

RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

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I. AGENCY RULEMAKING: METHANE EMISSIONS

Obama-Era Methane Pollution Prevention Rule Survives Legal Challenge but Is Repealed by Trump Administration

A. *The Venting and Flaring Rule*

The United States Department of the Interior’s Bureau of Land Management (BLM) recently announced a final rule (Final Rule) that revises an Obama-era rule (2016 Rule) designed to prevent leaks of methane into the atmosphere during oil and gas operations on tribal and public lands.¹ The Final Rule has been published in the *Federal Register* and will be effective sixty days after publication.² The Final Rule revises the 2016 Rule that had many provisions but was primarily known for its “venting and flaring” and “leaks” restrictions.³ First, the 2016 Rule prevented venting of natural gas, “except under certain specified conditions, such as in an emergency or when flaring is technically

1. Waste Prevention, Production Subject to Royalties, and Resource Conservation, 81 Fed. Reg. 83,008 (U.S. Dep’t of the Interior, Bureau of Land Mgmt. Nov. 18, 2016); Press Release, U.S. Dep’t of the Interior, Interior Department Finalizes New Waste Prevention Rule (Sept. 18, 2018), <https://www.doi.gov/pressreleases/interior-department-finalizes-new-waste-prevention-rule>; *Trump Administration Formally Rolls Back Rule Aimed at Limiting Methane Pollution*, N.Y. TIMES (Sept. 18, 2018), <https://www.nytimes.com/2018/09/18/climate/trump-methane-rollback.html>.

2. See 5 U.S.C. §§ 801-802 (2018); Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements (Final Rule), 83 Fed. Reg. 49,184 (U.S. Dep’t of the Interior, Bureau of Land Mgmt. Sept. 28, 2018).

3. See Waste Prevention, Production Subject to Royalties, and Resource Conservation, 81 Fed. Reg. 83,008.

infeasible.”⁴ Second, the 2016 Rule required operators to use an instrument-based approach—such as optical-gas imaging equipment, portable analyzers deployed according to the protocol prescribed in the Environmental Protection Agency’s (EPA) Method 21, or an approved alternative leak detection device—to leak detection.⁵

The 2016 Rule’s stated purposes were to “reduce waste of natural gas from venting, flaring, and leaks during oil and natural gas production activities on onshore Federal and Indian Leases; clarify when produced gas lost through venting, flaring, or leaks is subject to royalties; and clarify when oil and gas production may be used royalty-free on-site.”⁶ Some requirements of the 2016 Rule became effective on January 17, 2017, but the majority were to become effective on January 17, 2018, or later.⁷ However, on March 28, 2017, President Trump issued an executive order that directed the Secretary of the Interior to review and, “if appropriate . . . suspend, revise, or rescind” the 2016 Rule.⁸

Pursuant to President Trump’s executive order, BLM conducted a review of the 2016 Rule and found that “many provisions [of the 2016 Rule] would have added regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation.”⁹ Specifically, the BLM focused on the compliance costs of the rule. The BLM estimated,

[A]pproximately 73 percent of wells on BLM-administered leases would be considered marginal wells and [] the annual compliance costs associated with the 2016 rule would have constituted 24 percent of an operator’s annual revenues from even the highest-producing marginal oil wells and 86 percent of an operator’s annual revenues from the highest-producing marginal gas wells.¹⁰

4. *Id.* at 83,011.

5. *Id.*

6. *Id.* at 83,008.

7. *See id.* at 83,033, 83,082-83; *see also* Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements, 83 Fed. Reg. 7924, 7925 (U.S. Dep’t of the Interior, Bureau of Land Mgmt. Feb. 22, 2018).

8. Exec. Order No. 13,783, 82 Fed. Reg. 16,093, 16,096 (Mar. 31, 2017).

9. Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements (Final Rule), 83 Fed. Reg. 49,184 (U.S. Dep’t of the Interior, Bureau of Land Mgmt. Sept. 28, 2018).

