

PUBLIC AND PRIVATE LAW

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I. INTRODUCTION

Public and private law have always coexisted. In medieval common law,¹ and in Justinian’s time,² tort and criminal law arose together. A physical harm could be redressed in tort by a private action or under criminal law by the state.³ Over time, both tort and criminal law have broadened in scope to include nonphysical harms, and other noncriminal forms of public law have arisen. The emergence of noncriminal public law as a part of the New Deal and its legacy⁴ today raises questions about whether private law rights have been altered and, if so, how.

This Article explores the impact of state and federal environmental laws and regulations on landowners’ property rights, and their constitutionally protected rights of access to the courts, which have historically been employed by property owners to protect those property rights.⁵ These private actions include actions for nuisance, negligence

1. See generally A.H. MANCHESTER, A MODERN LEGAL HISTORY OF ENGLAND AND WALES (1980) (discussing the development of criminal and civil liability in 18th century England); R.C. VAN CAENEGEM, THE BIRTH OF THE ENGLISH COMMON LAW (2d ed. 1988) (discussing the limited impact of Justinian’s *Corpus Juris Civilis* and *Codex* on the development of English common law).

2. See WOLFGANG KUNKEL, AN INTRODUCTION TO ROMAN LEGAL AND CONSTITUTIONAL HISTORY 64-94 (2d ed. 1973).

3. See *id.*

4. See generally STEPHEN G. BREYER & RICHARD B. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 29-32 (2d ed. 1985) (noting the rapid expansion of administrative government during the New Deal).

5. See U.S. CONST., art. 4, § 2, cl. 1 (privileges and immunities); *Chambers v. Baltimore and Ohio R.R.*, 207 U.S. 142 (1907) (finding that access to the courts is a constitutionally protected privilege which must be provided by states to citizens of other states to the same extent that the state provides its own citizens with access to the courts); see also *Ryland v. Shapiro*, 708 F.2d 967, 972 (5th Cir. 1983). In *Ryland*, the court found that where plaintiffs possess interests protected by the due process clause of the 14th amendment, they have a procedural due process right of access to the courts. *Id.* at 972-73. The court further noted that property is an entitlement based on state law, and that where state law recognizes a property interest, procedural due process requires that the plaintiff have access to the courts to protect that property interest. *Id.* (quoting *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982)).

The Louisiana Constitution specifically provides for access to the courts. LA. CONST. of 1974, art. I, § 22. But see *Crier v. Whitecloud*, 496 So. 2d. 305, 309 (La. 1986) (finding that, although a cause of action in a medical malpractice case could be considered a property interest for purposes of

and strict liability for abnormally dangerous activities. At the same time, new public law regulatory schemes have emerged to deal with these same activities and intrusions.

The co-existence of public and private laws addressing environmental hazards raises a number of important issues. One question is when, if at all, may legislation establishing an administrative regime be invoked defensively to validate and legitimate conduct that would, under judicial scrutiny at private law, be deemed to damage the property of another, or interfere unreasonably with the use and enjoyment of another's property? In other words, when, if at all, does a civil wrong cease being an immediately actionable wrong?

The answer proposed here is that it rarely makes sense to delay the prosecution of an otherwise actionable civil wrong. Most arguments in favor of delay improperly attempt to create an expression of legislative will to compel the weighing of pragmatic concerns of dubious authenticity and substance against constitutional rights expressly created to protect one's property and to authorize private actions in service of the same goal. More troubling are the extreme misrepresentations one sees in arguments concerning the forms, limits, and practice of public environmental law which are advanced to defeat property rights.

II. HYPOTHETICAL

In order to illustrate the problems in this area, a short hypothetical will be useful. Imagine a situation in which Property Owner A pollutes the land of Property Owner B by discharging contaminated waste water from his factory onto B's property:

due process protection, the legislature is free to modify or eliminate the cause of action without impinging on the plaintiff's due process rights).

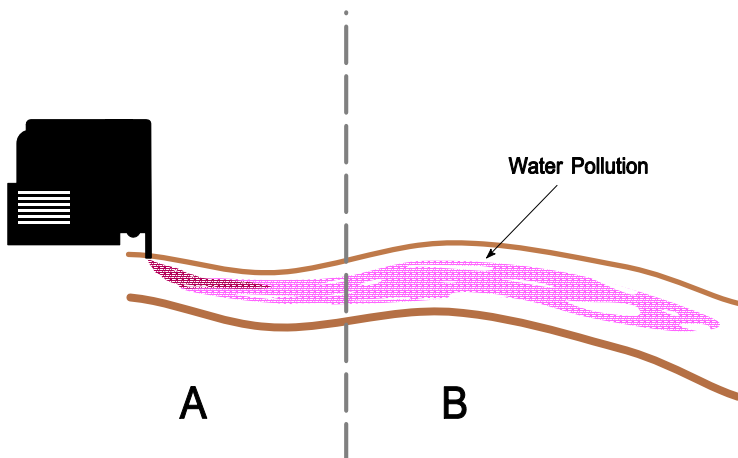
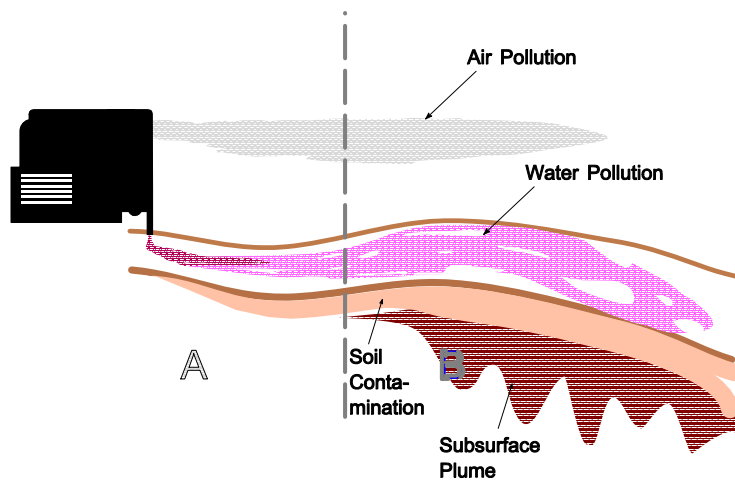


FIGURE A

Imagine further that pollution from that stream of waste water builds up in the artificial stream and migrates onto the surrounding land and into the subsurface waters on B's property:

FIGURE B



III. PRIVATE RIGHT OF ACTION

Assuming that A has no contract with B, that no natural servitude exists, and that no administrative regime exists, B would clearly be entitled to sue A under a variety of common law theories,⁶ including trespass,⁷ nuisance,⁸ and strict liability,⁹ or, in Louisiana, under the Civil Code.¹⁰ B's remedies would include damages and, under appropriate circumstances, injunctive relief.¹¹

IV. INTERPLAY OF PUBLIC AND PRIVATE LAW

Historically, private rights of action were the primary vehicle to remedy environmental or toxic harms. This has remained true, even though public environmental laws have existed for quite some time. In this country, some environmental legislation has been in effect since at least the early twentieth century.¹² Although the enforcement of these laws has often been lax, it is apparent that the state's traditional police power has been viewed as not inconsistent with these private law rights,

6. See ALLAN KANNER, ENVIRONMENTAL AND TOXIC TORT TRIALS § 6 (1991 & Supp. 1996).

7. See *id.* § 6.24.

8. See *id.* § 6.22. If the stream were natural, an alteration in its water quality might be a nuisance since every riparian owner is entitled to water in its natural flow without alterations of its character or quality. See *Jones v. Llanrwst*, Urban Dist. Council, [1911] 1 ch. 393, [1908-10] All E.R. 922; *John Young & Co. v. The Bankier Distillery Co.*, [1893] App. Cas. 691. Actual damage need not be proven by the lower riparian owner. See *Crossley and Sons, Ltd. v. Lightowler* 16 L.T.R. 438, 440 (1867).

9. See KANNER, *supra* note 6, § 6.01-6.05. If the waste water were not polluted or hazardous, some of these theories of liability might not apply. See *generally* *Fletcher v. Rylands*, L.R.-Ex. 265 (1866) (establishing a strict liability standard for the hazardous use of one's land). Those conducting hazardous activities, should pay for the damage they cause. It is too much to ask an innocent neighbor to bear the burden thrust upon him as a consequence of an abnormal use of the land next door. See *Cities Serv. Co. v. Florida*, 312 So. 2d 799, 802 (Fla. Dist. Ct. App. 1975) (applying strict liability under RESTATEMENT OF TORTS (2d) § 520).

10. For example, Louisiana Civil Code Article 667 has been held to allow damages or injunctive relief in cases involving environmental concerns. See *Brister v. Gulf Cent. Pipeline Co.*, 684 F. Supp. 1373 (W.D. La. 1988), *aff'd*, 788 F.2d 1564 (5th Cir. 1986) (puncture of underground pipeline without adequate markings resulting in release of anhydrous ammonia); *Ewell v. Petro Processors Inc.*, 364 So. 2d 604 (La. Ct. App. 1978) (industrial waste leaking onto neighboring property); *Hopkins v. Department of Highways*, 364 So. 2d 616 (La. Ct. App. 1978) (contamination of neighbors' drainage ditch with oil, grease and tar); *Moreland v. Acadian Mobile Homes Park, Inc.*, 313 So. 2d 788 (La. Ct. App. 1975) (leaking of sewage onto adjoining property); *Salter v. B.W.S. Corp.*, 290 So. 2d 821 (La. 1974) (disposal of chemical wastes); *Fisher v. Kansas City S. & G. Ry.*, 107 So. 302 (La. 1926) (flow of oil through municipal drainage system).

11. See *supra* note 7.

12. See, e.g., Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (1994) (limiting excavation or filling in the navigable waters of the United States).

and that, historically, private actions have coexisted comfortably with environmental statutes.

