's approach is a sound one. It allows the use of the statutory criteria to select an appropriate penalty\textsuperscript{223} without conferring authority to punish an alleged violator for exercising the statutory right to request a hearing. If the hearing produces new evidence regarding the factors on which the hearing is based, the original assessment may be increased or decreased; if the hearing merely confirms the information previously available to the department, the penalty cannot be drastically increased merely because the respondent has required the department to prove its claim.

The first circuit's approach in \textit{McGowan} undoubtedly limits the ability to consider "hearing records" as a penalty factor,\textsuperscript{224} but the limitation is not an absolute one. The court of appeals did not forbid any increase in a penalty. It merely declared that a ten-fold increase based solely on the cost of the appeal was arbitrary.

As a matter of policy, increasing penalties merely because the respondent exercises a statutory right to appeal is undesirable. External review of administrative enforcement is not a necessity to be tolerated. Instead, it is the basic mechanism for ensuring that penalties are assessed in a fair and consistent manner.

To the extent that the legislature wants the department to recoup the cost of appealing penalty determinations from violators, the statute should provide for apportioning the total cost of hearings rather than requiring a violator to bear the cost of a particular hearing. The legislature should direct the secretary to issue rules that compute the total cost of hearing records for the previous year and allow the secretary to consider that cost in setting future penalties.

A 1994 decision of the first circuit imposes an additional restriction on the secretary's administrative power to assess penalties. \textit{In re Amco Construction Co.}\textsuperscript{225} held that the secretary has a mandatory duty to consider each of the

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\textsuperscript{220} In re Amco Constr. Co., 633 So. 2d 727 (La. App. 1st Cir. 1993).
\textsuperscript{222} \textit{McGowan}, 533 So. 2d at 1005.
\textsuperscript{225} 633 So. 2d 727 (La. App. 1st Cir. 1993).
factors enumerated in the Environmental Quality Act\textsuperscript{226} when assessing penalties administratively. In \textit{Amco}, the secretary failed to consider two factors—the gross revenues of the respondent and the cost of bringing the enforcement proceedings—because no evidence regarding them was presented at the penalty hearing. Ruling that the department had failed to perform its statutory duty, the court of appeal “vacate[d] the penalty and remand[ed] the matter [to the secretary] for reconsideration of the penalty after appropriate consideration of all of the [statutory] factors.”\textsuperscript{227}

The extent to which \textit{Amco} will hamper the administrative imposition of civil penalties is unclear. The department should have little difficulty in estimating the costs of enforcement. It can simply require enforcement personnel to keep time records, multiply the time spent by the proper hourly rates, and make an appropriate addition for overhead expenses. On the other hand, the department may lack information regarding the gross receipts of the person against whom the penalty is assessed. Moreover, the Environmental Quality Act gives the secretary no express authority to order that the information be provided. Thus, the first circuit may have to find the authority to compel this information in the secretary’s general information-gathering authority\textsuperscript{228} or to imply an exception to the \textit{Amco} rule when the person assessed refuses to provide the information on gross receipts.

The \textit{Amco} opinion is a surprising one. Previously, the first circuit had sustained several penalties where the administrative record contained no information on some of the factors that the statute requires the secretary to consider.\textsuperscript{229}

In reality, \textit{Amco} may represent the dissatisfaction of the court of appeal with the secretary’s failure to justify what the court described as “a large fine for a minor violation.”\textsuperscript{230} As noted above,\textsuperscript{231} the first circuit has been reluctant to declare civil penalties arbitrary or capricious or to characterize the amount assessed as an abuse of discretion. In \textit{Amco}, the court avoided making such a finding by seizing on the failure to consider two statutorily mandated factors as a basis for requiring the secretary to reconsider a penalty that seemed disproportionate to the underlying violation.

What \textit{Amco} demonstrates is the need for the department to adopt rules to guide the administrative assessment of penalties.\textsuperscript{232} The Environmental Quality

\begin{itemize}
\item \textsuperscript{226} La. R.S. 30:2025(E)(3) (1989 and Supp. 1996); see supra notes 212-213 and accompanying text.
\item \textsuperscript{227} 633 So. 2d at 735.
\item \textsuperscript{229} E.g., In re Witco Corp. Taft Facility, 618 So. 2d 1112, 1119 (La. App. 1st Cir. 1993); In re Mullins & Pritchard, Inc., 549 So. 2d 872, 877-78 (La. App. 1st Cir. 1989).
\item \textsuperscript{230} 633 So. 2d at 735.
\item \textsuperscript{231} See supra note 218 and accompanying text.
\end{itemize}
Act directs the department to establish "policies for the enforcement of the . . .
Act," and the department had an informal penalty policy at one time. However, a hearing officer ruled that the secretary had to issue a rule incorporating the policy before it could be used to assess penalties in cases in which the respondent demanded a hearing. Rather than proposing a rule, the secretary simply abandoned the policy. Perhaps Amco will prompt the department to reconsider the need for a formal penalty policy.

The Environmental Quality Act addresses several procedural details regarding the administrative imposition of civil penalties. The penalty procedures included in the 1995 amendments to the Act generally follow those established for compliance orders except that they require a notice of violation before a penalty is assessed. In addition, the first circuit has ruled that even an administrative compromise of a penalty requires the concurrence of the attorney general, and the 1995 amendments appear to continue that mandate.

Before a civil penalty may be assessed administratively, the secretary or assistant secretary must issue a notice of violation to the respondent. Ten

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236. La. R.S. 30:2050.2 (Supp. 1996); see supra notes 165-173 and accompanying text.
238. La. R.S. 30:2050.3(B), 2050.25(B) (Supp. 1996), as added by 1995 La. Acts No. 947, § 1. For the details that the notice of violation must contain, see supra notes 147-152 and accompanying text.

Before the 1995 amendments, the statute was ambiguous on the crucial question of who could assess a civil penalty administratively. Section 2025(E) allowed the administrative imposition of civil penalties by "the commission, the secretary, [or] the assistant secretary." At the time that language was placed in the Act, the Office of Environmental Affairs in the Department of Natural Resources was responsible for administering the Act (which was then known as the Environmental Affairs Act), and the Environmental Control Commission was the final administrative authority with respect to penalty issues. 1979 La. Acts No. 449; see supra note 34. Thus, the persons authorized to issue penalty assessments were the Environmental Control Commission, the Secretary of the Department of Natural Resources, and the Assistant Secretary of the Office of the Office of Environmental Quality.

Exactly how the statutory provision applied to the officials responsible for environmental enforcement at the time of the 1995 amendment was uncertain. After the Department of Environmental Quality was created in 1983, see supra note 34, the legislature changed the definition of "secretary" in the Act to refer to the Secretary of the Department of Environmental Quality. La. R.S. 30:2004(4) (1989). Similarly, the powers of the Environmental Control Commission were transferred to the new secretary when the commission was abolished. La. R.S. 30:2013 (1989). However, the legislature enacted no similar redefinition or transfer with respect to the term "the assistant secretary." But see 1995 La. Acts No. 947, § 2, amending La. R.S. 30:2004(18) (Supp. 1996) (adding definition of assistant secretary). Thus, to find authority for an assistant secretary to issue a penalty would have required interpreting "the assistant secretary" to mean any assistant secretary, which might suggest that an assistant secretary could impose penalties for any violation of the Act, not simply those chapters for which the assistant secretary's office was responsible; construing the general grants of administrative and enforcement authority to the various assistant secretaries as broad enough to encompass the assessment of civil penalties, see La. R.S. 30:2011(C)
days after the notice of violation is given to the respondent, the penalty may be assessed,239 and the secretary or assistant secretary must notify the respondent of the penalty assessment by personal delivery or by certified mail, return receipt requested.240 The penalty assessment must describe the violation that gives rise to the penalty "with reasonable specificity," include the amount of the penalty, and advise the respondent of "the right to an adjudicatory hearing."241 Unless a request for an adjudicatory hearing is submitted within thirty days after the respondent receives notice of the penalty assessment, the assessment "is a final enforcement action."242

With respect to adjudicatory hearings and administrative finality, the penalty procedures in the 1995 amendments are identical to those established for compliance orders.243 Any "aggrieved person" other than the respondent may request an adjudicatory hearing, but only the respondent has a "right to an adjudicatory hearing."244 If the secretary does not grant the request for a hearing within thirty days, "the applicant" may seek "de novo review of the secretary’s action in the Nineteenth Judicial District Court."245 Moreover, after

243. See supra notes 165-177 and accompanying text.

Prior to the 1995 amendments, the Act required that the "person charged" be "given a notice and an opportunity for a hearing" before the secretary assessed a civil penalty. That language appeared to make the assessment of a civil penalty an adjudication under the Administrative Procedure Act and, thus, to require an adjudicatory hearing when one was requested by person against whom the penalty was assessed. See La. R.S. 49:951(1), (3), 955 (1987); accord Environmental Control Comm’n Rules of Procedure, Rule 3.6 (all hearings for civil penalties shall be adjudicative). Although "an opportunity for hearing" had to be granted when a civil penalty was assessed, a hearing did not have to be held in every case. The Act allowed the person charged to waive the hearing "on the issue of whether or not a violation has occurred, . . . culpability for [the] violation and any other ultimate issue." When the hearing was waived, the penalty was assessed "upon the uncontested facts." La. R.S. 30:2025(E)(4) (1989), prior to repeal by 1995 La. Acts No. 947, § 3.