10. *Id.*

The repeal of the 2016 Rule on economically focused grounds returns methane emissions regulation to the status quo and has ramifications for pending litigation challenging the 2016 Rule.¹¹

B. Wyoming v. United States Department of the Interior

As other commentators have noted, the 2016 Rule garnered significant attention in political and legal arenas.¹² When the Obama Administration announced the 2016 Rule as a final rule, a multistate litigation claim was filed almost immediately.¹³ In *Wyoming v. United States Department of the Interior*, Wyoming, Montana, North Dakota, and industry groups (Plaintiffs) challenged the 2016 Rule on the grounds that the BLM lacked authority to act or, alternatively, the 2016 Rule was arbitrary and capricious. In 2017, Plaintiffs sought a preliminary injunction before the Rule took effect.¹⁴ First, Plaintiffs challenged the authority of the BLM to promulgate the Rule by arguing that the 2016 Rule was beyond the realm of authority granted to the agency by Congress.¹⁵ The United District Court for the District of Wyoming reviewed the preliminary injunction under *Chevron* deference.¹⁶ Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,

a reviewing court must first ask whether Congress has directly spoken to the precise question at issue. If Congress has done so, the inquiry is at an end; the court must give effect to the unambiguously expressed intent of Congress. But if Congress has not specifically addressed the question, a reviewing court must respect the agency's construction of the statute so long as it is permissible.¹⁷

The district court found that Congress did not announce that the precise activity in question was not subject to federal regulation and proceeded to step two of *Chevron*.¹⁸

At step two of the district court's *Chevron* inquiry, the district court pointed to two congressional acts that support the conclusion that the 2016

11. *Wyoming v. U.S. Dep't of the Interior*, 2017 WL 161428 (D. Wyo. 2017); Bradley N. Kershaw, Note, *Flame, Fixes, and the Road Forward: The Waste Prevention Rule and BLM Authority to Regulate Natural Gas Flaring and Venting*, 29 COLO. NAT. RESOURCES, ENERGY & ENVT'L. L. REV. 115 (2018).

12. Kershaw, *supra* note 11, at 117 (quotation marks omitted) (brackets omitted).

13. *Id.* at 154 (citing *Wyoming v. Interior*, 2017 WL 161428).

14. *Id.*

15. *Wyoming v. Interior*, 2017 WL 161428, at *5.

16. *Id.*

17. *Id.* (internal citations omitted).

18. *Id.*

Rule was not beyond the BLM's authority.¹⁹ First, the 1920 Mineral and Leasing Act requires oil and gas lessees to "use all reasonable precautions to prevent waste of oil or gas developed in the land."²⁰ Further, the Mineral and Leasing Act gives the BLM authority to issue rules "for the prevention of undue waste."²¹ Even further, the district court found support for the BLM's authority in the Federal Oil and Gas Royalty Management Act of 1982, which created a system for collecting and accounting for federal mineral royalties through the Secretary of the Department of the Interior's (Secretary) promulgated rules.²² The district court found that it was clear that Congress intended for the Secretary, through the BLM, "to exercise its rulemaking authority to prevent the waste of federal and Indian mineral resources and to ensure the proper payment of royalties to federal, state, and tribal governments."²³ With the district court finding sufficient statutory basis for the BLM to regulate venting, flaring, and equipment leaks, the question shifted instead to whether the BLM was unambiguously granted this authority for the purpose of *preventing waste*.²⁴

The district court pointed out that it was less clear whether the 2016 Rule "was promulgated *for the prevention of waste* or instead for the *protection of air quality*, which is expressly within the 'substantive field' of the EPA and states pursuant to the Clean Air Act."²⁵ The district court accurately stated that, "While the statutory obligations of two separate agencies may overlap, the two agencies must administer their obligations to avoid inconsistencies or conflict."²⁶ Ultimately, the district court found that the 2016 Rule had potential conflict and inconsistency with EPA regulations both substantively and structurally.²⁷ For example, the district court found that the 2016 Rule upended the Clean Air Act's *cooperative federalism* framework by placing the burden on the states to prove that variance from a particular BLM provision should be granted because they have already complied with an EPA Rule that "would perform at least as well as the BLM provision to which the variance would apply."²⁸

19. *Id.*

20. *Id.* at *6 (citing 30 U.S.C. § 225 (2016)).

