Tulane Environmental Law Clinic

December 6, 2013

By e-mail to: Tyler.Gray@la.gov
Mr. Tyler Gray
Office of Conservation
P.O. Box 94275
Baton Rouge, LA 70804-9725

Re: Comments on Docket No. IMD-2013-07 by Roger Stelly, Save Lake Peigneur, Inc. and the Louisiana Environmental Action Network

Dear Mr. Gray,

On behalf of Save Lake Peigneur, Inc., the Louisiana Environmental Action Network, and Mr. Roger Stelly ("Citizens"), we submit the following comments on the Department of Natural Resources, Office of Conservation's proposed changes to Statewide Order 29-N-1, LAC 43:XVII.Chapter 33, to be enacted as Statewide Order 29-M-3. Citizens appreciate the efforts of the Office of Conservation to improve and strengthen the regulations governing solution mining and injection wells. However, some sections of the proposed regulations do not adequately protect against the severity of the possible outcomes if the Commissioner does not strictly and consistently regulate salt dome mining and storage.

Injection mining and hydrocarbon storage in salt domes pose very serious risks and, therefore, the regulations governing these activities must require the precautions necessary for protecting both the environment and the people of Louisiana. Solution mining and the subsequent storing of hydrocarbons like natural gas in salt dome caverns open the door for a number of dangerous consequences if the process is not carefully and constantly regulated. Potential loopholes in the regulations, even those that appear small, can lead to disastrous consequences. Citizens have seen, at Bayou Corne, the potential damage that solution mining and drilling in salt domes can trigger, and they are concerned that, without full and complete analysis of all aspects of the construction and operation of project in salt domes, existing and future projects could repeat these disastrous consequences or even exceed them.

For that reason, the primary change Citizens recommend in the regulations is that they be amended to explicitly incorporate the Environmental Impact Analysis that DNR's constitutional

duty as public trustee over the environment mandates for any proposed action affecting the environment.

Citizens reserve the right to rely on all oral and written comments submitted during the comment period, particularly those of Wilma Subra. Citizens also incorporate their comments with changes recommended to the 29-M revisions where the language tracks language in the proposed revisions to 29-N-1.

INTRODUCTION

Some language in the proposed regulations is overly permissive and fails to ensure the oversight and transparency necessary to protect the public and the environment. Therefore, Citizens urge DNR to revise these sections in the interest of the public health and safety. The sections addressed in these comments must not be enacted as proposed because:

A. Certain changes to the original language of 29-N-1 are overly permissive given the grave possible outcomes if proper care is not taken with permit review.
B. Area permitting, and its associated exclusions, do not sufficiently protect against dangers associated with future drilling and, therefore, should be prohibited.
C. The requirements for public notice and hearings are not sufficient and may violate citizens' Due Process rights.
D. The regulations describing the process for allowing variances are ambiguous and not sufficiently stringent.
E. Disclosure of information on permit applications is not sufficiently transparent.

Further, the regulations should explicitly incorporate the environmental impact analysis required by DNR pursuant to its constitutional duties.

A. The Regulations Should Explicitly Incorporate the Requirement for an Environmental Impact Analysis.

As primary public trustee over the environment with respect to the construction and operation of solution mined hydrocarbon storage caverns, DNR has a Constitutional duty under Article IX, section 1 of the Louisiana Constitution to protect the environment "insofar as possible and consistent with the health, safety, and welfare of the people." La. Const. Art. 9, § 1. To meet this duty, the Louisiana Constitution requires DNR "before granting approval of [a] proposed action affecting the environment, to determine that adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare." *Save Ourselves v. La. Envtl. Control Comm'n*, 452 So. 2d 1152, 1157 (La. 1984).

The Supreme Court has delineated what DNR's constitutionally-required Environmental Impact Analysis, often referred to as the "IT Analysis," ***must*** include. Before granting any proposed action affecting the environment, like the construction and operation of hydrocarbon storage caverns, DNR must address and analyze at least three core issues:

> ***(1)*** whether the potential and real adverse environmental effects of the proposed project have been avoided to the maximum extent possible;
> ***(2)*** whether a cost-benefit analysis of the environmental impact costs balanced against the social and economic benefits of the project demonstrate that the latter outweighs the former; and
> ***(3)*** whether there are alternative projects or alternative sites or mitigating measures which would offer more protection to the environment than the proposed project without unduly curtailing non-environmental benefits to the extent applicable."