However, in order to assess the contemporary interplay of public and private law, begin by assuming that the state in which A and B reside enacts legislation to create an administrative regime to protect the environment. Assume further that individuals possess constitutionally protected rights allowing ownership of property and granting access to the courts to protect property rights,¹³ that government is charged as a public trustee to protect the environment,¹⁴ and that government may not take private property for public use without paying just compensation,¹⁵

V. PREEMPTION

Under these circumstances, may A invoke the state's administrative regime defensively against B and claim that all private rights to sue are preempted? Administrative processes can range from informal rule making with notice and comment procedures¹⁶ to formal rule making with trial-type procedures¹⁷ to "hybrid" rule making, to formal adjudication¹⁸ to information gathering and inspections,¹⁹ and so on. In addition to the formality of an administrative process, the underlying regulatory scheme might be quite varied from requiring a NEPA-like study²⁰ to TSCA-like record keeping and reporting regime²¹ to an NPDES-like discharge limit and monitoring rules²² to a CERCLA-like cleanup regime.²³

13. See LA. CONST. of 1974, art. I, § 22. ("All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation or other rights."); see also *Magnolia Coal Terminal v. Phillips Oil. Co.*, 576 So. 2d 475, 483 (La. 1991)(quoting article I, section 22, of the Louisiana Constitution); *supra* note 5.

14. See generally James L. Huffman, *Symposium on the Public Trust and the Waters of the American West: Yesterday, Today and Tomorrow: Introduction and Overview: A Fish out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENV'T'L L. 527 (1989) (discussing the public trust doctrine as a facet of property law).

15. See U.S. CONST. amend V.

16. See The Administrative Procedure Act, 5 U.S.C. § 553 (1994).

17. See *id.* §§ 556-557.

18. See *id.* §§ 554, 556-557.

19. See *id.* § 555.

20. See The National Environmental Policy Act, 42 U.S.C. § 4332(C) (1994).

21. See The Toxic Substances Control Act, 15 U.S.C. § 2607 (1994).

22. See The Federal Water Pollution Control Act, 33 U.S.C. § 1342 (1994) (The National Pollution Discharge Elimination System (NDPES) requires dischargers to comply with the limits specified in NDPES discharge permits).

23. See The Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. §§ 9604, 9607 (1994).

As a practical matter, we can answer this question of whether B's private right of action has been preempted without knowing much about the particulars of that hypothetical administrative regime. In the United States, the answer is no, because of the express savings clauses included in virtually every piece of public environmental regulation.²⁴ These savings clauses enable us to avoid the constitutional question of whether the legislature, in creating an administrative regime, has violated the constitutionally protected property and litigation rights of B.²⁵

Without these savings clauses, there is a real concern that an administrative regime would run afoul of takings law limitations on the state's police power. As the court in *Richards v. Washington Terminal Co.* stated, "while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking of private property for public use."²⁶ In short, preemption would not apply under these facts.²⁷

In some cases the savings provision is less clear. Nevertheless, the core result dictated by our federalism remains the same. In *Cipollone v. Liggett Group, Inc.*, the U.S. Supreme Court delineated the law of preemption.²⁸ The Court noted that, under Article VI of the Constitution, the laws of the United States are the supreme law of the land.²⁹ However, the court noted, that consideration of issues arising under the Supremacy Clause "start[s] with the assumption that the historic police powers of the States are not to be superseded by . . . Federal Act unless

24. See Allan Kanner, *Future Trends in Toxic Tort Litigation*, 20 RUT. L.J. 667, 670 n.20, 687 n.124 (1989) [hereinafter *Future Trends*]. The origins of the preemption doctrine are found in the Supremacy Clause of Article VI of the United States Constitution which provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall the supreme law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

U.S. CONST. art. IV. Nothing within the text of the Constitution itself mandates the preemption of state tort law.

25. Preemption of state law may be effected by provisions of congressional legislation. Under such circumstances, a court's sole task is to ascertain the intent of Congress. See *California Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1983) (Marshall J.) The requisite congressional intent may manifest itself in several forms. See *id.* at 280-81.

26. *Richards v. Washington Terminal Co.*, 233 U.S. 546, 553 (1914); see also *Urie v. Franconia Paper Corp.*, 218 A.2d 360, 362 (N.H. 1966).

27. See Allan Kanner, *Tort Law In the Regulatory Age*, 43 WASH. U.J. OF URB. & CONTEMP. L., 1993, 275, 275; *Future Trends*, *supra* note 24, at 687 n.124.

28. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

29. *Id.* at 516.

that [is] the clear and manifest purpose of Congress.”³⁰ The Court further noted that these considerations create a presumption against the preemption of state police power.³¹

VI. PUBLIC LAW AND THIRD PARTY LIABILITY MAY IMPACT LANDOWNERS’ CHOICE OF REMEDY

We generally think about environmental law as only generating positives. However, there is a growing judicial recognition that those same public environmental laws may hurt private landowners, particularly in relation to the fact of damages, and the types of remedies available. To return to the hypothetical set out above, if A pollutes B’s property, then B may be liable to the government for A’s pollution by virtue of B’s landowner status, or B may be liable to third parties (such as neighbors) as a result of a citizen suit.³² Thus, even if public environmental law preserves B’s rights to sue for damages, B may have to seek a more substantial remedy in a private-law tort suit. Such relief would include restoration damages, indemnification, or a hold harmless agreement.³³

In *Magnolia Coal Terminal v. Phillips Oil Co.*, the court was sensitive to the landowner’s dilemma and the need to sue for restoration even though the cost of such restoration might exceed the fair market value of the polluted land.³⁴ For example, if B’s unpolluted land would be worth \$1,000,000, it could have a negative worth due to pollution. If the cleanup cost is \$3,000,000, then B is not sitting on a \$1,000,000 asset. Furthermore, fears of lender liability³⁵ would likely prevent B from borrowing against the land. This also means that no potential buyer could borrow to purchase the property, rendering it nonmarketable.

Because of B’s personal liability as a landowner, B needs a restoration remedy to be made whole, as opposed to a remedy based on

30. *Id.* (quoting *Rice v. Santa Fe Elev. Corp.*, 331 U.S. 218, 230 (1947)).

31. *Id.*

32. See KANNER, *supra* note 6, § 7.

33. There are gains for B as well, including access to more information and various other rights created by environmental statutes. See KANNER, *supra* note 6, § 1.04. In addition, nuisance law can arguably be expanded when a nuisance is statutorily defined. See, e.g., *Farmington v. Scott*, 132 N.W.2d 607 (Mich. 1965) (zoning ordinances declaring nonconforming uses to be per se nuisances).

34. *Magnolia Coal Terminal v. Phillips Oil Co.*, 576 So. 2d 475, 483-84 (La. 1991). The propriety of restoration damages has been recognized in other cases. See, e.g., *Roman Catholic Church v. Louisiana Gas Serv. Co.*, 618 So. 2d 874 (La. 1993); *Guste v. Shell Oil Co.*, Civ. No. 95-601 (Jan 16, 1997) (Lemmon J.) (denial of Motion for Partial Summary Judgment).

35. See Final Rule on Lender Liability Under CERCLA, 57 Fed. Reg. 18,344 (1992).

the fair market value of the land. Fair market value is a *de facto* taking. However, the restoration remedy fails to put B in his pre-pollution position, due in part to his potential future liability for the pollution on his property.

VII. THE DIFFERENCE BETWEEN PUBLIC AND PRIVATE LAW

Leaving aside statutory savings clauses and takings concerns, public and private law differ substantially, even though on occasion they deal with exactly the same environmental harms located at the exact same sites.³⁶ Regulators and landowners do not have the same outlook on our polluted world. It is tempting but incorrect to assume that there is one immutable and objective problem that is ideally suited for one solution.

“[Environmental regulators] do not discover a problem ‘out there;’ [they] make a choice about how [they] want to formulate a problem.”³⁷ That choice, if not arbitrary and capricious, reflects certain legislative and administrative norms which also constrain the realm of possible governmental solutions. No environmental regulator in the United States has an unlimited cleanup mandate combined with an unlimited budget. Agencies suffer jurisdictional and budgetary constraints. Some problems may only be attacked prospectively (*e.g.*, future closure of oilfield pits³⁸) or under certain circumstances (*e.g.*, where an imminent and substantial endangerment to human health or the environment exists.³⁹)

In Louisiana, for example, oilfield pollution is only partially regulated by state government. The Department of Natural Resources (DNR) and the Department of Environmental Quality (DEQ) have different jurisdictional areas, different agendas, and different legal and technical resources.⁴⁰ Even together, however, these agencies do not address the full gamut of pollution associated with oilfield production.

36. Private property cleanup actions often indirectly serve the public interest, but that private interest is independent of, and not diluted by, the public interest. *See* Alfred L. Snapp & Son, Inc. v. Puerto Rico, *ex rel.*, Barez, 458 U.S. 592, 604 (1982) (quoting *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907) (“[T]he State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain”)).

37. CHARLES E. LINDBLOM & DAVID K. COHEN, *USABLE KNOWLEDGE: SOCIAL SCIENCE AND SOCIAL PROBLEM SOLVING* 50 (1979); *see* Eugene Bardach, *Problems of Problem Definition in Policy Analysis*, 1 *RES. IN PUB. POL. ANALYSIS AND MGMT.* 161, 163 (1981).

38. *See infra* notes 41-45 and accompanying text.

39. *See infra* note 53 and accompanying text.

40. The federal government is not clear on Louisiana authority. The issue of who is legally responsible for potentially toxic oilfield wastes generated during the exploration, development and production of oil and gas is currently an unsettled issue in Louisiana

The DNR and its predecessors initially did little or nothing to prevent and clean up oilfield pollution. Since then, it has regulated in small incremental steps. For example, the pit closure program under the Department of Conservation's Statewide Order 29-B was not retroactive.⁴¹ Pits closed prior to the program's effective date are not clean.⁴² Subsequently, closed pits were only examined for listed 29-B chemicals above a certain level of regulatory concern.⁴³ Thus, serious pollution hazards such as radiation were entirely ignored under 29-B, and only recently have regulations been promulgated on this subject.⁴⁴ Other oilfield hazards,⁴⁵ below certain levels or in certain contexts, were not tested for, even though their presence today would prevent a prudent person from building their home there, or prevent a bank from underwriting a mortgage on the property.

Thus, defining the problem is a more complicated matter than is often imagined. Deciding to address environmental concerns in Louisiana oil fields, for example, is only the starting point in defining the problem. Choices must be made about what hazards should be regulated and at what levels. In addition, issues of whether regulations are to be retroactive and how compliance with these regulations will be policed must be settled. No Louisiana environmental agency is charged with protecting private property owners' interests in unpolluted property. Such a law would waste taxpayer money because individuals can generally protect their property interests with an array of private tort and contract rights.

Public authorities may also define a problem as much in terms of political concerns as environmental safety concerns. Private landowners may define the problem in terms of their own goals and values such as

environmental law. Louisiana is pressing ahead in an attempt to regulate these discharges despite opposition from industry and the U.S. Department of Energy. See James O'Bryne, *La. Seeks Rules on Toxic Oil Waste*, THE TIMES PICAYUNE, Sept. 9, 1990 at B1.