The Environmental Control Commission Rules added a few details to the pre-1995 statutory provisions regarding penalty procedures. The rules confirmed that all penalty hearings were adjudicative and that penalty assessments could be served by hand or by certified mail, return receipt requested. Environmental Control Comm’n Rules of Procedure, Rules 1.3, 3.6. They also allowed “[a]ny person possessing a real interest that might be adversely affected” by the penalty assessment to petition the secretary to hold an adjudicatory hearing, and they permitted the secretary to make “informal disposition . . . of any case of adjudication by stipulation, agreed settlement or consent order” except where informal disposition is “precluded by law.” Id. Rule 5.4, repealed, 21 La. Reg. 556 (1995).
245. Id. § 2050.4(G).
October 1, 1996, the administrative law judge rather than the secretary is responsible for issuing "the final decision or order." \(^{246}\)

The Act allows the public, as well as the attorney general, to participate in penalty proceedings. It provides for public comments "[p]rior to the adjudicatory hearing" and requires that the public comments be made available "to the parties to the adjudicatory hearing." \(^{247}\) In addition, the secretary "shall invite and receive written public comment" and "may hold a public hearing" regarding a proposed settlement or compromise of a penalty. \(^{248}\) The Act also requires that the attorney general must concur before the secretary may settle or compromise "claims for any penalty." \(^{249}\) This language relating to settlements was originally found in the subsection entitled "Settlement of Suits." Nonetheless, the first circuit held that it also applied to administrative settlements of penalties even when the secretary agreed to the settlement before suit is filed. \(^{250}\)

A former Secretary of the Department of Environmental Quality suggested that the concurrence authority of the attorney general was limited to the legal sufficiency of the proposed compromise. \(^{251}\) That position should be rejected because it is inconsistent with the role that the attorney general plays in the settlement process. \(^{252}\) Nothing in the statute indicates that the attorney general's role is limited to legal issues. A more reasonable interpretation is to construe the statutory requirement as an administrative check to insure that the secretary is not unduly lenient in compromising penalties.

*In re BASF Corp.* \(^{253}\) is the leading decision regarding the administrative assessment of civil penalties. Applying the statutory and regulatory provisions in existence prior to the 1995 amendments, \(^{254}\) the first circuit concluded that neither the statute nor any rule required "an adjudicatory hearing in all

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\(^{248}\) La. R.S. 30:2050.7(B), (D) (Supp. 1996). The secretary may hold a public hearing when a "written request for a public hearing has been filed by twenty-five persons, by a governmental subdivision or agency, or by an association having not less than twenty-five members who reside in the parish in which the facility is located" or when the "secretary finds a significant degree of public interest in the settlement or compromise." *Id.*


\(^{250}\) In *re BASF Corp.*, 538 So. 2d 635, 644 (La. App. 1st Cir. 1988), *writ granted*, 539 So. 2d 624, *writ denied*, 541 So. 2d 900 (1989).

\(^{251}\) See Letter dated March 20, 1992 from Kai David Midboe, Secretary of the Department of Environmental Quality, to Richard Ieyoub, Attorney General. For the Attorney General's response, which rejected this interpretation of the scope of concurrence authority, see Letter dated March 23, 1992 from Richard Ieyoub, Attorney General, to Kai Midboe, Secretary of the Department of Environmental Quality.

\(^{252}\) Cf. La. R.S. 30:2050.1(C) (Supp. 1996), as added by 1995 La. Acts No. 947, § 1 (assistant secretary for legal affairs and enforcement shall review all administrative enforcement actions "for legal sufficiency").

\(^{253}\) 538 So. 2d 635 (La. App. 1st Cir. 1989).

\(^{254}\) *See supra* note 243.
enforcement proceedings" to assess civil penalties or granted "the public an absolute right to be heard concerning violations of the Act." Although the rules allowed interested persons to petition for an adjudicatory hearing, the secretary had discretion as to whether a hearing should be held. In short, the statute and rules allowed the secretary to settle or to resolve "any claim informally," when the person against whom the penalty was assessed waived the right to a hearing; moreover, they allowed the secretary to hold "[m]eetings" with the alleged violator "in an attempt to settle" a claim, and these meetings were not "hearings" for which public notice and comment were required.

The 1995 amendments to the Environmental Quality Act also give the secretary the authority to prescribe rules establishing "informal procedures" for the assessment of civil penalties. As with compliance orders, the informal procedures may only be used with the consent of the respondent, and a penalty assessed after informal procedures is "a final enforcement action," even though the procedures are not subject to the normal rules regarding adjudications or adjudicatory hearings. In the rules establishing the informal procedures, the secretary must identify the penalty assessment to which the informal procedures apply, and the rules must provide for documentary evidence that a violation occurred, notice of the evidence to the respondent, an opportunity for the respondent to rebut the evidence, participation by the public, and listing of the final action on the public enforcement list.

The first circuit has ruled that civil penalties must be strictly construed because they are "penal in nature," but no Louisiana decision has yet considered whether the civil penalties authorized by the Environmental Quality Act are sufficiently punitive to require that they be classified as criminal. In Ward v. United States, the United States Supreme Court held the Fifth Amendment's privilege against self-incrimination inapplicable to a $500 civil penalty that the Coast Guard imposed under the oil spill provisions of the Clean Water Act. For several reasons, however, Ward does not definitively resolve the issue of whether the privilege applies to the civil penalties that the Department of Environmental Quality is authorized to impose. For one thing, the punitive

255. 538 So. 2d at 643.
256. Id.
257. Environmental Control Comm'n Rules of Procedure, Rule 3.0. The secretary now exercises the duties of the "assistant secretary" to whom the rule refers. See supra note 34.
258. 538 So. 2d at 643.
260. See supra notes 195-199 and accompanying text.
263. La. R.S. 30:2050.6(C) (Supp. 1996).
265. La. R.S. 30:2050.6(B) (Supp. 1996).
aspect of the Coast Guard penalties in *Ward* was much less substantial because the maximum penalty was much smaller than those provided in the Louisiana statute. For another, the Coast Guard penalties had a clearer remedial function. They went to a special fund devoted to environmental cleanup; by contrast, the Louisiana penalties become part of the state’s general fund. Finally, even if the federal courts would find *Ward* applicable to civil penalties imposed by the Department of Environmental Quality, the Louisiana courts might construe the self-incrimination privilege of the Louisiana Constitution more broadly.

Despite these grounds for distinguishing *Ward*, the Louisiana Supreme Court should not, and probably will not, classify the civil penalties of the Environmental Quality Act as criminal. In upholding a drug forfeiture statute against challenges under both state and federal constitutions, the Louisiana Supreme Court cited *Ward* with approval. Under the approach outlined in *Ward*, the legislative intent to classify the penalties as civil in nature is unmistakable.

Even if the Louisiana Supreme Court were to decide that the civil penalties of the Environmental Quality Act are sufficiently criminal to invoke the privilege against self incrimination, two doctrines will serve to limit the scope of the privilege. First, the privilege only applies to natural persons, and corporations are responsible for most environmental violations. Second, the required records exception to the privilege would apply to most records that polluters are required to keep in the regular course of business.

E. Emergency Powers

Like most federal environmental statutes, the Louisiana Environmental Quality Act grants the governmental agency responsible for environmental protection broad authority to respond to emergencies. Because exercise of these emergency powers does not require proof of a prior violation of the statute or its

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268. The maximum penalty authorized in *Ward* was $5,000. The Coast Guard originally imposed a $500 penalty, but the district court reduced it to $250. *Id.* at 245-47, 100 S. Ct. at 2639-40.


implementing regulations, use of the powers is not technically an administrative enforcement action. Instead, the powers are special responsibilities the legislature has given to the Department of Environmental Quality, “the primary agency in the state concerned with environmental protection and regulation,” in fulfillment of the constitutional mandate to ensure that the state's natural resources are “protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people.”

Louisiana Revised Statutes 30:2033 allows the secretary to take a variety of actions following a declaration “that an emergency exists.” The secretary may make the emergency declaration after receiving evidence of an “incident” that “require[s] immediate action to prevent irreparable damage to the environment or a serious threat to life or safety based on recognized criteria or standards.” After the secretary has declared the existence of the emergency, the statute mandates the secretary to “direct the attorney general to take such legal action as the secretary deems necessary,” authorizes administrative action to contain or to abate the source of pollution, allows the secretary to “issue such permit[s], variances, or other orders” as are necessary to respond to the emergency, and permits the use of “emergency response personnel . . . to undertake necessary actions to contain and [to] abate the pollution source and pollutants.”

