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ENVIRONMENTAL LAW

Joseph T. Bockrath*

JURISPRUDENCE

Louisiana courts decided three environmental law cases of interest during the time period encompassed by this article. In the first, *State v. Rollins Environmental Services*,¹ the Supreme Court of Louisiana reversed a decision of the 19th Judicial District court that quashed bills of information against the defendant for lack of jurisdiction. The case involved the criminal prosecution of Rollins, a company doing substantial waste disposal business in Louisiana, for keeping and burning substances offensive to smell or injurious to health, contrary to the East Baton Rouge Parish Code.² The Supreme Court of Louisiana granted a writ to review the trial court's conclusion that state law had preempted the field of hazardous waste regulation. In 1979, the Supreme Court of Louisiana, in *Rollins Environmental Services v. Iberville Parish Police Jury*,³ had declared a parish ordinance against hazardous waste unconstitutional as an attempt to regulate a field which had been preempted by state and federal governments. At the time of that decision, state law gave the Department of Natural Resources "exclusive jurisdiction for the development, implementation, and enforcement of a comprehensive state hazardous waste control program consistent with federal laws and regulations."⁴ Subsequent to this Iberville Parish decision, the statute upon which it was based was re-

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1. 398 So. 2d 1122 (La. 1981).

2. EAST BATON ROUGE PARISH, LA., CODE OF ORDINANCES 12:501(1), (2) (1968) provides that all persons, firms or corporations are forbidden from: (1) Allowing, keeping, throwing, dropping or depositing any ordure, excrement, offal, filth, manure, foul and offensive matter, stagnant, corrupt or putrid water, dead animals or fowls, shells, hay, straw, kitchen stuff, paper, cloth or any substance of any kind which may be offensive to the smell or injurious to health, in any private yard, tract of land, lot, room or on any sidewalk, road, street alley, public right of way, or any public place, or in any drainage channel within the parish; or (2) From burning any such substance, automobiles or other material in such a manner as to be offensive to the smell or injurious to health. The burning of wrecked or discarded automobiles shall be done only in designated open spaces or incinerator enclosures approved for burning by the building official.

3. 371 So. 2d 1127 (La. 1979). For a detailed consideration of this case, see Murchison, *Developments in the Law, 1979-1980--Local Government Law*, 41 LA. L. REV. 483, 486 (1981).

4. LA. R.S. 30:1103(a) (Supp. 1978).

placed by the Louisiana Hazardous Waste Control Law;⁵ however, both the previous and the current statute indicate a legislative intent that the state of Louisiana should have exclusive jurisdiction over the regulation of hazardous waste.

In *State v. Rollins*, the Supreme Court of Louisiana noted that the statutory definition of hazardous waste⁶ compels the conclusion that the designation of "hazardous waste" does not apply to all health hazards but is instead only applicable to those identified by the Department of Natural Resources as constituting hazardous waste. Distinguishing the Iberville Parish case on the grounds that there the parish ordinance undertook to regulate hazardous waste itself, the supreme court noted that a parish has authority to regulate the keeping and burning of debris not falling within the definition of hazardous waste⁷ and noted that there was no evidence that the debris disposed of by Rollins had been classified by the Department of Natural Resources as hazardous waste. Thus, although concluding that the state has exclusive jurisdiction over the field of hazardous waste, the court decided that the parish ordinance therein involved was not in contravention of this jurisdictional grant.

In *McCastle v. Rollins Environmental Services*,⁸ the plaintiffs brought suit under Louisiana Civil Code article 667,⁹ seeking an

5. 1979 La. Acts, No. 449, *amending* LA. R.S. 30:1131-1149. The Louisiana Hazardous Waste Control Law was further amended by 1980 La. Acts, No. 748, *amending* LA. R.S. 30:1136(B) (effective Sept. 12, 1980, and subsequently redesignated as LA. R.S. 30:1136(C)), after prosecution of the Iberville Parish case was initiated. However, this amendment adds only greater specificity to the exclusive jurisdiction conferred by LA. R.S. 30:1134(A).

