

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2003 CA 2768

DORÉ ENERGY CORPORATION

VERSUS

L. HALL BOHLINGER, SECRETARY,
LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY

Judgment Rendered: OCT 29 2004

Appealed from the Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge,
State of Louisiana
Suit Number 512,639

Honorable William A. Morvant, Judge

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BEFORE: FOIL, PARRO, FITZSIMMONS, GAIDRY, AND McCLENDON, JJ.

*McCleendon, J. concurs for reasons assigned by Judge Parro.
Fitzsimmons, J. dissents with reasons.
Parro, J., concurs with reasons.
Foil, J. ...*

GAIDRY, J.

Defendant/appellant, Louisiana Department of Environmental Quality (DEQ), contests a trial court's issuance of a writ of mandamus ordering DEQ to review and consider a plan for remedial action submitted on behalf of petitioner/appellee, Doré Energy Corporation (Doré). Following a review of the facts and applicable law, this court affirms.

FACTS AND PROCEDURAL HISTORY

Doré contends that oil and gas exploration by mineral lessees on Doré's land resulted in the contamination of Doré's property. Under the aegis of La. R.S. 30:2276(G)(3),¹ Doré presented a document to DEQ entitled "Preliminary Site Conditions and Request for Proposals for Clean-Up and Remediation." DEQ referred the report to the Office of Conservation in the Louisiana Department of Natural Resources (DNR) for review by the Commissioner of Conservation, and stated that it would only review the remediation plan if asked to do so by DNR. Doré sought a writ of mandamus to compel DEQ to review the proposed remediation plan. The trial court rendered judgment making the alternative writ of mandamus peremptory, and DEQ filed this appeal.

DISCUSSION

DEQ does not contest its statutory authority and general responsibility for inactive and abandoned hazardous waste sites pursuant to La. R.S. 30:2225-2226 and La. R.S. 30:2271-2290. La. R.S. 30:2226(A) instructs the Secretary of DEQ to develop a comprehensive evaluation of hazardous waste in Louisiana. Thereafter, in La. R.S. 30:2226(H)(1), the Secretary is directed to "promulgate rules and regulations implementing a comprehensive state inactive and abandoned hazardous

¹ La. R.S. 30:2276(G)(3) provides that a person who has incurred remedial costs in responding to a discharge or disposal of a covered substance, without the need for an initial demand by the Secretary, may sue and recover such remedial costs if the plan for remedial action was approved by the secretary in advance.

waste site cleanup program.” La. R.S. 30:2272.1(A)(1)² commands DEQ to adopt minimum remediation standards for soil, groundwater, and surface water quality necessary for the remediation of contamination of immovable property. Doré does not contest DEQ’s compliance with these statutory directives.

The legal question with which this court is presented is whether DEQ is subject to a mandatory duty to review an oil-and-gas-related remediation plan initiated by a landowner. On legal issues, the appellate court assigns no special weight to the legal findings of the trial court; rather it exercises its constitutional duty to review questions of law and render judgment on the record. *Gravois v. Delta Airlines, Inc.*, 99-0824, p. 4 (La App. 1 Cir. 5/12/00), 797 So.2d 686, 688, writ denied, 2000-1739 (La. 9/15/00), 769 So.2d 545. The issuance of a writ of mandamus must be premised on the failure of a public officer to perform a ministerial duty required by law. La. C.C.P. art. 3863. Doré asserts that DEQ is imbued with a mandatory, non-discretionary duty to review a plan for remediation submitted pursuant to La. R.S. 30:2276(G)(3). We agree.

Louisiana Revised Statutes 30:2276(G) provides:

(1) In furtherance of the purpose of R.S. 30:2275, those participating parties who, after an initial demand is made by the secretary under R.S. 30:2275, agree to clean up the pollution source or facility may, without the institution of a suit by the secretary under R.S. 30:2275, sue and recover from any other nonparticipating party who shall be liable for twice their portion of the remedial costs. The plan for remedial action of the pollution source or facility shall be subject to approval by the secretary upon request by the participating parties. The secretary shall act as expeditiously as possible in approving the plan proposed by the participating parties. Prior to any suit by a participating party for recovery of their portion of the remedial costs, the participating party shall make a written demand on any nonparticipating party they intend to sue requesting payment of that portion the nonparticipating party would be liable for if he participated.

....