41. Statewide Order No. 29-B (effective Aug. 1, 1943) (*codified at* LA ADMIN. CODE tit. 43 pt. XIX § 129 (B)). Again, public and private entities operate under different constraints. In Louisiana, regulators generally refuse to apply standards retroactively. The reasons may be partially constitutional, partially political, and partially based on economic concerns. Private litigants on the other hand are not so limited, and may sue for past damages.

42. See *id.*

43. See *id.*

44. See *id.*

45. One waste which is frequently discharged is known as produced water, a sometimes radioactive mixture of salt water and toxic organic chemicals which is extracted during oil and gas exploration. By amendment of the Louisiana Water Control Law in 1990, the Department of Environmental Quality was directed to "conduct a risk analysis of the discharge of produced waters . . . from oil and gas activities onto the ground and into the surface waters of this state." LA. REV. STAT. ANN. § 30:2074(c) (West Supp. 1997).

protecting market value, ensuring marketability, and retaining environmental aesthetics. Thus, in *Magnolia Coal*, for instance, the DNR determined that for its purposes, there was no pollution adjacent to the allegedly leaking well to warrant a cleanup.⁴⁶ The Louisiana Supreme Court did not challenge this conclusion; it merely held that the plaintiff had a right to clean up the mess to its own standards of cleanliness.⁴⁷

Public authorities are also constrained in how they can regulate and enforce formal legal rules. For example, unlike court proceedings, DNR proceedings do not allow discovery. For example, in *Magnolia Coal*, the DNR, acting on one-sided expert testimony only, found that the well was not leaking.⁴⁸ However, the district court and the Louisiana Supreme Court found to the contrary, based on defendant Phillip's own internal documents and admissions.⁴⁹

The mission of the courts and the agencies are different. The Louisiana Supreme Court, in *Ardoin v. Hartford Accident & Indemnity Co.*, explained the role of the courts:

Under the civilian tradition of our state the courts have been given a broad, general principle of legislative will from which they are required to determine when the

46. *Magnolia Coal Terminal v. Phillips Oil Co.*, 576 So. 2d 475, 484-85 (La. 1991).

47. In *Blackett v. Louisiana Department of Environmental Quality*, 506 So.2d 749 (La. Ct. App. 1987), a solid waste permit had been granted by DEQ. Neighboring landowners contested the granting of the permit. *See id.* at 750. The court recognized the necessity of requiring the agency to address each of the factors set forth in *Save Ourselves, Inc. v. Louisiana Environmental Control Commission*, 452, So. 2d. 1152 (La. 1984) (The "IT Decision Questions"). In affirming the issuance of the permit, the Louisiana First Circuit Court of Appeal noted that:

Environmental amenities will often be in conflict with economic and social considerations. To consider the former along with the latter must involve a balancing process. In some instances environmental costs may outweigh economic and social benefits and in other instances they may not. This leaves room for a responsible exercise of discretion and may not require particular substantive results in particular problematic instances.

Id. at 754-55 (citing *Save Ourselves Inc. v. Louisiana Env'tl. Control Comm'n.*, 452 So. 2d 1152, 1157 (La. 1984)).

Utilizing this rather vague standard of review, the court concluded in this particular instance that DEQ's decision was not arbitrary or capricious. *Id.* at 755. A similar result was reached in *In re Shreveport Sanitary & Industrial Landfill*, 521 So.2d 710, 713 (La. Ct. App. 1988). However, there the court noted that the *Save Ourselves* decision involved the disposal of hazardous waste, and that therefore the facts with respect to a solid landfill permit case were inapposite. *Id.* Nevertheless the court found the *Save Ourselves* balancing test had been met. *Id.* Thus, while recognizing an arbitrary and capricious standard of review, the court nevertheless utilized the five IT Decision Questions in evaluating the agency action.

48. *Magnolia Coal*, 576 So. 2d at 484-85.

49. *See id.* at 484.

interest of society is best served by requiring one who harms another to respond in damages for the injury caused. In deciding whether the conduct in a specific case falls below that in which a person can engage without becoming responsible for the resultant damage, a court must refer first to the fountainhead of responsibility, Article 2315, and next in applying the article to the many other articles in our code which deal with the responsibility of certain persons or that which arises due to certain types of activity.⁵⁰

Remedies are not the exclusive province of government. In the classic example of the slow taking condemnation cases, the government is charged with the responsibility of defining fair compensation, multiple expert appraisers are used, and reasonable offers must be timely submitted.⁵¹ Yet the landowner need not accept the government's offer, and, despite the government's liability for attorney fees in the case of a bad offer, numerous cases involve private parties proving a more substantial remedy than the one originally proposed by government.⁵²

Experience suggests that even when public and private entities address the same or similar problems, the range of acceptable solutions varies considerably. These differences involve what might be called solution definition, a process much like defining the problem. For example, government may be satisfied if a toxic spill is cleaned to the point that residual toxins no longer present an imminent and substantial endangerment to public health and the environment.⁵³ If the polluter is also the landowner, this on-site storage may be an acceptable solution. If the landowner did not cause the spill, the problems (the inverse condemnation, the lack of marketability, the potential liability to third-party trespassers) have not been solved.

50. *Ardoin v. Hartford Accident and Indem. Co.*, 360 So. 2d 1331, 1334 (La. 1978) (footnote omitted). Other codal provisions which contain amplifications as to what constitutes fault and under what circumstances a defendant may be liable for his act include those Louisiana property law provisions dealing with the responsibilities a party may have to his neighbors: *See* LA. CIV. CODE ANN. Arts. 667-669 (West 1980 & Supp. 1996); *see also* *Langlois v. Allied Chem. Corp.*, 249 So. 2d 133, 140 (La. 1971) (holding that proof of lack of negligence or imprudence did not exculpate the defendant).

51. *See, e.g.*, *Gully v. Southwestern Bell*, 774 F.2d 1287, 1291 (5th Cir. 1985).

52. *See id.*

53. *See, e.g.*, The Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C § 9604 (1994) (providing that the government may take cleanup actions when a release or threatened release "may present an imminent and substantial danger to the public health or welfare").

These differential approaches, and the legitimacy of their co-existence, can be seen throughout Louisiana law.⁵⁴ For example, *McCastle v. Rollins Environmental Services of Louisiana, Inc.* stands for the proposition that a regulated industry may still constitute an actionable nuisance to its neighbors.⁵⁵ *Ouachita Parish Police Jury v. American Waste and Pollution Control Co.* says that a contract limiting property use to nonhazardous waste is still a contract, even though a third party environmental regulatory agency would agree with the desire of one of the contracting parties to accept hazardous waste.⁵⁶ Oil and gas cases in other jurisdictions mirror this result.⁵⁷

In the 1974 Louisiana constitutional convention, the state's express police power was enhanced to include public trustee powers to protect the environment.⁵⁸ Whether this power was necessary to justify the increased level of environmental regulation in the 1970s, 1980s and 1990s is doubtful.⁵⁹

What is clear is that polluters have sought to seize on the adoption of statutory and regulatory schemes to deflect or eliminate private law actions. In *Magnolia Coal*, the Louisiana oil and gas industry, aided by amicus briefs from DNR and DEQ, unsuccessfully raised the question of how those environmental statutes and regulations affect the rights and remedies of private parties to maintain tort actions for damages.⁶⁰

54. The U.S. Supreme Court has reached the same result as Louisiana courts. See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 249-51 (1984) (holding the pervasive regulatory scheme of the Atomic Energy Act does not preempt punitive and compensatory damages under state tort law); *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 298-306 (1976) (common law tort action alleging fraudulent misrepresentation on the part of an air carrier in the matter of overbooking was permitted to proceed despite the fact that the air carrier's activities were regulated by the Civil Aeronautics Board).

55. *McCastle v. Rollins Envtl. Serv. of Louisiana*, 415 So. 2d 515 (La. Ct. App. 1982).

56. *Ouachita Parish Police Jury v. American Waste and Pollution Control Co.*, 606 So. 2d 1341, 1349 (La. Ct. App. 1992).

57. See, e.g., *Marshall v. El Paso Natural Gas Co.*, 874 F.2d 1373 (10th Cir. 1989) (involving pollution arising from the failure to properly plug an abandoned oil and gas well wherein a jury verdict for \$400,050 in compensatory damages and \$5 million in punitive damages were affirmed on appeal).

58. The Department of Environmental Quality's powers were extended to actions as a public trustee. The Department of Natural Resources' powers were not.

59. The state also has environmental powers under various federal laws. See, e.g., *Rockaway v. Klockner & Klockner*, 811 F. Supp. 1039, 1050 (D.N.J. 1993) (states may obtain natural resource damage awards under CERCLA).

60. See *Magnolia Coal Terminal v. Phillips Oil Co.*, 576 So. 2d 475, 483-85 (La. 1991).

VIII. THE VARIETIES OF PUBLIC LAW

Generally, claims of preemption or primary jurisdiction began with an attempt to characterize the relevant administrative regime as being in some sense comprehensive.⁶¹ As was suggested above, administrative regimes are construed in subjective and thus differing ways.⁶²

Administrative regimes also employ multiple means to achieve their ends. For example, it would be difficult to equate the impact of an informal communication with the exercise of rulemaking responsibilities or with a trial-type hearing. In other words, claims of preemption and primary jurisdiction must be scrutinized based on what the agency in fact is doing.

IX. PRIMARY JURISDICTION

Returning to the hypothetical discussed above, may A invoke an administrative regime to seek administrative stay of some type to restrain B from proceeding with a private law suit? Under the doctrine of primary jurisdiction, courts can refer to the agency those questions that should first be resolved by specialized administrators.⁶³ For example, in *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, the Supreme Court held that the legality of routing practices is within the primary jurisdiction of the Interstate Commerce Commission.⁶⁴ However, the Court went on to hold that courts could then award damages after the ICC finds conduct unlawful.⁶⁵ In other words the private cause of action survives, but its prosecution may be delayed, in whole or in part, awaiting the outcome of the administrative procedure which will help the judicial process. There is no emphasis on the idea that the judicial process creates a negative for the administrative process.

