

Practicing Before The Bar Exam

Jason T. Barbeau

I write this with the satisfaction of having just successfully closed the first case of my legal career: Civil Action Number 99-60570 (5th Cir.), *Louisiana Environmental Action Network et al. v. United States Environmental Protection Agency*. Sure, every lawyer eventually closes that memorable first case. But I'm not a lawyer yet — I haven't even taken the bar exam. In fact, I am a third-year law student and a Louisiana Supreme Court-approved student practitioner in the Tulane Environmental Law Clinic.

According to my academic transcript, the Clinic is a class like any other, receiving the usual number of credits and a letter grade at the end. But it is so much more. The Clinic is the practice of law. As allowed by the state Supreme Court, I and two dozen other students are permitted to serve as student-attorneys under a licensed supervising attorney. We work for real clients who have very real concerns about the health and environmental effects of activities occurring in their communities. For better or for worse, in Louisiana, resolving these concerns usually requires individuals and citizens groups either to sue facilities that violate their operating permits or sue U.S. EPA or the Louisiana Department of Environmental Quality to compel adherence to or implementation of existing environmental protection laws. Since its inception in 1989, the Clinic has been one of the only sources of legal assistance for these otherwise unrepresented interests.

In this case my supervising attorney and I represented the members of four citizens groups who are directly impacted by the state's continuing failure to reduce ozone pollution to federally mandated health standards in the Baton Rouge area. These groups — the Louisiana Environmental Action Network, the North Baton Rouge Environmental Association, Save Our Lakes and Ducks, and the Southern University Environmental Law Society — consist of people who live in

the five parishes that make up the Baton Rouge Ozone Non-attainment Area, an industrial region that has never met the Clean Air Act's minimum health-protection standard for ozone.

The case brought me into a monumental effort to help our clients prompt the state DEQ into compliance. The case centered on EPA's approval of Louisiana's CAA State Implementation Plan for the non-attainment area. What started as a petition for judicial review to the U.S. Court of Appeals for the Fifth Circuit in August 1999 ended last week with the signing of a final settlement agreement among our clients and the federal and state agencies. In the agreement and related submissions to the court, EPA accepted a voluntary remand of its approval of the state's faulty contingency plan for the Baton Rouge area, which is intended to provide some immediate relief, and the state acknowledged its application of the act's emissions banking system is inconsistent with federal policy.

Environmental law often involves lengthy and complex litigation, and this case was no exception. On August 30, 1999, our clients filed a Petition for Review of EPA's approval of the SIP. Over the course of the first year of litigation, student-attorneys prepared and filed the principal brief in support of the petition, which detailed three major deficiencies in EPA's approval. They also wrote several reply briefs on the merits as well as briefs in opposition to motions to intervene by the state and the Louisiana Chemical Association. The state was allowed to intervene in order to defend its SIP, but the association's attempt was successfully resisted. Added to this situation was the fact that in May 2000, Louisiana Governor Mike Foster publicly admitted in a letter to EPA that the SIP had failed to bring the region into attainment by the November 1999 deadline, and announced that a new plan would be submitted.

This was the state of affairs when I picked up the case during the first week of classes in late August 2000. I was assigned to learn the case — with its seven briefs on the merits and over 500 pages in the record — and present

oral argument before the Fifth Circuit during the first week of November. The thought of arguing in support of an environmental citizen suit in a federal appeals court as my first appearance before the bar was daunting but thrilling, to say the least.

In September and October, while taking four other classes and simultaneously preparing for oral argument, I participated in numerous settlement negotiations with all of the parties in person and over the telephone. In what was surely a historic event, the student-attorneys and our supervisors sat down in a conference room with representatives from our client citizens groups, officials from EPA Region VI, attorneys from the U.S. Department of Justice, the secretary of the Louisiana DEQ, and a mediator. What ensued was an open, lengthy, and intense discussion about problems and solutions to air quality issues in the state.

Through these meetings, all sides came to a consensus that the SIP appeal could be best resolved through settlement. On October 6, approximately one month before the scheduled date for oral argument, the parties agreed to a Settlement in Principle and filed a joint motion to stay the proceeding and remand part of the SIP to EPA. As part of the settlement, the agency accepted a partial remand, on the issue of the contingency measures. Our clients agreed to stay oral argument and ultimately dismiss the other two issues in the suit upon approval of the remand and settlement. The court granted the stay and remand two weeks later.

The last step in the process required the parties to agree on the exact language of the settlement, and included negotiations with EPA and DOJ for payment of our costs and attorney fees in the case. As my legal research revealed, however, there are already too many reported opinions resolving secondary litigation over attorney fees. None of the parties wanted to engage in a protracted fight. Instead, we all labored to reach a compromise. After presenting legal memoranda and an excruciatingly detailed itemization of costs and fees accumulated over a year and a half, we engaged in several

rounds of negotiations by phone, fax and email. Ultimately, we reached an acceptable compromise. Despite some rumors about the contemporaneous replacement of my worn-out red Converse All Stars, the funds actually will benefit future legal endeavors on behalf of the Clinic's clients.

Looking back on this case, it is clear that the settlement will advance the public's interest in reducing pollution. Our clients' efforts on the appeal focused EPA's attention on the problems in Louisiana's SIP and DEQ's long-standing failure to attain the air quality standards. The appeal also motivated the agency to review the state's contingency measures, which are needed to provide immediate, additional reductions in ozone levels to compensate for the failure to meet the standard. This in turn led to scrutiny of the state's emissions banking and trading system, which was designated as the sole source of reductions for the contingency measures. Currently, EPA is reviewing the

contingency plan and evaluating the need for further action, and Louisiana is preparing a revised emissions banking program to correct the serious flaws we brought to light.

On a personal note, reaching a settlement was bittersweet for me. As a law student, settlement was a letdown in a sense because I never got to argue the case in court. But the efforts to prepare for such an engagement and the related sense of exhilaration were intense enough and provided valuable practice for the next time.

But more importantly, as a student-attorney, the sweet part was that EPA's acceptance of a remand and the state's admissions swiftly concluded this case and set the stage for future challenges to air pollution permitting decisions. The settlement also provided confirmation that the Clinic's and our clients' involvement is vital to advancing the public interest in Louisiana. In all likelihood, we achieved more through settlement than was probable from a lengthy appeals process. And the settlement allows everyone to focus on making a new, workable plan

now that will achieve the necessary emission reductions to meet the ozone standard.

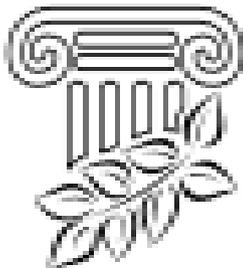
Obviously, I can't claim too much credit for the good results in this case. The patience, determination, and fortitude of our clients made our success possible. Due credit for much hard work also belongs to the consortium of fellow student-attorneys writing briefs and negotiating, my supervising attorney, and the clinic director. And even though I didn't get to go head to head with the DOJ, EPA, and Louisiana DEQ in front of a panel of appellate judges, I take solace in the belief that we are making slow but sure progress to improve our air quality.

—May 2001

Jason T. Barbeau, JD, Tulane Law School, 2001, will begin practice this fall with Verner Liipfert in Washington, D.C.

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