The scope of the administrative alternatives available under this section is not altogether clear. In 1983, the Louisiana legislature passed two amendments to Subsection C, which pertains to the secretary’s emergency powers. Both amendments allow the department to “undertake the containment and abatement of the pollution source and pollutants” and to “retain personnel for these purposes who shall operate under [the] direction” of the responsible departmental official. However, Act 97 of 1983, which created the Department of Environmental Quality, grants this power to the “secretary”; while Act 459, which was enacted after Act 97 but became effective before the earlier Act,

277. La. Const. art. IX, § 1.
281. La. R.S. 30:2033(D) (Supp. 1996), as added by 1995 La. Acts No. 947, § 2. Prior to the 1995 amendments, this language was contained in La. R.S. 30:2024(B) (Supp. 1996). The subsection did not define what constituted an “emergency,” nor did it expressly cross reference the Section 2033 or require the secretary to “declare” that an emergency exists. However, an implied incorporation of the standards of the section on emergency powers would have given a reasonable definition to the term. That approach would also have given meaning to the primary purposes of Subsection 2024B, which were to make the emergency orders “effective immediately upon issuance” and to provide that “any appeal or request for review shall not suspend the implementation of the action ordered.”
284. The legislature enacted Act 97 on June 16, 1983, the governor signed it on June 24, 1983, and it became effective on February 1, 1984; the legislature enacted Act 459 on June 27, 1983, the
grants expanded powers to "the assistant secretary" (who, at that time, was the Assistant Secretary of the Office of Environmental Affairs in the Department of Natural Resources).

In addition to the powers confirmed by Act 97, Act 459 empowers the assistant secretary to order action by the "owner, operator, or person responsible for the pollution." These orders can direct the responsible person "to conduct testing, monitoring, and analysis to ascertain the nature and extent of [the] hazard or [to] undertake the containment, abatement, or cleanup of [the] pollution source and pollutants." Moreover, Act 459 expressly makes failure to comply with any of these orders a "violation" that is subject to the enforcement provisions of the Act.

Both the formal legal rules regarding legislation and common sense suggest that the secretary should be able to exercise the broader powers conferred by Act 459. The Louisiana Supreme Court has ruled that the date of the final legislative action on a statute, not the effective date, controls when statutes conflict, and final legislative action on Act 459 occurred after the final legislative action on Act 97. Furthermore, when the legislature passes two acts in the same session, the courts give effect to both whenever possible, and no real conflict exists between Act 97 and Act 459. Act 97 merely made a technical amendment clarifying that the powers previously exercised by the Assistant Secretary of the Office of Environmental Affairs in the Department of Natural Resources would thereafter be exercised by the Secretary of the newly created Department of Environmental Quality. Before the statute creating the new department went into effect, the legislature broadened the powers available to the assistant secretary. Thus, the courts can implement the apparent purpose of both acts by ruling that Act 459 granted expanded powers to the assistant secretary and that Act 97 transferred those powers to the Secretary of the Department of Environmental Quality when the new department was created.

The 1995 amendments to the Environmental Quality Act both distinguish the emergency powers conferred by Section 2033 from emergency cease and desist orders and confirm that permits, variances, and orders issued pursuant to a declaration of emergency are "effective immediately upon issuance." An "appeal or request for review" does not "suspend the implementation of the action ordered," but "[a]n action for injunctive relief against an order" may be brought.


287. La. R.S. 30:2033(F) (Supp. 1996), as added by 1995 La. Acts No. 947, § 2. For a discussion of potential constitutional challenges to Act 947, see supra note 165. For detailed analysis of emergency cease and desist orders, see supra notes 135-144 and accompanying text.
in the Nineteenth Judicial District Court without exhausting administrative remedies. To obtain relief in the action for injunctive relief, the party bringing the action must demonstrate, "by clear and convincing evidence, that granting injunctive relief shall not endanger or cause damage to the public health or the environment."288

IV. CIVIL ENFORCEMENT BY THE GOVERNMENT

Like most federal environmental statutes,289 the Louisiana Environmental Quality Act authorizes governmental agencies to initiate a variety of civil actions to enforce its provisions. In the past, the most common form used in Louisiana has been an ex parte petition by the state to collect civil penalties or to enforce compliance orders.290 Alternatively, the state may file suit to assess a civil penalty, to collect damages resulting from a violation, or to secure injunctive relief to abate a violation.291 In addition, state law also provides a special authorization for the national guard and local governments to recover certain costs they incur in responding to environmental violations.292

As enforcement shifts from administrative to judicial sanctions, the Environmental Quality Act establishes a complicated division of authority between the secretary and the attorney general. Subsection A of the enforcement section provides that the secretary shall bring "any civil action necessary to carry out the provisions of [the Act]" and that the secretary "shall be represented by the attorney general."293 Subsection B authorizes the "department" to "bring a civil action in the name of the state to recover any damages or penalties resulting from a violation" of the Act or the rules or orders implementing the Act. It also provides that the attorney general "may" file suits to assess, or to collect, penalties when cases are "referred" by the secretary.294 However, Subsection G provides that the attorney general "shall have charge of and shall prosecute all civil cases arising out of" any violation of the Act, "including the recovery of penalties."295 Furthermore, the Act also requires that the secretary obtain the "concurrence" of the attorney general before settling "any suits, disputes, or claims for any penalty."296 In addition, the 1995 amendments

290. La. R.S. 30:2025(G)(2) (Supp. 1996); see infra notes 305-311 and accompanying text.
291. La. R.S. 30:2025(A), (B) (Supp. 1996); see infra notes 312-319 and accompanying text.
292. La. R.S. 30:2025(K) (Supp. 1996); see infra note 327 and accompanying text.
grant the secretary authority, "with the concurrence of the attorney general," to use departmental lawyers to file suit when the attorney general declines to file suit or fails to respond to a request from the secretary.\textsuperscript{297}

Although the details of the Environmental Quality Act are not entirely consistent, one can discern a general pattern in the division of responsibilities. As the head of "the primary agency in the state concerned with environmental protection and regulation,"\textsuperscript{298} the secretary may demand judicial enforcement when administrative sanctions are inadequate and may initiate civil action when the attorney general declines or fails to act. On the other hand, the attorney general, "the chief legal officer of the state,"\textsuperscript{299} can also initiate judicial action to compel adherence to the state's environmental laws. Moreover, once litigation is initiated, the attorney general is responsible for strategy and tactics. Finally, the legislature has also prescribed that the attorney general is to serve as a check to insure that the secretary is not unduly accommodating in compromising the state's position with respect to civil penalties.

A 1994 decision of the first circuit suggested that the secretary might also have the power to settle some lawsuits without the concurrence of the attorney general. The court ruled that the attorney general's concurrence was not required to compromise an administratively imposed compliance order when the order did not include a civil penalty; according to the court of appeal, the concurrence requirement only applied to disputes or claims that involve penalties.\textsuperscript{300} If, as the first circuit held, "for any penalty" modified "disputes,"\textsuperscript{301} it would also seem to modify "suits." Under this interpretation, the statute only required the concurrence of the attorney general when a suit compromised by the secretary involved a civil penalty.\textsuperscript{302}

The 1995 amendments to the Environmental Quality Act confirm the interpretation of the preceding paragraph. The Act now explicitly provides that the attorney general's concurrence "is not required for the secretary to settle or [to] resolve (1) a suit, dispute, or claim in regard to a compliance order or (2)
any part of a suit, dispute, or claim insofar as it regards a compliance order."

Of course, to the extent that the attorney general's powers regarding the settlement of lawsuits are derived from the constitutional position as the state's "chief legal officer,"

legislative restrictions of those powers after a lawsuit has been filed may violate separation of powers principles.

A. Collection of Penalties and Enforcement of Orders

The Environmental Quality Act provides for summary enforcement of the secretary's penalty assessments and compliance orders. When the person who has been assessed an administrative penalty or required to perform "specific compliance actions" fails to pay the penalty or to undertake the compliance actions, Subsection G of the general enforcement section directs the attorney general to file a civil action "seeking to make the order of the secretary a judgment of the district court and making the judgment executory for all purposes provided by law." To convert the secretary's order into a district court judgment, the attorney general files "an ex parte petition in the Nineteenth Judicial District Court, in accordance with Code of Civil Procedure Article 2782, attaching a certified copy of the order to the petition." When the ex parte petition is filed, the Act directs the district court to "grant the relief prayed for and [to] issue a judgment without a trial de novo of the facts supporting the order." Notably absent from the subsection providing for summary enforcement is a right to demand a hearing on the violation that gives rise to the penalty assessment or compliance order. That omission is both reasonable and constitutional because other avenues of judicial review are available. A party who appeals a compliance order or penalty assessment has already received the administrative hearing and judicial review that due process requires. On the other hand, a party who chooses not to appeal an assessment or order has elected not to exercise the due process rights and is thus bound by the administrative determination.

304. La. Const. art. IV, § 8.
306. La. C. Civ. P. art. 2782 provides:

A creditor wishing to have judgment of a Louisiana court made executory, as provided in Article 2781, may file an ex parte petition complying with Article 891, with a certified copy of the judgment annexed, praying that the judgment be made executory. The court shall immediately render and sign its judgment making the judgment of the other Louisiana court executory.

The judgment thus made executory may be executed or enforced immediately as if it had been a judgment of that court rendered in an ordinary proceeding.
308. La. R.S. 30:2025(C) (Supp. 1996); see supra notes 168-170 and accompanying text.
309. La. R.S. 30:2024(B), 2025(E) (Supp. 1996); see supra notes 243-246 and accompanying text.
The defendant in the enforcement action does have a limited right to contest judicial enforcement of a penalty assessment or compliance order. "Upon good cause shown and upon the posting of a bond in favor of the state as the court may require," the Act allows "[the] person against whom a judgment is rendered requiring specific compliance actions to be undertaken" to "seek an extension, modification, or suspension of the judgment by summary proceeding." The person challenging the judgment must seek the extension, modification, or suspension "within ten days of service of the judgment," and the hearing on the challenge is limited "to the issue of whether or not compliance has taken place."