A. *Is There Administrative Jurisdiction?*

In order to evaluate A's claim of primary jurisdiction, a number of questions need to be asked. First, does the administrative regime have jurisdiction and, if so, over what? For example, as the Court explained in *Magnolia Coal*, the administrative regime did not have the power to

61. See *supra* Part V.

62. See *id.*

63. See KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE §§ 19.01-19.09 (2d ed. 1978); Louise L. Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037, 1038 (1964).

64. *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1962).

65. See *id.* at 89.

award *damages*.⁶⁶ Accordingly, delay did not create a positive for the judicial process.

Constitutional language regarding the public trust was likewise found to have failed to usurp private law rights and remedies with governmental regulations.⁶⁷ Article IX, Section 1, of the Louisiana Constitution of 1974 states the current overall policy with regard to environmental matters:

The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy.⁶⁸

A review of the records of the Louisiana Constitutional Convention of 1973 indicates that this provision was intended to be a public policy statement on the environment, without an intent to expand legislative authority to establish an agency with judicial power.⁶⁹ In doing so, the delegates adopted the existing policy statement of Article VI, Section 1, of the 1921 Louisiana Constitution regarding wildlife and fisheries.⁷⁰ Their purpose was to provide that

[t]he people of this state are entitled to a clean environment, and it's our feeling that we should protect, conserve and replenish insofar as possible, the natural resources of our state. . . . What we attempted to do is to strike a balance, or find a happy medium between the environmentalist on one side, and the agri-industrial interest on the other side. We feel that we have found, hopefully, a policy statement that does this--that strikes a balance, that is not extreme one way or the other. *We heard amendments by members of our committee who wanted to provide a citizen with the right to sue in our constitution. In other words, the right to file a suit to close, for example, to seek an injunction to close down some industry. . . . The majority of the members of our*

66. *Magnolia Coal*, 576 So.2d at 483-84 (emphasis added).

67. *See id.* at 483.

68. LA. CONST. of 1974, art. IX, § 1.

69. Records of the Louisiana Constitutional Convention of 1973; Convention Transcripts, Vol. IX 103rd Day's Proceedings, 2911-913 (Dec. 18, 1973) [hereinafter Constitutional Convention Records].

70. LA. CONST. of 1921, art. IX, § 1.

committee felt that this was an extreme position because there are provisions in our present law, in our civil code, our nuisance laws, class action provisions in our civil code . . . in our Code of Civil Procedure, that provide this. . . . After much discussion and much debate on this particular area we came up with the language that you see here. . . . So, I assure you that we have debated this at great length and we have made a sincere effort to come up with something that gives you more than what you had in the past, but yet is not so extreme as to jeopardize the operation of industries and businesses in our state.⁷¹

The *Magnolia Coal* court clearly acknowledged this point in holding that Civil Code damage actions, including environmental restoration claims, are unaffected by public environmental law.⁷² State governments have a great deal of power over environmental matters. However, it does not follow that every governmental action counts as an action sufficient to quash private law.

In *Sanders v. Gary*, one issue raised by Defendant Texaco was whether Plaintiff could cancel an injection well lease servicing a state regulated oil field.⁷³ Texaco invoked various broad state powers and constitutional provisos.⁷⁴ Plaintiffs sought to portray the case as a simple contract dispute.⁷⁵ Relevant portions of transcripts from the *Sanders* case demonstrate this dispute:

71. Constitutional Convention Records, *supra* note 69, at 2911-12 (statement of Mr. Lambert) (emphasis added).

72. *Magnolia Coal*, 576 So. 2d at 483-85. Courts in other states have reached the same conclusion as the court in *Magnolia Coal*. See, e.g., *Missouri ex rel. Dresser Indus., Inc. v. Ruddy*, 592 S.W.2d 789 (Mo. 1980) (holding that Missouri's environmental laws regarding water pollution did not proscribe common-law nuisance actions for pollution of streams and waterways by the state or private individuals); *Bennett v. Mallinckrodt, Inc.*, 698 S.W.2d 854 (Mo. Ct. App. 1985) (no preemption of state law claims for damages from injuries at federally regulated radiopharmaceutical processing plant); *Marshall v. Consumers Power Co.*, 237 N.W.2d 266 (Mich. Ct. App. 1975) (allowing a nuisance action against a nuclear power plant based on nonradiological matters); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) (holding that the extensive federal statutory scheme regulating the safety aspects of nuclear power did not bar state common law tort actions for compensatory and punitive damages caused by nuclear radiation); *Bagley v. Controlled Env't. Corp.*, 503 A.2d 823 (N.H. 1986) (allowing tort action for property damage to land and groundwater, and personal injury against a company regulated under New Hampshire statutes governing hazardous waste, and allowing proof of statutory noncompliance as evidence of breach of requisite duty to plaintiff-neighbor); *T & E Indus., Inc. v. Safety Light Corp.*, 546 A.2d 570, 576 (N.J. Super. Ct. App. Div. 1988), *aff'd as modified*, 587 A.2d 1249, 1246 (N.J. 1991) (allowing tort action for damages, despite the statutory regime of cleanup responsibility).

73. *Sanders v. Gary*, 657 So. 2d 1085, 1086 (La. Ct. App. 1995).

74. See *id.* at 1086-87.

75. See *id.*

[MR. KANNER] [counsel for plaintiffs-appellees]:

Mr. Dore, Your Honor, I think I can save everybody a lot of time here. Uh, it appears to me that Mr. Dore assumes that we're challenging injections. I want to be very clear as to the motion we brought. We're saying that there's a contract between our client and Texaco . . . we're saying that our client entered into a contract for saltwater. The injection that's going on there is for more than saltwater. There was either not a meeting of the minds, or there was fraud in the inducement and the contract is void.⁷⁶

MR. KANNER: We are not attacking any regulatory policy of the State. And if, in fact, it turns out that Your Honor rules on the preliminary injunction that the contract is valid then we don't have an objection here today the continuation, or the continued use lawfully of Long No. 1, *but we're not putting at issue before Your Honor whether or not that regulatory scheme is appropriate or not, we're just saying, my guy made a contract but it wasn't for what they're doing.*

JUDGE MARIONNEAUX: Okay. I understand your point. Mr. Dore I'm gonna go ahead and let you finish your answer.

MR. DORE [counsel for defendant-appellant]: Sure. Let me, and let me just address very briefly, Your Honor, it is Texaco's contention that regardless of if it's the fact that the contract itself is attacked or the actual use of the disposal wells, we contend that it is still in the jurisdiction of the LOC.⁷⁷

Plaintiffs are able to depose the official responsible for regulating the oilfield who expressed no concern with the pending private law claim:

MR. KANNER: We have two issues floating around in the case. One issue is just damages. Mr. Long is requesting an opportunity to sue Texaco for money to clean up his property. He would like to run that clean-up to get it back to his level versus what Texaco is trying to do right now, which he views as being less of a clean-up.

76. Hearing Transcript at 5, *Sanders v. Gary*, No. 95-CW-0070 & 95-CW-0940 (Jan. 10, 1995).

77. *Id.* at 6.

Is there anything in your regulations or your department that would in any way want to interfere with a private property owner's right to sue a polluter for clean-up to the levels that he, the property owner, wants to get it to?

MS. AKCHIN [counsel for defendant-appellant]: Object to the form of the question.

BY MR. WELSH [Louisiana Department of Environmental Quality]: *There would be no reason for us to get involved at all between a landowner, a lessee/lessor type situation.*

MR. KANNER: And, in fact, you are not trying your department is not trying in any way to interfere with respect to that damages lawsuit, correct?

MR. WELSH: That is correct.

MR. KANNER: With respect to a separate question from the damages, there is a question of the use of wells. Mr. Long's position is, *he made a contract that did not allow the use of his well for recovery water versus saltwater, or radioactive water versus saltwater.* At least that is a distinction in his mind that he is drawing, and he is taking the position that Texaco has to abide by the terms of its contract with the Longs, not with any understanding Texaco may have had with the state. Do you understand that distinction?

MR. WELSH: Um-hm.

MR. KANNER: Is there anything that DNRS does DNR, in any way, want to interfere with a private landowner's right to enforce his contract as between the two parties?

MS. AKCHIN: Object to the form of the question. Feel free to answer.

MR. WELSH: I have no reason to interfere. Had I testified that afternoon in January, I would have probably said what I just said awhile ago about what can go down a Class 2 well. *You know, Texaco doesn't have a problem with this agency of what they are putting down a well. If they have a problem with their landowner, they need to work that out. Maybe that is*

*what the Judge needs to decide, and I think that is what you said, and I agree with that.*⁷⁸

Accordingly, the Court in *Sanders* had little difficulty in rejecting Texaco's plea for an administrative stay.⁷⁹

To understand the historic rulings in *Magnolia Coal* and *Sanders*, it is vital to appreciate the differences between the structure and workings of the civil law tort system and the structure and workings of the current Louisiana regime of environmental statutes and regulations:

Choosing one example, the law of nuisance is thought of as a body of private law, subject to enforcement by private individuals, among others. Environmental regulation, on the other hand, is regarded as public law, with enforcement vested principally in public officials. The law of nuisance consists of general, broad and abstract principles of unreasonable interferences, applicable to any activity. The regulatory structure, in contrast, is highly particularized, detailed and expected to govern well-defined kinds of activity. In nuisance, plaintiff's rights are exclusively determined by courts of general jurisdiction. To be contrasted, the regulatory structure is drafted, enforced and adjudicated within regulatory agencies and under the supervision of officials commanding technical expertise in particular, and often quite specialized, areas of regulation.⁸⁰

Without doubt, public and private legal schemes can and do operate independently and concurrently.⁸¹ In *International Paper Co. v. Ouellette*,⁸² the Supreme Court held that the Clean Water Act (CWA),⁸³ did not preempt a common law nuisance suit for compensatory and punitive damages against a permitted polluter, so long as the plaintiffs relied on the private law of the state in which the polluter was located.⁸⁴

78. Welsh Deposition at 36-39, *Sanders v. Gary*, No. 95-CW-0070 & No. 95-CW-0940 (March 27, 1995)(emphasis added).

79. See also *Guste v. Shell Oil Co.*, Civ. No. 95-601 (Jan. 17, 1997) (Lemmon J.) (denying Motion for Partial Summary Judgment).

80. GERALD W. BOSTON & M. STUART MADDEN, *LAW OF ENVIRONMENTAL AND TOXIC TORTS* 213-14 (1994).

81. Further, plaintiffs and defendants may seek to use public law violations or compliance in private law cases as evidence of negligence or non-negligence, respectively.