21. *Id.* (citing 30 U.S.C. § 187).

22. *Id.* (quotation marks omitted) (brackets omitted) (citing 30 U.S.C. § 1751).

23. *Id.*

24. *Id.* (quotation marks omitted) (brackets omitted) (emphasis added).

25. *Id.*

26. *Id.* (quoting *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007)).

27. *Id.* at *8.

28. *Id.* (citing *Waste Prevention, Production Subject to Royalties, and Resource Conservation*, 81 Fed. Reg. 83,008, 83,013 (U.S. Dep't of the Interior, Bureau of Land Mgmt. Nov. 18, 2016)).

Regardless, the district court found that it could not hold that the overlapping EPA and BLM provisions lacked a “legitimate, independent, waste prevention purpose” and accordingly denied the petitioners relief and an injunction against the 2016 Rule.²⁹

Although an injunction was not granted by the district court, the district court’s analysis of whether the 2016 Rule was an arbitrary and capricious use of power in violation of the Administrative Procedure Act gives some insight into the ultimate decision to rescind and amend the 2016 Rule by the BLM under the Trump Administration.³⁰ The district court questioned the economic efficiency of the 2016 Rule, as well as the use of the “social cost of methane” as an appropriate factor for BLM to consider in promulgating the rule.³¹ Specifically, in promulgating the 2016 Rule, the BLM estimated “the net benefits of the Rule outweigh its costs by ‘a significant margin,’ producing net benefits ranging from \$46 million to \$204 million per year depending on the discount rate used.”³² The district court asserted that this “net benefit” is only an accurate figure if the “social cost of methane” was factored into the analysis.³³ Consequently, the court “question[ed]” whether the “social cost of methane” was even “an appropriate factor for [the] BLM to consider in promulgating a resource conservation rule pursuant to its MLA authority.”³⁴ The determination of how to assess “net benefit” thereby led to the question of whether the 2016 Rule was arbitrary and capricious because it “impos[ed] significant costs to achieve *de minimis* benefits.”³⁵ Although the district court did assert concerns over the “net benefit” issue, it declined to hold that the 2016 Rule was arbitrary and capricious and, ultimately, declined to grant an injunction.³⁶

C. Conclusion

The 2016 Rule promulgated under the Obama Administration gained significant legal attention, as well as political scrutiny, from the outset, which led to an immediate challenge from political opponents and industry groups. Although the 2016 Rule temporarily survived its legal challenges,

29. *Id.* at *9.

30. *Id.* (citing Nat’l Ass’n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 658 (2007)).

31. *Id.* at *9-10 (quotation marks omitted) (brackets omitted).

32. *Id.* at *9 (quoting Waste Prevention, Production Subject to Royalties, and Resource Conservation, 81 Fed. Reg. at 83,013).

33. *Id.*

34. *Id.* at *10.

35. *Id.* (citing Michigan v. EPA, 135 S. Ct. 2699, 2707 (2015)).

36. *Id.* at *10-12.

Wyoming v. Interior offered significant guidance regarding hurdles that a similar rule may face were a new administration to attempt to regulate the venting and flaring of natural gas and oil wells in a comparable manner. Particularly, it is clear that the usage of the “social cost of methane” remains an inappropriate gauge of “net benefit” if gauged in terms of preventing the “waste of natural gas” rather than preventing losses from air pollution and climate change.³⁷ A distinction that the district court failed to expound on thoroughly, it nonetheless may prove consequential in subsequent attempts to reduce methane prevention by the BLM. Further, the demise of the 2016 Venting and Flaring Rule gives credence to the notion that an agency rule may be challenged more effectively by virtue of winning elections rather than legal challenges.

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II. LOUISIANA COASTAL LAND LOSS

Caught in the Crosshairs: Coastal Restoration Waits for Its Day in Court

A. Introduction

The Louisiana coast is in a state of emergency. Louisiana has lost nearly 2000 square miles of land over the past eighty years—about twenty-five percent of the wetland area that existed in 1932 and roughly the size of Delaware.³⁸ The future is not encouraging. The state-run Coastal Protection and Restoration Authority reported Louisiana stands to double that loss of wetlands over the next fifty years if dramatic action is not taken.³⁹ Fortunately, Louisiana has a plan—specifically, the Coastal Master Plan—which requires \$50 billion to fund various restoration projects.⁴⁰ However, Louisiana does not have the money to fund such a costly plan.