The Act does not expressly provide for a hearing on penalty assessments, but the judgment ordering payment of a penalty could reasonably be construed as one "requiring specific compliance actions to be undertaken." That construction would entitle the person who is ordered to pay the penalty to a hearing limited to the issue of whether compliance has taken place, i.e., whether the penalty has been paid.

The only hearing mentioned in the subsection providing for summary enforcement is a hearing in opposition to an enforcement action initiated by the attorney general. The first circuit has, however, construed the subsection as allowing a "suit for declaratory judgment" that challenges the constitutionality of the enforcement scheme established in the subsection. Because the provisions of the subsection relate "merely to a procedure employed by the Attorney General in the district court" and not "to issues that might ever be brought before the [department]," allowing litigation of the constitutional issue in the district court "in no way undermines the statutory scheme."

B. Assessment of Penalties and Damages

As an alternative to judicial enforcement of administrative sanctions, the Environmental Quality Act permits the secretary to proceed directly to a civil action. Because this approach requires the state to prove the violation in an ordinary civil suit and grants the district court discretion as to the amount of the penalty that is imposed, the state has seldom, if ever, preferred it to the initial use of administrative sanctions. The civil action does, however, grant the state the right to recover damages, a remedy that is not available in administrative enforcement actions. Moreover, the changes that the 1995 legislature made with respect to administrative issuance of compliance orders and assessments of penalties may incline the secretary to reconsider the use of civil enforcement actions.

Subsection B of the enforcement section permits the department to bring a civil enforcement action "in the name of the state" for the recovery of "any

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311. Marine Shale Processors, 551 So. 2d at 643.

312. See supra notes 174-185, 243-246 and accompanying text.
damages or penalties resulting from a violation of any requirement" of the Environmental Quality Act or any rule or order issued pursuant to the Act. In the civil action, the attorney general represents the department, and the Act provides that the attorney general "may" file suit on cases referred by the department. Jurisdiction lies in the state district courts, and proper venue is "any parish in which damage has occurred or any parish where the defendant resides, is domiciled, or has his principal place of business."\(^{313}\)

A civil action to recover damages or penalties does not preclude other forms of judicial relief. However, the violator is entitled to a credit for any amounts paid in response to any civil penalties assessed by the secretary. The credit applies to "the amount for which [the violator] is held liable to the state in a judgment or settlement" that "is based on the same violation or violations."\(^{314}\)

In the past, the department has had little incentive to use civil actions to assess civil penalties. The civil action has had two significant disadvantages when compared to administrative imposition of civil penalties.\(^{313}\) First, as the plaintiff in the civil enforcement action, the department bears the burden of proof without the presumption of correctness that attaches to an administrative assessment. Second, the judge rather than the secretary has the discretion as to the amount of the penalty.\(^{316}\) Not surprisingly, the reported decisions on civil penalties all involve administrative assessments.

In 1995, the legislature made two changes that may render civil enforcement more attractive to the department in the future. First, an appeal from an administratively imposed civil penalty now goes to the Nineteenth Judicial District Court, rather than to the First Circuit.\(^{317}\) Second, since October 1, 1996, the administrative law judge, rather than the secretary, makes the final administrative decision in enforcement actions.\(^{318}\) Without the expedited appeal to the first circuit, the secretary may prefer—at least, on some occasions—to prove the violation before an elected district judge rather than before an appointed administrative law judge in the Department of Civil Service.

The civil action has always had one additional advantage over the administrative imposition of sanctions: it allows the state to recover damages, a remedy that is not available in an administrative enforcement action.

\(^{313}\) La. R.S. 30:2025(B) (Supp. 1996). If the attorney general declines or fails to respond to the secretary’s request to initiate a civil action, the secretary can, "with the concurrence of the attorney general," use departmental lawyers to file the civil action. \textit{Id.}, as amended by 1995 La. Acts No. 1160, § 1.


\(^{315}\) See \textit{supra} notes 202-258 and accompanying text.

\(^{316}\) Under federal environmental statutes, federal courts have held that they are not obligated to follow the penalty policy of the Environmental Protection Agency. \textit{See, e.g.}, Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd., 611 F. Supp. 1542 (E.D. Va. 1985), aff’d, 791 F. 2d 304 (4th Cir. 1986), \textit{rev’d on other grounds}, 484 U.S. 49, 108 S. Ct. 376 (1987).


Moreover, the Act appears to give the district court broad discretion to award restoration or compensatory damages as well as to allow the state to recover the amounts it has spent in detecting and correcting the violation. When the court “determines that a violation of [the Act] has occurred,” the statute directs that the assessment of damages “shall include . . . the costs of all reasonable and necessary investigations made or caused to be made by the state in connection therewith.” It also provides that the court is to “take into consideration” both “the costs of restoring the affected area to its condition as it existed before the violation and its present market value.”

C. Injunctive Relief

Both the section of the Environmental Quality Act allowing the secretary to issue emergency and desist orders and the citizen suit section provide for injunctive relief, but no other section of the Act expressly authorizes the secretary to seek injunctive relief from the courts. Nonetheless, the initial subsection of the enforcement section should be broad enough to permit the secretary to obtain an injunction. That subsection allows the secretary, “represented by the attorney general,” to bring “[a]ny civil action necessary to carry out the provisions” of the Act. Because the enforcement section of the Environmental Quality Act lacks specific provisions regarding injunctions (except for emergency cases), the normal rules of the Code of Civil Procedure should govern.

Prior to 1995, the secretary gained few advantages by seeking an injunction rather than issuing an administrative compliance order. In the civil action, the department bears the burden of proof, and discretion as to the scope of the order passes from the secretary to the district court. As with administrative penalties, the 1995 amendments may, however, make civil actions more attractive in the future.
The secretary is most likely to bring an action for injunctive relief after issuing an emergency cease and desist order. Those administrative orders expire after fifteen days, and that period of time will be insufficient to complete the processing on a compliance order if the alleged violator requests a hearing. To continue the cease and desist order beyond fifteen days, the secretary will probably need to seek a temporary restraining order or preliminary injunction from a court.

D. Recovery of Resources Used or Funds Expended

A 1990 amendment to the Environmental Quality Act gives the Louisiana National Guard and local governments a special cause of action for money they spend or resources they use in emergency response actions. Whenever the national guard or a local government has "used resources or expended funds for the protection of the health, safety, or welfare of its citizens, for prevention of damage, or for the cleanup or repair of damages caused by or as a result of a violation" of the Act, the amendment allows the recovery of those funds expended or resources used that "are reasonably considered to be outside the scope of normal activities."327

The amendment imposes several limits on the statutory cause of action. First, the statute provides that the right of recovery is subject to "the concurrence or review of the department," but the Act provides no mechanism for obtaining that concurrence or review. Second, the violator receives a credit for any "funds recovered" by the national guard or local government against "the amount that [the violator] is assessed" by the state or for which the violator is "held liable" to the state. Third, the cause of action is subject to an extremely short prescriptive period. The national guard or local government must bring its action "within sixty days of the completion of the emergency response action."

V. CRIMINAL PROSECUTIONS

The Environmental Quality Act establishes criminal penalties for a variety of violations. The general enforcement section contains criminal penalties

326. La. R.S. 30:2050.8(E) (Supp. 1996); see supra notes 135-144 and accompanying text.
applicable to all portions of the Act. In addition, both the Hazardous Waste Control Law and the Water Control Law provide additional criminal sanctions for certain violations of their provisions.

Actual criminal prosecutions for violations of environmental laws have materialized more slowly in Louisiana than in federal courts and in some other states. During the 1980s, several decisions of the Louisiana Supreme Court raised questions about the viability of criminal prosecutions for violations of the Environmental Quality Act. In 1994, however, the court distinguished these precedents and affirmed a felony conviction for a violation of hazardous waste rules promulgated by the secretary. Whether the most recent decision will actually prompt any substantial number of prosecutions under the Environmental Quality Act remains to be seen.

Two decisions from the mid-1980s held that legislative attempts to delegate the power to prescribe rules punishable by criminal prosecution could violate the state constitutional provision requiring separation of powers. In State v. Broom, the Louisiana Supreme Court invalidated a statute prescribing criminal penalties for violations of administrative regulations governing the transportation of explosives. Two years later, State v. Taylor held unconstitutional a statute that gave heads of correctional institutions the power to define what constituted contraband, the possession of which was punishable as a felony.

In both Broom and Taylor, the court ruled that the legislature had failed to provide sufficient standards to guide the exercise of administrative discretion. According to Broom, the deficiency in the explosives statute was the legislature's "delegat[ion] to the director of public safety [of] the authority to create felonies." Similarly, Taylor found the contraband law unconstitutional.


333. La. Const. art. II, § 2. Article II, Section 1 divides state government into "legislative, executive and judicial" branches. Section 2 then provides: "Except as otherwise provided by this constitution, no one of these branches, nor any person holding office in one of them, shall exercise power belonging to either of the others."

334. 439 So. 2d 357 (La. 1983).

335. 479 So. 2d 339 (La. 1983).