82. 479 U.S. 481 (1987).

83. 33 U.S.C. §§ 1251-1387 (1994).

84. *Ouellette*, 479 U.S. at 487, 500; accord *Milwaukee v. Illinois* 451 U.S. 304, 328 (1981) ("States may adopt more stringent limitations . . . through state nuisance law, and apply them to in-

Nevertheless, express legislation may expand individual rights, such as where a citizen suit provision is added to public law. It may also restrict individual rights, such as where private rights are expressly preempted, so long as the restrictions are constitutionally permissible.⁸⁵

Indeed, it is well settled that environmental legislation passed under the Louisiana Constitution must comply with all other Constitutional mandates. For example, *State v. Union Tank Car Co.*⁸⁶ represented the first comprehensive review of the Louisiana Environmental Affairs Act⁸⁷ by the Louisiana Supreme Court. The court recognized that environmental law is an area “in its infancy, is yet inexact, and consequently is progressively changing.”⁸⁸ At issue was the constitutionality of the Louisiana Air Control Law⁸⁹ and regulations.⁹⁰ Following an analysis of the principles of delegation of legislative authority, the court found the law constitutional, as its goal was to create an environment free from pollution.⁹¹ However, the regulations were found deficient to support a criminal prosecution based upon penal regulations, as they contained such vague terms as “undesirable levels,” “appreciably injure,” “beyond inconvenience,” “materially injure or interfere,” “reasonable use,” “acceptable national standards,” and “published safe limit values.”⁹² While the court recognized it was a reasonable governmental policy⁹³ to protect the environment, such “legislation is not exempt from the due process requirement of definiteness.”⁹⁴

state dischargers”); *Committee for Jones Fall Sewage Sys. v. Train*, 539 F.2d 1006, 1009 n.9 (4th Cir. 1976) (The CWA preserves state common law suits filed in source state); *Ouellette v. International Paper Co.*, 666 F. Supp. 58 (D. Vt. 1987) (common law suits are preserved in air pollution claims).

85. See, e.g., *Moore v. Roemer*, 567 So. 2d 75, 80 (La. 1990).

86. 439 So. 2d 377 (La. 1983).

87. LA. REV. STAT. ANN. §§ 30:2001-2391 (West 1989 & Supp. 1997).

88. See *State v. Union Tank Car Co.*, 439 So.2d 377, 382 (La. 1983).

89. LA. REV. STAT. ANN. §§ 30:2051-2059 (West 1989 & Supp. 1997).

90. See LA. ADMIN CODE tit. 33 pt. III. § 101-5937. The Louisiana Air Quality Regulations, including Louisiana Emission Standards for Hazardous Air Pollutants, are administered by the Department of Environmental Quality (DEQ), Office of Air Quality and Radiation Protection Air Quality Division. The regulations also cover control of pollution from sulfur dioxide; control of air pollution from carbon monoxide, hydrocarbons, atmospheric oxidants, nitrogen oxides and smoke; and emissions of particulate matter from fuel burning equipment. DEQ has taken the position that it has authority over air emissions from surface and storage facilities used in oil and gas exploration and production. See *id.*

91. See *Union Tank Car Co.*, 439 So. 2d at 380-84.

92. *Id.* at 385-86.

93. See *id.* at 381.

94. *Id.* at 387.

Despite broad regulatory powers, it does not follow that every governmental act creates valid law. First, the rule must be valid or binding. A governmental rule counts as a binding rule if it is promulgated according to the rules governing rule creation.⁹⁵ This emphasis on strict adherence to promulgated agency procedure was forcefully articulated in *Weyerhaeuser Co. v. Costle*.⁹⁶

Even more so than our review of [the Agency's] statutory interpretations, *our review of its procedural integrity in promulgating the regulations before us is the product of our independent judgment, and our main reliance in ensuring that, despite its broad discretion, the Agency has not acted unfairly or in disregard of the statutorily prescribed procedures.*⁹⁷

Another example derives from the state's power to protect the state waters. Article IX, Section 1, of the Louisiana Constitution of 1974, as interpreted by the Louisiana Supreme Court, imposes an affirmative duty upon state agencies to protect the environment in a manner consistent with the health and welfare of the people.⁹⁸ To implement and further this constitutional requirement, the Louisiana Legislature enacted the Louisiana Environmental Quality Act.⁹⁹ Under this Act, the Secretary of DEQ has the authority to grant or deny permits.¹⁰⁰

The policy of the Louisiana Water Control Law¹⁰¹ includes the following declaration: “[T]he waters of the State of Louisiana are among

95. See, e.g., *Central Louisiana Elec. Co. v. Louisiana Pub. Serv. Comm'n*, 377 So. 2d 1188, 1195 (La. 1979) (“[A]dministrative agencies are bound by their own rules . . . which are promulgated to affect the rights and liabilities of members of the public”); *Greenberg v. Secretary of the Dep’t of Revenue and Taxation*, 416 So. 2d 205, 207 (La. Ct. App. 1982) (“absent special circumstances, an administrative agency may not waive, suspend, or modify the operation of its own rules and regulations. . . .”); *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) (“Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures . . . even where the internal procedures are . . . more rigorous than otherwise would be required.”); *United States v. McDaniels*, 355 F. Supp. 1082, 1085 (E.D. La. 1973) (agency regulations are consistent with principles recognized as affording due process of law); *United States ex rel Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954) (failure of federal agencies to follow their own established procedures amounted to a violation of due process); *United States v. Newell*, 578 F.2d 827, 834 (9th Cir. 1978) (The purpose of this rule [that agencies must abide by their own regulations] is to prevent unjust discrimination and denial of adequate notice of procedures by the agency in violation of due process.”).

96. 590 F.2d 1011 (D.C. Cir. 1978).

97. *Id.* at 1027 (emphasis added).

98. See *Save Ourselves, Inc. v. Louisiana Env’tl. Control Comm’n*, 452 So. 2d 1152, 1156 (La. 1984).

99. LA. REV. STAT. ANN. §§ 30:2001-2391 (West 1989 & Supp. 1997).

100. *Id.* § 30:2011(D)(2).

101. *Id.* § 30:2071-2078.

the state's most important natural resources and their continued protection and safeguard is of vital concern to the citizens of this state."¹⁰² Accordingly, the Secretary has the power under the Louisiana Water Control Law: "[t]o establish such standards, guidelines, or criteria as he deems necessary *or appropriate* to prohibit, control, or abate water pollution of the waters of the state."¹⁰³ Water pollution is defined as discharges into state waters "of any substance in concentrations which tend to degrade the chemical, physical, biological, or radiological integrity of such waters. . . ."¹⁰⁴

Regulations have been promulgated in furtherance of the Secretary's authority to abate water pollution. Those regulations include the Water Quality Regulations.¹⁰⁵ As explained by one commentator:

The Louisiana Solid Waste Rules and Regulations are administered by the Department of Environmental Quality, Office of Solid and Hazardous Waste, Solid Waste Division. There is a specific exemption for '[p]roduced waste fluids and muds resulting from the exploration for or production of petroleum and geothermal energy, and all surface and storage waste facilities incidental to oil and gas exploration and production. . . .'

However, the scope of the regulations makes it possible that they may apply to discharges from the drilling site. The regulations define 'solid waste' to mean, 'any garbage, refuse . . . and other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations.' A 'facility' includes 'any land and appurtenances thereto used for storage, processing and/or disposal of solid wastes.'¹⁰⁶

Despite this broad language the jurisdiction of relevant administrative regimes is not broad enough to usurp private damage actions.¹⁰⁷

102. *Id.* § 30.2074(B)(1).

103. *Id.* (emphasis added).

104. *Id.* § 30:2073(6).

105. LA. ADMIN. CODE tit. 33, pt. IX, §§ 301-317, 1101-1123 (1996).

106. Charles S. McCowan, Jr. *The Evolution of Environmental Law in Louisiana*, 52 LA. L. REV. 907, 927 (1992) (quoting LA. ADMIN CODE. tit. 33, pt. VII, §§ 501, 701(A) (1988)).

107. *See id.* at 929 n.95. (noting that in *Magnolia Coal*, 576 So. 2d. at 475, the Louisiana Supreme Court recognized that LA. REV. STAT. § 30:4(c)(16)(a) "gave the Commissioner of Conservation jurisdiction over site clean up of abandoned and unused wells. However, a civil

The Louisiana Supreme Court in *Moore v. Roemer* discussed the grant of original jurisdiction of all civil matters to district courts under Article V, Section 16(A) of the 1974 Louisiana Constitution:

Original jurisdiction refers to jurisdiction in the first instance. The term designates the adjudicative tribunal in which the initial adjudication is made. *When the original jurisdiction allocated to the various courts is circumscribed by the Louisiana Constitution, the Legislature may not alter such jurisdiction by statute. . . . The language of La. Const. art. V, § 16 makes it evident that the drafters of the 1974 constitution intended to vest the district court with at least concurrent original jurisdiction to adjudicate all legal matters, both civil and criminal, except for those matters in which original jurisdiction is 'otherwise authorized' by the constitution itself in other courts or in other adjudicate tribunals. . . .*

The Constitution's explicit statement that original jurisdiction over all civil and criminal matters is to be in the district courts 'unless otherwise authorized by the constitution,' along with express authorization elsewhere in the constitution for original jurisdiction in administrative bodies such as the Civil Service Commission and Public Service Commission, further indicates that matters under the original jurisdiction of administrative bodies are civil matters which would otherwise come under the original jurisdiction of the district court.¹⁰⁸

Magnolia Coal affirms this analysis.¹⁰⁹ The court in *Magnolia Coal* did distinguish between the plaintiffs' claims for damages (which can never be decided by an administrative agency) and injunctive relief (which a Court may sometimes decide to defer to an agency for the benefit of any agency expertise).¹¹⁰

The court in *Magnolia Coal* did not, however, hold that the Commissioner of Conservation had exclusive jurisdiction and that the Commissioner's jurisdiction over the plugging of wells could not be

action for damages due to the failure to properly clean the site was found to be a matter of 'private law' and exclusively within the jurisdiction of the courts.").

108. *Moore v. Roemer*, 567 So. 2d 75, 79 (La. 1990) (citations omitted) (emphasis added).

109. *Magnolia Coal*, 576 So. 2d at 483-85.