(3) In furtherance of the purpose of this Chapter, a person who has incurred remedial costs in responding to a discharge or disposal of

² Louisiana Revised Statutes 30:2271-2290 are contained in Chapter 12 of Subtitle II (Environmental Quality) entitled “Liability for Hazardous Substance Remedial Action.”

a substance covered by this Chapter, *without the need for an initial demand by the secretary*, may sue and recover such remedial costs as defined in R.S. 30:2272(9) from any person found by a court to have performed any of the activities listed in Subsection A *if the plan for remedial action was approved by the secretary in advance* or, if an emergency, the secretary was notified without unreasonable delay and the secretary accepts the plan thereafter. An action by a person other than the secretary shall not be barred by the failure of the secretary to demand participation in the remediation. Such action shall be barred if the plaintiff does not make written demand on the defendant by certified mail, return receipt requested, at least sixty days prior to initiation of suit based on the cause of action provided in this Subsection. (Emphasis added).

When a law is clear and unambiguous and its application does not lead to absurd consequences, La. C.C. art. 9 provides that the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature. When read in conjunction with other provisions of Title 30, La. R.S. 30:2276(G)(3) clearly imposes a duty on the Secretary of DEQ to consider Doré's plan. The Secretary of DEQ has the discretion to either approve or disapprove Doré's remediation plan, but the duty to consider it is non-discretionary. This non-discretionary duty does not prevent the Secretary of DEQ from referring the remediation plan to DNR; however, the ultimate responsibility for approving or disapproving the plan remains with the Secretary of DEQ.

Appellant's assignment of error is without merit. The judgment ordering the issuance of the writ of mandamus is affirmed. Costs associated with this appeal in the amount of \$464.53 are to be borne by DEQ.

AFFIRMED.

STATE OF LOUISIANA

COURT OF APPEAL

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97 CA 2676

DORÉ ENERGY CORPORATION

VERSUS

**L. HALL BOHLINGER, SECRETARY, LOUISIANA
DEPARTMENT OF ENVIRONMENTAL QUALITY**

BEFORE: FOIL, PARRO, FITZSIMMONS, GAIDRY, AND McCLENDON, JJ.

 **PARRO, J., concurring.**

Louisiana Revised Statute 30:2276(G)(3) gives a right and a cause of action to a person who has incurred remedial costs; however, such a right cannot be exercised unless "the plan for remedial action was approved by the secretary in advance." Therefore, the Secretary of DEQ must decide to either approve or not approve the plan, and such a decision cannot be made without a review and consideration of the merits of the plan. Thus, it follows that the Secretary of DEQ has a ministerial duty to review and consider the plan, and no legal basis has been cited, or found, authorizing the delegation of this duty to another state agency.

Although LSA-R.S. 30:2003(B) recognizes it is necessary to provide for comprehensive policies on a statewide basis to unify, coordinate, and implement programs to preserve, protect, and enhance the quality of the environment in Louisiana, it is incumbent on the legislature to set forth the specifics of the manner in which this is to be accomplished. Certainly, until such is done, there is no prohibition against coordination of efforts by multiple governmental agencies in a case such as the one under consideration. As noted by the trial court, if the Secretary of DEQ requests the assistance of DNR in reviewing the plan, there appears to be no reason to prohibit DNR from providing its assistance; however, it is the Secretary's responsibility under the statutory scheme to either approve or disapprove the plan for remedial action submitted by Doré.

For the foregoing reasons, I respectfully concur.

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FITZSIMMONS, dissents and assigns reasons.

FITZSIMMONS, Judge, dissenting with reasons.



I respectfully dissent from the majority's affirmation of the trial court's writ of mandamus on the basis that DEQ was under a mandatory duty to review Doré's plan. To follow the logic of the majority will result in a state of "Ananda¹ for Doré. Pursuant to the precepts enunciated in La. R.S. 30:2276, DEQ correctly espoused that La. R.S. 30:2276G(1) does not apply to the instant factual scenario because no initial demand by the Secretary of DEQ occurred. The application of both sections 2276G(1) and 2276G(3) is further limited to a situation involving any party who has been found liable in court for discharge and who has borne all or part of the costs of remediation. In order to recover costs in such an instance, prior approval of the plan for remediation action must be obtained from the secretary, absent an emergency. The factual prerequisite of a finding of liability in a court is lacking in the instant matter. Thus, La. R.S. 30:2276G(3) is inapposite to the claim asserted by Doré.