336. 439 So. 2d at 369.
because it "fail[ed] to prescribe sufficient standards by which the power delegated is to be exercised." 337

A third decision from the 1980s involved the Air Control Law. Although the Louisiana Supreme Court reversed the specific conviction that was being appealed, it upheld the legislature’s delegation of rulemaking authority to the Environmental Control Commission, even when violations of the regulations could be punished criminally. Noting that "Louisiana courts [had previously] upheld the constitutionality of statutes delegating broad powers to administrative officers to determine the details of a legislative scheme," State v. Union Tank Car Co. 338 ruled that the air law satisfied the requirements of the state constitution. It contained "a scheme which provides intelligible standards sufficient to guide the . . . [commission] in its enforcement of the legislative will," and it incorporated procedural safeguards that provided "ample protection against arbitrary action by the [commission] in adopting the regulations." 339

Because the Union Tank Car decision preceded the opinions in Broom and Taylor, 340 those later decisions created uncertainty regarding the continuing vitality of the Union Tank Car doctrine. Arguably, the later cases limited the legislature’s ability to delegate the power to define criminal conduct, at least when the crime was a felony.

The 1994 decision in State v. All Pro Paint and Body Shop, Inc. 341 unequivocally reaffirmed the legislature’s power to punish violations of environmental regulations as felonies. According to Justice Kimball’s opinion in All Pro Paint, Broom and Taylor did not establish a special delegation rule when administrative regulations were punished as felonies. Instead, they merely applied the well-established three-part test of Louisiana law:

[A] delegation of authority to an administrative agency is constitutionally valid if the enabling statute (1) contains a clear expression of legislative policy, (2) prescribes sufficient standards to guide the agency in the execution of that policy, and (3) is accompanied by adequate

337. 479 So. 2d at 343.
339. Id. at 383.
340. Confusion over the authoritateness of Union Tank Car was compounded by the unusual chronology of the Broom and Union Tank Car decisions. The supreme court issued its opinion in Union Tank Car on the same day as the original decision in Broom was handed down. The original decision in Broom upheld the delegation of administrative authority and the conviction that was based on a violation of the administrative regulation. Union Tank Car relied on Broom as the basis for upholding the delegation of authority to the Environmental Control Commission, but the court reversed the conviction on the ground that the regulations were unconstitutionally vague. On rehearing, Broom reversed the conviction it had previously upheld on the ground that the delegation of regulatory authority was unconstitutional. Because the Broom opinion on rehearing took a narrower view of the legislature’s power to delegate rulemaking authority to administrative agencies than the court had embraced on original hearing, the continuing validity of the language in the Union Tank Car opinion regarding delegation was uncertain.
341. 639 So. 2d 707 (La. 1994).
procedural safeguards to protect against abuse of discretion by the agency.\textsuperscript{342}

\textit{All Pro Paint} involved a prosecution for violating the hazardous waste disposal rules of the secretary. Applying the \textit{Union Tank Car} test, the supreme court had little difficulty in concluding that the delegation of rulemaking authority in the Hazardous Waste Control Law was constitutional. First, the law satisfied the "clear expression of legislative policy" criterion because its "policy and purpose provision establishe[d] a reasonable and definite governmental policy warranting the exercise of the State's police power to protect the public health, safety, and welfare by regulating hazardous waste."\textsuperscript{343} Second, \textit{All Pro Paint} concluded that "the statute when construed as a whole prescribes sufficient standards to guide [the department's] administration and enforcement of the legislative will."\textsuperscript{344} Specifically, it authorized the secretary "to promulgate regulations implementing a comprehensive state hazardous waste control program consistent with 'the minimum criteria hereinafter set forth' and also 'consistent with the mandates of [federal law].'"\textsuperscript{345} Finally, the court found "adequate procedural safeguards to protect against abuse of discretion" in the requirement for a public hearing on any proposed rule, the provision for "judicial review of the validity or applicability of rules," and the prescription of "procedures for legislative review of rules."\textsuperscript{346}

Read together, \textit{Union Tank Car} and \textit{All Pro Paint} recognize a broad legislative power to punish violations of environmental regulations as crimes. The supreme court has now upheld the delegations in both the air and hazardous waste statutes, and the analysis it used appears equally applicable to the other statutes that form the Environmental Quality Act.\textsuperscript{347}

Of course, criminal prosecutions will always raise special problems. \textit{Union Tank Car} itself applied the rule of strict construction applicable to criminal statutes to rules that are punishable as crimes.\textsuperscript{348} In addition, the government must prove environmental crimes beyond a reasonable doubt, and both federal\textsuperscript{349} and state\textsuperscript{350} constitutions grant special protections to criminal defendants.

\textsuperscript{342} Id. at 712 (citing State v. Barthelemy, 545 So. 2d 531, 534 (La. 1989); Adams v. State, 458 So. 2d 1295, 1298 (La. 1984); State v. Union Tank Car Co., 439 So. 2d 377, 381 (La. 1983); Schwegmann Brothers Giant Super Markets v. McCrory, 237 La. 768, 787-88, 112 So. 2d 606, 613 (1959)).

\textsuperscript{343} 639 So. 2d at 716.

\textsuperscript{344} Id. at 716-17.

\textsuperscript{345} Id. at 717.

\textsuperscript{346} Id. at 720.


\textsuperscript{348} 439 So. 2d 377, 385 (La. 1983). See also State v. Domangue, 549 So. 2d 1034 (La. 1995) (fish and wildlife statute did not prohibit sale of improperly skinned alligator hide).

\textsuperscript{349} U.S. Const. amends. IV, V, VI, VIII.

\textsuperscript{350} La. Const. art. 1, §§ 5, 13, 17, 18.
When criminal violations occur, the role of state officials is advisory in Louisiana. The Environmental Quality Act recognizes that local district attorneys are responsible for initiating and controlling criminal prosecutions. The Act does, however, direct the secretary to notify the appropriate district attorney whenever the department determines that "a criminal violation may have occurred." After giving the statutory notice, the department is to "provide the district attorney with any and all information necessary to evaluate the alleged violation for criminal prosecution" and to "cooperate fully with the district attorney."

The general enforcement section of the Environmental Quality Act contains both felony and misdemeanor subsections. The felony subsection provides the most severe penalties for substantive violations in which human life or health is, or could be, endangered. Other substantive violations, as well as failures to pay fees or to file documents and reporting or monitoring violations, are punished less severely in the misdemeanor section.

The felony subsection requires both a violation and an endangerment. It limits the crime it creates to "[a]ny person who willfully or knowingly discharges, emits, or disposes of any substance in contravention of any provision" of the Environmental Quality Act or its implementing regulations or of any condition of a permit or license issued pursuant to the Act. The endangerment requirement provides that the substance must be "one that endangers or that could endanger human life or health."

The penalties prescribed for these felony violations are substantial: a fine of "not more than one million dollars or the cost of any cleanup made necessary by [the] violation" plus a fine of "not more than one hundred thousand dollars per violation and costs of prosecution" and imprisonment "at hard labor for not more than ten years." The statute does, however, provide a special rule for certain air violations resulting from "the incineration of cardboard by a retail or wholesale merchant or by his employee or agent." Those violations are not subject "to the fine herein provided for."

The misdemeanor subsection covers four distinct offenses:

1) Violating the Act, a rule implementing the Act, or a term or condition of a permit "when the substance does not endanger or could not endanger human life or health."

353. La. R.S. 30:2025(F)(1) (Supp. 1996). The special provision does not extend to when the incineration is a violation of "an applicable requirement of the federal Clean Air Act" and "the emission source" emits, or has the potential to emit, more than ten tons of any toxic air pollutant annually (or more than 25 tons of any combination of toxic air pollutants) or more than 100 tons annually or any regulated air pollutant or it is "located in an ozone nonattainment area" and emits, or has the potential to emit, more than specified levels of volatile organic compounds or oxides of nitrogen.
2) Failing to comply with "any fee or filing requirement" without a prior notice to the department that the violator "contest[s] the legal or factual basis of the matter."

3) Making "any false statement, representation, or certification" in any "document filed or required to be maintained" under the Act or a rule or permit issued under the Act.

4) Falsifying, tampering with, or rendering inaccurate "any monitoring device or method required to maintained" under the Act or a rule or permit issued under the Act.

The mental element for the first three of the misdemeanor offenses is the requirement that the act be done "willfully or knowingly." For the fourth offense, the mental element is "willfully or knowingly" for falsifying, "intentionally" for tampering, and "knowingly" for rendering inaccurate. A finding that the misdemeanor section has been violated is a responsive verdict when an individual is charged under the felony provision.\(^{354}\)

The maximum penalty for a misdemeanor violation can include both a fine and imprisonment. The fine cannot exceed "twenty-five thousand dollars per day of violation, which may be assessed for each day the violation continues, and costs of prosecution." The maximum term of imprisonment is one year. Somewhat confusingly, in light of the clause allowing fines to be assessed for each day a violation continues, a proviso at the end of the penalty section declares that "a continuous violation extending beyond a single day shall be considered a single violation."\(^{355}\)

The subsection on criminal liability provides express authority for suspending sentences imposed on persons convicted of "illegally disposing of solid waste." Those sentences may be suspended "if the offender is placed on supervised probation for at least two years and, as a condition of probation, cleans up the site or removes the illegally disposed waste from the site to the satisfaction" of the department.\(^{356}\)

Union Tank Car is the only reported decision that has considered the criminal provisions in the general enforcement section of the Environmental Quality Act. The provisions do, however, raise numerous legal issues that may have to be addressed now that All Pro Paint has endorsed criminal prosecution for violations of environmental regulations.