110. *Id.*

decided by a Court in the first instance.¹¹¹ The court did determine that the Commissioner is required to reevaluate the plugging of the well after and separate from the trial court's exercise of its civil duties, and ordered the Commissioner to consider the court's record in so doing.¹¹²

The court in *Magnolia Coal* merely chose to defer to the agency's expertise in well plugging to assure regulatory compliance with the procedure by requiring the DNR "to determine at a new hearing what procedures should be followed to have the well properly plugged and abandoned."¹¹³ This was done to make sure the laws designed to protect the general public, in addition to those which protect one particular property owner's rights, are complied with. Significantly, the court also held that the Commissioner infringed on judicial authority by holding a hearing with regard to regulatory matters while the civil matters were under advisement with the district court.¹¹⁴

That this deferral was not constitutionally mandated is made clear in the *per curiam* decision rendered by the Supreme Court on rehearing:

The deference to administrative agencies for an initial decision on matters within the expertise of the agency, which is contemplated by the doctrine of primary jurisdiction, is a matter within the sound discretion of the trial court. In the present case the trial court, in deciding the remediation issue, did not abuse its discretion by refusing to defer to the Commissioner of Conservation as a matter of primary jurisdiction.¹¹⁵

In addition, the court noted that

[t]he Court of appeal correctly concluded that this record should be presented to the commissioner of conservation, who can order, monitor and supervise a plugging and abandonment of the well which will protect the public as well as the landowners. The jurisdiction of the Commissioner of Conservation . . . extends to the plugging of oil and gas wells.¹¹⁶

The fact that the court said the matter *should* be sent to the Commissioner of Conservation, rather than *must* be, indicates that

111. *Id.* at 485.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 489.

116. *Id.* at 485.

deferral of the plugging and abandonment issue to the Commissioner of Conservation was a discretionary act. As Justice Dennis stated in his concurring opinion:

In the present case, there is nothing in the Louisiana Conservation Act which purports to take away from the courts the jurisdiction to determine a controversy over a damage suit for wrongful pollution of private land or to make an administrative finding a prerequisite to filing a suit in Court. Indeed, the state constitution guarantees at least concurrent jurisdiction over such civil matters in the district courts. . . .

The basis of the Court's decision is mainly judicial discretion rather than law because the factors pulling each way are usually plural, each is usually a variable, having differing degrees of strength or weakness, so that the Court must weigh the combinations of degrees of factors pulling one way against those pulling the other way, and the judge is typically limited to deciding on the basis of preliminary impressions.¹¹⁷

The next Supreme Court case which provides guidance on the issue of jurisdiction in the judiciary and administrative agencies is *In re American Waste and Pollution Control Co.*¹¹⁸ In that case the court notes that there is a distinction between the judiciary rendering injunctions and the executive branch issuing permits: "While Courts have traditionally enjoined nuisances, courts have never been in the business of issuing permits for water pollution or waste disposal."¹¹⁹ The Court in *American Waste* noted further that the power to determine whether an environmental permit is valid or whether the permit should have been granted is an executive, and not a judiciary power.¹²⁰

In *Central Louisiana Electric Co. v. Louisiana Public Service Commission*, the court again addressed the issue of the jurisdiction of administrative agencies vis a vis the courts.¹²¹ This case involved Public Service Commission (PSC) authority, which to some extent is conferred original jurisdiction *by the Constitution*.¹²² Indeed, in *Central Louisiana*

117. *Id.* at 487-88 (citations omitted).

118. 588 So. 2d 367 (La. 1991).

119. *Id.* at 371.

120. *Id.* at 369.

121. *Central Louisiana Electric Co. v. Louisiana Pub. Serv. Comm'n.*, 601 So. 2d 1383 (La. 1992).

122. *Id.* at 1383-84.

Electric Co., the court very narrowly construed the PSC's constitutional grant of original jurisdiction and found that the court, not the administrative forum, was the proper area to litigate the dispute: "The Legislature has never 'provided by law' for the PSC to exercise jurisdiction over other subject matters and in areas of litigation in which public utilities are involved, *such as tort actions and contract disputes.*"¹²³

Although courts have the authority to defer to an administrative agency at their discretion under the common law doctrine of primary jurisdiction, before a court reaches that point in the analysis, a conflict such as competing or concurrent interests in exercising jurisdiction must first be presented.¹²⁴ In determining whether a conflict exists over the exercise of administrative jurisdiction and the exercise of the court's jurisdiction, the court must narrowly and precisely construe the administrative action asserted. Only after such a conflict is found could it constitute what has been referred to as a direct or collateral attack on the agency's action. As stated above, no conflict exists where the agency has no jurisdiction over a particular matter. Thus, no collateral attack has been made.

In a situation where more stringent requirements than those proposed or required by a Commissioner's permit are determined to be a direct or collateral attack, for the judicial relief sought, to be impermissible it must "be offensive to the order, considering the order's intended purpose. Mere supplemental requirements may be provided for by contract."¹²⁵

The issue in *United Gas Pipe Line Co. v. Watson Oil Corp.* was whether a more protective requirement relative to well construction was imposed by contract than that required by the Commissioner of Conservation in his regulatory scheme.¹²⁶ Under the *Watson* case, where contract and tort law impose more environmentally protective action than an agency requirement, there is not necessarily a conflict, and if there is any doubt at all that a conflict exists, after narrowly construing the Commissioner's order and its intended purpose, plaintiff is entitled to have a court hear its claim in the first instance:

United, however, is *entitled to have its day in court*. In the event the trial court makes the determination that the

123. *Id.* at 1386 (emphasis added).

124. *See id.* at 1387 (Lemmon J. concurring).

125. *United Gas Pipe Line Co. v. Watson Oil Corp.*, 306 So. 2d 731, 736 (La. 1975).

126. *Id.* at 736-37.

intermediate casing was bargained for and acquired by United upon execution of the Gas Storage Agreements, that such a measure is not at variance with, or technologically comprising to, the Commissioner's ordered cement bond, then the plaintiffs shall have proved the merit of their claim and defendant's protest shall have been without merit.

We hold that plaintiff's suit to enforce contractual rights against Watson does lie in the Parish of Bienville and that dismissal, at this stage of the litigation at any rate, was incorrect. Accordingly, the judgment of the district court, dissolving the temporary restraining order and dismissing plaintiff's suit without prejudice for lack of jurisdiction, is reversed. The writ heretofore issued by this Court is made absolute. The temporary restraining order heretofore reinstated by this Court is ordered maintained in force and effect until a determination, in the district court on remand, on the rule for preliminary injunction, is made, all in accordance with law. Hearing on the preliminary injunction is ordered at the earliest practicable time.¹²⁷

B. What Is a Regulated Industry?

The idea that an industry is regulated by an administrative regime makes little sense if one views the concept of regulation as black or white. Rather, industry is generally regulated in some ways and with respect to some waste streams only. For example, with respect to water pollution, the U.S. General Accounting Office (GAO) estimates that the Permit Compliance System (PCS) regulates only 23% of all toxic water pollution.¹²⁸

127. *Id.* (emphasis supplied).

128. UNITED STATES GENERAL ACCOUNTING OFFICE, WATER POLLUTION: POOR QUALITY ASSURANCE AND LIMITED POLLUTANT COVERAGE UNDERMINE EPA'S CONTROL OF TOXIC SUBSTANCES, 6, 53, 55 (1994) (GAO/PEMD-94-9).

Similarly, the annual Toxic Release Inventory (TRI) data understates pollution. According to the EPA, TRI data reflected only 9% of PCS's discharges. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, NATIONAL SEDIMENT CONTAMINATION POINT SOURCE INVENTORY: ANALYSIS OF RELEASE DATA FOR 1992, Final Draft (March 22, 1995).

The level of regulation, or enthusiasm for regulatory enforcement may vary between states to a significant degree.¹²⁹ Even though the same laws are on the books, the regulatory reality varies among the states.

To return to the hypothetical discussed above, it may be that the relevant law does not give government power over A unless and until government can meet some burden such as showing the existence of an imminent and substantial endangerment of public health. Absent this showing or in the face of ambiguous facts, government may lack the ability to go to court to enforce an order against A. In addition to this threshold showing, the administrative regime may only have power over water pollution, but not over B to the extent that pollution migrates to another medium or via another medium. For example, the government agency in charge of permitting waste water discharges may have no power to sanction A for air pollution emanating from A's plant or for soil or subsurface contamination associated with the pollutants in its subject waste stream. Thus, the remedial powers of that administrative regime are likely not unlimited.

C. *Do Polluters Hide Behind Regulators?*

Even an administrative regime of limited power and jurisdiction may be an appealing object for a consent decree. For example, A may consent to entry of a decree to study a problem to achieve a number of positives including the ability to: (1) stop citizen suits if defendant is under a compliance order,¹³⁰ (2) shape and control the study, (3) go forward without the inconvenience of civil discovery, and (4) to avoid an agency which may, in fact, have enforcement power or that may have a reputation for exercising its jurisdiction more sympathetically. If the consent decree does not admit guilt or responsibility for a cleanup, then A may still test the government's jurisdiction in a later enforcement action.

It is well recognized that polluters solicit particular administrative orders for self-interested reasons, such as saving money. Money can be saved if the order can be used to shape or limit investigations, or to stop or delay a private-party suit or a citizen suit.

129. See John H. Cushman, Jr., *States Neglecting Pollution Rules*, N.Y. TIMES, Dec. 15, 1996, at A1.

130. See MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS (1991).

1. Consent Orders May Be Solicited to Frustrate Private-Party Suits

In some cases, polluters may solicit consent orders solely to frustrate a private-party suit. This obviously demonstrates a relatively pliant administrative regime as well as the importance of civil discovery.

For example, in *Sanders v. Gary*, Texaco asked the state DEQ for entry of a compliance order for the sole purpose of frustrating a mineral owner's cleanup suit against a mineral lessee:

[MR. KANNER]

Q. Are you familiar with the order entered by J. Dale Givens, dated January 10, 1995, relative to Texaco, Inc. in the Fordoche field?

[MR. SCHRAMM] [Louisiana Department of Environmental Quality]:

A Yes.

Q What do you know about the background of that order? How did that come about?

A The way I understand well, through various meetings with Texaco, we were trying to get this work plan implemented,¹³¹ and there was some maneuvering by various parties to hold up the implementation of the plan,¹³² and we sat down in a meeting with Texaco and kicked around some ideas, and what came out of it was that they said is it possible to have an order issued to help get it back on line. At that point we were instructed to start looking at writing an order. That was done, but the order that we were working on never was issued, and it sort of fell by the wayside for awhile.¹³³ Then when the legal proceedings started up again, that issue was brought up again, could we have an order, and it was pursued through the legal department. I wasn't involved in any of that.