Id; *see also In re Rubicon, Inc.*, 95-0108 (La. App. 1 Cir. 2/14/96); 670 So. 2d 475, 483.

Further, DNR's "role as the representative of the public interest does not permit it to act as an umpire passively calling balls and strikes for adversaries appearing before it; the rights of the public must receive ***active and affirmative protection***." *Save Ourselves*, 452 So. 2d at 1157 (interpreting La. Const. Article 9, § 1) (emphasis added).

As it derives from the Constitution, this duty exists regardless of whether DNR includes or references it in its regulations. Adherence "only to [the agency's] own regulations rather than to the constitutional and statutory mandates" is not adequate. *Save Ourselves*, 452 So. 2d at 1160. That is particularly true here, where the regulations do not appear to cover critical aspects of an Environmental Impacts Analysis. For example, the regulations do not appear to include any requirement that the DNR analyze whether there are alternative sites that would offer more protection than the proposed site.

However, though the DNR retains this duty regardless of whether the regulations require it, placing the requirement for an Environmental Impact Analysis into the regulations provides both citizens and the applicant with a clear indication of what is required before proposed action affecting the environment can be permitted. Further, placing the requirements into the regulations allows DNR to mandate that the applicant perform the initial Environmental Impact Analysis as part of its application. Though the DNR will need to independently analyze the issues and independently assess the risks, requiring the applicant to do the initial analysis will allow the costs involved in an adequate analysis to be borne by the applicant rather than the DNR.

In sum, DNR should add a provision in the regulations requiring an Environmental Impact Analysis consistent with the requirements of the Louisiana Constitution as articulated by the *Save Ourselves* court. Further, as the *Save Ourselves* court referenced the analysis required under the National Environmental Policy Act (NEPA) when mandating this analysis under Louisiana law, its requirement for an Environmental Impact Analysis essentially requires an environmental impact statement (EIS) consistent with one required by NEPA. Further, when these projects are permitted by the Federal Energy Regulatory Commission (FERC), FERC performs Environmental Impact Statements. Louisiana citizens affected by similar projects permitted instead by the DNR are entitled to the same stringent analysis.

B. Proposed Language Changes Dilute Previous Protections.

The changes between the existing 29-N-1 and the new 29-M-3 include several shifts in the requirements of the Commissioner and the Office of Conservation. In some instances, the duties prescribed by the new regulations to protect underground sources of drinking water from the potential hazards associated with injection mining relax requirements that citizens should be able to rely on.

1. *Changes in language from "will" to "may" in the proposed 29-M-3 diminish the duty of the DNR as a protector of the public and the environment.*

First, in **29-N-1, §107,** the original regulation states that,

> *[t]he commissioner shall impose on a case-by-case basis such additional conditions as are necessary to protect underground sources of drinking water.*

29-N-1, §107(O) (emphasis added).

However, in the revised regulations under 29-M-3, the mandate to protect drinking water is less clear, stating that,

> *The Office of Conservation may, on a case-by-case basis, impose any additional conditions or requirements as are necessary to protect … underground sources of drinking waters…*

29-M-3, §3309(O) (emphasis added)**.**

As these and other changes relate to the protection of sources of drinking water, the DNR must hold permit applicants to the highest standards and, accordingly, the language requiring agency action in the event of a threat to drinking water should be mandatory.

Second, in **29-N-1**, **§ 111(D)(2)**, the regulations currently mandate what the Commissioner must include in a fact sheet with a draft permit. This fact sheet is a significant source of information to the public on what the project will involve. It provides:

> *The fact sheet shall include, when applicable . . .*

29-N-1, § 111(D)(2) (emphasis added).

The proposed regulations, however, now provide:

> *The fact sheet may include . . . .*

29- M-3, **§ 3311(F)(1) (**emphasis added)**.**

Both of these provisions should retain the mandatory "shall" language rather than the permissive "may" language.

2. DNR Should Not Delete Language Imposing a Duty to Reapply.

The existing regulations, at § 107(E), entitled "Duty to Reapply," mandated that

> *If the permittee wishes to continue an activity required by a permit after the expiration date of this permit, the permittee must apply for and obtain a new permit.*

This language has been removed from the current draft. It should be retained, as it closes a potential loophole concerning what happens when a permit expires before the activity is completed.