37. *Id.* (quotation marks omitted) (brackets omitted).

38. Mark Schleifstein, *Louisiana Is Losing a Football Field of Wetlands an Hour*, *New U.S. Geological Study Says*, *TIMES-PICAYUNE* (May 11, 2017), https://www.nola.com/environment/index.ssf/2011/06/louisiana_is_losing_a_football.html.

39. See Johnny Bradberry, *Coastal Protection Guest Column: Louisiana Land Loss a Crisis; Here's What We're Doing About It*, *ADVOCATE* (Apr. 3, 2018), https://www.theadvocate.com/baton_rouge/opinion/article_7179c8c2-3691-11e8-a12a-63644815819e.html.

40. Mark Schleifstein, *Louisiana's \$50 Billion Coastal Master Plan, \$644 Million Annual Plan OK'd by Senate*, *TIMES-PICAYUNE* (May 17, 2017), https://www.nola.com/environment/index.ssf/2017/05/louisiana_senate_approves_coast.html.

Desperate for a solution, in April 2017, Louisiana Governor John Bel Edwards formally declared a state of emergency over coastal land loss in Louisiana, primarily to expedite the project approval process.⁴¹ However, the state still needs to find sources to fund its coastal projects. Over the past several years, state agencies and parishes have targeted and sued one known contributor to coastal land loss: oil and gas companies.

B. Suing Oil Ain't Easy: The SLFPA-E Lawsuit

The concept of suing oil and gas companies for coastal damages started with the Southeast Louisiana Flood Protection Authority-East (SLFPA-E) lawsuit in 2013.⁴² Designed by former SLFPA-E board member and historian John Barry, the lawsuit alleged that over ninety oil and pipeline companies' dredging of canals throughout coastal Louisiana resulted in erosion and loss of coastal land.⁴³ This in turn allegedly increased the risk of storm surges and threatened the levee system and coastal communities that the board had been charged with protecting.⁴⁴ The lawsuit sought injunctive relief and damages in the form of coastal restoration projects—specifically, backfilling canals and revegetating every canal dredged by defendants, among other environmental improvements.⁴⁵

Immediately after its filing, the lawsuit faced backlash from the oil and gas industry, as well as then-Governor Bobby Jindal's administration. With some decrying the lawsuit as a cash grab by lawyers, state legislators introduced a flurry of eighteen bills to preemptively kill the lawsuit.⁴⁶ While many oil-backed legislators rushed to support industry-friendly bills, others were hesitant to interfere with the judicial process. Current Louisiana Governor and former State Senator John Bel Edwards disparaged the proposed acts that retroactively killed the SLFPA-E lawsuit and stated a proposed bill “effectively immunize[d] the oil and gas

41. See *Gov. John Bel Edwards Declares State of Emergency for Louisiana Coast, Says “Immediate, Urgent” Action Needed*, ADVOCATE (Apr. 19, 2017), https://www.theadvocate.com/baton_rouge/news/article_2f64e29a-254f-11e7-8205-036adfbfc535.html.

42. See *Bd. of Comm'rs of the Se. La. Flood Prot. Auth.—E. v. Tenn. Gas Pipeline Co.*, 29 F. Supp. 3d 808 (E.D. La. 2014).

43. *Id.* at 816-17; see also Nathaniel Rich, *The Most Ambitious Lawsuit Ever*, N.Y. TIMES (Oct. 2, 2014), <https://www.nytimes.com/interactive/2014/10/02/magazine/mag-oil-lawsuit.html>.