Q So just so we are real clear, it is Texaco that asked the DEQ for an order, and they did it on two occasions; is that correct?

131. Texaco volunteered to do a work plan to satisfy DEQ concerns, but had not done anything or even defined the terms of the plan.

132. Plaintiffs sued in tort after ten years of inaction.

133. Texaco removed the tort suit to federal court where it sat for about nine months before a remand.

A As far as yes, it was discussed that it would work that way.

Q And the first time was roughly in April of '94 and the second was roughly in December of '94 or January of '95?

A That sounds about right.

Q And the first time the Groundwater Protection Division was actually working on a draft of an order that was not issued, correct?

A Correct.

Q When Texaco came back the second time in about December of '94 and asked for an order, at that point in time it was DEQ's legal people who prepared a form of order, not the groundwater protection people?

A Right.

Q Do you have a draft of the order that you or your group was working on in the Spring of '94?

A On the computer, I think we may have.

Q I would request a copy of that. I would like to see how that may be different than the order they ultimately issued, if we could get a printout of that at some point. Is that a yes?¹³⁴

2. Administrative Processes Often Do Not Seek to Protect Private Property Rights

Interestingly, and illustrative of the tunnel vision of many administrative regimes as well as the lack of due process afforded private landowners, the DEQ entered that order without first speaking to the affected landowners:

[MR. KANNER]

Do you have any understanding of what Mr. Raymond Long and Mr. Gary are seeking to accomplish in their lawsuit?

[MR. SCHRAMM]

A I am confused on that case.

Q So right now you are confused about that case. Despite that confusion, you went ahead and prepared a

134. W.H. Schramm Deposition at 8:24-10:25, Sanders v. Gary, No. 95-CW-0070 & No. 95-CW-0940 (Mar. 27, 1995) 03/27/95, (DEQ employee). The order turned out to be much more rigorous than the version drafted by Texaco and entered by DEQ's legal department.

form of order for Texaco, even though it wasn't implemented in April?

A Yes.

Q Did you think to pick up the phone and maybe call those gentlemen and ask them what their goal was, in terms of cleaning up their property?

A Call whom?

Q The landowners, Mr. Long and Mr. Gary.

A No.

Q Why not?

A The approach that the department took here was to deal with the people that, well, are taking responsibility for whatever contamination is on the property, and starting from the initial investigation and the complaint from Mr. Long, we went ahead and we explained to Mr. Long we were dealing with Texaco, and he never offered any objections to that course of action.

Through all of our discussions and actions that dealt with Texaco, we tried to stress that they should communicate with Mr. Long.

We didn't follow up on whether they did or not. That was their responsibility under our

Q Just so we are clear, as far as the department is concerned, it was Texaco's responsibility throughout to keep both Mr. Long and Mr. Gary apprised of what they were doing, correct?

A Yes.

Q And did that responsibility go beyond, in your mind, the mere publication of a form of notice in a newspaper?

A I had hoped that was the case, yes.

Q But you never ordered them to talk to Mr. Long or Mr. Gary?

A Only on the approval of the final corrective action plan we required them to obtain all permission, licenses, [to] implement the plan. That was supposed to make certain that they had everybody's knowledge and approval to do it. I can't answer for all of the other licenses and permits and regulatory issues.¹³⁵

135. *Id.* at 14:3-16:2.

Q So do you have any idea of whether, in fact, they did do that?

A No.¹³⁶

3. Polluters Use Consent Orders to Shape the Investigation

Another way for a polluter to save money is to consent to an order that allows it to shape the investigation of pollution. This gives the polluter an opportunity to shape the data in a way most favorable to itself. In *Guste v. Shell*, an in-house memorandum clearly expressed that the primary benefit of consenting to a compliance order would be the ability to shape the data and leave the government in a more passive role:

Voluntarily agreeing to perform an RIFS would give Shell substantial control over the study protocols as well as immediate access to all data. This would not be the case if DEQ developed the data . . . if Shell were agreeable to performing an RIFS, some could be accomplished . . . as long as care is taken to carefully craft any factual statements as to toxicity, etc. . . .¹³⁷

4. Polluters Use Consent Decrees to Frustrate Future Government Action

This language also illustrates that jurisdiction among administrative regimes is not comprehensive. If there is no toxicity data, there is imminent and substantial endangerment as a necessary predicate for an enforcement action. The situation here was that DEQ felt it had sufficient evidence, and so Shell volunteered to do the Remedial Investigation/Feasibility Study (RI/FS) in part in order to undercut that evidence. There are numerous ways to shape data. For example, the problem can be defined to entirely exclude certain areas of pollution such as heavy metal other than lead. Also, detection limits can be set too high.

5. All Cleanups Are Not Created Equal

The investigation not only shapes government's future enforcement options, but also shapes cleanup options. *Sanders v. Gary* also illustrates the point that all cleanups are not created equal:

136. *Id.* at 17:12-14.

137. In-house memo from attorney Aurelius to W.L. Caughman, at 4 (Aug. 29, 1988) (EA002922).

[MR. KANNER]

Q Is it the goal of the remediation plan to remove all the contaminants in the groundwater back to background level; is that the goal of the remedial action plan, as you understand it?

[MR. SCHRAMM]

A No.

Q It is not the goal?

A It is not the goal.

Q What do you understand the goal of the remedial action plan that is the subject of the DEQ order to be?

A To implement some kind of a recovery of the groundwater, and the target goal is to meet the drinking water standards, but not necessarily the background; however, I don't believe it is stated in the plans as background.

Q And there is no order right now ordering Texaco to either get it back to background or even the drinking water standards? At this point in time there is no order to that effect, correct?

A I believe that is correct.¹³⁸

Indeed, a better cleanup, such as the one the landowner desires, is always available:

Q Has there been any discussion that you are aware of the impact of the lawsuit, the Raymond Long lawsuit? Do you know when the Raymond Long lawsuit is supposed to go to trial?

A No.

Q Do you know that it is set for trial in Pointe Coupee Parish May 10th through 18th of this year?

A I may have been notified.

Q From your point of view, is there any urgency that any work needs to be done by Texaco or anybody between now and the time of trial?

A Well, at this point, probably there is no urgency. The urgency is that there is an approved plan out there [the one sought by Texaco after the litigation began] that is not being implemented.

138. Schramm Deposition, at 20:16-21:13, Sanders v. Gary, No. 95-CW-0070 & 95-CW-0940 (Mar. 27, 1995).

Q And if Raymond Long came to you with Texaco after May 18th and said, I just won a judgment of X dollars, I would like to put in a much better plan, or what, to my mind, is a much better plan, would you have any problem sitting down with Mr. Long and Texaco and looking at the plan at that point in time?

A No.

Q Would you have any problem sitting down if it was a better plan and substituting it for the existing plan?

A No.¹³⁹

Further, Mr. Schramm stated that the Plaintiff's goal of restoration to pre-contamination conditions by judicial process was not in conflict with the State order:

Q *If the evidence were presented to you that the only way to guarantee a clean-up in a timely period would be to excavate, would you still be against excavation?*

A *Are you talking philosophically or as a regulator?*

Q *As a regulator.*

A *I wouldn't be opposed to it.*¹⁴⁰

As indicated earlier, Mr. Jim Welsh, of the Louisiana Department of Natural Resources, in his deposition similarly agreed that Plaintiffs' pursuit of protecting their property rights here in state court in no way conflicts with DNR and its objectives:

[MR. KANNER]

Q We have two issues floating around in the case. One issue is just damages. Mr. Long is requesting an opportunity to sue Texaco for money to clean up his property. He would like to run that clean-up to get it back to his level versus what Texaco is trying to do right now, which he views as being less of a clean-up. Is there anything in your regulations or your department that would in any way want to interfere with a private property owner's right to sue a polluter for clean-up to the levels that he, the property owner, wants to get it to?

MS. AKCHIN: Object to the form of the question.

[MR. WELSH]

139. *Id.* at 66:21-67:24.

140. *Id.* at 50 (emphasis added).

A There would be no reason for us to get involved at all between a landowner, a lessee/lessor type situation.

Q And, in fact, you are not trying your department is not trying in any way to interfere with respect to that damages lawsuit, correct?

A That is correct.

Q With respect to a separate question from the damages, there is a question of the use of wells. Mr. Long's position is, he made a contract that did not allow the use of his well for recovery water versus saltwater, or radioactive water versus saltwater. At least that is a distinction in his mind that he is drawing, and he is taking the position that Texaco has to abide by the terms of its contract with the Longs, not with any understanding Texaco may have had with the state. Do you understand that distinction?

A Um-hm.

Q Is there anything that DNRC does DNR, in any way, want to interfere with a private landowner's right to enforce his contract as between the two parties?

MS. AKCHIN: Object to the form of the question. Feel free to answer.

A I have no reason to interfere. Had I testified that afternoon in January, I would have probably said what I just said awhile ago about what can go down a Class 2 well. You know, Texaco doesn't have a problem with this agency of what they are putting down a well. If they have a problem with their landowner, they need to work that out. Maybe that is what the Judge needs to decide, and I think that is what you said, and I agree with that.¹⁴¹

In February 6, 1989, Texaco wrote to DNR and said that recovered produced water would be injected in only one of the wells (Dearing 2). Texaco did not submit any lab data. No one ever got Mr. Long's or Mr. Gary's permission. More important, DNR did not order anyone to use the injection wells for anything:

[MR. KANNER]

Q If, on the other hand, DEQ said that, as far as they are concerned, it wasn't necessary to use these injection

141. Welsh Deposition, at 39-39, Sanders v. Gary, No. 95-CW-0070 & No. 95-CW-0940 (Mar. 27, 1995).

wells, your office wouldn't insist that they use these injection wells for recovery water, correct?

MS. AKCHIN: Object to the form of the question.

[MR. WELSH]

A We would not insist that anybody use injection wells.

Q And as you understand it right now, the Department of Conservation is not ordering anybody to use those wells for recovery purposes; is that correct?

A That is correct.

Q And, in fact, you are not ordering anybody to use those wells for any purpose at all, whether recovery or associated with the E & P activities, correct?

MS. AKCHIN: Object to the form of the question.

A No, we don't order anybody to use any injection well. If they meet the regulations and operate the well according to the regulations, they can use the well, if they so desire.