C. Area Permits Do Not Offer the Same Scrutiny for New Wells As Do Individual Permits.

The DNR must stop allowing area permits. 29-M-3 maintains the provisions allowing for area permits that were also in place under 29-N-1. 29-N-1§109(B)(11), 29-M-3§3309(M). These permits put the public and the environment at risk. In light of the likely impetus for these rule changes – the ongoing disaster at Bayou Corne – allowing such a large loophole for new projects that will impact a new area of a salt dome flies in the face of the prevention goal.

When DNR gives a permittee an area permit, it allows the permittee to construct and operate not only the caverns it has currently applied for permission on, but it is also granting permission for an unlimited additional number of caverns. The proposed regulations state that,

> *[t]he area permit may authorize the operator to construct and operate, convert, or plug and abandon wells within the permit area provided…*

29-M-3§3309(M)(3).

Citizens understand the existing and proposed regulations to exempt these additional caverns from undergoing the same review process as the first one. In fact, it is unclear what, if any, substantive requirements apply to all but the first well under an area permit. Worse, it is unclear if any public notice requirements attach to the construction and/or use of future wells authorized by an area permit. At a minimum, Citizens request that the DNR inform them whether notice and comment is required whenever additional caverns under an area permit are developed and used. If it is not required, this must change.

The exact structure, composition, and stability of salt domes is unknown without extensive seismic scanning, and the structural integrity of an entire salt dome area is unreliable at best. If the DNR maintains the provisions allowing area permits, it should include language to ensure that they are only allowed sparingly and not without a higher level of scrutiny on the area

in question. Without extensive testing of a mining site and all connected or possibly related sites, an area permit could usher in a project that starts off safe but gradually loses structural integrity as it expands to new wells.

The DNR must require the applicant to provide higher quality studies, like 3-D seismic, of existing caverns and wells and more interaction and transparency with the surrounding communities if it maintains this ill-advised provision on area permits.

D. The DNR Must End the Apparent Exemption for Expansions.

The regulations, current and proposed, can be read to exempt expansions of existing wells/caverns from all of the regulatory requirements, including the requirement that it apply for a permit. Language must be included to clarify that expansions of existing caverns must be permitted, and must go through the same rigor as new caverns.

E. The Proposed Language in 29-M-3 Does Not Make It Sufficiently Clear That a Public Hearing Is Required.

The DNR must change the regulatory language with regard to public notice and hearings to ensure that these valuable rights are protected and enforced. Regardless of how effective the substantive changes in the proposed regulations are, the only way to ensure that the public's health and safety is being sufficiently protected and that their Due Process rights are maintained is with transparency in the permitting process through the mandatory and consistent requirement for public notice, comment and hearing, and for sufficient time for these important contributions.

While the proposed regulations may have attempted to improve the public hearing requirements for permit applications, it still remains unclear that one is required when the public requests one. This, however, should be the standard. Currently, the regulations state:

> *The commissioner shall hold a public hearing whenever he finds, on the basis of requests, a significant degree of public interest in (a) draft permit(s). The commissioner also may hold a public hearing at his discretion, whenever, for instance, such a hearing might clarify one or more issues involved in the permit decision.*

29-N-1 §111(G) (emphasis added).

The new 29-M-3, though it contains better language on public hearings, is still unclear in this regard. The proposed regulations state that,

> *If a public hearing has been requested, the Office of Conservation shall fix a time, date, and location for a public hearing... '*

29-M-3 § 3311(G).

Thus, the regulation mentions a hearing but fails to clearly that the DNR requires a hearing during the permitting process. In order to adequately protect the public, the DNR must make its permitting process public and it must make clear to permit applicants that hearings are a non-negotiable part of this process.

F. The Regulations Describing the Process for Allowing Variances Are Ambiguous and Not Sufficiently Stringent.

The proposed regulations include a "case- by- case basis" allowance for variances, subject to the discretion of the Office of Conservation. This language provides for an avenue around the regulations at the discretion of the Office of Conservation and at the expense of the public, and must be limited. The new regulations state,

> *Except where noted in specific provisions of these rules and regulations, the Office of Conservation may allow, on a case- by- case basis, exceptions or variances to these rules and regulations. It shall be the obligation of the applicant, owner, or operator to show that the requested exception or variance and any associated mitigating measures shall not result in an unacceptable increase of endangerment to the environment, or the health, safety and welfare of the public. The applicant, owner, or operator shall submit a written request to the Office of Conservation detailing the reason for the requested exception or variance. No deviation from the requirements of these rules or regulations shall be undertaken by the applicant, owner, or operator without prior written authorization from the Office of Conservation…*
> *Granting of exceptions or variances to these rules and regulations shall only be considered upon proper showing by the applicant, owner, or operator at a public hearing that such exception or variance is reasonable, justified by the particular circumstances, and consistent with the intent of these rules and regulations regarding physical and environmental safety and the prevention of waste. The requester of the exception or variance shall be responsible for all costs associated with a public hearing.*

29-M-3§3303(F)(1-2) (emphasis added).