44. See Rich, *supra* note 43.

45. See *id.*

46. See *id.*; see also Mark Ballard, *Louisiana House Votes to Kill Levee Board Lawsuit*, ADVOCATE (June 2, 2014), http://www.theadvocate.com/baton_rouge/news/politics/legislature/article_c3e74431-7b3e-5dce-a8b7-61b486bb2654.html.

industry from bearing any responsibility for environmental damage.”⁴⁷ After days of heated debate, Edwards became so exasperated with his colleagues’ oil-backed bill proposals that he turned to the chamber and asked, “Who runs this place?”⁴⁸ Despite Edwards’ protests, the Senate passed Act 796 and Act 544 (Senate Bill 469), which effectively prevented the SLFPA-E or a similar organization from filing another lawsuit.⁴⁹

While the legislature fiercely debated in Baton Rouge, the SLFPA-E lawsuit proceeded through the judicial process. The suit was promptly removed to federal court where it was dismissed on grounds that the board’s claim for injunctive relief could not be granted under state law.⁵⁰ On appeal, the Fifth Circuit (first by a three-judge panel and later by a full fifteen-member court) affirmed the district court’s dismissal and rejected the board’s negligence, tort, and breach of contract claims.⁵¹ In a last-ditch effort to revive the lawsuit, the board petitioned the Supreme Court for review.⁵² In late October 2017, the verdict arrived: the Supreme Court refused to hear the SLFPA-E’s appeal.⁵³ Singing the praises of the High Court, Louisiana Oil & Gas Association (LOGA) President Don Briggs declared “it’s three strikes, and you’re out!”⁵⁴ The book was closed on the SLFPA-E’s efforts.

C. *Tapping the Old Wells: The Parish Lawsuits*

While the SLFPA-E case floundered, six coastal parishes (Jefferson, Plaquemines, Vermilion, Cameron, St. Bernard, and St. John) filed numerous lawsuits against oil, gas, and pipeline companies over the past five years (Lafourche Parish has also retained counsel but has not filed suit).⁵⁵ These parish lawsuits opted for a different legal approach. While the SLFPA-E lawsuit relied on negligence, tort, and breach of contract

47. Ballard, *supra* note 46.

48. *Id.*

49. *Id.*

50. See Mark Schleifstein, *Appeals Court Rules for Oil Firms, Against Levee Authority in Wetlands Damage Suit*, TIMES-PICAYUNE (Mar. 17, 2017), https://www.nola.com/environment/index.ssf/2017/03/dismissal_of_levee_authority_w.html.

51. *See id.*

52. See Mark Schleifstein, *U.S. Supreme Court Won’t Hear Appeal of Levee Authority Oil Suit*, TIMES-PICAYUNE (Oct. 30, 2017), https://www.nola.com/environment/index.ssf/2017/10/us_supreme_court_wont_hear_app.html.

53. *Id.*

54. *Id.*

55. Faimon A. Roberts III, *St. John Parish Becomes 6th Parish to File Suit Against Oil and Gas Companies for Coastal Loss*, ADVOCATE (Apr. 26, 2017), https://www.theadvocate.com/baton_rouge/news/environment/article_fb4b84e0-2acc-11e7-a8aa-3b51b1a9d703.html.

claims, the parish lawsuits alleged violations of the state's Coastal Zone Management laws and claimed that oil and gas exploration activities caused substantial damage to the land and waterbodies in the Coastal Zone.⁵⁶ Each parish lawsuit's petition is nearly identical, with each suit corresponding to a specific operational area where the damaging activities occurred.⁵⁷

In April 2016, Governor Edwards intervened on behalf of the state in all the suits "to ensure that the interests of the state of Louisiana [were] protected."⁵⁸ In an interview with *The Times-Picayune*, Governor Edwards stated he believed oil and gas companies had engaged in activities in the course of exploration and production that resulted in coastal land loss and cited pipeline construction and canals that allowed saltwater to destroy vegetation as a primary cause of land loss.⁵⁹ Edwards stated that canals were not backfilled and pipelines were not constructed in accordance with permit requirements and Louisiana Department of Natural Resources (LDNR) regulations.⁶⁰

While Governor Edwards intervened in the litigation, Republican Attorney General Jeff Landry also sought control of the lawsuits.⁶¹ Landry, with the apparent support of the oil and gas industry, also protested Edwards' choice of attorneys to represent the state and accused the governor of appointing friends to lucrative positions overseeing the state's intervention in the lawsuits.⁶² Oil and gas industry leaders similarly attacked the lawsuits. LOGA President Don Briggs claimed the lawsuits were hurting the Louisiana economy and even causing severe job loss and unemployment statewide.⁶³

56. See Dana M. Douglas & Jonathan J. Fox, *The Coastal Zone Management Act Litigation Removed to Federal Court (Again)*, ENERGY L. BLOG (June 28, 2018), <https://www.theenergylawblog.com/2018/06/articles/energy-litigation/the-coastal-zone-management-act-litigation-removed-to-federal-court-again/>.