6. Hazardous waste is defined in La. R.S. 30:1133(2) as:

any waste, or combination of wastes, which because of its quantity, concentration, physical, chemical, or infectious characteristics may (a) cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness or (b) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of, or otherwise managed. Such definition shall be applied only to those wastes identified and designated as such by the department, consistent with applicable federal laws and regulations.

7. Police juries are empowered:

to enact ordinances to require, prohibit, or regulate the destruction, disposal, or burning of trash, garbage, leaves, limbs and branches, or debris of any kind and to regulate the dumping and the use of borrow pits for sanitary fill. However, no parish or municipality shall engage in any regulation of the generation, transportation and/or disposal of hazardous wastes other than the initial siting of facilities pursuant to general land use planning, zoning, or solid waste disposal ordinances.

LA. R.S. 33:1236(31) (Supp. 1966 & 1980).

8. 415 So. 2d 515 (La. App. 1st Cir.), *writ denied*, ___ So.2d ___ (1982).

9. LA. CIV. CODE art. 667: "Although a proprietor may do with his estate whatever he pleases, still he can not make any work on it, which may deprive his neighbor

injunction¹⁰ barring the defendant from releasing into the atmosphere "stinking, obnoxious, nauseating, repugnant, burning chemical fumes and odors"¹¹ which had caused them to become ill. The fact that the odors were of sufficient intensity to make the average person uncom-

of the liberty of enjoying his own, or which may be the cause of any damage to him."

10. See LA. CODE CIV. P. art. 3601.

11. LA. R.S. 30:1074 (Supp. 1979, 1980, & 1981). LA. R.S. 30:1074 reads as follows:

(1) Except as provided in Subsection (2) of this Section, any person having an interest, which is or may be adversely affected, may commence a civil action on his own behalf against any person whom he alleges to be in violation of this Chapter or of the regulations promulgated hereunder. The action must be brought either 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 shall be afforded preferential hearing by the court. .

If, at the hearing on the order, it appears to the satisfaction of the court that a violation has occurred, or is occurring, the court may, in order to enforce the provisions of this Chapter, assess a civil penalty not to exceed ten thousand dollars for each day of the continued noncompliance and the court may, if appropriate, issue a temporary or permanent injunction.

The court in issuing any final order in any action brought pursuant to this Section, may award costs of court including reasonable attorneys and expert witness fees to the prevailing party. The court may also award actual damages to the prevailing plaintiff. The judgment of the court at the hearing, or subsequently on a petition for fixing the penalty if the violation is a continuing one, shall fix the total amount of penalty due, which shall be collectible under the same procedures as now fixed by law for the collection of money judgments and shall be awarded to and collected by the state of Louisiana and deposited into the state treasury.

(2) No action under this Part shall be commenced under Subsection (1) hereof:

(a) Prior to thirty days after the plaintiff has given notice of the violation (i) to the assistant secretary and (ii) to any alleged violator.

(b) If the assistant secretary or his legal counsel 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, in any such action any person having an interest which is or may be adversely affected may intervene as a matter of right.

(c) If the alleged violator is operating under a variance granted by the commission or by an appropriate secretary and is in compliance with the terms of such variance.

(d) Against any person while such person, with respect to the same violation is: (i) under any order pursuant to this chapter to enforce any provision of this Chapter, or (ii) a defendant in any civil suit brought under the provisions of R.S. 30:1073, or (iii) the subject of an action to assess and collect a civil penalty pursuant to R.S. 30:1073(E).

(3) Provided, however, that nothing herein shall be construed to limit or deny any person's right to injunctive or other extraordinary and ordinary relief under the Louisiana Civil Code or otherwise under Louisiana law, *other than this Part*. (emphasis added).

(4) The enforcement, procedures, and remedies herein provided for shall be in addition to any such procedures and remedies authorized under the laws of this state. (emphasis added).

fortable and to constitute a nuisance to those living and working in the area was stipulated. The defendant contended that the court's authority to issue injunctive relief had been preempted by the statutory authority creating the Environmental Control Commission, which, the defendant contended, was vested with exclusive jurisdiction in the areas of air quality, water quality, solid waste, nuclear waste, and hazardous waste. The defendant specifically pointed to that section of the Louisiana Environmental Affairs Act dealing with citizen suits.¹² The subsection of immediate significance is subsection (3), which provides that "nothing herein shall be construed to limit or deny any person's right to injunctive or other extraordinary and ordinary relief under the Louisiana Civil Code or otherwise under Louisiana law other than this Part."¹³ It was the contention of the defendant that if the legislature had intended to allow all suits for injunctions by any party, it would not have included the language "other than this Part" within the statutory scheme allowing citizen suits.