Q So you are giving, with respect to E & P injection of produced water, you are giving Texaco permission to use those wells, so long as the wells satisfy requirements of mechanical integrity and the contents of what are being injected is consistent with Class 2 requirements, correct?

A Correct.¹⁴²

It turns out Texaco failed to properly report to DNR about recovery water in the wells, and had to backdate reports:

[MR. KANNER]

Q When somebody converts a well from an operating well to a saltwater disposal well, part of what they do is tell you what they are going to inject in it and list sources of waste stream; is that correct?

[MR. WELSH]

A Yes. They are required to do that. They are required to file an annual report as to volumes and source of water that goes down each well.

Q Are you aware that at some point in time Texaco had to go back and amend its prior annual reports with

142. *Id.* at 31-32.

respect to the subject wells we have been talking about today?

A I am not personally familiar with that, no.

Q You are not aware of the fact that do you know who Dale Bienvenu is?

A Yes, I know who Dale Bienvenu is.

Q He is the fellow at Texaco who files the annual reports and sources?

A Yes. I recognize his name.

Q If Mr. Bienvenu, at his deposition, says he had not been aware of the use of recovery wells and had to go back and amend his prior filings, do you have any reason to disagree with that?

MS. AKCHIN: Object to the form of the question. You can answer.

A They should speak for themselves, if they have been amended. But I understand I think there are recovery trenches, too, out there.

Q They are proposed.

A Oh, okay.

Q There are proposed recovery trenches under the—to be put out there under the contemplated, what is it called, Camp, Dresser & McKee plan that is outstanding right now. I don't know that there are any trenches that have been dug already.

A Okay.¹⁴³

Q At any point in time, has Texaco requested permission to modify the initial list of sources with respect to saltwater disposal well number 1?

A I would have to

Q Would you take a look, please?

A I see the word correction written on the year 1992.

Q What does that mean?

A I suppose it means that something on here has been corrected, and I see the same for the year 1991.

Q And can you tell what year that was corrected?

A I can't, no.

Q Do you know if it was after this lawsuit was filed?

143. *Id.* at 32-34.

A No. I have no idea. In fact, I am looking at it for the first time right now, so I have no idea.

Q Is there a piece of paper in there that says that Texaco can put stuff from the recovery well down that particular well?

MS. AKCHIN: You are asking him about in the Long Number 1 file?

Q Is that what you are looking at now?

A I am looking at the Number 1 file, yes. Well, here is something written on the 1992 report, Fordoche Groundwater Recovery, but

Q Again, you don't know when that corrected version was put in?

A No, and it scratched out the dates January of 92 through December of 92, and a volume is scratched out, and I would have to ask the technician who goes over this.

Q For the record, is it also correct to say that it looks like somebody typed in Fordoche Groundwater, that this wasn't in the original printing?

A Apparently the font is different, or something.

Q Again, you don't know when that was submitted to your office?

A I do not.

Q Is there another copy somewhere that would have been time stamped on its receipt?

A I'm sorry. Here is a time stamp. March 17, 1994.¹⁴⁴

Indeed, DEQ in its regulatory compliance approval of Texaco's French drain project, directed Texaco to contact the landowners and obtain their approval before implementation of the work plan:

[MR. KANNER]

Q Just so I am clear, on February 16, 1994, Linda Korn Levy wrote to Mr. George Roszkowski, copying William H. Schramm, indicating that, The Groundwater Protection Division of the Department of Environmental Quality approved a remedial work plan for the Fordoche field brine pit by letter of December 6, 1993. The plan has been available for public comment, dot, dot, dot, no

144. *Id.*

comments have been received, dot, dot, dot. you are hereby directed to implement the work plan at your earliest convenience. Please make all necessary efforts to inform the involved landowners. All appropriate regulatory authorities or individuals must be notified, and any permits, license, waivers, approvals, et cetera, must be obtained before implementation of the work plan. You may contact Mr. Schramm, dot, dot, dot. That is the letter you are referring to in your testimony?

[MR. SCHRAMM]

A Yes.¹⁴⁵

These two administrative agency witnesses, which were listed by Texaco for trial and then deposed by counsel for the plaintiffs, plainly stated that the plaintiff's attempts to restore their property and enjoin unauthorized injection into the Long injection wells did not create a conflict with any administrative order. A conflict between the administrative order and the cleanup attempts was a necessary element for Texaco to have prevailed on its claim of lack of subject matter jurisdiction and related claims.

As shown from the deposition testimony above, DEQ's position had always been that landowner consent to French Drain implementation is required. DEQ did not object to the plaintiffs' securing a better, faster, more comprehensive cleanup in this restoration damage suit. Accordingly, there was no conflict between the plaintiffs' lawsuit demands regarding restoration and the DEQ order to Texaco to implement the French Drain.

6. Lengthy Studies Sap Government Enforcement Ability

Sanders v. Gary also shows how a long term study can lead regulators to forget about underlying facts, including the presence of a compliance order. In other words, there was a ten-year old DEQ compliance order that the DEQ case manager did not know about and that the plaintiff did not know about until after discovery began in the tort suit:

[MR. KANNER]

Q . . . What do you know about the history of the contamination at this site, if anything?

145. Schramm Deposition, at 16, *Sanders v. Gary*, No. 95-CW-0070 & No. 95-CW-0940 (Mar. 27, 1995).

[MR. SCHRAMM]

A All I know is, they operated those [oilfield] brine pits there. At some point in time there was a breach in one of the levees, and surficial contamination resulted. That was dealt with, I guess it was outside of our office. Maybe it was dealt with through DNR at the time, since they were still operating. The pits were closed, from my understanding, under the DNR regulations at that time. Somewhere down the line Texaco investigated possible contamination. They installed some wells and one recovery well. There was a report submitted to the department. I believe that occurred before I was involved. The first instance that I became aware of anything going on out there was when Mr. Long wrote a letter complaining about his stock well. We went out and sampled that, and through that investigation, through that complaint, we found some records in our files. We went out to Texaco, and that started the whole thing off, started speaking with various people.

Q Had Mr. Long not complained, did the DEQ have any type of program to just be monitoring for problems out there?

A No.

Q I would like to show you a letter from J. Dale Givens to Texaco, dated October 1, 1985, with an attached form of order signed by then DEQ Secretary Patricia Norton, dated October 1, 1985, and it is a compliance order relative to the discharge of contaminated storm water into ditches. I want to ask you if that is the order that you referred to earlier.

A I don't remember referring to any order.

Q You said that there was a problem with saltwater in ditches.

A Okay. Yes. No, a discharge.

Q A discharge into ditches. Okay. Let me go back a step. Do you recall that resulting in a DEQ enforcement order against Texaco?

A No.

Q Do you recall it involving any kind of order with Texaco?

A No. I never investigated the surface water aspect.

Q So sitting here today, except for what I just said, you are not even aware that DEQ entered an order against Texaco in October of 1985?

A No.

Q Let me mark it and show you a copy of it anyway. (SCHRAMM 4 MARKED.)

Q So you have not seen that order previous to today?

A No.¹⁴⁶

7. Polluters Play Competing Agencies Off Against Each Other

Sanders also demonstrates the role jurisdiction plays in leading one agency to do nothing on the assumption that another agency is handling the matter. In this instance, DEQ was responsible for cleaning up groundwater. The source was acknowledged to be old oilfield pits. DEQ elected not to sample that source:

[MR. KANNER]

Q So if fly ash was put into those pits, there is a chance that some heavy metals may have been migrating downward in that pit; is that correct?

[MR. SCHRAMM]

A There is a chance.

Q But you have never made an inquiry into that one way or another, correct?

A Other than looking at whatever sampling regime we had, which may have included metals, and I think in the corrective action plan we included some metals, if I am not mistaken. I would have to review that again.

Q Have you ever asked Texaco to excavate into that pit and do some serious sampling there?

A No.

Q At the source?

A No.

Q No?

A No.

Q Do you think that you could learn something of value by doing that?

146. *Id.* at 27:12-29:21.

A Possibly, yes. It raises a question, though, of jurisdiction.

Q Oh, you are not sure you have the jurisdiction to tell them to go back and sample the pit? Is that what you are saying?

A Yes. A closed pit is under DNR orders.

Q So regardless of what was in that pit, it may not be your jurisdiction to go back to that?

A That may be the case.¹⁴⁷

D. *Conciliation and Capture*

Clearly, primary jurisdiction should not be used in situations involving collusive or nonjurisdiction administrative action. However, this constantly occurs given the conciliatory style of many agencies.¹⁴⁸

Public law may be enforced by either compulsory or conciliatory models.¹⁴⁹ A conciliatory style is remedial, and a method of social repair and maintenance. Assistance is provided for people in trouble, the concern being with what is necessary to ameliorate a bad situation. Compulsory process is more straightforward. It prohibits certain conduct, and it enforces its prohibitions with punishment.¹⁵⁰ Criminal law is the classic example of the compulsory model. The conciliation style of enforcement has its critics who charge that it renders regulations ineffective.¹⁵¹

Distinct from enforcement models, but often occurring in conciliatory contexts, the public process is criticized as being subject to capture. This means that the agency is co-opted by those it seeks to regulate.¹⁵² This is significant to the extent that the concept of primary jurisdiction presupposes some administrative expertise.

147. *Id.* at 70:19-71:23.

148. See Allan Kanner, *The Evolving Jurisprudence of Toxic Torts: The Prognosis for Corporations*, 12 CARDOZO L. REV. 1265, 1272-73 (1991) (reviewing agency capture and agency failure).

149. See DONALD J. BLACK, *THE BEHAVIOR OF LAW* 4 (1976).

150. See *id.* at 3-4.

151. See NEIL GUNNINGHAM, *POLLUTION, SOCIAL INTEREST AND THE LAW* 56 (1974).

152. See PHILLIP SELZNICK, *TVA AND THE GRASS ROOTS: A STUDY IN THE SOCIOLOGY OF FORMAL ORGANIZATION* (rev. ed.) (1966); MARVER BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 83 (1955).

X. CONCLUSION

Absent express congressional intent to limit state law rights, dual schemes of state and federal regulations may coexist. Indeed, this view is expressly recognized in savings language.

By the same token, there is little to be gained in delaying the prosecution of a state tort action. The fact that a regulatory matter is also underway alone provides no warrant for delaying a civil action. Generalized claims of administrative action and expertise are no substitute for careful analysis of the subject proceeding and its legitimate impact if any, on the pending tort suit.