57. See *id.*

58. See Katherine Sayre, *Gov. Edwards Intervenes in 39 Oil Industry Damage Lawsuits*, TIMES-PICAYUNE (Apr. 7, 2016), https://www.nola.com/environment/index.ssf/2016/04/gov_edwards_steps_in_to_39_oil.html.

59. LSU Manship Sch. News Serv., *Taxes, Criminal Justice, Coastal Crisis: What Gov. John Bel Edwards Said*, TIMES-PICAYUNE (Apr. 24, 2017), https://www.nola.com/politics/index.ssf/2017/04/taxes_death_penalty_coastal_re.html.

60. See *id.*

61. See Julia O'Donoghue, *John Bel Edwards: Jeff Landry Can't Stop Louisiana from Suing Oil and Gas Industry*, TIMES-PICAYUNE (Sep. 22, 2016), https://www.nola.com/politics/index.ssf/2016/09/coastal_lawsuit_edwards.html.

62. See *id.*

63. Kerrie Hatcher, *Don Briggs: Coastal Litigation Tactics Unnecessary*, TEXANS FOR LAWSUIT REFORM (June 18, 2016), <https://www.tortreform.com/news/don-briggs-coastal-litigation-tactics-unnecessary/>.

D. Squabbling in State Court

While the Governor and Attorney General feuded, Jefferson Parish's lawsuit was dismissed in August 2016 by the 24th Judicial District Court, which found that the parish did not exhaust all administrative remedies before suing; principally, the parish did not allow the LDNR to address the suit.⁶⁴ However, in November 2016, the ruling was overturned when Judge Enright of the 24th Judicial District Court determined the LDNR did not have adequate staffing or funding to address the thousands of administrative enforcement proceedings necessary to resolve the violations in the lawsuit.⁶⁵ As a result, the Jefferson Parish suit was allowed to proceed to trial.⁶⁶

The five other parish cases remain in the early stages of litigation. The oil defendants have taken multiple steps to deter the lawsuits. First, they filed to remove the cases to federal court.⁶⁷ They argued that expert witness reports revealed state law violations by the oil defendants actually took place before the state laws existed and thus were governed under WWII-era federal directives.⁶⁸ In response, the plaintiffs argued the lawsuits only address permit violations beginning in 1980 or completely unpermitted activity.⁶⁹

Next, the oil defendants sought to consolidate the cases in federal court, claiming each lawsuit involved similar facts, activities, and actors.⁷⁰ However, in late July 2018, the U.S. Judicial Panel on Multidistrict Litigation struck down the oil company defendants' motion to consolidate the pending coastal parish cases.⁷¹ Despite admitting the cases raise common factual questions, the panel determined the forty-one cases were distinct enough to remain separate.⁷² The panel stated each lawsuit involved different operational areas, companies, and methods.⁷³

64. See Mark Schleifstein, *Jefferson Lawsuit Against 9 Oil Firms to Go to Trial, Judge Says*, TIMES-PICAYUNE (Nov. 10, 2016), https://www.nola.com/environment/index.ssf/2016/11/jefferson_suit_against_9_oil_c.html.

65. *Id.*

66. *Id.*

67. Tyler Bridges, *Coastal Parishes Prepare for Trial Against Oil Companies*, ADVOCATE (July 22, 2018), <http://www.houmatoday.com/news/20180722/coastal-parishes-prepare-for-trial-against-oil-companies>.

68. *Id.*

69. See Mark Schleifstein, *Parish Oil Damage Lawsuits Won't Be Consolidated Before One Judge*, TIMES-PICAYUNE (July 31, 2018), https://www.nola.com/environment/index.ssf/2018/07/parish_oil_damage_suits_wont_b.html.