Even if Doré had submitted a claim with the Secretary of DEQ for a voluntary remedial action pursuant to La. R.S. 30:2288.1, i.e., in the capacity of a responsible party seeking exemption from liability, no legal provision in the statute mandates DEQ to review the plan. Moreover, DEQ's referral of the proposal to

¹ Origin: Sanskrit. In Sikhism, Buddhism, and Hinduism, "Ananda" signifies the realm of Paradise, or the achievement of bliss. Ananda was also the name of one of Buddha's disciples.

the Office of Conservation of DNR satisfied any demands for compliance instituted by Doré.

The Commissioner of Conservation is expressly empowered by statutory fiat with jurisdiction and authority over all persons and property in controversies involving conservation of oil and gas resources. Louisiana Revised Statute 30:1D provides: “The disposal of any waste product into the subsurface by means of a disposal well and the regulation of all surface and storage waste facilities incidental to oil and gas exploration and production, shall be within the jurisdiction of the department [of Conservation].” Pursuant to the commissioner’s primary duty to prevent waste of the state’s mineral resources, his responsibilities specifically revolve around issues of conservation of oil and gas resources. La. R.S. 30:4A; **Yuma Petroleum Company v. Thompson**, 98-1399, 98-1410, p. 5 (La. 3/2/99), 731 So.2d 190, 193. Moreover, in accordance with La. R.S. 30:4C(1)(iv) and 30:4C(16)(a), the commissioner possesses the jurisdiction and authority to establish rules and regulations associated with site cleanup and all surface and storage waste facilities incidental to oil and gas exploration and production. Thereafter, La. R.S. 30:74 addresses problems associated with abandoned oilfield waste sites and the cleanup process.²

² Section A(1) and (2) of La. R.S. 30:74 states the following:

- (1) Whenever any responsible person, owner, or operator of any abandoned waste site obtains information that indicates that oilfield waste is spilling, discharging, or otherwise escaping into, or on any land or water without appropriate authorization or permit, or is being treated, stored, handled, or disposed of in a manner contrary to applicable regulations of the commissioner, such person shall notify the office of conservation in accordance with regulations to be adopted.
- (2) Upon receipt of the information required to be provided in Paragraph A(1) of this Section, the commissioner may order any responsible owner, operator, or person to take samples, monitor, or take action at the abandoned waste site to ascertain the nature and extent of any waste or discharge, or hazard. The commissioner, upon failure or refusal by the responsible person, operator, or owner to comply with the orders, may undertake such activities and investigate the abandoned waste site samples to be analyzed, and may expend monies available for these purposes. (Underlining added.)

Statutes are to be interpreted in a manner which is consistent with logic and the presumed fair purpose and intention of the legislature in its passage. **City of Pineville v. American Federation of State, County, and Municipal Employees, AFL-CIO, Local 3352**, 2000-1983, p. 4 (La. 6/29/01), 791 So.2d 609, 612. Where two statutes address the same subject matter, they should be harmonized, if possible. If there is a conflict, the statute directed at the specific issue at hand prevails as an exception to the statute more general in character. **Id.** While the secretary of DEQ possesses the overall authority and responsibility for inactive and abandoned hazardous waste sites of all types, the legislature has purposely enacted statutes that specifically address hazardous waste related to the drilling of oil and gas. The power and duty for conserving the oil and gas resources within Louisiana, as well as overseeing cleanup of waste sites, are essentially vested in the office of the Commissioner of Conservation, Department of Conservation. **Hunt Oil Company v. Batchelor**, 644 So.2d 191, 196-197 (La. 1994).

Moreover, the Secretary of DEQ's role in reviewing a party's proposal for cleanup and restoration remains discretionary. It is axiomatic that discretionary action by a public official falls outside of the parameters of a writ of mandamus. **Penalba v. Blount**, 405 So.2d 1378, 1379 (La. App. 1st Cir. 1981), writ denied, 407 So.2d 1189 (La. 1981). In contrast, it should be noted that the provisions of La. R.S. 30:74 establish a mandatory requirement that an owner notify the office of conservation of the existence of oilfield waste. See n. 3, *supra*. *A fortiori*, the Secretary of DEQ possessed the prerogative to refer the oil-related matter initiated by Doré to the Office of Conservation.

For these reasons, it is respectfully submitted that the writ of mandamus should be reversed.