Rejecting this contention, and therefore the claim of preemption, the court concluded that the "Part" referred to in subsection (3) is Part II of Chapter 11 of Title 30.¹⁴ Chapter 11 is entitled "Environmental Affairs" and includes the Louisiana Air Control Law, the Louisiana Water Control Law, the Louisiana Nuclear Energy and Radiation Control Law, the Louisiana Solid Waste Management and Resource Recovery Law, and the Hazardous Waste Control Law. Part II is entitled "Office of Environmental Affairs" and is the part in which the citizen suit provision is located. The court noted that subsection (3) begins with "Provided, however," indicating a limitation to subsection (2). The limitation, the court said, is that subsection (2) does not apply to suits brought under other Louisiana laws but is instead applicable only to suits brought under Part II. No provision exists in Chapter 11 which prohibits a suit for an injunction in this type of case. The citizen suit section, however, regulates suits to enforce provisions of Chapter 11 and the rules and regulations promulgated thereunder. The court pointed out that the plaintiffs had not claimed a specific violation of the chapter or of a rule or regulation thereunder, and the plain language of subsection (3) makes it clear that subsection (2) does not deny any person the right to relief under any other Louisiana law. Thus, there was nothing in Chapter 11 to prevent the plaintiffs from bringing their suit under article 667.

In a case illustrating the complex evidentiary problems often found in environmental law cases, the Louisiana Fourth Circuit Court of Ap-

12. LA. R.S. 30:1074.

13. LA. R.S. 30:1074(3).

14. LA. R.S. 30:1061-1080 (Supp. 1979, 1980, & 1981).

peal affirmed a decision that granted a preliminary injunction prohibiting a defendant from any use of phenoxy herbicide, *Riverside Citrus Farms, Inc. v. Louisiana Citrus Lands, Inc.*¹⁵ The technical evidence was divided. The court noted that there was substantial technical testimony to the effect that the defendant's method of application of this herbicide, under the recorded wind conditions, could not have allowed the herbicide to spread to the plaintiff's property and therefore could not have caused the flu-like symptoms experienced by the plaintiffs or damaged their citrus trees and vegetable plants. On the other hand, the court noted testimony from an allergist that phenoxy caused flu-like symptoms and could even alter human genetic matter and noted evidence that the plaintiff's trees and plants had been affected. Upholding the issuance of the preliminary injunction as within the sound discretion of the trial court, the court of appeal noted that the plaintiff's basic burden of proof was to make only a prima facie showing that he would have prevailed on the merits of the case. The court of appeal held that a trial judge has the discretion to accept as prima facie proof the medical opinion of a doctor, even though that opinion may not be precisely within his formal speciality. Pointing out that there was merit in the consideration that an expert can be found to espouse almost any view, the court opined that it may well be doubted whether a single trial judge, unskilled in a highly technical area, should be allowed to make a "credibility call" by believing one expert who may very much be in a minority position in that technical field.¹⁶

LEGISLATION

That litter is a problem of significant proportions along the roadways of Louisiana is obvious to anyone driving the state's highways.¹⁷ In response to this problem, the Louisiana Legislature, in 1981, established the Louisiana Litter Control and Recycling Commission¹⁸ and made littering a crime under state law.¹⁹

The Louisiana Litter Control and Recycling Commission, housed

15. 400 So. 2d 263 (La. App. 4th Cir. 1981).

16. 400 So. 2d at 264. Litigation involving complex scientific and technological issues occasionally brings forth proposals for the creation of a specialized "science" court. For a consideration of this subject one might see Martin, *The Proposed "Science Court,"* 75 MICH. L. REV. 1058 (1977), or Talbott, "Science Court": A Possible Way to Obtain Scientific Certainty for Decisions Based on Scientific "Fact"?, 8 ENVTL. L. 827 (1978).