First, the mental element required by the criminal provisions of Section 2025 is uncertain. The "willfully or knowingly" language differs from the language normally used to specify criminal intent in the Louisiana Criminal Code.\(^{357}\)


\(^{355}\) Id.


\(^{357}\) See La. Crim. Code arts. 10, 11 (codified at La. R.S. 14:10, 11 (1986)). In the Louisiana Criminal Code, "in the absence of qualifying provisions, the terms 'intent' and 'intentional' have reference to 'general criminal intent.'" Id. art. 11.
Nor is federal law a reliable guide. Most federal statutes require that a violation be committed "knowingly"; whether either "willfully" or "intentionally" is a significant addition is unclear.358

Second, the statutes are imprecise as to what elements are covered by the mental element. In prosecutions under the Resource Conservation and Recovery Act, federal courts of appeals are divided on the question of whether the violator must know more than that a discharge, emission, or disposal has occurred.359

Third, the reach of the enhancement for endangerment of human life or health is unclear. Not only is the statute ambiguous as to whether the nature of the substance or the circumstances in which it is handled give rise to the enhancement, but the Act makes no attempt to define what constitutes an endangerment.360

Fourth, the provision regarding suspension of solid waste violations is ambiguous. It does not indicate whether it is the sole ground for suspending a sentence imposed under the Act or whether suspended sentences are also appropriate for other violators.

Fifth, exactly what the special protection for retail merchants who violate air regulations covers is unclear. Apparently, a merchant who is a natural person remains subject to the possibility of being imprisoned for not more than ten years. Moreover, the exemption covers "the fine herein provided for,"361 but the subsection provides for two types of fines: one for "not more than one million dollars or the cost of any cleanup made necessary by violation," and the second for "not more than one hundred thousand dollars per violation."362

Sixth, the general criminal law provisions do not directly delineate the liability of corporations and their employees. The definition section of the Environmental Quality Act does, however, include corporations within the term "person,"363 and the federal government has frequently prosecuted employees for actions taken in the scope of their corporate duties.364


The Hazardous Waste Control Law establishes three additional crimes. It provides criminal penalties for two types of substantive violations. In addition, it subjects certain reporting and monitoring violations to lesser penalties.

The more serious of the substantive provisions in the Hazardous Waste Control Law carries a maximum penalty of "a fine of not more than two hundred fifty thousand dollars per day of violation and costs of prosecution" and "imprisonment at hard labor for not more than fifteen years." It covers "[a]ny person who knowingly transports, treats, stores, disposes of, or exports any substance in contravention of the provisions" of the Hazardous Waste Control law or a regulation, license, or permit issued under the law as well as "any person who otherwise knowingly violates" the law. It only applies, however, when a person has acted "in such manner that he knows, or should have known, at that time that he thereby places another person in imminent danger of death or serious bodily injury."365

The less severe of the substantive criminal provisions applies to "[a]ny person who willfully or knowingly discharges, emits, or disposes of any substance in contravention of any provision" of the Hazardous Waste Control Law or any rule, permit, or license issued pursuant to the law and to "any person who otherwise knowingly violates any provision" of the law. The maximum penalty provided for a violation is "a fine of not more than one hundred thousand dollars per day of violation and costs of prosecution, or imprisonment at hard labor for not more than ten years, or both."366 Unlike the general enforcement section, the Hazardous Waste Control Law does not expressly make a conviction for violating the less severe substantive provision a responsive verdict to a charge of violating the more severe provision discussed in the preceding paragraph. Because the substantive criminal provisions of the Hazardous Waste Control law differ with respect to mental element and the acts they specifically enumerate, defendants are certain to argue that the legislature declined to make the lesser offense a responsive verdict.

The legislature added the section providing criminal penalties for certain reporting and monitoring violations in a 1990 amendment to the Hazardous Waste Control Law. The amendment covers "any person who knowingly omits material information" in an "application, record, label, manifest, report, plan, or other document filed or required to be maintained" under the law as well as any person who "knowingly and intentionally makes any false statement, representation, or certification" in such a document. The monitoring violations apply to any person "who falsifies, intentionally tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained" under the law. The maximum penalty for reporting or monitoring violations is "a fine of not more that twenty-five thousand dollars or imprisonment for not more than six months, or both."367

In addition to the ambiguity regarding responsive verdicts, the criminal provisions of the Hazardous Waste Control Law raise many of the same issues as the criminal provisions of the general enforcement section of the Environmental Quality Act. The mental element is unclear, and the provisions are ambiguous as to the elements to which the mental state applies. Furthermore, the legislature has neither provided a definition of what constitutes placing a person "in imminent danger of death or serious bodily injury" nor expressly stated whether corporations and corporate employees are subject to the criminal penalties.

In 1993, the legislature added a special set of criminal provisions to the Water Control Law. The amendment makes it a crime to violate the Louisiana Pollutant Discharge Elimination System negligently or knowingly and provides enhanced penalties when the violator knows that the violation "places another person in imminent danger of death or seriously bodily injury." However, the criminal provisions are not yet operative. The Louisiana Pollutant Discharge Elimination System only came into existence when the federal government delegated authority to the state to operate the discharge permit program required by Section 402 of the Clean Water Act. The federal government has granted final approval to Louisiana's program effective August 27, 1996.

VI. ENFORCEMENT BY PRIVATE PARTIES

A. Citizen Suits

Like many federal statutes, the Louisiana Environmental Quality Act has a citizen suit provision that allows private parties to seek judicial enforcement of the Act. Although the Louisiana provision appears to have been modeled on the federal statutes, the state's courts may reject some of the restrictive interpretations that federal courts have embraced with respect to the federal statutes.

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The citizen suit provision of the Environmental Quality Act appears to be a unique feature of Louisiana law. The environmental statutes administered by the Commissioner of Agriculture, see, e.g., La. R.S. 3:3201-3377 (1996), and the Department of Public Safety and Corrections, La. R.S. 32:1501-1521 (1989), have no similar provisions. However, persons who are "adversely affected" may enforce the conservation laws and orders of the state when the Commissioner of Conservation fails to do so. See La. R.S. 30:16 (1989).
Subsection A defines the scope of the citizen suit provision. It allows "any person having an interest, which is or may be adversely affected," to file a civil action "on his own behalf against any person whom he alleges to be in violation" of the Environmental Quality Act or rules promulgated under the Act. Proper venue lies "in the district court in the parish in which the violation or alleged violation occurs or in the district court of the domicile of the alleged violator," and the district court must afford the citizen suit "preferential hearing." If the district court finds "that a violation has occurred, or is occurring," it may "assess a civil penalty not to exceed ten thousand dollars for each day of the continued noncompliance." The court may also, "if appropriate, issue a temporary or permanent injunction." In addition, the court may "award costs of court including reasonable attorneys and expert witness fees to the prevailing party" and "may also award actual damages to the prevailing plaintiff."

Subsection B limits the authority to file a civil suit in four ways. First, the plaintiff cannot file the action "prior to thirty days" after giving "notice to the secretary and the alleged violator." Second, a citizen suit may not be commenced "[i]f the secretary . . . has commenced and is diligently prosecuting a civil or criminal action in a court of this state to require compliance with any standard, limitation, or order." However, anyone who could have filed a citizen suit may intervene in the secretary’s enforcement action "as a matter of right." Third, the Environmental Quality Act does not permit a citizen suit "[i]f the alleged violator is operating under a variance and is in compliance with the terms of such variance." Fourth, a plaintiff cannot file a citizen suit against any person who is, "with respect to the same violation," complying with "any order issued pursuant" to the Act; who is a "defendant in a civil suit brought under the provisions of R.S. 30:2025"; or who is the "subject of an action to assess and [to] collect a civil penalty pursuant to R.S. 30:2025(E)."

The citizen suit provision is supplementary to other remedies available to injured parties. "[N]othing herein shall be construed to limit or deny any person’s right to injunctive or other extraordinary and ordinary relief under the Louisiana Code of Civil Procedure or otherwise under Louisiana law, other than this Section." Furthermore, the statute also provides that "[t]he enforcement, procedures, and remedies herein provided for shall be in addition to any such procedures authorized under the laws of this state." When compared to the federal provisions on which it was modeled, the Louisiana citizen suit provision has two distinct advantages. For one example, the Louisiana statute allows the court to award damages to a prevailing party, a remedy that is generally not available under federal law. For another, the
state law applies to past violations as well as those that are continuing at the time the citizen suit is filed whereas the United States Supreme Court has ruled that the Clean Water Act only allows citizen suits for violations that are occurring when the citizen suit is filed.\textsuperscript{378}

The damages remedy is potentially important. Arguably, it creates a new tort with only two elements: violation of the Environmental Quality Act plus a causal relationship between the violation and the "actual damages" suffered by the plaintiff. Moreover, actual damages may include the restoration costs that are provided when the state seeks judicial relief under the general enforcement section.\textsuperscript{379}

Unlike federal citizen suit provisions, the Louisiana statute does not allow suits to force the secretary to perform nondiscretionary duties. That omission is probably not particularly significant, however. The Code of Civil Procedure already authorizes writs of mandamus to require a public official to perform a mandatory duty.\textsuperscript{380} Alternatively, the courts might construe a failure to perform a mandatory duty as a violation of the Act that is covered by the citizen suit provision.