70. *See id.*

71. *Id.*

72. *Id.*

73. *Id.*

Before attempting to remove or consolidate the cases, the defendant oil companies initially refused to comply with discovery requests, eventually requiring a state judge's order to comply in one Plaquemines Parish case.⁷⁴ Governor Edwards' attempts at settlement talks with the oil defendants were to no avail.⁷⁵ Despite the oil and gas industry and Attorney General's opposition, Governor Edwards has suggested that other parishes file similar lawsuits or he would file them on behalf of the state.⁷⁶ In July 2017, New Orleans City Councilman Jason Williams proposed Orleans Parish file its own lawsuit before scrapping the proposal.⁷⁷ Recently elected New Orleans Mayor Latoya Cantrell has stated that an Orleans Parish lawsuit against oil and gas companies is "on the table."⁷⁸

E. Conclusion

Amidst a swirling backdrop of feuding politicians and lawyers grappling in courtrooms, the famous boot of Louisiana continues to disappear, and the state continues its quest for funding for its coastal plan. With no settlement discussions on the horizon and a federal administration focused on cost-cutting measures, many of Louisiana's coastal parishes may be washed away before they get their day in court.

Dante Alessandri

74. Mark Schleifstein, *Plaquemines Wins Document Access in Oil Industry Damage Suit*, TIMES-PICAYUNE (May 10, 2017), https://www.nola.com/environment/index.ssf/2017/05/plaquemines_wins_document_acce.html.

75. See Associated Press, *Edwards, Oil Execs Disagree on Industry's Help Restoring Coast*, TIMES-PICAYUNE (May 21, 2016), https://www.nola.com/environment/index.ssf/2016/05/edwards_oil_execs_disagree_on.html.

76. See Tim McNally, *Louisiana Parishes Resist Governor's Push to Sue O&G Industry*, OILMAN MAG., <https://oilmanmagazine.com/article/louisiana-parishes-resist-governors-push-sue-og-industry/> (last visited Oct. 16, 2018).

77. Tristan Baurick, *Charbonnet Says She'd Sue Oil Firms Over Coastal Damage, Cantrell Says Option 'on the Table'*, TIMES-PICAYUNE (Oct. 26, 2017), https://www.nola.com/environment/index.ssf/2017/10/mayoral_candidates_differ_on_w.html.

78. *Id.*

III. REMEDIATION OF OILFIELD CONTAMINATION

*Settlement Under Act 312*A. *Background*

Britt v. Riceland Petroleum Corp. was a “legacy” lawsuit in which landowners sued Riceland Petroleum Company (Riceland) and BP America Production Company (BP) seeking damages for and remediation of contamination caused by historic oil and gas operations conducted on the landowners’ property.⁷⁹ In turn, Riceland filed a third-party demand against its insurer, Certain Insurers.⁸⁰ Certain Insurers, however, denied coverage under any of the applicable policies.⁸¹

Eventually, BP, Riceland, and the plaintiffs (the settling parties) reached a settlement to resolve all of the plaintiffs’ claims.⁸² As part of the settlement agreement, BP and Riceland agreed to remediate the property in accordance with state regulatory standards.⁸³ Thereafter, pursuant to the express mandates of Act 312 (Louisiana Revised Statute section 30:29), the settling parties (1) provided notice of the settlement to the Louisiana Department of Natural Resources (LDNR) and Attorney General (AG), (2) allowed the LDNR at least thirty days to review the settlement and provide any comments to the trial court, and (3) sought and obtained the trial court’s approval of the settlement.⁸⁴

Subsequently, Certain Insurers argued that the court’s approval of the settlement failed to comply with section 30:29(J) because the trial court failed to (1) hold a contradictory hearing, (2) determine if remediation was required, and, if it were, (3) order the deposit of funds into the court registry.⁸⁵ Rejecting the insurer’s interpretation of section 30:29(J), the trial court approved the settlement, finding the settling parties had complied with the requirements of section 30:29(J). Certain Insurers appealed the trial court’s decision before the Louisiana Third Circuit.⁸⁶

79. *Britt v. Riceland Petroleum Co.*, 240 So. 3d 986, 988-89 (La. Ct. App. 2018).