17. For a statistical review of the scope of the solid waste and litter problems in the United States, see Comment, *State Bottle Bill Model Legislation—Lessons from Prior North Carolina Bills and the Potential Impact of Passage*, 15 WAKE FOREST L. REV. 759 (1979).

18. 1981 La. Acts, No. 773, adding LA. R.S. 51:1801.

19. LA. R.S. 51:1811 (Supp. 1981).

in the Department of Transportation and Development, is an unpaid policymaking and coordinating body²⁰ whose potential for impact on the problem at hand is difficult to discern.²¹

20. LA. R.S. 51:1803-1805 (Supp. 1981).

21. An examination of the powers and duties of the Louisiana Litter Control and Recycling Commission is revealing.

The commission shall establish policy for and the department shall implement the provisions of this Chapter, including the following:

(1) Develop and implement publicity, educational, and motivational campaigns to build and sustain a public awareness of litter and of the unacceptability of littering, and to create a litterless ethic.

(2) Serve as the coordinating agency between the various government and private organizations seeking to aid in litter control and reduction and recycling efforts.

(3) Assist local governments in the adoption and revision of ordinances aimed at litter control and reduction.

(4) Encourage, organize, and coordinate voluntary campaigns seeking to focus the attention of the public on programs to control and reduce litter and increase public and private recycling.

(5) Encouragement of and increased funds for litter cleanup and collection, litter prevention and cleanup equipment.

(6) Provide for strict enforcement of laws to control and reduce litter and littering.

(7) Encourage all state and local agencies to cooperate with and aid public and private recycling programs in whatever ways they can, including providing publicity which encourages recycling, and allowing the use of publicly owned land, buildings or equipment for recycling efforts.

(8) Promote litter abatement and control and encourage recycling.

(9) Promote public awareness and education.

(10) Design a logo, a symbol, as provided in R.S. 51:1807, and establish an insignia for litter receptacles.

(11) Serve as the coordinating agency among various local governments, industries, and other organizations which aid in the anti-litter and recycling effort.

(12) Cooperate with local governments to accomplish coordination of local anti-litter and recycling efforts.

(13) Encourage, organize, and coordinate all voluntary local anti-litter campaigns seeking to focus the attention and participation of the public on the laws of this state enacted to control and remove litter and to provide for the recycling of trash materials.

(14) Investigate the availability of, and apply for, funds from any private or public source, to be used for the purposes of this Chapter.

(15) Exchange information directly with judges, district and municipal attorneys, Louisiana state police, and local law enforcement officers on enforcement mechanisms and offer technical assistance.

(16) Award grants and provide financial assistance on a local level, in accordance with rules adopted pursuant to this Chapter, in order to achieve the purposes of this Chapter and award certificates of achievement for litter abatement and recycling.

(17) Establish a method whereby summer employment for persons for litter clean-up and recycling may be obtained.

(18) Develop plans, investigate methods, and monitor effectiveness of this Chapter and of techniques in the control of litter and in recycling, and develop,

Of somewhat more impact may be new provisions prohibiting the disposal of litter in public places or on private land not owned by the disposer.²² Preemption of local ordinances dealing with litter clearly is not contemplated, as one of the specific duties of the commission is to assist local governments in the adoption and revision of ordinances aimed at litter control.²³ One might question, in light of the innumerable miles of highway in Louisiana and the enforcement personnel likely to be available, whether an enactment such as this can have any significant effect. In fact, several other states have considered this issue and have acted in far more vigorous and direct ways.

The most noted example comes from Oregon which, after prolonged debate with a variety of special interest groups, passed the Oregon Beverage Container Refund Act (The Bottle Bill),²⁴ which became law on October 1, 1972. The Oregon statute bans from sale all cans with detachable metal parts and cans which cannot be returned for a refund. Thus, the pop-top beer and soft drink cans which add such color to Louisiana roadways are simply not sold in Oregon. This naturally precipitated a substantial increase in the use of bottles, and the legislature therefore required that beverage containers have refundable deposits and that dealers or distributors could not refuse to accept empty beverage containers of the kind, size, and brand they sell, or refuse to pay the refund of the container.²⁵ Several other states have adopted variations of the Oregon scheme.²⁶

encourage, and coordinate litter control and recycling within the state.