In at least one respect, the citizen suit provision of the Environmental Quality Act is less favorable than the typical provisions found in federal statutes: the Louisiana statute expressly bars a citizen suit when a violation is the subject of any judicial or administrative enforcement effort. It precludes a citizen suit whenever an alleged violator is operating in compliance with a variance, has received a compliance order with respect to the same violation, is a defendant in a civil enforcement action, or is the subject of an administrative action to assess a penalty.\textsuperscript{381} By contrast, federal environmental statutes originally only barred citizen suits when the Environmental Protection Agency was "diligently" pursuing an enforcement action in court.\textsuperscript{382} Recent amendments to the Clean Water Act have, however, precluded the use of citizen suits to assess penalties for violations for which administrative penalties have been imposed,\textsuperscript{383} and some lower federal courts have interpreted the new amendments quite expansively.\textsuperscript{384}

\textsuperscript{379} See supra note 319 and accompanying text.
\textsuperscript{381} La. R.S. 30:2026(B)(3)-(4) (1989).
The impact of the additional grounds for barring citizen suits in the Louisiana statute may not be as great as it seems at first glance. Under Louisiana law, citizens have substantial rights to intervene in administrative and judicial enforcement actions and to appeal administrative enforcement decisions. Thus, a collusive administrative enforcement effort to preclude a citizen suit may not completely avoid citizen participation in the enforcement process.

The broader preclusion provision of the state statute may have discouraged the filing of citizen suits in Louisiana. At any rate, few judicial decisions have construed the citizen suit provision of the Environmental Quality Act. Not surprisingly, therefore, the language of the statute raises a number of unresolved issues.

Although the statute requires notice to the secretary and to the alleged violator, no Louisiana decision has ruled whether failure to provide notice requires dismissal of the suit, as the United States Supreme Court has held is required for noncompliance with the notice requirements of the citizen suit provision of the Resource Conservation and Recovery Act. Nor does the Louisiana statute prescribe the form in which notice is to be given, beyond requiring that it be provided by certified mail, return receipt requested. At the federal level, the Environmental Protection Agency has issued regulations governing notice in citizen suits, but the secretary has not promulgated comparable rules at the state level. In the absence of such rules, presumably any written notice will suffice.

The scope of the citizen’s right to intervene is also unclear. The statute precludes a citizen suit when “the secretary or ... [the secretary’s] legal counsel has commenced and is diligently prosecuting a civil or criminal action in a court of this state,” but it allows an aggrieved party to intervene “in any such proceeding ... as a matter of right.” The language suggests that the right to intervene extends to criminal proceedings, but the courts may resist that linguistic interpretation for at least two reasons. First, private parties normally have no role in criminal prosecutions. Second, the secretary does not “commence” or “prosecute” criminal cases; even the Environmental Quality Act recognizes that responsibility belongs to local district attorneys.

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391. La. R.S. 30:2025(F) (1989); see supra note 351 and accompanying text.
A third issue raised by the text of the statute is whether the plaintiff's right to recover damages extends to cases in which the plaintiff intervenes. If not, the secretary's enforcement of the Act could preclude a private party's right to recover damages as well as the right to obtain injunctive relief and penalties. On the other hand, granting an intervening plaintiff the right to recover damages could preclude the secretary from settling or compromising the state's claims, even when the attorney general has agreed to the settlement or compromise.

B. Other Remedies Available to Private Parties

The devices for enforcing environmental statutes do not preclude recourse to other remedies, such as those available under general property or tort law. The citizen suit section expressly preserves "any person's right to injunctive or other extraordinary and ordinary relief." Moreover, the first circuit has rejected the argument that a permit from the Department of Environmental Quality precludes an injured party's from recovering damages caused by the permittee's pollution.

C. Attorney Fees

Louisiana follows the "American rule," which ordinarily requires litigants to pay their own attorney fees regardless of who prevails in litigation. The American rule admits exceptions, and the Louisiana Supreme Court has recognized three. It has allowed the prevailing party in a lawsuit to recover legal fees from the losing party when a contract between the parties provides for payment of attorney fees, when a statute authorizes recovery, and when the actions of the plaintiff have created a "common fund" to which attorney fees may appropriately be charged.


394. McCastle v. Rollins Environmental Services of La., 415 So. 2d 515 (La. App. 1st Cir.), writ denied, 420 So. 2d 449 (1982).

The first exception has little applicability in environmental litigation. Because the plaintiff in an environmental action seldom has a contractual relationship with the defendant, contractual provisions shifting attorney fees are rare.

The Louisiana citizen suit provision falls within the second of the exceptions. It allows "the prevailing party" to recover "costs of litigation, including reasonable attorneys and expert witness fees" in a suit based on a violation of the Environmental Quality Act. Because few reported decisions have construed the citizen suit provision, the precise scope of this provision remains uncertain.

No reported decisions have defined who is a "prevailing party" or what are "reasonable attorney fees." Because the terms were drawn from the citizen suit provisions of federal environmental laws, federal decisions may provide guidance for construing the Louisiana statute. State law, however, allows contingency fees in other contexts, and so the Louisiana Supreme Court may decline to follow federal decisions that have refused to enhance normal hourly rates for the possibility that an environmental plaintiff might lose a novel environmental case.

Although the citizen suit provision of the Environmental Quality Act is a notable exception in Louisiana law, the Administrative Procedure Act includes a more limited provision for attorney fees. It allows a "small business" to recover "reasonable litigation expenses" when it successfully challenges an agency action in which "the agency acted without substantial justification."

The Louisiana Supreme Court has also recognized the "common fund" exception to the rule barring recovery of attorney fees, although it has not yet used it in an environmental case. The fourth circuit restrictively construed the exception to deny attorney fees to plaintiffs who had successfully challenged the awarding of dredging permits in violation of the state's public bid laws.


397. One important limitation in the citizen suit provision is obvious. It only applies to violations of the Environmental Quality Act. It does not encompass suits for damages or penalties based on violations of other environmental laws. See Mayor and Council v. Ascension Parish Police Jury, 506 So. 2d 773 (La. App. 1st Cir. 1987).


399. See, e.g., Idaho Conservation League, Inc. v. Russell, 946 F.2d 717 (9th Cir. 1991); National Wildlife Federation v. Hanson, 859 F.2d 313 (4th Cir. 1988). But see Meredith v. Ieyoub, 672 So. 2d 375 (La. App. 1st Cir.), writ granted, 676 So. 2d 1094 (1996) (attorney general lacks authority to enter contingency agreement without express legislative authorization).


According to the court of appeal, an essential condition of the “common fund” exception requires that the fund arise “solely” by virtue of the attorney’s efforts. Because public bids for new leases (which the plaintiffs opposed) were necessary before the state realized the increased revenues from the dredging leases, the exception was not applicable.

VII. CONCLUSION

An accurate analysis of the enforcement provisions of the Louisiana Environmental Quality Act requires careful attention to both statutory text and judicial decisions. Although the enforcement options of state law are modeled on federal environmental statutes, federal law is not always a reliable guide to the details of the Environmental Quality Act. In the state law, the legislature has provided an impressive set of tools for enforcing pollution control regulations. Nonetheless, improvements in the statutory scheme are still needed.

At least three important differences have distinguished Louisiana law from the federal models on which it is based: greater unity exists with respect to enforcement options under state law, provisions similar to federal statutes have different meanings in Louisiana law, and state law has placed greater emphasis on administrative enforcement.

The unity of enforcement options under state law is a major improvement upon the federal statutes on which state law is largely based. Each federal statute contains separate enforcement provisions;[404] although most are similar, they are not identical. By contrast, the general enforcement sections of the Environmental Quality Act[405] apply to violations of all of the statutes administered by the Department of Environmental Quality. This consolidation permits a more coordinated enforcement effort. It is a statutory reform that Congress would do well to emulate.[406] Unfortunately, the Louisiana legislature itself has compromised this desirable aspect of state law in the Hazardous Waste Control Law[407] and the Water Control Law[408] it should avoid additional compromises in the future.

The wording of the enforcement provisions of the Environmental Quality Act is frequently similar to the text of federal statutes. Nevertheless, the meaning of state and federal law is not always identical. The authorization for the issuance of compliance orders is a good example of a difference between state and federal law. Because federal compliance orders are not final agency actions, they do not

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407. La. R.S. 30:2183(G) (1989); see supra notes 363-367.
408. La. R.S. 30:2076.1, 2076.2 (Supp. 1996); see supra notes 368-370 and accompanying text.
mandate administrative process or judicial review—even though polluters violate them at their peril.\textsuperscript{409} By contrast, the Louisiana compliance order is a binding administrative determination with two significant consequences. It increases the size of the civil penalty to which the violator is subject,\textsuperscript{410} and the department can use summary judicial process to enforce its provisions.\textsuperscript{411} Not only is the Louisiana provision fairer to alleged violators, it also gives the agency an additional administrative option that is not available to federal regulators.\textsuperscript{412}

A second example of state law differing from its federal model is the citizen suit provision.\textsuperscript{413} On the one hand, state law covers past violations and permits damage awards. On the other, state law is more willing than federal law to allow administrative enforcement actions to bar a citizen suit.