The proposed regulations do not offer any further criteria for what constitutes a reasonable and justified variance, nor what it means to be consistent with the "intent" of the regulations. While there is more description here than in the original regulations, the DNR needs to make its variance allowance criteria more detailed and available to the public for comment and hearing prior to the final adoption of this regulation.

G. Disclosure of Information with regard to Permit Applications Is Not Sufficiently Transparent.

The availability of documents and information relating to the permit application is a critical element of the transparency requisite to protect the public. Without open access to the details of what a possible injection mining and storage will mean for a community, the public is left vulnerable. In the original 29-N-1, the DNR first emphasizes that information shall be available to the public, and that only by request and approval by the commissioner can it be withheld from the public, if the request meets certain criteria.

> *Information obtained by any rule, regulations, order, or permit term or condition adopted or issued here-under, or by any investigation authorized thereby, shall be available to the public, unless nondisclosure is requested in writing and such information is determined by the commissioner to require confidentiality to protect trade secrets, processes, operations, style of work, apparatus, statistical data, income, profits, losses, or in order to protect any plan, process, tool, mechanism, or compound; provided that such nondisclosure shall not apply to information that is necessary for use by duly authorized officers or employees of state or federal government in carrying out their responsibilities under these regulations or applicable federal or state law. If no claim is made at the time of submission, the commissioner may make the information available to the public without further notice.*

29-N-1§105(H) (emphasis added).

Contrarily, the proposed regulation changes imply that the default is for the DNR to automatically withhold information submitted and stamped as confidential without a determination that such protection is merited.

> *In accordance with R.S. 44.1, et seq., any information submitted to the Office of Conservation pursuant to these regulations may be claimed as confidential by the submitter. Any such claim must be asserted at the time of submission in the manner prescribed on the application for, or instructions, or in the case of other submissions, by stamping the words "Confidential Business Information" on each page containing such information. If no claim is made at the time of submission, the Office of Conservation may make the information available to the public without further notice. If a claim is asserted, the information will be treated in accordance with the procedures in R.S. 44.1, et seq. (Public Information).*

29-M-3, §3307(G) (emphasis added).

The DNR must prioritize making information submitted with applications available to the public. It is the public's right to know what a company plans to put in a community, especially the details of the project's proposed contents of the well and the structural information about the area and the project. Without public access to this information, the permit applicant may place a potentially hazardous project in the midst of an unknowing community that stands to lose the most if there is a disaster.

H. The Regulations Should Require Applicants to Obtain All Information Regarding Wells and Other Structures Penetrating the Salt Stock.

Both the current and proposed regulations impose only a limited duty of permit applicants to determine what wells and other structures exist in the area of review surrounding its project. The proposed regulations, at § 3307(D), provide:

> *Only information of public record or otherwise known to the applicant need be researched or submitted with the application, however, a diligent effort must be made to identify all wells and other manmade structures that penetrate the salt stock in response to the area of review requirements.*

29-M-3, §3307(D). The added "diligent effort" language is an improvement over the current language, but does not suffice. Permit applicants, who seek to profit from mining salt domes, must be responsible for discovering all wells in its area of review, even if they are not of public record or "otherwise known." The term "diligent effort" is too vague, and is likely not enforceable. No other entity will undertake a study of what wells are in the area of review, yet this information is essential to ensuring that the drilling and caverns in a salt dome will not be impacted by existing, and particularly abandoned, wells. The language should plainly require the applicant to "identify all wells and other manmade structures that penetrate the salt stock in response to the area of review requirements."

CONCLUSION

For the reasons above, Citizens request that DNR adopt the changes recommended in these comments into the final version of LAC 43:XVII Chapter 33.

Respectfully submitted by:

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On behalf of Roger Stelly, Save Lake Peigneur, Inc., and LEAN and as supervisor over Ms. Conant's representation of Roger Stelly[1]

[1] Mr. Stelly's consent to representation by a student attorney and the Introduction of Student Attorney was filed into the record at the November 26, 2013, public hearing.