LA. R.S. 51:1805.

22. No person shall throw, drop, deposit, discard, or otherwise dispose of litter upon any public place in the state, upon private property in this state not owned by him, or in or on the waters of this state, whether from a vehicle or otherwise, including, but not limited to, any public highway, public park, beach, campground, forest land, recreational area, trailer park, highway, road, street, or alley except:

(1) When such property is designated by the state or any of its agencies or political subdivisions for the disposal of garbage and refuse, and such person is authorized to use the property for such purpose; or

(2) When litter is placed into a litter receptacle in such manner that the litter will be prevented from being carried away or deposited by the elements upon any part of the said private or public property or waters.

LA. R.S. 51:1811(A).

23. LA. R.S. 51:1805(3). For an extensive discussion of the state-local preemption problem in Louisiana, see Murchison, *supra* note 3. For a consideration of federal preemption in this area see Comment, *Oregon's Bottle Bill: A Model for Comparable Legislation?*, 11 CAL. W.L. REV. 537, 542-44 (1975).

24. OR. REV. STAT. §§ 459.810-995 (1971). A detailed consideration of the legislative and political history of the Oregon Bottle Bill may be found in Caswell & Verhulst, *The Oregon Bottle Bill*, 54 OR. L. REV. 175, (1974) and Comment, *supra* note 23, at 539.

25. OR. REV. STAT. § 459.830(1) (1971 & Supp. 1973).

26. For a listing of such states, see Comment, *supra* note 17, at 768.

Bottle bills have been subjected to a variety of constitutional challenges²⁷ and have emerged intact, leading one to suspect that opposition to them is based primarily on parochial economic interests or legislative or social inertia.

Anticipating action on the part of the Environmental Protection Agency, the 1981 Louisiana Legislature amended the Louisiana Air Control Law²⁸ to broaden the powers and duties of the Environmental Control Commission. Act 626 empowers the commission to adopt the regulations necessary to establish and administer an air pollution emission reduction credit banking system for the state as an inducement for Louisiana industries to reduce emissions of air pollutants.²⁹

In April, 1982, the Environmental Protection Agency (EPA) announced and published a new policy statement proposing the establishment of a system of air pollution emission trading.³⁰ The new policy replaces the original bubble policy³¹ and sets forth minimum legal requirements for creation, use, and storage of emission reduction credits³² under the Clean Air Act.³³ It is the purported goal of the EPA to achieve a more flexible, rapid, and efficient attainment of the national ambient air quality standard by providing alternatives to traditional regulation. These alternatives do not alter existing air quality requirements but instead provide states and industry more flexibility in meeting such requirements. The various alternatives available under the emission trading system include bubbles, netting, and offsets, as well as banking emission reduction credits for future use.³⁴

27. Bottle bills have survived constitutional challenges based upon the due process clause of the 14th amendment, the equal protection clause of the same amendment, and the commerce clause of the United States Constitution. These attacks were rejected in *American Can Co. v. Oregon Liquor Control Comm'n*, 15 Or. App. 618, 517 P.2d 691 (1973).

28. LA. R.S. 30:1081-1088 (Supp. 1979 & 1980).

29. 1981 La. Acts, No. 626, *amending* LA. R.S. 30:1084 (Supp. 1979).

30. 47 Fed. Reg. 15076 (1982) (proposed April 2, 1982).

31. 44 Fed. Reg. 71779 (1979).

32. To qualify as an emission reduction credit (ERC), the reduction must be surplus, quantifiable, enforceable, and permanent. 47 Fed. Reg. 15077 (1982) (proposed April 2, 1982).

33. 42 U.S.C. §§ 7401-7626.