80. *Id.* at 988.

81. *Id.* at 989.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 990.

B. Court's Decision

The primary issue before the Third Circuit was the interpretation of section 30:29(J)(1)—specifically, whether its requirements for approval of settlements in legacy lawsuits had been satisfied.⁸⁷ In interpreting the statute, the appellate court necessarily studied the language of section 30:29(J)(1) itself:

In the event that any settlement is reached in a case subject to the provisions of this Section, the settlement shall be subject to approval by the court. The department and the attorney general shall be given notice once the parties have reached a settlement in principle. The department shall then have no less than thirty days to review that settlement and comment to the court before the court certifies the settlement. If after a contradictory hearing the court requires remediation, the court shall not certify or approve any settlement until an amount of money sufficient to fund such remediation is deposited into the registry of the court. No funding of a settlement shall occur until the requirements of this Section have been satisfied. However, the court shall have the discretion to waive the requirements of this Section if the settlement reached is for a minimal amount and is not dispositive of the entire litigation.⁸⁸

The Third Circuit found that a plain reading of the provisions demonstrated that three requirements are applicable to all settlements in cases governed by Act 312: (1) the settlement “*shall* be subject” to the trial court’s approval, but before which (2) notice of the settlement “*shall* be given” to the LDNR and the AG, and (3) the LDNR and the AG “*shall* then have” thirty days to review the settlement and provide any comment to the trial court.⁸⁹ The court determined that the legislature rendered these three requirements mandatory for all settlements; further, it prohibited the funding of any settlement until these requirements had been satisfied.⁹⁰

The Third Circuit also found that the remaining mandatory provisions of the statute only came into play when certain circumstances are met, such as when (1) a contradictory hearing is held and the court requires remediation, or (2) the settlement amount is *de minimis* and the settlement does not dispose of the entire matter.⁹¹ According to the court, the use of the conjunction “if” serves as an introduction to a conditional clause.⁹² Thus, the need for a hearing is triggered by and conditioned upon

87. *Id.*

88. *Id.* at 991.

89. *Id.* (bolded emphasis removed).

90. *Id.*

91. *Id.*

92. *Id.*

an objection to the remediation proposed by the settling parties.⁹³ In the absence of such an objection, settling parties need only provide the required notice to the LDNR and the AG and allow the time mandated for review, after which time the settlement becomes ripe for the court's approval.⁹⁴ Therefore, under this plain reading of the statutory provisions, the appellate court held that section 30:29(J)(1) did not require (1) a contradictory hearing, (2) a finding concerning remediation, and (3) a deposit of necessary funds for court approval in all settlements under Act 312.⁹⁵

Next, the court examined whether the trial court erred in approving the settlement.⁹⁶ Pursuant to section 30:29(J)(1), the settling parties herein had to, and did, seek court approval after first providing the LDNR and AG with notice and allowing thirty days for their review and comments on the proposed settlement.⁹⁷ Because no one raised any objection to the settlement, all the mandatory requirements for approval were satisfied and the trial court acted well within its authority to approve the settlement at that time.⁹⁸ Thus, the Third Circuit held that the trial court's approval of the settlement was legally sound and affirmed its decision.⁹⁹

C. *Analysis*

Britt is the first appellate court opinion addressing the procedure for approval of settlements in cases governed by Act 312 (Louisiana Revised Statute section 30:29). Because *Britt* rejected an argument traditionally made by insurers to avoid settlement payments to landowners for remediation, the Third Circuit's decision facially dealt a blow to insurers in such legacy situations. Under *Britt*, a contradictory hearing is not required unless the LDNR, the AG, or another interested party objects to a proposed settlement. As a matter of practical knowledge, the LDNR rarely objects to such settlements. Unless that were to change, or if the AG's office were to suddenly become significantly more active in mediating these settlements, the *Britt* decision makes it more challenging for insurers in oil field legacy lawsuits to refuse to pay for settlement.

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93. *Id.*

94. *Id.* at 991-92.

95. *Id.* at 992.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*