In the past, the greatest difference between state and federal enforcement has probably been the state’s greater reliance on administrative enforcement. State law permits administrative assessment of civil penalties as large as those that can be imposed judicially. In addition, until October 1, 1996, the secretary had the authority to make the final administrative decision. Thus, the department has had little incentive to file judicial enforcement actions, other than suits to collect penalties that have been administratively assessed.

The significant enforcement authority that the Louisiana Environmental Quality Act confers on the Secretary of the Department of Environmental Quality has been one of the greatest strengths of the Act. In particular, administrative imposition of civil penalties is essential if effective enforcement of environmental standards is to be achieved. If violators incur no financial loss, environmental regulations create a perverse competitive advantage for those who wait until they are caught to comply with pollution control standards. Without administrative penalties, the expense of judicial enforcement would reduce the number of penalties that the department can impose.

For the reasons summarized in the preceding paragraph, the change made in Act 739 of 1995 was particularly unfortunate. Transferring the department’s hearing officers to the Department of Civil Service has the desirable effect of increasing the reality and appearance of administrative fairness. Renaming the

\textsuperscript{409} Laguna Gatuna, Inc. v. Browner, 58 F.3d 564 (10th Cir. 1995), cert. denied, 116 S. Ct. 771 (1996); Southern Pines Assoc. v. United States, 912 F.2d 713, 716 (4th Cir. 1990) (Clean Water Act); Lloyd A. Fry Roofing Co. v. EPA, 554 F.2d 885, 891 (8th Cir. 1977) (Clean Air Act).


\textsuperscript{412} Louisiana regulators could achieve a functional equivalent of the federal compliance order through creative use of the notice of violation. By issuing a notice of violation together with a recommended corrective action, the department could advise the violator of what needed to be done without committing itself to providing any administrative process. If the violator refused to take the department’s advice, the department could consider the violator’s “recalcitrance” in setting a civil penalty, La. R.S. 30:2025(E)(3)(iv) (1989), or the department could recommend criminal prosecution because the violator acted “willfully or knowingly” by continuing the violation after the notice of violation was served. La. R.S. 30:2025(F) (1989).

\textsuperscript{413} La. R.S. 30:2026 (1989 and Supp. 1996); see supra notes 378-384 and accompanying text.
hearing officers administrative law judges and giving them final responsibility for the administrative decision dilutes the secretary's duty to serve as the state's primary trustee of the environment.

Both the Louisiana legislature and the state's supreme court have wisely recognized that environmental activists have a vital role to play if environmental standards are to be enforced effectively. The participation of activists helps to minimize two dangers: "capture" of the agency by the regulated community and bureaucratic indifference to environmental dangers. Under the Environmental Quality Act, citizens can appeal administrative penalties\(^\text{414}\) and participate when administrative hearings are held on contested penalties.\(^\text{415}\) Alternatively, individual citizens and environmental groups can file citizen suits to enforce violations that the department ignores and to recover damages caused by those violations.\(^\text{416}\)

The Supreme Court's decision in *All Pro Paint* confirms a third strength of Louisiana environmental enforcement provisions—the possibility of serious criminal punishment for intentional violations of environmental regulations. Only time will tell whether criminal prosecutions become an actual, as opposed to a theoretical, risk for egregious violators. What is clear is that, in light of *All Pro Paint*, the Environmental Quality Act gives district attorneys the tools they need to prosecute criminal violations.

Despite these positive aspects of the enforcement provisions in the Environmental Quality Act, reforms are needed. The legislature should amend the statute to restore the secretary's authority as final decisionmaker in all administrative enforcement actions, make administrative enforcement actions appealable to the First Circuit Court of Appeal rather than to the Nineteenth Judicial District Court, allow emergency cease and desist orders to extend beyond fifteen days, provide streamlined procedures for minor penalties, consolidate and clarify the criminal penalties, and modify the conditions that bar a citizen suit. In addition, the secretary should complete the job of updating the procedural rules applicable to administrative enforcement, and the secretary should issue new rules to standardize the amounts of civil penalties.

Act 41 of 1996 makes administrative enforcement actions appealable to the district court rather than to the court of appeal. Because the district court's review is confined to the administrative record, the lower court's review is the same as would be available in the court of appeal. Thus, the new legislation wastes both administrative and judicial resources, and the legislature should eliminate the district court review.

\(^{414}\) La. R.S. 30:2024(B), 2050.21(A) (Supp. 1996), as amended and added by 1995 La. Acts No. 947, §§ 1, 2; In re BASF Corp., 533 So. 2d 971 (La. App. 1st Cir. 1988), writ granted on other grounds, 539 So. 2d 624, writ denied, 541 So. 2d 900 (1989).

\(^{415}\) La. R.S. 30:2050.4(B), (I), 2050.7(B), (D) (Supp. 1996); see supra notes 247-248 and accompanying text.

\(^{416}\) La. R.S. 30:2026 (Supp. 1996); see supra notes 372-391 and accompanying text.
As explained above, the legislature unwisely amended the Environmental Quality Act in 1995 to allow the administrative law judge rather than the secretary to make the final administrative decision in enforcement actions. The legislature should repeal this change.

The Environmental Quality Act grants the secretary extremely broad authority to issue emergency cease and desist orders, but the orders expire after fifteen days regardless of the threat to the environment. To continue the order requires the filing of a civil action, but the secretary is better able than a judge to evaluate the environmental threat posed by a violation. A preferable procedure would allow the secretary to extend the cease and desist order, but make the order immediately appealable and require that the secretary offer the alleged violator a preliminary administrative hearing before the order is extended.417

The Act requires that an alleged violator be offered an opportunity for a formal adjudicatory hearing with respect to a compliance order or penalty assessment.418 Although the penalties authorized for violations are substantial, most of the penalties that the agency actually imposes are fairly small.419 Federal statutes establish expedited procedures for minor administrative penalties,420 and those procedures seem adequate to satisfy the requirements of due process.421 The Louisiana legislature was wise to allow the secretary to streamline the state process for minor enforcement actions, but it should not have required the respondent’s consent to invoke those procedures.

Legislative revision could improve the criminal provisions of the Environmental Quality Act in at least three respects. First, the legislature should move the criminal provisions of the Hazardous Waste Control Law and the Water Control Law to the general enforcement section. Consolidation of enforcement provisions is one of the major accomplishments of the Louisiana statute, and the

417. This administrative procedure would be analogous to the judicial proceedings for injunctions. The Code of Civil Procedure allows a temporary restraining order to be issued ex parte, La. Code Civ. P. art. 3603; but it requires a hearing before the judge may issue a temporary or permanent injunction. La. Code Civ. P. arts. 3602, 3603.
418. La. R.S. 30:2025(C)(3), 2050.2-4 (Supp. 1996); see supra notes 168-169, 244-245 and accompanying text.
419. According to a document the Department of Environmental Quality furnished to an advisory committee of the Louisiana Law Institute, the amount of most civil penalties assessed by the department in 1991-1992 was less than $7500. Letter dated Sept. 9, 1992 from Donald Trahan, Department of Environmental Quality, to James J. Carter, Staff Attorney, Louisiana Law Institute.
crimes in the Hazardous Waste Control Law and the Water Control Law are the major exceptions to that consolidation. Second, the legislature should clarify the mental element of the environmental crimes by using the normal intent language of the Criminal Code 422 and by specifying the elements to which the mental element applies. Third, the legislature should amend the text of the crimes in the Hazardous Waste Control Law to make clear that the misdemeanor crime is a responsive verdict to the felony charge. 423

Legislative revisions could also improve the citizen suit section in at least three respects. First, a variance or compliance order should bar a citizen suit for future violations only if two conditions are satisfied: the compliance order was issued before the citizens notified the agency of their intent to sue and the citizens have been afforded a meaningful opportunity to challenge the variance or order. Second, the statute should expressly state that a variance or compliance order never bars a citizen suit to collect civil penalties for a violation that occurred prior to the issuance of the variance or order. Third, no governmental enforcement action should ever bar a citizen suit to recover damages that the violation caused to persons or property.

In addition to these legislative reforms, the secretary should issue rules that would improve environmental enforcement. For one thing, the secretary should complete the revision of the enforcement procedures in the rules of the Environmental Control Commission to conform to current agency practice and to make agency practice consistent among the various offices. For another, the secretary should implement the legislative directive in the enforcement section 424 and standardize the size of administrative penalties, at least for routine violations. To the extent that penalties become more predictable, violators will be less likely to incur the costs of challenging them within the agency and in the courts. In addition, penalty rules will also confine the authority of administrative law judges to overrule the secretary’s decision as to the appropriate size of a civil penalty.

As is usual with environmental statutes, Louisiana’s Environmental Quality Act is a glass that is both half empty and half full. Legislative and administrative reform can improve the statute. The need for those reforms should not, however, blind the department or the public to the opportunities for meaningful enforcement that the legislature has already provided.

422. La. Crim. Code arts. 10, 11; see supra notes 357-358 and accompanying text.
423. See supra note 359 and accompanying text.