34. A trade between existing plants, or groups of plants, whereby a decrease in pollution controls at one emission source is exchanged for an increase in control at another source is called a "bubble." When an existing facility plans to expand or modernize, it may use "netting" to bypass the burden of new-source review requirements. To do so, the plant must reduce existing emissions to compensate for any new sources in order that there be no significant increase in plant wide emissions. If a new or expanding facility is subject to new-source review, it may be required to secure surplus reductions from nearby sources in order to offset the increased emissions. The banking of emission reduction credits is a process by which firms can store surplus reductions in a legally protected manner for future use in bubble, netting, or offset transac-

The trading system involves the creation of surplus reductions in the emission of pollutants at certain sources and the use of these reductions to meet requirements applicable to other emission sources. Thus it is possible for companies to use alternative compliance plants to achieve the same total ambient impact as the required reductions; this gives companies the flexibility to substitute inexpensive pollution reductions for more expensive ones.

In 1981, the problem of pesticide waste was addressed by the Louisiana Legislature in the form of the Louisiana Pesticide Waste Control Law.³⁵ This act empowers the Louisiana Commissioner of Agriculture to promulgate rules and regulations establishing permit procedures for the operation of facilities used by commercial³⁶ or custom³⁷ applicators of pesticides to treat, store, or dispose of pesticide waste on site. The commissioner is further empowered to promulgate design, construction, and operational standards to assure safe treatment and disposal of pesticide wastes and to assure adequate record-keeping with regard to pesticide wastes which are treated or stored.³⁸

Custom applicators of pesticide wastes are required to apply for a permit for each site on which such wastes are treated, stored, or disposed,³⁹ and each custom applicator must keep records for three years which adequately reflect his possession or disposal of pesticide wastes.⁴⁰ Farmers who dispose of pesticide wastes generated by their own use are not required to obtain a permit but must dispose of the wastes in accordance with the commissioner's rules and regulations.⁴¹

Civil penalties not to exceed \$25,000 for each violation may be assessed by the commissioner based on an adjudicatory hearing provided for by the new statute.⁴² Criminal penalties are also specified.⁴³

Act 280 of 1981⁴⁴ prohibits employers, including governmental agencies, from acting in a retaliatory manner against employees who,

tions. Bank credits (ERC's) can also be sold to other firms. 47 Fed. Reg. 15076-15077 (1982) (proposed April 2, 1982).

35. 1981 La. Acts, No. 391, *adding* LA. R.S. 3:1821-1832.

36. A "commercial" applicator is any person who applies pesticides in the course of his employment. LA. R.S. 3:1822(1).

37. A "custom" applicator is a person who charges a fee for the application of pesticides by any method or a person who employs any commercial applicator. LA. R.S. 3:1822(4).

38. The powers of the Louisiana Commissioner of Agriculture under this act are enumerated in LA. R.S. 3:1823.

39. LA. R.S. 3:1825.

40. LA. R.S. 3:1826.

41. LA. R.S. 3:1831.

42. LA. R.S. 3:1828.

43. LA. R.S. 3:1830.

44. *Adding* LA. R.S. 30:1074.1.

in good faith, report or complain about possible environmental law violations. An employee may commence civil action in the district court of his parish of domicile and may recover from the employer treble damages resulting from the action taken against him, as well as all costs of preparing, filing, prosecuting, and appealing his law suit. The term "action is taken" includes dismissal, lay-off, lock-out, loss of promotion, loss of raise, loss of present position, loss of job duties or responsibilities, placement in a position with more onerous duties or responsibilities, and any other action or inaction the court finds was taken as a result of the report of an environmental violation.

Louisiana's attempt to control hazardous wastes was modified in two respects in 1981. Act 246 of 1981⁴⁵ prohibits tampering with any hazardous waste container or the contents thereof and prohibits the discharge of the contents between the point of origin and the point of destination listed in the manifest, or at any other location other than that for which it is permitted.

Act 180 of 1981⁴⁶ makes it illegal for anyone to intentionally discharge or cause to be discharged the contents of any transport vehicle containing hazardous material between the point of origin and the point of bill destination, except as expressly authorized by the Department of Public Safety or the Department of Natural Resources.

45. *Amending* LA. R.S. 30:1137 (Supp. 1979).

46. *Adding* LA. R.S. 32:1511.